



EMPLOYMENT TRIBUNALS

Claimant: Mr David Cunane

Respondent: Royal National Lifeboat Institution (RNLI)

Heard at: Southampton On: 25th and 26 April 2022

Before: Employment Judge Dawson

Appearances

For the claimant: In person

For the respondent: Mr Vatcher, counsel

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. The question of remedy is adjourned to 7 June 2022.
3. Further directions are given in the separate document entitled “Case Management Orders”

REASONS

1. By a claim form presented on 30 October 2020, the claimant brings a claim of unfair dismissal only.
2. The claimant was employed, prior to his dismissal, as an Investigations Manager. He had been employed since 16 August 2016, but not for the whole time in that role.
3. The respondent admits that it dismissed the claimant and asserts, as a potentially fair reason for doing so, some other substantial reason, namely a

breakdown of trust and confidence. The Grounds of Resistance state as follows “The Respondent submits that it fairly dismissed the Claimant for Some Other Substantial Reason, namely a breakdown of trust and confidence and therefore in the relationship between the Claimant and his line manager and his direct reports, and therefore the organisation, and that the breakdown was irretrievable”.

The Hearing

4. For the purpose of the hearing I was presented with a bundle running to 282 pages including witness statements, and heard evidence from the claimant and his wife as well. For the respondent I heard from Mr Faricy who had been the claimant’s line manager since December 2019, Mr Morris, Senior Contract Refit Manager for the respondent and who made the decision to dismiss the claimant; Ms Newman, Head of People Policy & Field Support and Mr Vaughan who heard the claimant’s appeal. The claimant also sought to rely upon a witness statement from Hannah Macklin whose evidence I have read but who has not attended for the purposes of cross-examination. I have given her statement any substantial weight.
5. Having regard to the number of witnesses it was necessary to ask the parties to agree a timetable in respect of the calling and presentation of evidence. The parties presented an agreed timetable at the outset of the hearing which they largely stuck to without needing to ask for additional time and I was grateful to them.
6. I explained the parties that I would only consider the documents in the bundle which were referred to in the witness statements or which I was taken to in the course of the hearing. The reason, I explained, was partly because of time constraints and partly because if a tribunal relies upon a document upon which it has not been addressed, it has no way of knowing what the parties would say about that document. One party (at an extreme) might say that the document is a forgery. More likely, it might be said that the document appears out of context. I therefore invited to parties to ensure that they drew my attention to relevant documents.
7. References to page numbers, below, are to the hearing bundle unless otherwise stated.

The Issues

8. The parties had agreed a list of issues but it had not been confirmed by the tribunal. It is appended to this judgment.
9. At the outset I asked counsel for the respondent to confirm in what way the respondent asserted this was a case of “some other substantial reason” rather than one of conduct or capability. As I will set out in more detail below, it seemed to me that for the matter to be “some other substantial reason” it must be a reason which is not one set down in section 98(2) Employment Rights Act 1996. Having read the claim form and response, I raised the question of whether this was, in reality, a claim where the respondent was saying that the claimant was

incapable of management or guilty of misconduct in the way he performed his management. Counsel, having taken instructions, remained adamant that this was neither a capability nor a conduct case. When I asked him to specify what the reason was for the dismissal he said that it was “the way the claimant took issue with things in the organisation, the way he acted in respect of his stance to the role, the way he felt being managed and his changing his position on who he would manage, the claimant resigning and reneging on his resignation”. He said it was the overall picture playing out that the respondent sought rely upon. In his closing submissions, counsel said that of the 8 issues which the respondent says led to the breakdown of trust and confidence (both in the letter of dismissal and the Grounds of Resistance) the 5th issue and the 8th issue were ones which were neither issues of conduct or capability.

10. In respect of the list of issues, the respondent, upon reflection, took the view that given that this was not a misconduct case, the question was not whether the dismissing officer had a genuine belief which led to the dismissal but whether, as a matter of fact, the claimant had behaved in such a way as to breach the implied term of trust and confidence. It seemed to me that was right and the list of issues was varied by the deletion of paragraphs 4a and 4b.
11. When we discussed paragraph 7 of the list of issues, the respondent sought to rely upon the principle set out in its Grounds of Resistance namely if “a Tribunal finds that the dismissal was procedurally unfair, the Respondent will rely on *Polkey v AE Dayton Services Ltd* [1987] ICR 142 to argue that the Claimant would have been dismissed in any event and to seek a reduction in any award for compensation accordingly.” The claimant sought to resist the respondent doing so on the basis that he had not prepared on that basis. It seemed to me that the issue was clear from the pleadings and the respondent should be allowed to take the point. I directed accordingly.
12. The respondent did not seek to argue that compensation should be reduced because the claimant had contributed to his dismissal by his conduct.

The Law

13. Section 98 Employment rights Act 1996 provides as follows
 - (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
 - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
 - (2) A reason falls within this subsection if it—
 - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d)

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

14. In *A v. B* [2010] IRLR 844, the Employment Appeal Tribunal stated “We have observed a growing trend among parties to employment litigation to regard the invocation of 'loss of trust and confidence' as an automatic solvent of obligations: it is not. In the present case it is necessary to identify more particularly why CAIC's disclosure is said to have, in effect, made it impossible for the respondent to continue to employ the claimant.” (Paragraph 31)

15. The Court of Appeal in the same case (now *Leach v Office of Communications* [2012] ICR 1269) stated “The trust placed by an employer in an employee is at the core of their relationship, which can break down in a wide spectrum of circumstances. Some cases fall short of a “conduct” reason for dismissal. The legislation is clear: in order to justify dismissal the breakdown in trust must be a “substantial reason”. Tribunals and courts must not dilute that requirement. “Breakdown of trust” is not a mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal.”

16. In *Software 2000 Ltd v Andrews* [2007] IRLR 568, the EAT held:

The following principles emerge from these cases:

(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for

him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

Findings of Fact

17. The claimant commenced employment for the respondent on 15 August 2016 as an Investigator. He started work at the same time as Mr Faricy, who subsequently became his line manager. Although the Grounds of Resistance plead that the claimant became a manager in 2017, the claimant's own statement says that he became Investigations Manager in around October 2018. It seems to me that evidence is likely to be correct given Mr Faricy, in evidence, thought the claimant had not been a manager for 2 years.
18. The claimant's evidence, which I accept since it was not challenged, is that in April 2019 the claimant suggested to his line manager that he took responsibility for management of the Team and Investigation processes. That was to be trialled over a 3 month period. Ms Classon became the claimant's line manager. The claimant was responsible for the management of investigators, being Sarah Weedon, Sam Paling, and a team coordinator, Hannah Macklin. He also managed Sheridan Spicer from August 2019. Hannah Macklin left the respondent in December 2019 and was replaced by Lisa Galton. In 2018 the claimant had been responsible for the recruitment of Mr Pearl but he left on 24 December 2018 having completed 7 weeks in the role due to a lack of flexibility. I note that was in excess of 12 months before the respondent concluded it had a lack of trust in the claimant, although in his evidence, Mr Faricy placed some reliance upon that resignation to justify the respondent's stance.
19. It is clear that by the end of 2019 the claimant was not happy in his role and, it appears from the evidence, nor were some of the people the claimant was managing. The claimant complains that he had been given a huge workload, he had been given additional line management responsibility, he had to train and mentor 2 inexperienced investigators and carry out a further recruitment campaign. He was not given a pay increase which had been promised. He told me, and I accept (it not being challenged), that he had 3 different line managers

in 2019. He accepts that there were morale issues throughout the team but he says those issues stemmed primarily from the lack of stable line manager responsibility and a redundancy process which had been instigated in December 2019.

20. The respondent says that the morale issues were due to the claimant's management.
21. Mr Faricy became responsible for the claimant's line management in December 2019 when the Investigation Team was moved to his department. He says that he inherited significant unresolved issues as per p141 of the bundle. That page is an email dated 13 November 2019 to Ms Classon with Mr Faricy copied in. It refers to a change of attitude over the last 3 months in respect of how outcomes of investigations are dealt with and stated "it felt somewhat disingenuous, almost as if David had crossed the line from being a trusted and independent investigator, into an individual feeding his personal frustrations through the new Director..." The email goes on "I am worried that David will start to lose his hard-won status as a trusted independent investigator...". That email was not a handover document, it was an email invited by Ms Classon for the purposes of carrying out a review on the claimant in November 2019.
22. Notwithstanding those alleged concerns, on 15 December 2019 Mr Faricy completed a RADAR form (being in effect an appraisal for the year of 2019) in which he graded the claimant as "doing the job well". According to the same form the definition of doing the job well is "where the majority of staff will sit. It is a very positive reflection of a job well done..." (Page 43).
23. On the same day the claimant sent an email resigning from his role as Investigations Manager (see page 53 of the bundle). I find that the claimant did so as a result of the matters I have set out in paragraph 18 above. Having heard the claimant and seen him give evidence, it seems to me that is the most likely reason for him sending that email. It was put to the claimant in cross examination that by then he was unhappy with the way that the job was going and he agreed with the respondent's position and also that he had concerns about the fact that he was not being rewarded properly for the job which he was doing.
24. A meeting took place between the claimant and Mr Faricy on 18 December 2019 where the claimant, seemingly with the agreement of Mr Faricy, retracted that resignation and said that he would continue in the role but, initially, said he would only manage one person from 5 pm on that day. That meeting appears to have finished at 11:15 (page 223) but by 5 pm the claimant had confirmed that he would carry on to manage the full team. The way the claimant refused to commit to a definite position on who he would be willing to manage during the course of that day was unhelpful and bound to cause Mr Faricy frustration. At 4:40 pm, Mr Faricy asked the claimant if he would manage both investigators to which the claimant replied "I don't know, I have 40 minutes". Then, at 5 pm, the claimant confirmed that he would line manage two investigators. The claimant's behaviour on that day, as seen in the minutes of the meetings at page 224 of the bundle was unreasonable.

25. Mr Faricy looked into the claimant's concerns about pay and, he says, and it was not challenged, that a Job Evaluation process was carried out which determined there would be no change to the grade but a pay parity check did result in a small uplift in the claimant's salary from April 2020. The claimant was informed of this on 2 January 2020. Again the undisputed evidence is that the claimant, at that stage, stated that he wished to swap jobs with one of the investigators and, having taken HR advice, Mr Faricy devised a solution which could accommodate that request. However the claimant then said that he did not want to swap after all and would continue to manage the team. It is easy to understand a large degree of frustration on the part of Mr Faricy. However in his statement Mr Faricy goes further and says that by that point he had lost confidence in the claimant's commitment to the role he was paid to do and in his leadership abilities. I accept that as an accurate statement of how Mr Faricy felt about the claimant but it is a somewhat extreme position given that less than a month earlier, he had scored the claimant as doing his job well. On the evidence which I have seen, there was no apparent attempt by Mr Faricy to explore with the claimant why he was behaving in the way that he was.
26. It is right to say that Mr Faricy was supportive of the claimant in the sense that he engaged the job evaluation process and the pay parity check. He also devised a solution to accommodate the claimant's request. Those things are to Mr Faricy's credit, however his witness statement does not suggest that he addressed, with the claimant, the behaviour which he found unhelpful and which had caused him to lose confidence in the claimant's commitment to the role and his leadership abilities.
27. In his evidence Mr Faricy refers to a number of matters which he says are further examples of the way in which the claimant had behaved to cause a loss of trust and confidence. He refers to matters both before and after he became the claimant manager.
28. At paragraph 13 of his statement he refers to an issue in respect of Ms Weedon and the failure to provide her with appropriate PPE. He criticises the claimant for forwarding an email from the claimant to Mr Chaplin who was the Head of Asset planning. He states "this was bizarre, as Neil was not responsible for PPE provision and have nothing to do with Sarah's line management or David's team." He relies on an email from the claimant to Mr Chaplin dated 15 November 2019 timed at 16:23 (p44).
29. What Mr Faricy overlooks (and does not appear to have discovered during the course of the process by which the claimant was dismissed) is that on 5 November 2019 Mr Chaplin had written to the claimant stating "Allen Stevens from my team has asked me to speak to you ref PPE for Sarah W. Can we have a chat when you have a moment." (Page 194).
30. Mr Faricy slightly moved his position in the light of that evidence to assert that Ms Weedon had raised a grievance and the matter should not have been left with the head of asset management. However, the thrust of paragraph 13 of his witness statement is wrong. It was not bizarre for the claimant to refer the matter to Mr Chaplin in the circumstances.

31. Mr Faricy says that in January 2020 he received an email from Sarah Weedon asking for a change in line manager because she had been in tears at the prospect of coming into work. He asked for further details and an email was sent by her on 22 January 2022. Whilst there is no doubt that she raised concerns, in her covering email she also stated “please can I add the caveat here that 2019 was in no way all bad. There were a lot of positives and there has been some good line management too. The issues I’m describing in the attached document began to appear around September/October and have just snowballed from there.” (Page 57). Ms Weedon did raise concerns that the claimant had not dealt with an issue of bullying of Sheridan Spicer.
32. Mr Faricy spoke to the claimant about Ms Weedon’s email and he challenged the accuracy of it. He stated that he would “wish to register that there are many untruths in her words, I am not proposing an examination of these, however a full and proper examination of the facts and evidence would portray a different picture. Her comments are vitriolic and quite frankly a character assassination.” (Page 60). There was no investigation into the matters raised by Ms Weedon.
33. In February 2020, Mr Faricy decided to speak to the whole of the claimant’s team about how they found working with David as their manager.
34. Mr Faricy spoke to Mr Paling. He records that Mr Paling told him things verbally that were different to what he was reporting to David and, Mr Paling was unwilling to formally record his concerns. Mr Faricy therefore emailed Mr Paling with a summary of their conversation. In reply, on 18th February 2020, Mr Paling stated “I am in a very difficult position here, I know the relationship between David and Sarah needs some work and both parties are hurting. The reality is that I don’t have any strength of feeling either way... I see the road ahead for both parties being equally difficult...” He went on, within the body of the email which had been sent to him by Mr Faricy to state “as I said at the time I feel that David has had a difficult hand to play over the past 6 months, however, I would have liked to have felt he was driving for more clarity and on the front foot more. He did, also, confirm various criticisms which he had made of the claimant’s management style.
35. I accept Mr Faricy’s evidence that one member of the team, Ms Spicer, told him that she felt let down by David’s failure to deal with bullying she had experienced. That is a justifiable matter of concern. However, it does appear that some of the other things she told Mr Faricy were not accurate. According to paragraph 21 of Mr Faricy’s witness statement she told him that a request for an OH referral was never followed up. That is inaccurate as is apparent from page 197 of the bundle. She also said that she was not allowed a passport to well-being, but that was also inaccurate as is apparent from page 176 of the bundle. It appears, however, that Mr Faricy accepted what he was told by Ms Spicer without investigating it any further. He appeared somewhat surprised during his cross-examination when those documents were put to him by the claimant.
36. Mr Faricy goes on to state that overall the rest of the team portrayed a balanced picture of working with the claimant although he felt that serious issues were being mismanaged.

37. At paragraph 24 of his witness statement Mr Faricy says that he put in to practice 2 sets of improvement actions, the first was RADAR objectives and the 2nd was a performance action plan. For reasons which were not explained to me neither of those documents are in the bundle. The claimant accepted that he was given some sort of plan but it appears that the plan was not completed prior to the time when the claimant went on furlough in April 2020. I do not know what was in the plan and there appears to have been no review of the plan later in the year.
38. Mr Faricy says that the claimant refused to participate in 360 degree feedback and refused to undertake mediation with Ms Weedon for at least 9 to 12 months because the relationship was too bad at that point. He refers to an email at page 64 in that respect, an email of 18th February 2020. In fact that is not an accurate statement of the claimant's position in 2 respects.
39. Firstly, in the email the claimant actually wrote "I have no problem in principle in undertaking this however due to recent events I don't think the timing is good. I think the feedback as a result of this would not therefore be an accurate reflection. I would prefer that this is delayed for at least 9 to 12 months." There was not an outright refusal to participate in either mediation or in the 360° feedback. He was expressing a preference.
40. Secondly, in fact, the claimant went on to ask for feedback from colleagues in respect of the 360° review. It is instructive to consider the feedback which those colleagues gave which shows the claimant being rated as above the midpoint for inspiring and including behaviours (page 195). In respect of that, having initially said that the claimant refused to participate in the 360° feedback and coaching process (in paragraph 25 of his statement) Mr Faricy modified his evidence to say that the claimant only consulted a select group of people to give him feedback. He also asserted that the claimant had not completed his own feedback, as the claimant accepted. The witness statement is, nevertheless, inaccurate in so far as it states that the claimant refused to participate in the 360° feedback and coaching process.
41. Given the inaccuracies which I have set out above, I am not willing to uncritically accept the evidence of Mr Faricy as to how the claimant managed his team.
42. Mr Faricy records an email he received from Sheridan Spicer on 5 March 2020 telling him that there was no induction plan for Lisa Galton and that she had been showing Ms Galton what to do. Mr Faricy appears to have accepted that without any further investigation, he simply passed on the feedback to the claimant and asked him to ensure that if there was an induction plan it was communicated. The claimant replied to state that it was incorrect for it to be said there was not an induction plan, he replied stating he had an induction/prioritisation plan in place. The matter does not appear to have been taken further at that stage (page 76). In fact on 13 March 2020 Mr Faricy signed Ms Galton off as having completed her trial period assessment successfully (page 79). That plan shows that there were targets for development and training to be reached at the end of each week and it is apparent they were met by virtue of the fact they were signed off.

43. The claimant was off sick for 3 days in early April 2020 and he returned to work on 6 April 2020. I find that the claimant completed a telephone return to work interview and in the course of it stated that there had been a loss of trust between him and Mr Faricy and Mr Faricy's conduct had contributed to his stress. That evidence is not in dispute. There is also no dispute that during the return to work meeting, the claimant asked Mr Faricy if he wanted him in the role to which Mr Faricy answered "no". The claimant said he wanted to revert to being an investigator.
44. The claimant was furloughed from 7 April 2020.
45. In his evidence Mr Faricy said that following that call he felt overwhelmed and went to see his manager and then HR and told them that he had said that he did not want the claimant in the role which reflected his total loss of confidence in the claimant. In paragraph 39 of his statement Mr Faricy states that, at that point, he had not started any investigation but was drawing on his experience over the past 4 months and the fact that 2 members of the claimant's team had resigned and another 2 had asked for a new manager.
46. Mr Faricy said that he felt he had done all that he could to accommodate the claimant's demands and the claimant refused to accept responsibility for the issues which had arisen within his team. I accept that was a genuine feeling on the part of Mr Faricy although, as I will set out below, I do not consider that from a management point of view all that could have been done to address the concerns in respect of the claimant had been done.
47. What happened next is not clear from the witness statements. At paragraph 41 of his statement Mr Faricy says that in discussion with HR there was then a decision to have an investigation undertaken by an independent manager and he communicated that decision to David in a phone call on 18 May 2020. He had no further dealings with the matter and did not carry out any investigation..
48. On 2 June 2020 the claimant was invited to a meeting to discuss concerns around the breakdown of trust and confidence between him and the organisation. The letter came from Mr Morris. The letter stated that he was concerned that there had been a breakdown of trust and confidence and set out 8 reasons why he had reached that conclusion. The 8 reasons were (as repeated in the Grounds of Resistance):
- a. A lack of confidence in the Claimant's leadership of a team, as evidenced by poor morale, poor feedback and high staff turnover.
 - b. The Claimant's failure to support a member of the team raising claims that she was being bullied, leading to significant period of sickness absence and subsequent disengagement, as evidenced by her feedback and job applications to roles at same grades elsewhere in RNLI. Further an apparent failure by the Claimant to take the impact that this had on his team member seriously.
 - c. The Claimant's inability to engage the team in the vision for the team's future despite clear instruction from Mr Faricy on how to do this.

- d. The Claimant's failure to adequately onboard a new starter within the team, asking an unsuccessful applicant for the role to conduct a majority of the induction.
 - e. The Claimant's apparent frustration with the role; his resignation and retraction, request for his role to be regraded.
 - f. The Claimant's unwillingness to engage with measures to improve his work performance, as evidenced by his initial refusal to engage with the Improving Work Performance plan objectives, 360 feedback and mediation to support rebuilding of a relationship with another member of the team.
 - g. The Claimant's failure to conduct any meaningful upskilling to support his ability to conduct the role.
 - h. The Claimant's inability to work with his line manager describing his style as autocratic and that it is 'nigh on impossible' for Mr Faricy to manage his team, however despite this assertions the Claimant would still ask Mr Faricy to resolve team issues.
49. According to the evidence of Ms Newman, Head of People Policy & Field Support, the process for considering whether there had been a breakdown of trust and confidence and whether that should lead to dismissal was implemented by Mr Belling, a People Adviser for the respondent. He wrote an email to Mr Morris on 18 May 2020 stating, among other things, " we'll discuss this fully as it'll be a process you may be unfamiliar with. Ultimately the process will feel a lot like an appeal. Attached are 2 documents from Mr Faricy and the basis for this case." (Page 135)
50. When I asked why the email refers to the process feeling like an appeal, Ms Newman explained that a conclusion had been drawn that there was a breakdown of trust and confidence and now the claimant could appeal against that. I observe in passing that if, by that stage, such a conclusion had been reached, it had been reached without the claimant having been heard on the point.
51. It has remained unclear to me throughout the case precisely what documents Mr Morris was given, he could say no more than he was given the emails which are in the bundle before me, but then clarified that he would not have been given all of the emails in the bundle. It is equally unclear what documents were sent to the claimant with the letter of 2 June 2020 or at any other time. Mr Morris told me that he did not carry out any investigation into the allegations, he understood that Mr Faricy had carried out an investigation and the fruits of that investigation were the documents which he was given by Mr Belling.
52. Although the original meeting was fixed for 4 June 2020 that was delayed and a meeting subsequently took place on 17 June 2020. The claimant handed up a 15 page document which I accept Mr Morris considered. The meeting concluded and Mr Morris then carried out further enquiries including a meeting with Mr Faricy on 23 June 2020. That meeting was a very detailed one, the

notes of which appear between pages 112-115 of the bundle. Mr Morris commenced it by saying “firstly from my side I want to say thank you for the additional information you sent over. I won’t pretend I’m struggling on this. Mainly because David came back with quite a strong case and a lot of evidence. Today I really want to understand how you got from performance management to this process...”.

53. Mr Morris obtained further documentation which he sent to the claimant but he was not sure whether he sent the minutes of the meeting with Mr Faricy to the claimant. The claimant was equally unsure but did not take this as a point of unfairness in the procedure. In those circumstances I have not considered it further.
54. Mr Morris accepted in cross examination that when he sent the additional documentation to the claimant he was not expecting the claimant to respond, he was simply then going to make his decision on the basis of the information provided by Mr Faricy and the information provided by the claimant. However, he did subsequently give the claimant the opportunity to make any representations he wanted to about the documents, the claimant did not do so.
55. On 30 July 2020 Mr Morris wrote dismissing the claimant. There had been some delay because there was a concern that the claimant might have been making a whistleblowing claim, however that concern did not go further and does not form any part of the issues in this case.
56. In a reasonably detailed letter of dismissal, Mr Morris addressed each of the 8 allegations against the claimant. He found that each of them was proved. Mr Morris’ witness statement and the evidence he gave in tribunal did not attempt to substantiate all of the findings of fact which he had made. That is of some significance since the wording of some of the allegations was different to the way matters have been dealt with in the witness statement of Mr Faricy. For instance in respect of the induction process of Lisa Galton, the allegation which Mr Morris had to consider was not that there was no induction but that the claimant had failed to adequately on-board a new starter with the team, significantly asking an unsuccessful applicant for the role to conduct a majority of the induction. I have not heard any evidence on those matters. Another example is that rather than an assertion that the claimant had refused to engage in the 360° review, the allegation which the claimant faced by this stage was that he had shown an initial unwillingness to engage with measures to improve his work as evidenced by his initial refusal to engage with the 360 feedback.
57. Given the detailed way in which the letter of dismissal is written, it seems to me that on the balance of probabilities there is a basis for what was concluded by Mr Morris. The allegations were disputed by the claimant but there was an evidential basis for them. If this was a misconduct case, it would be a case where I would conclude that there were reasonable grounds for the belief of the dismissing officer. However, If I am required to decide on the balance of probabilities whether all of the findings of fact made by Mr Morris are correct the task becomes much more difficult, not least because of the narrative way in which the letter of dismissal is written and the lack of evidence called. Ultimately, I have resolved these issues by proceeding, below, on an

assumption that the findings by Mr Morris were correct. I also find, however, that they do not tell the whole story. They do not, for instance, take into account the fact that Ms Weedon had said that there were lots of positives in respect of the claimant's line management and that Mr Paling stated that the claimant had had a difficult hand to play for 6 months. They do not reflect the fact that Mr Faricy's witness statement said that the rest of the team portrayed a balanced picture of working with the claimant.

58. Mr Morris's witness statement contains the following statements, which I accept as being a reasonable reflection of the position. At paragraph 18 he states "managing is hard, but [the claimant] was only managing 5 people and he had a lot of problems with those 5 people. I think he is a very good investigator; I just don't think he was as good a manager as he thought he was." In paragraph 21 Mr Morris states of the claimant, "he had poor management skills throughout and poor communication. He just could not communicate and did admit he wasn't the best at communication during our interview...."
59. The claimant was given a right of appeal which he exercised. The appeal was operated by way of review of the decision of Mr Morris, in the sense that Mr Vaughan was considering whether or not Mr Morris's view was reasonable. No real issue is taken in respect of the way the appeal was conducted. The appeal was dismissed.
60. On the evidence which I have heard I consider that whilst there had been issues with the claimant's management from the 2nd half of 2019, he was still doing the job well by December 2019. That is what the RADAR appraisal records and I should be slow to go behind a contemporaneous document. There had been no complaints about his work of a formal nature before then.
61. I accept, however, that from September/October 2019, the claimant's performance had begun to deteriorate. That is consistent with the evidence which I have set out above.
62. Whilst it is true that some of the claimant's team had resigned, their letters of resignation do not show that claimant was the cause of their resignation and I have not been persuaded on the evidence which I have been provided with that he was the cause of their resignation, however I find that there was poor morale within the team which the claimant had at least contributed to.
63. There is very little evidence that there was a significant attempt to tackle the shortcomings which Mr Faricy perceived. To the extent that the claimant was placed on any kind of performance plan, no review had taken place in respect of that plan prior to the claimant going on furlough. Mr Faricy's statement does not refer to any meetings with the claimant to tackle his behaviour or management style and I have not been referred to any correspondence. There is no evidence that the claimant was given any warnings. At its highest from the respondent's point of view, Mr Faricy told the claimant about concerns raised by his subordinates but the claimant challenged those concerns. Mr Faricy does not appear to have gone further and said to the claimant that he accepted what the subordinates had said and now the claimant must change or face dismissal.

Conclusions

64. I give my conclusions by reference to the modified list of issues.
65. The first question I must consider is whether the dismissal was for some other substantial reason as averred by the respondent. I conclude that the 8 issues upon which the respondent says it formed a view that the claimant should be dismissed for some other substantial reason because of a loss of trust and confidence are, in reality, allegations of incapability or misconduct by the claimant. At its heart the respondent's case is that the claimant was not operating properly as a manager, either because he was not able to properly perform his functions or because he was not taking appropriate instruction from Mr Faricy. Rather than grasp the nettle and deal with those issues as conduct or capability, the respondent has, it seems to me, attempted to use the label of a loss of trust and confidence as a solvent in respect of the employment relationship.
66. As I have indicated, when I asked Mr Vatcher in his closing submissions which of the 8 allegations could not be said to be either conduct or capability he referred to number 5 and number 8.
67. Number 5 was the claimant's apparent frustration with his role, his resignation and retraction and his request for the role to be regraded. If the claimant was behaving inappropriately in doing those things, then seems to me that those were matters of conduct. If the respondent's case is that the claimant should not have been resigning and then retracting his resignation or requesting his role to be regraded then the respondent should have dealt with it as a conduct matter. If the issues was that the claimant simply could not cope with the job, hence his behaviour, it was a capability issue. Thus I do not accept the submission that this allegation is not a matter of conduct or capability.
68. Moreover as the Court of Appeal said in *Leach* "in order to justify dismissal the breakdown in trust must be a "substantial reason". Tribunals and courts must not dilute that requirement." If the respondent's case is that claimant was not doing something which reflected misconduct or incapability in retracting his resignation etc. then it is difficult to see how that conduct could amount to a substantial reason to justify dismissal. The fact that an employee is frustrated with his role is also not a substantial reason for dismissal
69. Allegation number 8 is that the claimant was unable to work with his line manager and described his style as autocratic and it was nigh on impossible to manage the claimant's team. It seems to me this is, in reality, either an allegation of incapability (the claimant could not manage his own team) or misconduct insofar as the claimant was describing his manager as autocratic when he was not. If it was not an issue of capability or conduct, that is to say it was not something that the claimant was doing wrong, it is again difficult to see how it could be a substantial reason for dismissal.
70. Given that one only looks for some other substantial reason under section 98(1) of the 1996 Act if the reason does not fall within section 98(2) and given that the respondent expressly denies that the claimant was dismissed because of

either capability or conduct, the respondent has not satisfied me that there was some other substantial reason of a kind which would justify the dismissal of the claimant or that the claimant was dismissed for such a reason. Thus I am not satisfied that the respondent has established a potentially fair reason for the claimant's dismissal.

71. In case I am wrong in that respect and the 8 allegations (or any of them) did amount to a potentially fair reason for dismissal, I will go and consider issue 3, namely whether the reason for dismissal was of a kind such as to justify the dismissal of the claimant. I do so on the basis that respondent is able to establish the factual basis on which it says the 8 allegations of breach of trust and confidence were made out.
72. At the risk of repetition, this is a claimant who was described as doing his management job well until December 2019. The claimant told me in his evidence, and it was accepted, that he had not been given any management training. It is apparent that once Mr Faricy had become the claimant's line manager he quickly formed the view that the claimant could not do the role. However, although he was supportive in some respects, I have seen no evidence that he supported the claimant in trying to address his managerial defects. To the extent that any formal improvement programme was embarked upon, it is apparent that that programme was never reviewed or considered with the claimant. The respondent's case must be that the claimant went from doing the job well in December 2019, to doing it so badly by the time he went on furlough on 7 April 2020 that dismissal could take place without more ado. I do not think that is right. Before the claimant could be fairly dismissed in this case he should have been provided with a clear statement of his shortcomings, he should have been provided with support to improve those shortcomings and a formal improvement program should have been embarked upon and seen through. At that stage consideration should also have been given to the claimant's previous request to move back to an Investigator role. If he was not succeeding in management, there seems no reason why there should not be consideration of moving the claimant back to a role which everyone accepts he was good in. That could have been accommodated in 2020 as explained by Mr Faricy in his evidence.
73. In my judgment, having regard to the evidence of Mr Morris in particular, the issues which arose in respect of the claimant in this case were not really ones of a misconduct nature, they were issues which arose because the claimant was struggling to manage people effectively. However, to the extent that they were issues of a conduct type, the claimant should not have been dismissed without being warned that his conduct needed to change and given the opportunity to heed that warning.
74. The claimant was not unwilling to engage with the requirements of his managers, he did engage in the 360 review and I consider the attempt to portray him as being somebody who was simply refusing to engage is unfair.
75. Thus on the evidence which I have seen I do not consider that the breakdown of the relationship was sufficient to justify the dismissal of the claimant at the time of the dismissal. Serious and significant attempts should have been made

by the respondent to overcome the breakdown of trust and confidence by the provision of support, training and proper performance review. Those things were not done

76. Issue 4 is in many respects a reiteration of issue 3. For the purposes of clarity I do not consider that the respondent acted reasonably in treating the 8 allegations as a sufficient reason for dismissing the claimant. The respondent could and should have done more in the ways that I have already indicated and, therefore, the act of dismissal did not fall within the band of reasonable responses.
77. The question of whether the dismissal was procedurally fair or not does not, therefore, arise.
78. Likewise, the question of whether or not the respondent carried out a reasonable and sufficient investigation regarding the allegations does not arise, although I would be minded to think the respondent did not do so. The witness statement of Mr Faricy suggests that he uncritically accepted allegations made against the claimant without checking them and in certain material respects the allegations were inaccurate. Mr Morris told me that he did not carry out an investigation because he relied upon the information he had been given. That evidence is somewhat at odds with what Mr Morris told me about speaking to Mr Faricy after the initial hearing in June and gathering documents. It seems to me that, in fact, there was a degree of confusion in respect of this dismissal which is why, during this hearing, Mr Morris could not tell me which documents he had been sent and no one could tell me whether the claimant had been sent the same documents. Those confusions draw me towards the conclusion that the investigation was not adequate in this case.
79. I must then consider what compensation should be awarded to the claimant, although at this stage, my considerations are limited to the question of whether a fair process would have made any difference to the outcome.
80. I am not satisfied that the outcome would have been the same if the claimant had been given the opportunities for improvement and the support which I have referred to. The respondent has not satisfied me that the claimant would not have been willing to change, I repeat that up until December 2019 the claimant was regarded as performing well and he did commence the 360 review.
81. I have considered whether I should reduce compensation to reflect the chance that the claimant might have been dismissed because he might not have changed, but that case was never put to the claimant and there is no evidential basis upon which I could draw that conclusion. Whilst I remind myself that sometimes tribunals must speculate and do the best they can on imperfect evidence, I do not think it is right that I reduce compensation simply because things might have been different, if there is no evidence for me to base such a reduction on. This In the circumstances I decline to make any reduction in compensation.

Employment Judge Dawson

Date: 28 April 2022

Judgment Sent to parties on 10 May 2022

By Mr J McCormick

For the Tribunal Office

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

APPENDIX

IN THE EMPLOYMENT TRIBUNAL
BETWEEN:

Case No: 1405794/2020

Mr David Cunane

Claimant

and

Royal National Lifeboat Institution (RNLI)

Respondent

LIST OF ISSUES

Ordinary Unfair Dismissal (s.98 Employment Rights Act 1996 (ERA))

- 1) Was the dismissal for one of the potentially fair reasons set out in s.98(1) and s.98(2) ERA?
- 2) Specifically, was there some other substantial reason (SOSR) for the Claimant's dismissal as averred by the Respondent?
- 3) Was the reason for dismissal, namely the breakdown of the relationship between the Claimant and the Respondent, of a kind such as to justify the dismissal of the Claimant, pursuant to s.98(1)(b) ERA?
- 4) If the reason for dismissal was potentially fair, did, in all the circumstances of the case, the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant, taking into account s.98(4) ERA?
 - a. What were the set of facts known to the Respondent or the beliefs held by them which caused them to dismiss the Claimant, and were those beliefs reasonably held?
 - b. Was the dismissing officer's belief genuinely formed?
 - c. Did the Respondent's action in dismissing the Claimant fall within the band or range of reasonable responses open to an employer?
- 5) Was the dismissal procedurally fair?
- 6) Did the Respondent carry out reasonable and sufficient investigation regarding the allegations made against the Claimant?
- 7) What compensation should be awarded to the Claimant?