



EMPLOYMENT TRIBUNALS

Claimant: Mr H Edwards

Respondent: Sovereign Housing Association Limited

Heard at: Bristol (via VHS) **On:** 23 and 24 February 2022

Before: Employment Judge Leith

Representation

Claimant: Ms Edwards (Claimant's mother)

Respondent: Mr Leach (Counsel)

JUDGMENT having been sent to the parties on 3 March 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The claimant claims unfair dismissal.

2. The issues for the Tribunal to consider were discussed and agreed at the outset of the hearing, as follows:
 - 2.1. It is common ground that the Claimant was dismissed.

 - 2.2. What was the reason for dismissal? The Respondent asserts that it was a reason related to capability, or alternatively that it was a reason related to conduct, either of which are potentially fair reasons for dismissal under s. 98 (2) of the Employment Rights Act 1996.

- 2.3. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?
- 2.4. If the reason for the dismissal was capability, the Tribunal will decide, in particular, whether:
- i. The Respondent had reasonable grounds for thinking that performance was below what was required?
 - ii. The Respondent adequately warned the Claimant and gave the Claimant a chance to improve?
- 2.5. If the reason for the dismissal was conduct, did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?
- 2.6. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
- 2.7. Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects:
- i. The Claimant felt intimidated in the meetings by being told he was telling untruths;
 - ii. The Claimant says that the objectives set were changed, giving him an impossible task to meet.
- 2.8. If the Respondent did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?
- 2.9. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

Procedure, documents and evidence heard

3. I heard evidence from the Claimant. On behalf of the Respondent, I heard from Ms Billinghamurst, Apprenticeship Officer; Mr Chalk, who is now the Head of Electrical, Fire and Security Systems but who at the relevant times was the East and West Regional Mechanical and Electrical Manager; and Matthew Messenger, the Head of Repairs (West). All of the witnesses gave

their evidence by way of pre-prepared witness statements, and were cross-examined.

4. I had before me a bundle of documents numbering 141 pages. I received written skeleton arguments from Ms Edwards on behalf of the Claimant, and from Mr Leach on behalf of the Respondent. Both were supplemented by oral submissions. Ms Edwards, who is the Claimant's mother, explained to me at the start of the hearing that she is not a lawyer and had not been to Court or Tribunal before. However, she presented the Claimant's case in a careful and articulate fashion. I am grateful to both Ms Edwards and Mr Leach for their assistance.

Factual findings

5. The Respondent is a social business providing homes for people in housing need across the south and south-west of England and the Isle of Wight. It employs 2,096 people.
6. The Respondent had in force at all relevant times a Performance and Capability Policy. The policy had an informal stage, which involved a Performance Improvement Plan being put in place. Where the informal stage proved unsuccessful in improving performance, the policy provided for a formal capability hearing to take place. If performance was considered to be unsatisfactory at that stage, the policy provided that an employee would be issued with a stage 1 formal written warning. If performance did not improve, a further formal capability hearing would take place, at which the employee could be dismissed. The policy did not use the phraseology "final written warning"; but as it only provided for one formal written warning, any formal written warning under the policy would, in effect, be a final one.
7. The Claimant commenced employment with the Respondent on 29 August 2017 as an apprentice electrician. The Claimant was employed on a permanent contract of employment. The Claimant's apprenticeship was due to be completed in April 2021.
8. As part of his apprenticeship, the Claimant was required to attend college and work towards a diploma, and additionally complete an NVQ. The diploma was the academic element of the apprenticeship. In order to complete the apprenticeship within the timescale, the diploma needed to be completed by September 2020, allowing him to focus on the practical element thereafter.
9. The NVQ was the practical element of the course. The NVQ was assessed primarily by a portfolio of evidence kept by the apprentice, of which the

predominant part was a site diary. The Respondent's general expectation for the Claimant's cohort of apprentices was that at least 95% of the portfolio would need to be completed by March 2021, to allow the apprenticeship to be completed by April 2021.

10. Ms Billingham's evidence was that there were issues with the Claimant's college work from the start of his apprenticeship. Her evidence was that she tried to address the issues with him informally on many occasions, and had conversations with him around prioritising his work and meeting deadlines. However, prior to the summer of 2020, no formal action was taken and no performance plan was put in place for the Claimant. The Claimant continued to receive pay increments throughout that time. I accept Ms Billingham's evidence that she had cause to speak to the Claimant informally. However, I find that the issues were relatively low-level and were dealt with under normal management arrangements.
11. Due to the effects of the COVID-19 pandemic, the Claimant was put on furlough in March 2020. While on furlough, he was unable to work for the Respondent. However, he was able to continue to undertake college work remotely.
12. The Claimant returned from furlough in July 2020. In light of the disruption that had been caused to the apprentices in the Claimant's cohort, the Respondent decided to extend their apprenticeships to 1 June 2021 to account for the time that they had lost.
13. When the Claimant and the other apprentices in his cohort returned to work, Ms Billingham checked their "One File" pages. The One File page allowed the Respondent to track each apprentice's progress towards completion of the diploma and NVQ. The Claimant's One File page as at July 2020 was not in evidence before me, but Ms Billingham's evidence was that it showed that he had several college assignments outstanding. Ms Billingham's evidence was that One File additionally showed that his portfolio was 0% complete. There was in evidence before me a graph from the Claimant's One File, running to March 2021, which showed that the Claimant's portfolio completion was at 0% as at July 2020. I accept Ms Billingham's evidence regarding the state of the Claimant's One File page as at July 2020.
14. Ms Billingham was concerned about the apparently outstanding college work, so she contacted the college to check what work was outstanding. On 21 July 2020, Daryl Scopes, the Claimant's tutor, sent Ms Billingham a document setting out the Claimant's progress against all of the assessments he would undertake on the course. That document showed that:

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- 14.1. Task E, Safe Isolation from Year 1 was not passed and had been handed back to the Claimant for a re-work – the document showed that the Claimant was on his 5th attempt to rework the task;
 - 14.2. Assignment 104, an assignment from Year 2, had been partially handed in;
 - 14.3. Assignment 105, an assignment from Year 3, had been handed in for marking by the Claimant for the second time;
 - 14.4. Assignment 114 had been set, but was not yet due;
 - 14.5. Unit 112, a written exam, had been failed by the Claimant.
15. It was common ground that if a piece of diploma coursework was not passed on the first attempt, it would be returned to the apprentice with comments. The apprentice would then rework (amend) the piece of coursework and resubmit it. This could happen more than once.
16. The Claimant's evidence was that he had fully handed in Assignment 104 in July 2019, and that part of it was handed back for rework in November. His evidence was that he had handed that part in again before he was furloughed, so that as at July 2020 the whole assessment was with the college for marking and none of it was with him for reworking. His explanation for the entry on the document received from the college was that it must have been an error.
17. Ms Billingham decided to put the Claimant on a Performance Improvement Plan ("PIP") to help him remain on track to pass his apprenticeship.
18. Ms Billingham met with the Claimant on 24 July 2020 to discuss the PIP. Mr Archer, the Electrical Supervisor, also attended the meeting. The following targets were agreed:
- 18.1. Complete Task E and unit 104 by 7 August 2020. In each case the "success criteria" on the PIP form was noted to be "evidence of hand in".
 - 18.2. Resit the test and inspection (unit 112) exam by 30 July 2020. The success criteria was noted to be the result, which would be available a week after the exam.
 - 18.3. Site diary to be up to date by 7 August 2020. The success criteria was noted to be evidence of the diary.
 - 18.4. Meet all of the Respondent's values and behaviours by 18 August 2020. The success criteria was noted to be "meeting with the Claimant delivering how these have been met with evidence."
19. The PIP form was emailed to the Claimant after the meeting. The Claimant accepted in evidence that he had agreed that he had to complete Task E. His evidence was that he could not have completed unit 104 by 7 August,

because at that point it was still with his college tutor for marking. Therefore, on the Claimant's evidence, that part of the PIP was impossible. The Claimant accepted that he did not raise that as an issue with the PIP.

20. The Claimant accepted in evidence that he was aware that he had to sit and pass the Unit 112 exam by the end of July 2020. The Claimant was given a date to resit the Unit 112 exam, but this fell during a week when he had other exams. He contacted his college tutor to ask if he could sit the exam the following week. The Claimant's college tutor agreed to this. However, he subsequently told the Claimant that the exam date could not be moved, but that he could sit it in September instead.

21. The Claimant accepted in evidence that he did not discuss postponing the exam with Ms Billingham, or anyone else at the Respondent. The Respondent was consequently unaware that the exam had been postponed, and unaware of the reason the Claimant had requested the postponement. The Claimant accepted also that postponing the exam meant that he was unable to fulfil that element of the PIP.

22. The Claimant met Ms Billingham and Mr Archer on 7 August 2020 to review the PIP. The PIP form recorded as follows in respect of that meeting:
 - 22.1. The Claimant had handed in Task E.
 - 22.2. The Claimant was waiting for feedback from his college tutor regarding Unit 104, as questions 2 – 7 had not been marked.
 - 22.3. The Claimant had requested that the unit 112 test be delayed until September as he was working on Assignment 104.
 - 22.4. The Claimant explained that his site diary was up to date, but he could not add the evidence.

23. The PIP form was again emailed to the Claimant after the meeting. The Claimant's evidence to the Tribunal was that what was recorded in the PIP was inaccurate and inconsistent. In particular, his evidence was that he could not have asked for the Unit 112 test to be delayed to give him time to work on Assignment 104 if Assignment 104 was still with his tutor awaiting marking. I accept the Claimant's evidence regarding the apparent inconsistency on the PIP form. I do note, however, that the Claimant did not suggest that he had raised the inconsistency when he received the completed PIP form from Ms Billingham.

24. The Claimant met Ms Billingham and Mr Archer again on 17 August 2020. Ms Billingham's evidence, which I accept, was that the Claimant was vague about progress against the targets. Ms Billingham agreed to extend the deadline for the Claimant to comply with the remaining targets to 17 September 2020.

25. The Claimant accepted in evidence that he was aware that he would have to take evidence that he had met the targets in the PIP to the next review meeting.
26. Ms Billinghamurst received further feedback verbally from the College on 21 August 2020. The feedback was that:
- 26.1. Task E had not been handed in
 - 26.2. Unit 104 had not been handed in
 - 26.3. The Claimant had advised his tutor that he could not attend the Unit 112 test on the scheduled date, and that was why it had been rebooked.
27. Ms Billinghamurst met the Claimant again on 17 September 2020. Regarding the targets on the PIP:
- 27.1. In respect of Task E, Ms Billinghamurst's evidence was that the Claimant couldn't remember whether he had handed it in or not. The Claimant accepted that he presented no evidence of having handed it in at that meeting.
 - 27.2. In respect of Assignment 104, it was common ground the Claimant had received it back from his tutor on 9 September 2020, as it required a rework. He accepted that he had not started on the rework by the time the meeting took place.
 - 27.3. In respect of the Unit 112 exam, it was common ground that the Claimant was still waiting for it to be re-booked.
 - 27.4. In respect of the site diary, the Claimant told Ms Billinghamurst that it was up to date, but he had no evidence to demonstrate that.
 - 27.5. In respect of compliance with values and behaviors, the PIP recorded that Mr Archer had received some poor feedback about the Claimant. The Claimant's evidence was that that came from one person, who he hadn't worked with previously, and related to a day when the Claimant was doing work that he was unfamiliar with so was working more slowly than usual and asking lots of questions. The PIP additionally recorded that Ms Billinghamurst had concerns regarding the Claimant's accountability, as he was not prepared for the meeting and had no evidence that the targets had been met.
28. As the targets on the PIP had not been met, Ms Billinghamurst handed it over to HR for further action.
29. On 8 October 2020, the Claimant was invited to a Formal Performance Review Meeting, to take place on 19 October 2020. A copy of the Performance and Capability Policy was included with the invitation letter. The Formal Performance Review Meeting was chaired by Chris Bairstow, Electrical Manager (East). The Claimant chose not to be accompanied to

the meeting. Minutes of the meeting were kept. The minutes were headed "Disciplinary Hearing Review Notes".

30. Having heard from the Claimant, Mr Bairstow concluded that:
- 30.1. Task E had been completed by the Claimant, and he had attempted to submit it; but the file he had sent to the college had been corrupted, so it needed to be resubmitted.
 - 30.2. The Claimant was working on Assignment 104, but it was not completed.
 - 30.3. The Claimant had a date of 6 November 2020 for the Unit 112 exam.
 - 30.4. The Claimant was working on his Site Diary.
 - 30.5. In terms of values and behaviours, the Claimant was making progress at the Respondent and at college.

31. Mr Bairstow consequently decided to issue the Claimant with what he described as a final written warning. He explained to the Claimant that he had a deadline of 27 November to complete the exam resit and the other assignments. The Claimant thanked Mr Bairstow for giving him what he described as a "last chance". The minutes then record that Stuart Archer gave the Claimant the following advice:

"You have until the 27th to get everything submitted. A good idea would be to get it done the week before so we know it's in, get it in early. Tell Darrell [Scopes, the Claimant's college tutor] you have to have this in can you get you mark back for when we next talk to you on 27th that would be a good idea. Any site visits talk to me so we can arrange the correct work and dates.

We are here to help. We have all been through college. Talk to anyone in the team as they can help with these things."

32. Mr Bairstow wrote to the Claimant on 22 October setting out the outcome of the meeting. He noted that the Claimant had made little or no progress towards achieving the objectives set, and decided to issue the Claimant with a first written final warning on the grounds of capability (poor performance). The warning was stated to remain live for a period of 12 months. The Claimant's objectives were stated to remain unchanged - they were set out in the outcome letter in the following terms:

- "Task E – ensure the assignment material has been received by the college after issues with a corrupt file
- Assignment 104 – to be completed around & on completion of the Testing [unit 112] exam

- Unit 112 - the date of the Exam is 6th November with the results given the following week.
- Site diary to be up to date - [Claimant] to supply dates of the site visit dates to Line-manager so work can be planned leading up to the visit
- Values and behaviours – to continue to visually show improvement in Sovereign’s V&B’s after some poor feedback.”

33. A target of 27 November 2020 was set for the Claimant to complete the exams/assignments, and a formal review meeting was set for Monday 30 November 2020.

34. The Claimant did not appeal the written warning, although he had the opportunity to do so. His evidence, which I accept, was that he accepted the targets that had been put in place. His evidence was that he understood that “completion” of Task E and Assignment 104 meant that he merely needed to submit the two pieces of work. I accept his evidence that that was his understanding, notwithstanding Mr Archer’s comments in the meeting.

35. The Claimant passed the Unit 112 exam resit. He handed in Task E and Assignment 104 on 27 November 2020. His evidence in cross examination was that he did ask his college tutor to get the marks back to him, but that he could do no more than ask. Given that he believed he only had to hand the work in, I find that he did not explain to his tutor the particular importance of having the assignments marked and returned to him promptly.

36. The review meeting did not in fact take place on 30 November 2020. The Claimant’s evidence was that he understood that this was because he had met the targets by handing in Task E and Assignment 104, and passing the Unit 112 exam. I again accept his evidence that that was his understanding.

37. On 18 December 2020 Ms Billingham emailed the Claimant to inform him that he had outstanding work to do on his portfolio, and that it needed to be done as a matter of urgency.

38. On 4 January 2020 Ms Billingham emailed the Claimant a copy of his end of year apprenticeship report. This is a report which is prepared for all of the Respondent’s apprentices. The report gives the risk of the apprentice failing to complete their apprenticeship, on a traffic light scale. The Claimant’s risk was red. Ms Billingham explained that this was because she could not see how the Claimant would complete his apprenticeship even by the amended date of June, given his recent progress.

39. On 12 January 2021 Andrew Chalk wrote to the Claimant to invite him to a Formal Performance Review Meeting, to take place on 21 January 2021. The letter informed the Claimant that the performance concerns he was being asked to discuss were:

- 39.1. Diploma being incomplete as of December 2020
- 39.2. NVQ progress at 0% as of January 2021

40. The letter informed the Claimant that dismissal was a possible outcome.

41. The Claimant attended the meeting on 21 January 2021. He chose not to be accompanied at the meeting. The meeting was minuted. The minutes were headed "Disciplinary hearing". Ms Billingham attended the meeting at Mr Chalk's request, to explain the background and ensure that the Claimant would have the opportunity to hear and challenge what Ms Billingham said. The Claimant did not submit any written evidence of his compliance with the targets that had been set within the final written warning.

42. Ms Billingham started the meeting by setting out the Claimant's progress with the Diploma and NVQ as she understood it to be:

- 42.1. Task E – originally due in July 2018. Handed in 5 times to be reworked until it passed, with the final hand-in being in November 2020.
- 42.2. Assignment 104 – handed in on 27 November but not yet marked.
- 42.3. Assignment 105 – had been handed in by the Claimant, although there was some confusion about when it had been handed in. The Claimant had suggested in June 2020 that it had already been handed in, but in July had said that it had not in fact been handed in. It was in any event handed back to the Claimant in September 2020 for a rework. The Claimant had handed it back in, but it had not yet been marked.
- 42.4. Unit 112 Test – The tutor had confirmed that the Claimant had asked for the date to be moved so he would have more time to revise. Retaken in November 2020 and passed.
- 42.5. Site diary – was at 0% in the week before the Review Meeting.

43. The Claimant was given the opportunity to respond, and he responded as follows:

- 43.1. Safe isolation - in the minutes of the meeting, the Claimant is recorded as saying "this is completely on me, I was just doing other stuff and completely forgot I hadn't even finished the assignment. I dropped the ball massively."
- 43.2. Assignment 104 – the Claimant mentioned furlough as a reason for the delay. He explained that he handed it in initially when it was due but that the tutor refused to mark it until all of the students

had handed the assignment in. He explained that he got part of it back to rework late in the 3rd year, but didn't get the rest back until much later.

- 43.3. Assignment 105 – the Claimant accepted that he had handed it in around a week late.
- 43.4. Unit 112 Exam – the Claimant frankly described his first attempt at the exam as “really bad”, and explained that he had asked for the retake to be moved back as it fell between another exam he was due to sit. He explained that his tutor subsequently told him that he would have to take it within the next lot of retakes.
- 43.5. Site diary – the Claimant explained that it was now at 59%.

44. During the meeting, the minutes recorded that Mr Chalk said to the Claimant “This is a long list of failure isn't it” to which the Claimant responded “Yeah”.

45. Mr Chalk put it to the Claimant that he had not told the truth about rebooking the exam dates for the Unit 112 exam. The Claimant indicated that he did not agree with that.

46. Mr Chalk adjourned to consider. When the meeting reconvened, he told the Claimant that he had made the decision to dismiss him with immediate effect. The explanation he gave for his decision was that the Claimant had been given a last chance to complete the apprenticeship, and that he [Mr Chalk] was not convinced that the Claimant would get the work done, and additionally that he was not convinced that the Claimant's values and behaviours aligned with those of the Respondent.

47. Mr Chalk wrote to the Claimant on the following day to confirm his decision. The dismissal letter was relatively brief. It explained that the Claimant was being dismissed because he had made little or no progress towards achieving the objectives set out (impliedly in the final written warning).

48. Mr Chalk's evidence before the Tribunal regarding his decision was as follows:

- 48.1. The Claimant had been late in handing in some of the assignments for his diploma, and two of them had yet to be marked.
- 48.2. He took into account the delays on the college's part in marking assignments, but noted also that the Claimant had not provided evidence that he had been engaging with the college, and that the delay in marking may have arisen in part because the work was handed in late.
- 48.3. He had considered what was meant in the PIP and the Final Written Warning by the requirement to “complete” Assignment 104 and Task E. His view was that given the frequency with which work

that had been handed in by the Claimant came back to him to be remarked, the requirement had to be that the assignment would be passed, not merely handed in.

48.4. He took account of the fact that the Claimant had managed to get his portfolio from 0% to 56% by the time of the Reviewing Meeting, and if that had been the sole issue then he may have considered allowing the Claimant more time, although it seemed unlikely that he would complete it in time.

48.5. He was concerned that the Claimant did not take his work seriously, and he formed the view that the Claimant had not been entirely up-front with Ms Billingham about his work. Based on the information placed before him at the capability hearing his view was that the Claimant had been dishonest about Assignment 105, in that he had initially told Ms Billingham that it had been handed in then told her it had not been handed in. His view was additionally that the Claimant had been dishonest about the Unit 112 exam and the reason it had been postponed, given the discrepancy between the Claimant's explanation and the information received from the College. However, whether the Claimant had been deliberately dishonest or whether he had simply forgotten or misremembered what he had handed in and when, it did not affect his decision either way. Rather, the issue was that the Claimant's overall attitude suggested that he didn't care. Mr Chalk's evidence was that this was of particular concern to him given that he worked in a profession that involved critical safety compliance.

49. Although Mr Chalk's evidence before the Tribunal was rather more detailed than the reasoning set out in either the minutes of the dismissal meeting or the dismissal letter, it was not inconsistent with them. I accept his evidence regarding the factors he took into account in deciding to dismiss the Claimant. In particular, I accept that his understanding was that the Claimant was expected to complete and pass Assignment 104.

50. The Claimant appealed against his dismissal. The basis for his appeal was, in essence, that:

50.1. His NVQ score had been at 56% by the date of the meeting, and was at 85% by the time of his appeal.

50.2. He had understood that he was required to hand in assignments 104 and 105 and pass the unit 112 exam; all of which he had done.

50.3. He had been disadvantaged by delays on the part of the College in marking work.

51. The Claimant's appeal was heard by Matthew Messenger. The Claimant was accompanied by Mark Miles, a workplace colleague. Ms Billingham

did not attend the appeal hearing, although Mr Messenger discussed the case with her before the appeal hearing.

52. The Claimant explained in the appeal hearing that:

52.1. His portfolio score was at 85%, as he had uploaded further work for jobs he had done in November.

52.2. He had reworked Assignment 105 and had attempted to hand it in on the morning of the appeal hearing, but was unable to do so as the college was closed for half term.

53. The Claimant presented as additional evidence a note from his college tutor, Mr Scopes. Mr Scopes indicated that Unit 105 had had 3 remarks, and was almost complete. Unit 104 had had one full marking and had now been resubmitted by the Claimant. Mr Scopes noted that it was not uncommon for apprentices to have coursework returned to them to be reworked. He went on to say the following:

“...it is hoped that these will be much closer if not pass. These assignments will be marked again in the coming weeks, I am sure if there are any outstanding bits on any of the questions, he will complete them quickly.”

54. Mr Scopes also noted that:

54.1. “Harrison’s coursework in the 7 main categories has been good and in line with the overall group expectations.”

55. Mr Messenger adjourned to consider. When the meeting reconvened, he told the Claimant that his appeal was not upheld. He wrote to the Claimant on 18 February 2021 confirming that the appeal was not upheld. He did not give any detailed reasoning on the appeal outcome letter.

56. Mr Messenger’s evidence before me was that the factors he took into account were as follows:

56.1. He took into account what the Claimant said about the delays on the part of the college in marking his work. However, he formed the view that the Claimant was given deadlines which he did not comply with, and there was a lack of urgency on his part.

56.2. He considered that the Claimant had been given support, and his PIP had been extended several times, but even on the date of the appeal hearing he was still handing in work.

56.3. He took into account the fact that the apprenticeship was in an area of work where compliance with deadlines and taking work seriously was required, as otherwise there would be serious safety issues.

57. Mr Messenger's evidence was that he is keen to give second chances, and he could see that there were good intentions from the Claimant after his dismissal, but it was in his view too little too late. Accordingly, Mr Messenger's evidence was that he felt that the decision to dismiss the Claimant was reasonable.
58. Although Mr Messenger gave no reasoning in the appeal outcome letter, I accept his evidence regarding the factors he took into account in determining the Claimant's appeal.
59. Since his dismissal, the Claimant has found another apprenticeship. He has not yet successfully completed Assignment 104.
60. It was suggested to Ms Billingham in the course of cross-examination that the Claimant's NVQ percentage was higher than other apprentices within his cohort at the point that he was dismissed. Ms Billingham's evidence was that in general terms, apprentices aren't compared against each other, and that each works to their own individual learning plan. Her evidence was that some apprentices require adjustments - she gave the example of a severely dyslexic apprentice within the Claimant's cohort. I accept Ms Billingham's evidence in that regard.

Law

Unfair dismissal

61. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the respondent under section 95.
62. Section 98 of the 1996 Act deals with the fairness of dismissals.
63. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

64. Capability and Misconduct are both potentially fair reasons for dismissal under section 98(2).
65. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.
66. In a capability dismissal, the Tribunal must decide whether the employer had a genuine belief on reasonable grounds that the employee was incapable of performing to the standard required (*Taylor v Alidair Ltd* [1978] IRLR 82 (CA)).
67. An employer should, in most cases, give an employee a warning and an opportunity to improve before dismissing for incapability (*James v Waltham Holy Cross UDC* [1973] IRLR 202).
68. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *Burchell* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23, and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563)
69. In either a conduct or a capability dismissal, where a formal warning has been given then the employer will only need to reconsider it at a later stage in exceptional circumstances. Examples of exceptional circumstances may be where the warning was alleged to be issued in bad faith, manifestly improper, or issued without prima facie grounds (*General Dynamics Information Technology Ltd v Carranza* [2015] IRLR 43).

Conclusions

70. It was common ground that the Claimant was dismissed by the Respondent.

71. I have given careful consideration to the reason for that dismissal. I bear in mind that the formal meetings that the Claimant attended on 19 October 2020 and 21 January 2021 were described in the minutes as “disciplinary hearings”; although the Claimant was sent a copy of the Performance and Capability Policy. The dismissal letter gave the reason as “capability (poor performance)”. Of course, none of those labels are determinative.

72. I bear in mind my findings regarding Mr Chalk’s reasoning. Although the references to values and behaviors may be thought, at first blush, to refer to misconduct, in essence they were really about the Claimant’s engagement with his college work. That sits alongside the Claimant’s failure to submit work in time, and the repeated reworks required in order to pass (some) assignments. I conclude that Mr Chalk’s rationale for dismissing the Claimant was that he was concerned about his ability to complete the apprenticeship in a timely fashion. Properly analysed, in my judgement, that is a question of capability. I conclude that the reason for the Claimant’s dismissal was capability.

73. I turn next to the question of whether the Respondent had reasonable grounds for thinking that the Claimant’s performance was below what was required. I bear in mind that, at the point that Mr Chalk made his decision, the Claimant was some way behind target with his portfolio work, and had not completed the diploma. Assignment 105 had not formed part of the PIP or the final written warning, so I set it aside in considering the position; but Assignment 104 remained outstanding, and the Claimant could not complete the diploma (and consequently the apprenticeship) without it.

74. I bear in mind the Claimant’s understanding that all he was required to do was hand in the college work. I bear in mind also the delays that the Claimant had experienced in having work marked by his college tutor. As at the date of the hearing before Mr Chalk, Assignment 104 had been awaiting marking for nearly 2 months. I have some sympathy for the Claimant’s contention that he was, in essence, being asked to do something that was to some extent out of his hands in terms of having the work marked.

75. Set against that, however, the Claimant’s college work should have been completed by August 2020. Had the Claimant’s work passed on the first or second occasions, it would not have become an issue. Most importantly, Mr Chalk was entitled to consider that he needed to be satisfied that the

Claimant would pass the assessments, not merely hand them in. Taken to its extreme, if the Claimant was only required to hand in the assignment, he could have simply resubmitted in almost exactly the same form as it had been handed back to him to be reworked. I bear in mind also Mr Archer's comments at the end of the first formal capability meeting, which suggested that the Claimant needed to do more than merely hand the assessments in. Therefore, although the target could have been expressed in a clearer way, I conclude that the requirement was to successfully complete and pass the assessment. I further conclude that that should have been apparent to the Claimant, given Mr Archer's comments in particular, and his proximity to the end of the apprenticeship.

76. Based on the evidence before Mr Chalk, I conclude that he had reasonable grounds for believing that the Claimant's performance was below the standard the Respondent required.
77. In coming to that conclusion, I take account of the Claimant's perception that he was, in effect, being held to a higher standard than other apprentices. I bear in mind Ms Billinghurst's evidence regarding the remainder of the Claimant's cohort. Ultimately, the Respondent was entitled to require the Claimant to complete his apprenticeship in a timely fashion, regardless of any extension granted to other apprentices based on their own circumstances. I conclude that the Respondent was entitled to hold the Claimant to the standard that it did.
78. I conclude also that the Claimant had been adequately warned about the issues with his performance, and given the chance to improve. In particular, he was set a PIP on 24 July 2020. His progress against the PIP was reviewed on 7 August 2020, on 17 August 2020, and on 17 September 2020. He was then given a formal written warning on 19 October 2020, which was described as a final written warning. Although that was not in line with the terminology used in the policy, if anything it served to further underline the significance of the situation. The consequences of failing to meet the requirements were made clear to the Claimant. Finally, when the Claimant was invited to the dismissal hearing it was made clear to him in the invitation letter what the issues were.
79. I turn next to the question of whether dismissal was a fair sanction. I remind myself that, when considering the fairness of dismissal as a sanction, I must not consider what I would have done if I was in Mr Chalk's position. I must rather consider whether dismissal fell within the range of reasonable responses open to a reasonable employer. Given the concerns that the Claimant would not complete his apprenticeship within even the extended time allowed, the support and opportunities that had been given to the Claimant to ensure that he would complete it in time, and the extant and

unchallenged final written warning, I conclude that the dismissal did fall within the range of reasonable responses.

80. I turn finally to the fairness of the procedure adopted.

81. In terms of the comment to the Claimant that he was telling untruths, while the meeting could have been conducted in a less adversarial way, it was in my judgement appropriate for Mr Chalk to put that concern to the Claimant. In light of the discrepancies in the accounts the Claimant had given at various stages in the process, and the discrepancy between the Claimant's account and the information received from the College, it was reasonable for Mr Chalk to hold the concern that he did. In reaching that conclusion, I am not finding that the Claimant was untruthful; merely that there was at that time grounds for Mr Chalk to reasonably believe that he may have been. I bear in mind also my finding that the suggestion of untruthfulness was not central to Mr Chalk's decision. In any event, the minutes demonstrate that the Claimant was able to explain his version of events to Mr Chalk. So I do not consider that the suggestion that the Claimant was telling untruths rendered the process unfair.

82. The second challenge to the fairness of the process was that the Claimant's objectives were changed, giving him an impossible task to meet. For the reasons I have already given, I conclude that the Claimant's objectives within the written warning did not change. The Claimant misunderstood the objective. Furthermore, while the marking of his assignments was out of his direct control, he could have done more to explain the urgency to his tutor. In any event, I do not consider that the fact the marking lay outside his control rendered the objective he was set inherently unfair, bearing in mind the Respondent's need to have his apprenticeship completed. Again, the situation would not arise if he had successfully completed the diploma within the timescale originally envisaged.

83. I conclude therefore that the Respondent did adopt a fair process. The Claimant was told about the issues with his performance, and given the opportunity to improve - first informally then formally. He was invited to the formal meeting on 21 January 2021 by letter. He was given the right to be accompanied to the meeting. He was told in advance of the meeting what the issues with his performance were. After he was dismissed, he was given the opportunity to appeal, and to have his appeal heard by a different manager.

84. It therefore follows that the Claimant's dismissal was a fair one. In light of that conclusion, it is not necessary for me to consider *Polkey* or contributory fault.

Employment Judge Leith

8 May 2022

REASONS SENT TO THE PARTIES ON
24 May 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE