EMPLOYMENT TRIBUNALS

Claimant: Mrs N Thurlow

Respondent: Norbar Torque Tools Limited

Heard at: Reading **On**: 9 and 10 June 2022

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimants: Mr C Barrow, FRU
For the Respondent: Miss M Sharp, counsel

JUDGMENT

The claimant's complaint of unfair dismissal is not well founded and is dismissed.

REASONS

1. In a claim form presented on the 16 April 2021, following a period of early conciliation which began on the 22 February 2021 and ended on 31 March 2021, the claimant presented a complaint of unfair dismissal. The respondent denied the claimant's complaint and defends the claim on the basis that the claimant was dismissed fairly on grounds of performance capability.

2. The claimant gave evidence in support of her own case, and the respondent relied on the evidence of Mr Max Goncharov, Mr Ian Broome and Mr Dereck Bell. All the witness produced written statements which were taken as their evidence in chief. There was also a trial bundle containing 506 pages of documents. From these sources I made the findings of fact which I considered necessary to determine the issues in dispute.

3. The issues that I have had to determine are what was the reason for the claimant's dismissal? Was it capability arising from the claimant's performance, a potentially fair reason for dismissal or was it because of the steps the claimant took to protect herself and her family from the risk of contracting Covid-19 by asking the respondent to adhere to health and safety protocols, an automatically unfair reason? If the claimant was dismissed because of capability arising from her performance, was the dismissal of the claimant within the range of responses of a reasonable

employer?

4. The respondent is a manufacturer of torque wrench tools. The claimant was first employed by the respondent in June 2008 as a Torque Wrench Assembler Tester working in the torque wrench assembly department. In March 2020, the claimant was working in the small torque wrench section and continued to do so until September 2020 when she transferred to the medium torque wrench section where she remained until her employment was terminated on grounds of her continued poor performance on 28 January 2021.

5. The respondent conducts 12 monthly reviews for all employees. Prior to March 2020 the claimant states that she had 14 years of unblemished work history and excellent appraisals and good conduct, she was proud to say she worked for the respondent. This was not disputed by the respondent.

6. On 19 March 2020, during a conversation involving the claimant and a colleague, SK, SK blew a raspberry in the course of telling a joke causing saliva to accidentally land on the claimant's face. The claimant reported this to her manager, Mr Dereck Bell, who spoke to SK and reminded her that she needed to take care and be mindful of the Covid-19 situation and to be respectful of the concerns of the team if they were not comfortable with what she was doing.

7. On 23 March 2020 the claimant returned to work after the weekend with cold sores and a sore throat. She was overwhelmed with stress and anxiety. She expressed concern about being away from home because of the emerging Covid-19 pandemic which left the claimant anxious for her own health and that of her mother, who lived with her. Mr Bell upon noticing the claimant's distress told her to go home. The claimant was signed off work with stress and anxiety.

8. A prolonged period of absence followed with the claimant being signed off work for 18 weeks with stress and anxiety. In accordance with the respondent's sick pay policy, the claimant was paid in full for the first 8 weeks' absence and then at 50% of pay for the remainder of her absence.

9. While off work, the claimant was referred to occupational health and was then contacted by the respondent's occupational physician, Dr Bray, in order to assess whether there was anything the respondent could be doing to support the claimant and help her return to work. Dr Bray made enquiries about the claimant's overall wellbeing and prognosis, the working environment and her relationships with her colleagues (particularly with her manager), in order to understand whether work was a contributing factor to her ill-health and prolonged absence. The claimant stated that her stress and anxiety was caused by a fear of leaving the house due to the pandemic and the risk of contracting Covid-19 and thus passing it on to her mother who was vulnerable.

10. Mr Ian Broome was employed by the respondent from August 1985 and

from 1 July 2020 was the Health, Safety and Environmental Manager. From the latter date his duties were primarily concerned with Covid-19. The respondent set up a Covid Committee to review and discuss all relevant Covid-19 regulations and to decide how best to keep the factory running in a way that was compliant with the rules. The respondent's first Covid-19 risk assessment was made just before the Government regulations required all companies to have one. The respondent provided a Covid-19 risk assessment dated 21 July 2020, this was the risk assessment in place when the claimant returned to work on 3 August 2020. The respondent did not have a requirement for staff to wear a mask in the building unless they were working within 2 meters of another person and there was no screen between them.

11. On 3 August 2020, the claimant returned to work in the small torque wrench section.

12. Mr Dereck Bell, the Technical Shift Manager, conducted a return-to-work interview with the claimant on her first day back. A phased return to work was agreed so that the claimant returned to work on reduced hours with a review at the end of the first week.

13. Soon after her return to work the claimant was approached by Mr Broome who enquired how things were in the small torque wrench area. The claimant expressed her concerns that there was no social distancing or wearing of face masks and social distancing was not respected. Following his conversation with the claimant, Mr Broome spoke with the claimant's manager, Mr Bell, and informed him that the claimant had raised concerns about Covid safety in the small torque wrench section.

14. The claimant states that the following day she was summoned to Mr Bell's office who then proceeded to shout and swear at her and told her to "*keep your F***ing mouth shut and stop causing trouble*". Mr Bell denies that he spoke threateningly to the claimant, shouted or swore at her as alleged. What Mr Bell states is that he told the claimant that if she had any concerns about safety on the section, she should be comfortable going to him with them and that staff should feel free to talk to him about any issue. The allegation made by the claimant is denied, I have not been able to conclude that the claimant has proved on balance of probability that these comments were made by Mr Bell. Having heard Mr Bell give evidence I consider it unlikely that he would make such a blatantly offensive comment to the claimant in these circumstances where she has just returned to work after a long period of absence.

15. On her return to work the claimant was put to work in a different area to that which she had been working in previous years. SK as the claimant's team leader was responsible for training the claimant on her duties.

16. After the claimant had been back at work for a week the claimant had a meeting with Mr Bell at which Mr Bell raised issues that had been brought to his attention while the claimant was off sick in about May 2020, these

matters concerned the claimant's conduct towards other work colleagues. The claimant denied the allegations and Mr Bell after counselling the claimant to be mindful how her behaviour may be perceived by others took no further action but warned the claimant that it there were further recurrences of similar behaviour a formal disciplinary process might be initiated.

17. In September 2020 Mr Bell became aware of tensions in the small torque wrench section so he carried out an investigation which involved speaking to all of the team members. This resulted in the claimant being invited to attend a formal disciplinary meeting conducted by Mr Mike Stevens, Electronics Assembly Department Shift Manager. Mr Stevens concluded that the breakdown of the relationship between the claimant and her fellow team members was not solely the claimant's responsibility, but he did attribute some responsibility to the claimant and encouraged her to be mindful of how her behaviour could be perceived by others. He took no further disciplinary action.

18. At about the same time concerns were raised about the claimant's performance by SK. The issues related to incorrectly calibrated tools (a serious issue) and misaligned or incorrectly placed labels (an aesthetic problem). The claimant was invited to a formal disciplinary hearing that took place on the 22 September 2020. The claimant stated, in mitigation for the errors discovered, that she had insufficient training. This explanation was not accepted by Mr Bell who considered that the claimant was an experienced torque wrench assembler with more than 10 years' experience of calibrating the respondent's torque wrenches so the process was very familiar to her. Mr Bell decided that a final written warning was an appropriate sanction because he wanted to highlight how serious the mistakes that she was making were and give her incentive to improve.

19. The claimant asked to be moved to another section and a place was found for the claimant in medium torque wrench packing section. The claimant's move meant that she was now under the management of Mr Max Goncharov.

20. Mr Max Goncharov was employed by the respondent as a Shift Manger. The claimant reported to Mr Goncharov from October 2020 onwards when the claimant was moved to the medium packing section. The respondent contends that the claimant was trained in accordance with a training plan that was drawn up by Mr Goncharov and the claimant's supervisor Ms Sam Brooks.

21. In about December 2020 and again in January 2021 Mr Goncharov spoke to the claimant about some performance issues, Mr Goncharov raised concerns about the quality of some of the claimant's work. One issue concerned the claimant placing the wrong coloured bung for some tools, the claimant explained that the light was bad in the area where she worked and she could not distinguish the colours. Mr Goncharov states that the lighting was sufficient to enable the right colour to be selected. Another issue raised

was rubber bands being twisted on the tool. A third issue involved incorrect laser markings on tools. A fourth issue involved missing tools in an order. When these errors were discovered it would take several hours to put the matters right and involved checking every box packed by the claimant. The claimant was warned that as she had a warning on her file for poor performance, if there were further instances the claimant could be subject to formal conversations which could trigger a disciplinary hearing relating to poor performance.

22. After the claimant had been spoken to about the fourth mistake Mr Goncharov told the claimant that she would be subject to disciplinary action and he sent the claimant a letter inviting her to attend a formal disciplinary hearing on 28 January 2021. At the disciplinary hearing the Mr Goncharov went through the four issues (mistakes) that had been raised with the claimant.

23. Mr Goncharov states that: "*In reaching my decision to dismiss the claimant I took into account the fact that she had made four errors in a short period of time … even though … sufficient training had been provided… I did not see her taking ownership of her mistakes and asking for help or more training to improve."* Explaining his decision to dismiss the claimant Mr Goncharov states: *"In the disciplinary meeting on 28 January 2021 I thought that she might be abel to provide me with more mitigating circumstances or some new explanation for her poor performance, but she was unable to do so. We had given several opportunities to improve and I did not think she had taken ownership of her mistakes. I did not want anymore mistakes to be made as the claimant's mistakes had already caused a lost of disruption and stress to other people involved in fixing them. As she already had an unexpired final written warning on her file at the time of this disciplinary hearing, I therefore felt I had no choice other than to dismiss her for continued poor performance."*

24. The Claimant was dismissed for the reason of poor performance with effect from 28 January 2021.

25. The claimant was offered the right to appeal against her dismissal and on 16 February 2021 the claimant attended an appeal meeting with Mr Alan Collins and Ms Wanda Stewart-Lee.

26. The claimant set out the grounds of her appeal in a letter dated 1 February 2021. In the letter she raised various allegations of bullying by her co-workers. The claimant said that the alleged bullying she had been subjected to had caused her to make the mistakes and that her dismissal should be overturned on this basis. The claimant confirmed that the main cause of her stress and anxiety and the resulting period of absence was her fear that she might contract Covid-19 and infect her mother who lived with her and was particularly vulnerable. The claimant said her relationship with her manager Mr Bell had broken down.

27. Mr Collins concluded that the claimant had not presented any evidence

which justified overturning her dismissal and therefore the original decision was upheld. The claimant was notified of the decision in a letter dated 18 February 2021.

28. The claimant was paid in lieu of her 12 weeks' notice together with any accrued untaken holiday entitlement in the February 2021 payroll.

29. Section 94 Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed. Section 98 (1) ERA provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2). A reason falls within this subsection if it relates to the capability or qualifications of the employee for performing work of the kind which she was employed by the employer to do. Subsection (3) explains that capability, in relation to an employee, means her capacity assessed by reference to skill, aptitude, health or any other physical or mental quality.

30. Section 98(4) ERA provides that where an 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 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 shall be determined in accordance with equity and the substantial merits of the case.

31. The Tribunal must not substitute its views about the employee's capacity for that of the employer. It is impermissible for a Tribunal to do that since frequently the Tribunal is not in a position to assess work performance or decide whether it falls below the standard expected of employees in a particular job. The test as laid down by Lord Denning in *Alidair Ltd v. Taylor [1978] ICR 451G, is: "Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent."* The function of the Tribunal is to decide whether the employer honestly and reasonably held the belief that the employee was not competent and whether there was a reasonable ground for that belief.

32. Section 100 (1) (e) ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that in circumstances of danger which the employee reasonably believed to be serious and imminent, she took (or proposed to take) appropriate steps to protect himself or other persons from the danger. Section 100(2) provides that for the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, her knowledge and the facilities and advice available to her at the time. Section 100 (3) states that where the reason (or, if more than one,

the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), she shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which she took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

33. The first issue that I have to determine is what was the reason for the claimant’s dismissal? Was it a potentially fair reason capability, namely her performance, or was it that the claimant was dismissed because of the steps she took to protect herself and her family from the risk of contracting Covid-19 by asking the respondent to adhere to health and safety protocols, and making complaints about COVID -19 compliance to colleagues and senior staff?

34. The claimant states that she was dismissed because she raised health and safety concerns in the workplace, and this was seen as a nuisance to senior staff members who did not want the hassle and expense of enforcing these and upsetting colleagues who refused to wear masks an observe social distancing.

35. The claimant’s own evidence and the evidence in the case as a whole in my view does not support such a conclusion. In the claimant’s evidence she refers to reporting issues about the quality of work in the summer of 2019. Prior to going off sick in March 2020 the speaks of raising with SK that colleagues were sitting around drinking coffee and not working at the start of the shift. These matters are not in any sense related to the suggestion that the claimant was raising issues of health and safety.

36. The first issues that the claimant refers to as having been reported by her involves the occasion when SK while telling a joke was blowing a raspberry, resulting in the claimant being concerned. However, when this happened the claimant raised it with Mr Bell. The action taken by Mr Bell was to speak to SK and ask her to be respectful of the concerns of the other members of the team. The claimant also speaks of reporting to Dr Bray, on 11 August 2020, her concerns that colleagues were not adhering to social distancing guidelines. There is no evidence that the claimant’s report resulted in any adverse consequence for the claimant. When the claimant was spoken to by Mr Bell about complaints from colleagues about her behaviour this arose from conversations which had taken place prior to the claimant’s return from sickness absence and was unrelated to comments she made to Dr Bray about social distancing guidelines.

37. There is clash in the evidence of the claimant and the respondent about how Mr Bell reacted to being told of the claimant’s concerns about Covid-19 and the fact that the claimant lived with her vulnerable mother, the claimant says Mr Bell reacted aggressively towards her this is denied by Mr Bell. I have not been able to conclude that the claimant has proved on balance of probability that there was an aggressive reaction by Mr Bell. The claimant in her evidence explains how she raised with Mr Bell the fact that she was

accused of being racist towards her work colleagues, but this too was not related to the claimant raising issues about health and safety. The claimant says that after the first disciplinary action taken she was given an unfair final warning and told to keep her "gob shut" and not to appeal decision. Implict in this is the suggestion that the claimant was being told to keep quite about health and safety issues. I do not consider that it is likely on a balance of probabilities that the respondent was hostile towards the claimant for raising issues about health and safety arising from Covid-19 regulations and the need to create safe ways of working. Mr Broome's evidence clearly shows that the respondent took its obligation to provide a safe way of working for its staff seriously and was not resistant to matters arising from Covid-19 regulations. The claimant has also set out in her evidence other incidents such as Mr Gonchaov and RG hitting the claimant's elbow while lifting a tray, being spoken to in an aggressive manner by CS, and a colleague being aware that the claimant was going to be sacked because they said "that little one on packing is getting the sack". None of these matters in my view suggest that the claimant was being targeted because of raising issues about health and safety.

38. What the evidence in my view does show is that during the claimant's absence from work in August 2020 some of her work colleagues who had made complaints about her during her absence suggesting that she had problems with them and there were issues with her conduct. There continued to be problems with colleagues after her return to work in August 2020 resulting in disciplinary proceedings, where no action was taken against the claimant, but the claimant asked to be moved and was moved to work in a different section. There were problems with the claimant's performance in small torque wrenches section which resulted in the claimant being given a final warning. There were problems with the claimant's performance in the section to which the claimant moved which resulted in the claimant being subjected to further disciplinary action and a decision was made to dismiss the claimant. The reason for the claimant's dismissal, in my view illustrated clearly by the evidence of all the witnesses including the claimant, is that the claimant was dismissed because of her poor performance.

39. Was the dismissal of the claimant for performance capability within the range of reasonable responses? The claimant says that the decision to dismiss was not within the range of reasonable responses. The claimant had over a decade of good service, the claimant had a limited amount of training in her new role, the claimant had been in the role for no more than a few days, the decision to recommend disciplinary action was not reasonable, the decision to issue a final written warning was not reasonable owing to the lack of training and brief period in the role and the decision to dismiss being influenced by the final written warning that was unreasonable the decision to dismiss the claimant was not reasonable in all the circumstances.

40. The respondent's products require accurate and precise production. The respondent sets out in its handbook its expectations of staff. The failure to

achieve and maintain reasonable standard of workmanship, or to the detail of that job to a standard that may reasonably be expected may lead to disciplinary action. The failure to show skill or aptitude for a job may lead to disciplinary action. Where an employee is transferred to another position internally and despite training and support, the performance of the employee is not to the required standard, a more formal process may be followed to address the concerns.

41. On the claimant's return to work in the small wrench section the claimant received training in calibrating the TT20-50. The calibrating work that the claimant was doing on her return to work after her sickness absence was similar, in principle, to the work that she had been doing before she went on extended sickness absence. Although the claimant had received the requisite training she made errors in her work. SK became concerned about the errors that the claimant was making and raised the issue with HR and Mr Bell. This resulted in the claimant being subjected to a disciplinary process and being given a final written warning in September 2020.

42. The claimant chose not to appeal the decision to impose a final written warning. The claimant's evidence in her witness statement was that Ms Sands (from HR) told her that she had the right to appeal "but she told me not to do so, as this would involve senior management and would be hassle for everyone." When questioned about the failure to appeal the claimant stated that, "I was offered the right to appeal I could have appealed but I did not". I do not need to determine whether or not what the claimant says was said by Ms Sands is correct or not, or whether she misunderstood something that was said to her. The claimant did not appeal the decision to impose a final written warning and so the warning remained unchallenged.

43. Mr Bell states that selling torque wrenches out of calibration could have had serious health and safety implications and damage the respondent's reputation. Mr Bell also was not satisfied with the claimant's explanation that she had insufficient training, because she was an experienced torque wrench assembler tester, with more than 10 years' experience of calibrating the respondent torque wrenches. Mr Bell decided that a final written warning was appropriate because he wanted to highlight the seriousness of the mistakes that the claimant was making and to give her an incentive to improve.

44. The claimant transferred to the medium torque wrench section under the management of Mr Goncharov. The claimant's annual review was however carried out by Mr Bell together with Mr Goncharov. In the review claimant was informed about the importance of her new role in which the claimant could be the last person to see a product before it leaves to go to the customer. The claimant was told that she was to maintain an eye for detail and to be very careful.

45. When Mr Goncharov carried out his disciplinary hearing on 28 January 2021, the claimant had made four mistakes about which she had been spoke to in a short period of time. This was a factor that was taken into

account against her. The claimant was not seen by Mr Goncharov as taking ownership of her mistakes and asking for help or more training. Mr Goncharov concluded that the claimant had not provided any new explanation or mitigation for her poor performance. Mr Goncharov considered that the claimant had been given the opportunity to improve but had not taken it up. The claimant's mistakes caused a lot of disruption and stress for other people involved in fixing them. The claimant had an outstanding final warning. Mr Goncharov concluded that the claimant should be dismissed.

46. While the decision to dismiss the claimant was difficult for the claimant after employment with the respondent for so many years, it was however a decision that was open to the respondent. The claimant was on a final written warning for performance issues. The claimant had been found guilty of further performance lapses after being given training and an opportunity to improve her performance. On the basis of what Mr Goncharov believed about the claimant's performance he was in my view entitled to come to the conclusion that the claimant should be dismissed. The process followed by the respondent in arriving at the decision to dismiss the claimant was a reasonable process which was in accordance with the respondent's own procedure and compliant with the ACAS code of practice.

47. I am of the view that the claimant was not unfairly dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 8 September 2022

Sent to the parties on:

13 September 2022

For the Tribunals Office

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