EMPLOYMENT TRIBUNALS

Claimant: Mr T Jackson

Respondent: Swiss Re Management Limited

Heard at: London South (via CVP) **On:** 15th and 16th August 2022

Before: Employment Judge Nicklin

Representation
Claimant: in person
Respondent: Mr C Kelly, Counsel

JUDGMENT having been sent to the parties on 19th August 2022 and written reasons having been requested on 30th August 2022 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a claim form presented on 15th June 2019, the Claimant brought a single claim of unfair dismissal. The Claimant was employed by the Respondent from 23rd July 2012 until 3rd January 2019, when he was dismissed by the Respondent on grounds of performance/capability.

2. At a case management hearing before Employment Judge Sage on 15th May 2020 a list of issues was agreed between the parties. At the beginning of this hearing, the parties confirmed that this list still represented the issues which the tribunal needed to determine in this claim. This is important because, unusually, neither party had fully set out its case in any pleading or statement of case. There is no document setting out the Claimant's case which supplemented his ET1 and the Respondent did not prepare a separate Grounds of Resistance to complement its ET3. At the time of completing its ET3, the Respondent acted without legal advisors before later instructing solicitors. Both parties agreed at the outset of this hearing that the case can be properly and fairly determined without any statements of case, having regard to the list of issues and those issues being limited to unfair dismissal and accordingly being relatively narrow in scope. As this case was presented more than three years before this final hearing commenced and both parties indicated that they were content to proceed by reference to the list of issues, I

decided that it was in accordance with the overriding objective to proceed with the final hearing across the two days listed.

3. It is unnecessary to set out the remainder of the procedural history in this case. It is sufficient to say by way of summary that the matter was last before the tribunal on 19th January 2022, when Employment Judge O'Rourke listed this two-day final hearing.

4. I had before me a bundle running to 257 pages and an additional document produced during the course of the final hearing (as page 258) regarding an invite to the meeting on 3rd January 2019, when the Claimant was told that he was dismissed. I also heard sworn witness evidence from the Claimant and three of the Respondent's witnesses: Tracy Ismay (HR Partner, who managed the Claimant's progress on the Respondent's performance procedure); Andreas Kopinits (the Claimant's line manager) and Poonam Chandiramani (HR Partner who heard the Claimant's appeal against dismissal). All witnesses were cross examined and I have carefully considered the submissions made by both parties (notwithstanding that I have not set out those submissions within these written reasons). At the outset of the hearing, I also reminded the parties to ensure that they took me to any relevant document in the bundle that they wanted me to consider.

5. The issues, as set out in the case management order of Employment Judge Sage, are:

<u>Unfair dismissal</u>

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent appears to state that it is capability and/or conduct.

(ii) In outline the Claimant states that the dismissal was procedurally and substantively unfair because:

- *a. He was not warned that he was attending a dismissal meeting;*
- *b. He was not advised of the right to be accompanied;*
- *c. He had no chance to respond to the case against him or to make any representations before the decision to dismiss had been made;*
- *d. He was provided with no information about the evidence relied upon when deciding to dismiss;*
- *e. He was put on a PIP after discussing the possibility of lodging a grievance alleging bullying and harassment;*
- *f. He was dismissed (in part) for taking time off for family emergencies despite being assured by HR that this would not count against him;*
- *g. HR failed to record some of his meetings and conversations where his concerns were discussed;*
- *h. The appeal failed to deal with all the points he raised;*
- *i. The Claimant states that the Respondent failed to comply with the ACAS statutory code of practice on disciplinary and grievance procedure.*

(iii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

<u>Remedy for unfair dismissal</u>

(iv) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have

been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604;

b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Findings of fact

6. The Respondent is a large organisation employing 869 people in Great Britain.

7. The Claimant's employment was terminated by the Respondent on 3rd January 2019. He had initially started work for the Respondent on a contractor basis in March 2012 but was then employed from 23rd July 2012. He was an IT Service Desk Analyst and then a Senior IT Service Desk Analyst.

8. In or around October 2016 there was a reorganisation and the Claimant joined the Respondent's Service and Quality team as a Service and Quality Specialist. He worked at the Respondent's Folkestone office. This team was led by Mr Andreas Kopinits who became the Claimant's line manager.

9. In or around May 2018, Mr Kopinits began to have concerns regarding the Claimant's performance in the Service and Quality team. These concerns included:

    9.1. The Claimant's failures to notify Mr Kopinits in accordance with the Respondent's notification of absence procedure when he was absent from work. Broadly, this procedure prescribes that an employee must telephone their line manager before 10am on the first day of an absence with a reason.

    9.2. A concern that the Claimant was repeatedly absent from his daily and weekly team meetings and did not attend all of his one-to-one meetings as required.

    9.3. A concern in 2018, raised in the Claimant's appraisal [61], about his behaviour goals. This concern primarily focused on attendance at work, attendance at meetings and failing to notify in accordance with the absence procedure.

10. On 2nd March 2018, Mr Kopinits gave the Claimant a verbal warning for lack of communication and unreliability. I accept Mr Kopinits' account of this warning because he recorded a note of what he told the Claimant after the meeting [77]. At that time, Mr Kopinits did not refer this verbal warning on to the Respondent's HR department because he wanted the Claimant to be able to change these performance issues without the impact of having such a warning recorded.

11. Mr Kopinits also had other concerns about the Claimant's performance. In particular:

11.1. Failure to organise a training session for the Service Desk team. Mr Kopinits was contacted about this issue by the Head of Customer Service at the Respondent on 3rd April 2018;

11.2. A concern arising at a team workshop in Zurich between 16th and 20th April 2018. The Claimant did not attend on 20th April and failed to notify Mr Kopinits. I accept Mr Kopinits' evidence about this event and found it compelling: he clearly recalled the event and the fact that his own manager attended whilst the Claimant was absent without reason or permission.

11.3. A concern about the effectiveness of the roll out of a Windows 10 project;

11.4. A continuing concern about the Claimant not being available when he might reasonably have been expected to be available. This concern is demonstrated by an email to the Claimant from Mr Kopinits on 29th May 2018 [86] which said:

> *"Again I don't know where you are! I checked my mails, leaving request and your calendar and I could not find any information that you would not be available today…this is the second time this month where I have to chase you (sic)".*

11.5. A concern about delays and efficiency with tasks, especially where others were reliant on an aspect of work to be completed by the Claimant. Mr Kopinits was, in particular, concerned about issues raised with him by other parts of the Respondent's business and members of staff being unwilling to work with the Claimant because of incomplete tasks.

12. The effect of these concerns was that the Claimant was placed on a Performance Improvement Plan ("PIP") by Mr Kopinits. This is part of the Respondent's formal performance management procedure. The Claimant met Mr Kopinits and Ms Ismay on 14th June 2018. The three identified concerns were:

    12.1. Delivery and completion of assigned tasks;
    12.2. Lack of communications with line manager (absence notification); and
    12.3. Working hours and meeting attendance.

13. The PIP was scheduled to last 6 months from 14th June – 14th December 2018 and was confirmed formally to the Claimant in a letter dated 4th June 2018 [79]. The letter explained that there would be a monthly review meeting with Tracey Ismay (an HR Partner) in attendance. It was explained to the Claimant that a possible outcome of the PIP could be: successful completion or a disciplinary sanction including a warning or termination of employment. The letter said: "*Any decision will not be made until you have had the full opportunity to respond*".

14. The letter also gave the Claimant the right to be accompanied at the first meeting (set for 14th June 2018) and all subsequent review meetings. This is in accordance with the Respondent's policy.

15. The Respondent's performance management procedure [55] provides that there may be an improvement warning, then a second formal meeting which may result in a final warning and then a third formal meeting "*to discuss and consider appropriate measures, which may include termination of employment*".

16. For formal meetings, the procedure says the aims include [56]:

- *"Setting out the required standards that we believe the employee may have failed to meet and going through any relevant evidence that we have gathered.*
- *Allowing the employee to ask questions, present evidence, respond to evidence and make representations.*
- *Establishing the likely causes of poor performance including any reasons why any measures taken so far have not led to the required improvement.*
- *Identifying whether there are further measures, such as additional training or supervision, which may improve performance.*
- *Where appropriate, discussing and setting targets for improvement and a time-scale for review, usually up to six months, through the medium of a PIP.*
- *If dismissal is a possibility, establishing whether there is any likelihood of a significant improvement being made within a reasonable time and whether there is any practical alternative to dismissal, such as redeployment."*

17. The procedure goes on to explain at [57] that:

> *"An employee must make every effort to attend a formal performance meeting and failure to attend without good reason may be treated as misconduct. If the employee cannot attend (including if an employee cannot attend repeatedly for health reasons), we may ultimately have to hold the meeting by telephone or take a decision based on the available evidence including any written representations the employee has made.*

18. The performance procedure states at [58] "*if performance remains unsatisfactory, then a further formal performance management meeting may be convened, following which further measures may be imposed, up to and including dismissal*". There is also provision for an appeal against a warning or dismissal. The Claimant exercised that right twice: firstly, in relation to a warning and finally in respect of his dismissal. Both decisions were upheld by the Respondent.

19. In accordance with the procedure, Ms Ismay arranged for 6 PIP review meetings on the following dates: 17th July 2018, 21st August 2018, 19th September 2018, 22nd October 2018, 20th November 2018 and finally 12th December 2018.

20. Around this time, the Claimant alleges that Mr Kopinits was behaving in a bullying, harassing and oppressive manner. I find that the working environment at the time the performance procedure was applied, though undoubtedly stressful for the Claimant, did not involve conduct by Mr Kopinits (or others) of the gravity or seriousness alleged. This is because:

    20.1. In his witness statement (at paragraphs 38 and 39), the Claimant made generalised comments about what he said was taking place (for example: he said there was slander, jokes, criticism and humiliation). However, I found his evidence on these allegations vague and too general to identify specific acts on which any findings could be made;
    20.2. Further, the Claimant's own notes of those meetings [226 onwards] do not support these allegations. There is no mention of this type of behaviour. The Claimant was cross examined about these notes and did

not have a satisfactory answer for the omission of the behaviours listed in his witness statement. Given these were private notes prepared by the Claimant, I find that it is more likely than not that such incidents would have been recorded in such a contemporaneous note.

20.3. The Claimant did raise the issue of bullying in an email to Mr Kopinits on 29th May 2018 [194], but this, similarly, did not set out any allegations or detail. It primarily highlighted the stress the Claimant felt he was under at work against a backdrop of meetings with Mr Kopinits and a difference in working atmosphere. In context, the situation was, by this point, moving forwards towards the formal performance procedure following the verbal warning earlier in March that year.

21. The Claimant attended his first PIP meeting on 14th June 2018, supported by a companion (in accordance with the Respondent's procedure): Richard Hughes.

22. The summary of this first meeting is set out in Ms Ismay's email note of 3rd July 2018 as below [87]:

- *"Progress has been made on communication over the last couple of weeks and this should continue to improve.*
- *Agreed to continue with weekly catch-ups which should ideally be held by VP and documented in writing as a follow-up (can use the weekly action log at the bottom of the PIP document for this).*
- *Agreed to ensure that Interim and end of year review meetings take place to discuss feedback/comments.*
- *Action (Andreas): think about how processes/recording information can be simplified.*
- *For the team in general to be clearer with each other on expectations/duties during team meetings – NB I'd expect for any of the team to reach out to Andreas if there is a lack of clarity (and vice versa of course).*
- *Tim expressed a request for more empathy and we agreed that in order for this to happen communications need to be clear about personal circumstances."*

23. The employee assistance programme was also flagged up to the Claimant as a means of support. This was a third party, independent and confidential personal advisory and counselling service.

24. The first review meeting (i.e. the second meeting) took place on 17th July 2018. At that point, Mr Kopinits was suitably happy with the Claimant's progress with some evidence of improvements. Accordingly, no improvement warnings were issued. The Claimant's absence notification had improved.

25. However, on 26th July 2018, the Claimant was absent without following the Respondent's reporting procedure. The Claimant acknowledged this in an email on the same day, having been chased by Mr Kopinits at 13.21 [95]. The Claimant explained that had been unwell and fell asleep before sending his email notification.

26. At the second review meeting on 21st August 2018, the Claimant was issued with his first improvement warning which the Claimant later appealed, albeit unsuccessfully. The Claimant disputed in evidence that such a sanction was issued at this meeting but the notes of the meeting [94] are very clear: it was

explained in this meeting that the warning was being given because of the absence incident on 26th July 2018 and the failure to follow procedure.

27. The Claimant spoke to Ms Ismay about his mental health and his concerns (arising from his work environment), but I accept Ms Ismay's evidence that, around this point was the first time she was aware of any mental health concern being reported. There was little detail provided about the Claimant's health and the specific things required to support him. Her evidence is supported by Mr Kopinits (as regards the lack of detail of any mental health needs) and there is no evidence to show a fuller report was made. Ms Ismay's email of 22nd August 2018 is also a contemporaneous record that she had not previously been made aware of any such health concern [97]:

> *"…Until now we have not been made aware of any health issues that could be impacting* [the Claimant's] *performance. Now that this has been brought to light, we will get guidance from our Occupational Health Doctors. Then moving forward, we will look at how we can support him effectively whilst proceeding with the PIP."*

28. The Claimant was referred to occupational health and Ms Ismay informed the Claimant of various other sources of support available (as shown in her email to the Claimant dated 21st August 2018 at [96]).

29. On 4th September 2018, the Claimant emailed Mr Kopinits at 13.06 to confirm his absence because of illness. This was in breach of the Respondent's notification procedure as to when and how the report was made [108].

30. On 10th September 2018 the Claimant was absent from a catch-up call with Mr Kopinits and had to be chased. The Claimant later confirmed that he had been overwhelmed that morning; he had had "*what can best be described as a panic attack about returning to work*" and was due to see his doctor. I accept Ms Ismay's evidence given in her witness statement at paragraph 25 and 26: the Respondent decided that the issues on 4th and 10th September would not count towards the PIP. The Respondent gave the Claimant an opportunity to improve.

31. The Claimant was then off sick from 11th to 24th September 2018 and a referral to occupational health was made to see if there was any reason why the Claimant could not comply with the notification procedure.

32. Owing to his sickness absence, the third formal review was on 22nd October 2018 (rather than 19th September). A summary of this meeting is found in the email from Ms Ismay dated 22nd October 2018 [122], which says:

- *"Andreas has seen a big improvement from Tim in the last couple of weeks with regard to communications, working hours and attendance. Tim has been providing up to date information with timings on deliverables, has been consistent with his working hours and attending meetings on time (if not early in some cases). Tim agrees that he feels as though positive steps have been made.*
- *We confirmed that Occupational Health appointment is booked for next Monday (29th). After the appointment Tim will receive a report from the Occ Health Dr – this will then be released to me within a few days and I can go through a high-level summary with Andreas (after confirming disclosure with Tim).*
- *Both agreed that you will continue with weekly 1-2-1s (VP when possible).*

- *Andreas advised that there is still some room to improve on assigned tasks. NB - tasks have been completed to time for the most part and Tim is just in the process of catching up on some items due to absence/leave.*
- *The incidences on the 10th Sept and 4th Sept did fail to meet the PIP criteria (absence notification). However, on this occasion Andreas has confirmed that he will omit these as he respects that TJ was going through a difficult time. However, if further absences do not follow the notification process then further warnings will be issued.*
- *To confirm, no formal warnings were issued during this third formal review meeting."*

33. At this meeting, the Claimant was therefore warned that he would receive further warnings if he did not follow the Respondent's notification procedure.

34. The Claimant was further absent on 1st November 2018 with no notification. The Claimant was chased by Mr Kopinits at 12.10 that day by email [130]. The Claimant responded on 2nd November 2018 in the early hours of the morning explaining that there had been a family emergency.

35. On the 8th November 2018 the Respondent held the fourth PIP review meeting. The second and final improvement warning was issued under the performance procedure. This was for failing to meet the communications target with his line manager. The procedure had been adjusted to allow for communication of absence by text message. In light of that adjustment, Mr Kopinits concluded that the Claimant had failed to meet the required standard. The expectations were restated in a letter confirming this decision, erroneously dated 7th November 2018 [137-8]. This final improvement warning was issued to last for 12 months and stated that "*if performance concerns persist, may result in termination*". The Claimant was therefore warned of a risk of dismissal at this point.

36. The final improvement warning gave the Claimant a right to appeal but he did not appeal it.

37. An occupational health report was prepared by Dr Ryan, dated 27th November 2018. He confirmed there were no work restrictions or adjustments required and there was no medical reason not to comply with the Respondent's notification procedure by 10am.

38. The final PIP review was scheduled for 12th December 2018. This concluded the 6 month review period. It was an important review stage, given that the Claimant was on a final warning. The Claimant failed to attend that meeting on 12th December and did not advise Mr Kopinits in advance.

39. The Claimant says he emailed Mr Kopinits at 05.40am on 12th December 2018 to request emergency time off for illness. However, the email at [177] clearly shows a time stamp at 14.11 that day. Having considered this conflict of evidence, on balance of probabilities, I prefer the Respondent's evidence that this was received at 14.11 because:

    39.1. There is no other evidence to show that the email was sent at this early time in the morning;
    39.2. The Claimant's performance issues include failures to notify on past occasions. Whilst the Claimant knew he was on a final warning, there

is pattern of contacting his line manager after the time required by the performance procedure; and

39.3. I approach Claimant's evidence about unsent emails with caution. At [95], there is an email dated 26th July 2018 sent at 13.47. This was sent to Mr Kopinits after the Claimant had been chased as to his absence. That email explained that, on that occasion, the Claimant had drafted an email which did not send. I find it unlikely that the Claimant had persistent issues with sending emails (which were not received). In any event, the Claimant was able to send a text message on 12th December 2018 to notify his line manager but failed to do so.

40. The Claimant was on his final improvement warning at this time. The Claimant was therefore in further breach of the procedure and the PIP meeting was ineffective. There is no reason not to think that the Claimant had genuine personal matters affecting him around this time, but there was no good reason given to the Respondent for failing to notify as expected.

41. The Claimant had a discussion on the telephone with Ms Ismay. There is a conflict in the evidence as to whether Ms Ismay identified the Claimant's situation as a 'crisis situation'. There is no dispute that the Claimant was distressed. However, I accept Ms Ismay's evidence that she did not say this. This is because:

41.1. She was a clear and reliable witness, doing her best to assist me about events which occurred over three and a half years ago. She was not prone to exaggeration and the evidence demonstrates that she acted responsibly when she had previously learnt of the Claimant's concerns about his mental health (i.e. initiating the occupational health referral and bringing the employee assistance programme to his attention).

41.2. Whilst the Claimant has represented himself well in these proceedings and has been well prepared, very courteous and generally doing his best to assist the tribunal, I found I could place less weight on his evidence where there are areas of conflict in the evidence. Some of his answers when he was cross examined tended to avoid the question and there was a tendency towards evasiveness at times. For example, when asked if he recalled there being a problem with his complying with the notification procedure, the Claimant said he did not remember and when asked to confirm that the Respondent had a concern about his performance, he answered that this was an assumption. There was no apparent reason for avoiding questions about these matters, although I take into account that the experience of giving evidence and representing oneself may be a stressful and pressured exercise.

42. I also find that it is unlikely that Ms Ismay would say that the situation the Claimant was in was 'outside of the PIP' (i.e. not part of the process) because Ms Ismay was working with Mr Kopinits at this time to decide what consequence followed under the PIP from the default on 12th December 2018.

43. On 17th December 2018, Mr Kopinits decided to dismiss the Claimant for the reasons set out at paragraph 52 of Mr Kopinits' witness statement. I accept that Mr Kopinits arrived at his decision based on the factors set out at paragraph 52. This was a decision based on the Claimant's performance at the end of the

6-month period, having regard to the specific targets outlined at the beginning of the process. In particular, the Claimant failed to attend and notify his absence for the final PIP review when he was on a final improvement warning. Mr Kopinits considered that he had offered the Claimant some latitude (in disregarding the incidents on 4th and 10th September 2018) and the medical report from Dr Ryan confirmed there was no reason why he could not comply with the procedure.

44. Having made this decision, nothing was communicated to the Claimant about it at all. The decision was taken to defer informing the Claimant to after Christmas. During the festive period, Mr Kopinits considered and reflected but did not change his decision.

45. The Claimant was invited to a meeting on 3rd January 2019. The invite shows that this was set up as a meeting for 11am that day and described as a *PIP Review with HR rep Tracey Ismay*. I am satisfied that the Claimant will have received this email/calendar invite because it references his name and details specifically. The Claimant also explained in his later appeal that he considered 3rd January 2019 to be a rescheduled PIP review, which accords with the invite.

46. However, the Claimant was not told that the meeting was to discuss dismissal. He was not told that a decision had already been made. There had been a discussion on 13th December 2018, but this did not engage with issues about dismissal and the end of the PIP process. Neither did any discussion on 20th December deal with these issues.

47. At the meeting on 3rd January 2019 the Claimant was handed a letter which had already been prepared, dismissing him. The letter (of the same date) says that he was dismissed for two reasons:

    47.1. not meeting the required standard for communications with his line manager (specifically: the failure to notify on 12th December 2018); and
    47.2. because Mr Kopinits said he had been informed by colleagues that the Claimant had not attended several recent project meetings without notification.

48. The Claimant was given a right of appeal which he duly exercised.

49. Mr Kopinits accepts that, but for the 12th December 2018 incident, there would be no dismissal at that particular stage. The final breach on this date meant Mr Kopinits had concluded that the PIP process was at an end and, given the final warning, the next sanction was dismissal. The second reason given was relevant, but it only served to reinforce his decision on dismissal for communications.

50. The Claimant initiated an appeal against the dismissal. There is little overall challenge to the appeal process (save that the Claimant considers that an issue about the alleged variance in advice given to him had not been fully considered by Ms Chandiramani, the appeal manager). The appeal meeting took place on 25th January 2019, the Claimant had a companion present (Mr Hughes) and the decision to dismiss was later upheld by a letter dated 8th February 2019. In line with the grounds of appeal raised (which focused on the PIP process and the handling of the Claimant as a 'known vulnerable employee'), the appeal did

not examine the procedural fairness of the circumstances of the Claimant's dismissal.

51. Alongside the chronology of the PIP, the Claimant has maintained that he was subjected to a pattern of bullying and harassment by Mr Kopinits. There has been insufficient evidence led in these proceedings to make clear findings about the exact relationship between the Claimant and Mr Kopinits. However, as above at paragraph 20, I have found that, at or during the period of the PIP process, Mr Kopinits was not acting in a bullying or oppressive manner towards the Claimant.

52. In any event, I accept the point made by the Respondent that the lack of record of such allegations in the Claimant's contemporaneous notes undermines this contention. Some allegations about Mr Kopinits are best described as an allegation of a lack of empathy as a manager. However, there are examples of Mr Kopinits being flexible and accommodating with the Claimant (such as emails about working from home and emails about his family circumstances when discussing an absence). This is not to say that the Claimant did not experience difficulties and stress, at times, in the workplace.

53. The Claimant alleged that Mr Kopinits said: "*people die, just deal with it*". I am not satisfied that this was said in the manner alleged. It was clear from Mr Kopinits' evidence that he accepts that people manage grief differently, even if this was his own attitude about how he might respond. Mr Kopinits understood the importance of accommodating the needs of his team even if those needs were different to his own. For example, at [234], in a record of messages exchanged on 12th December 2018, he said, in reply to the Claimant who apologised to him for being upset on the telephone: "*I understand that you are under (little) stress and if you are upset*".

54. I find that Tracy Ismay did not attempt to formally dissuade the Claimant from lodging a grievance. Her evidence was well rooted in HR practice and procedure. She understood the Respondent's policy and her prompt referral to occupational health in this case indicates that she accepts employees can and should use these policies when needed.

Law

55. I must have regard to the test in section 98 of the Employment Rights Act 1996 ("ERA"). There are two stages. First, the Respondent must show that it had a potentially fair reason for the dismissal within section 98(2). 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.

56. Section 98(4) 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, 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.

57. 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.

58. In a capability dismissal, where the issue is performance, the employer must have an honestly held belief, held on reasonable grounds, that the Claimant is incapable or incompetent. The employer does not need to prove, as a fact, that the Claimant is incapable or incompetent (*Alidair Ltd v Taylor* [1978] ICR 445, CA, per Lord Denning MR).

59. In *James v Waltham Holy Cross UDC* [1973] IRLR 202, Sir John Donaldson observed:

> *An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance.*

60. There are four core matters to consider when deciding whether dismissal was within the band of reasonable responses:

    1. Was there a proper investigation or appraisal of performance, identifying the problem?
    2. Were there reasonable warnings of the consequences of failing to improve?
    3. Was the employee given a reasonable chance to improve?
    4. Has the employer fulfilled its responsibilities in creating conditions which enable the employee to carry out his duties satisfactorily (i.e. training and supervision)?

61. What constitutes a reasonable chance to improve depends on the circumstances including: the nature of the job, the length of service, status and past performance.

62. In some cases, it may also be reasonable to consider alternative employment, having regard to the size and administrative resources of the employer, although there is not the same duty as exists on an employer in a redundancy situation (or other types of capability cases) (see *Bevan Harris Ltd (t/a Clyde Leather Co) v Gair* [1981] IRLR 520).

63. The ACAS Code of Practice is applicable (it states at paragraph 1 that disciplinary situations include misconduct and/or poor performance) and a reasonable employer will comply with the principles of the Code as to fairness. This includes: the right to be accompanied, clear warnings as to a consequence, an opportunity to consider documents and present a case and a right of appeal.

64. As to the consideration of the *Polkey* principle in adjusting compensation: HHJ Eady in *Williams v Amey Services Ltd* UKEAT/0287/14/MC (16th February 2015, unreported) said:

22. Section 123(1) provides ETs with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal. It is in making this assessment that the ET might consider it just and equitable to make a reduction following the guidance laid down by the House of Lords in Polkey v AE Dayton Services [1987] IRLR 503 HL. That is, to take account of the fact — if this is what the ET so finds — that the Claimant's loss should be limited given that the employer might have dismissed fairly in any event.

23. In making such an assessment the ET is plainly given a very broad discretion. In some cases it might be just and equitable to restrict compensatory loss to a period of time, which the ET concludes would have been the period a fair process would have taken. In other cases, the ET might consider it appropriate to reduce compensation on a percentage basis, to reflect the chance that the outcome would have been the same had a fair process been followed. In yet other cases, the ET might consider it just and equitable to apply both approaches, finding that an award should be made for at least a particular period during which the fair process would have been followed and thereafter allowing for a percentage change that the outcome would have been the same. There is no one correct method of carrying out the task; it will always be case-and-fact-specific. Equally, however, it is not a 'range of reasonable responses of the reasonable employer' test that is to be applied: the assessment is specific to the particular employer and the particular facts.

65. In *Lenlyn UK Ltd v Kular* UKEAT/0108/16/DM (22nd November 2016, unreported), the EAT observed that the tribunal should consider expressly whether, in light of any overlap between a reduction by reason of *Polkey* and any reduction for contributory fault, it is just and equitable to make a finding of contributory fault and, if so, what the amount should be.

Conclusions

66. Mr Kopinits decided, on 17th December 2018, to dismiss the Claimant for the breach of the PIP and notification procedure. The principal reason for this was plainly because of the events of 12th December 2018 and the end of the PIP process. Mr Kopinits and Ms Ismay accept that he would not, at that stage, have otherwise considered a dismissal sanction.

67. The Respondent's reason for dismissal was properly one of capability on ground of poor performance. Mr Kopinits honestly believed that the Claimant had not met the required standard by the end of the 6 month process and that his performance fell well below the standards expected of an employee of his experience and service. This belief was reasonably held having regard to the length of the PIP process; the opportunities given to improve over the various meetings; the disregard of two breaches to give the Claimant an opportunity to succeed with the procedure and the final breach on 12th December in circumstances where the Claimant was on a final warning.

68. Two of the issues I must determine (in the list of issues) concern the substantive fairness of the decision to dismiss. These are, firstly, 'issue 4 (ii) (e)' [24] – the Claimant says he was put on the PIP after discussing the possibility of lodging a grievance alleging bullying and harassment. I conclude that this is not a basis for any unfairness at all. As per my findings, the PIP plainly arose after growing concerns Mr Kopinits had about the Claimant's performance and attendance issues. He was not dissuaded from lodging a grievance and Ms Ismay actively took steps to make reasonable referrals upon learning of any concern about the Claimant's mental health.

69. The second issue concerning the substantive fairness of the decision concerns 'issue 4 (ii) (f)' – whether the Claimant was dismissed (in part) for taking time off for family emergencies despite being assured by HR that this would not count against him. It is not possible to conclude that the dismissal was related to the need to take time off or the nature of the emergencies encountered by the Claimant. Mr Kopinits was, overall, accepting of those reasons in his responses to the Claimant and it has not been suggested that the Respondent operates a policy of frowning on or refusing time off for illness or emergency. In the review on 22nd October 2018, Mr Kopinits recognised that the Claimant was going through a difficult time and, as a result, disregarded the two incidents in September. The Respondent's objection to the Claimant's performance (in terms of attendance) was its honestly held view that the Claimant was not communicating with his line manager.

70. In my judgment, the Respondent did have sufficient evidence to conclude that dismissal may be a reasonable response following the breach of 12th December 2018, particularly given that the Claimant was on a final improvement warning. The Respondent had implemented the PIP procedure in good faith and with a genuine belief in the need to bring about an improvement by the Claimant. This lasted over a 6 month period with regular reviews. That is a reasonable period having regard to the Claimant's length of service and the performance problems for which the Respondent required improvement. The meeting notes show times when positive improvement was recorded and the overlooking of two absence issues during the process demonstrates the Respondent's willing in that regard. Accordingly, the Respondent did afford the Claimant a reasonable opportunity to improve.

71. There was also a reasonable use of warnings to ensure that, following the Respondent's procedure, the Claimant could reasonably be expected to know that further breaches during the PIP process may lead to dismissal. The Claimant had received a verbal warning before the formal procedure was initiated. He then received a first warning and then a final warning in November 2018. It is clear from this final warning that he was at risk of dismissal if performance concerns persisted.

72. The Respondent had also used its resources to reasonably support the Claimant during this process. He had been referred to occupational health and offered the assistance programme. The regular reviews maintained focus and communication on the concerns and improvement. Considering the nature of the performance concerns, there were no other specific training or supervision activities which could reasonably have been deployed to assist the Claimant in improvement. I remind myself that it is not for the tribunal to substitute its own view as to how it might have dealt with the matter. On the evidence before the tribunal, there was little else the Respondent could have been expected to do to bring about the required improvements.

73. However, considering the other allegations of unfairness in paragraph 4(ii) of the list of issues [24], in my judgment, the circumstances of the decision to dismiss and the handling of it after 12th December 2018 and up to 3rd January 2019 was unfair and outside band of reasonable responses on procedural grounds. This is because:

73.1. The decision was taken by Mr Kopinits on 17th December 2018 without any further reference to the Claimant at all. Nothing which occurred in December 2018, in terms of contacting or communicating with the Claimant, is sufficient as a matter of procedure for a dismissal.

73.2. Whilst 6 months was a reasonable time to allow the Claimant to improve, he had come to the end of the 6-month process and, just prior to 12th December 2018, the Claimant had been contacting the Respondent to report any absences since his previous meeting. At the stage of the 12th December 2018 meeting, the Respondent had been happy to work on residual matters outside of the PIP process. A reasonable employer might have therefore engaged with the ACAS Code and held a meeting with the Claimant after the December default to decide on any sanction and whether to dismiss. Dismissal may have been very likely (having regard to the final warning), but by making a decision without further reference to the Claimant, the Claimant was unable to put a case, attend with a companion to make any representations and, if necessary, present any evidence, documents or reasons why the Respondent should take a different course.

73.3. As the performance procedure states [58] "*if performance remains unsatisfactory, then a further formal performance management meeting may be convened, following which further measures may be imposed, up to and including dismissal*". The policy envisages (as does the spirit of the ACAS Code) that, where the chance to improve has run out, the matter will be reviewed. Procedurally, a reasonable response would involve, even if in relatively brief terms, that review being conducted with the involvement of the Claimant. The Claimant played no part in this final review of his performance which, in the circumstances, was unreasonable.

73.4. As to the right to be accompanied and risk of dismissal, the Claimant was aware from the original letter of 4th June 2018 (and the final warning) of a clear risk of dismissal. The right to be accompanied was clear in the procedure and the Claimant's original invite letter. He attended the first meeting on 14th June 2018 with a companion and was aware of this continuing right. In my judgment, the real issue here is the way the dismissal decision was taken. It meant that a meeting with a companion was not part of the final review or decision making process. That is compounded by the fact that the Claimant was told that the meeting of 3rd January 2019 was a PIP review and might therefore have reasonably believed the question of sanction would be considered at the meeting.

73.5. The second factor taken into account by Mr Kopinits in his decision (observations about performance by others) also required a reasonable employer to put that issue to the Claimant, when taking it into account. I accept that the question of dismissal turned on the 12th December 2018 events in light of the final warning and this secondary factor was not determinative. However, there is no evidence that this concern was put to the Claimant or that he had an opportunity to respond to it.

73.6. I do not find that there is much in the point about the provision of further information or evidence (other than the secondary factor, discussed

above). This was not an investigatory exercise in a conduct matter. The Claimant was aware of the warning and the problem and there had been regular review meetings. The same applies to the complaint about HR records of the meetings. Both parties have made notes and records which have been fully referred to in the case. The issue here is the lack of fairness in the final process.

73.7. I have considered the Respondent's submission that the appeal process remedied all defects. Whilst it is to Respondent's credit that a right to appeal was offered and the appeal process was followed, applying the s98(4) test and considering size and administrative resources of the Respondent, I do not consider that this remedies the unfairness of the final process leading up to 3rd January 2019. The nature of the closed decision could not properly be remedied on appeal by reviewing the issues more generally and Ms Chandiramani's brief did not extend to an analysis of these procedural defects.

74. For these reasons, I conclude that the dismissal was unfair and the claim succeeds.

75. Turning to the question of *Polkey*: on the evidence before the tribunal, this is a case where there was a high likelihood that, had a fair procedure been followed at the end of the PIP process, the Claimant may well have been dismissed by the Respondent given that a final improvement warning was in place and because he had been through a 6 month period, with regular reviews, to improve and meet the targets.

76. Having found that the Respondent had before it evidence to reasonably dismiss the Claimant at the end of the PIP process and, taking into account the final warning, I consider that a high percentage reduction should be made to the compensatory award. This particular Respondent would, in my judgment, very likely have dismissed the Claimant in any event, even if it had followed a fair final process and convened a review meeting with the Claimant – as expected by its procedure. The 6 month process had been exhausted and ended with a further breach of a type which had led the parties into this process in the first place in June 2018.

77. I do not accept that such a reduction is to be properly assessed at 100% (as contended for by the Respondent) because, whilst the principal reason was the default in the context of the final warning, there was another reason relied upon (albeit of secondary importance) and the opportunity of a review meeting with the Claimant might possibly have given rise to a different outcome. The Respondent suggested that there was a 3 week period between the breach and actual dismissal and, during this time, a fair procedure would have been completed in any event meaning that the Claimant would have still been dismissed on the same date. This point carries less weight given the intervening holiday period and Mr Kopinits' desire to leave the matter until after Christmas. However, it is likely that, had the Respondent convened a review meeting to consider dismissal, there would not have been much variance as to when a decision to dismiss took effect. In my judgment, the facts of this case are properly analysed as a percentage chance that a fair process would still have resulted in the Claimant's dismissal.

78. Given the limited scope for a different outcome which might have arisen at a review meeting, in the circumstances, I consider that the appropriate reduction is an 85% *Polkey* reduction on the basis that this is the chance that the Respondent would have gone on to fairly dismiss the Claimant.

79. In light of that reduction to the compensatory award on the basis of *Polkey* and my findings, I do not consider that it is just and equitable to make any separate reduction for contributory fault (on either the basic or compensatory award) in this case. To do so would create a risk of penalising the Claimant twice in circumstances where I have found that, in a capability/performance dismissal, there was a small chance that, had the Respondent followed a fair process, the Respondent might have decided on a different outcome. I do not consider that it is just and equitable to impose any further reduction on the Claimant's award given that small chance has been lost because of the procedure adopted by the Respondent.

Employment Judge Nicklin

Date 27th September 2022