EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000954/2024

Held in person on 16, 17, 18 and 19 December 2024

Employment Judge S Neilson

Ms Anita Briggs	**Claimant** **Represented by** **Mr Drummond,** **Solicitor**
The Trustees of the National Museums of Scotland	**Respondent** **Represented by** **Ms Howie, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant was unfairly dismissed and the respondent is ordered to pay the claimant compensation in the sum of £22,210.75.

REASONS

1. The case was heard in person over four days. The Claimant was represented by Mr Drummond, Solicitor and the Respondent was represented by Ms Howie, Solicitor. The respondent had prepared and lodged a bundle of

documents relating to the substantive issues in the case and there was an additional bundle of documents from the respondent with copies of 147 different job adverts.

2. Evidence was heard from Hannah Barton, Head of Digital Media ("Ms Barton"); Helen Ireland, Director of External Relations ("Ms Ireland") and Dr Chris Breward, Director – National Museums Scotland ("Dr Breward"), on behalf of the respondent. The claimant gave evidence on her own behalf.

3. The issues in dispute are as noted below. The Claimant confirmed that she was seeking compensation only in respect of her claim.

Issues

4. This was a case in which it was not disputed that the claimant was dismissed. The claimant was dismissed on 13 February 2024. The respondent alleged that the dismissal was by reason of lack of capability to perform the role. There were two primary issues to be determined in the case.

5. Firstly, was the claimant dismissed for a potentially fair reason within the meaning of section 98(2) of the Employment Rights Act 1986 ("ERA")? The respondent contends that the reason for dismissal was capability under section 98(2)(a). The claimant contends that there was a long-standing orchestrated campaign to terminate her employment.

6. Secondly, if the claimant was dismissed for such a potentially fair reason did the respondent act reasonably or unreasonably in treating such reason as being a sufficient reason for dismissing the claimant in accordance with section 98(4) of the ERA? Did the respondent have a genuine belief that the claimant's capability was the reason for the dismissal and did the respondent have reasonable grounds upon which to base such a genuine belief?

7. In considering the issue under section 98(4) of the ERA the following additional specific issues had to be determined:-

(a) Did the respondent fail to take into account the claimant's personal circumstances (personal stress) during the performance improvement process?

(b) Did the respondent undertake a forensic investigation into the claimant's performance?

(c) Did the respondent fail to offer any training or guidance to remedy the poor performance issues?

(d) Did the respondent fail to consider redeployment to another department?

(e) Did the respondent fail to consider the effect of the department's high staff turnover upon the claimant?

(f) Was there a failure to issue adequate prior warnings to the claimant before dismissal?

(g) Was the dismissal process fundamentally flawed by Dr Chris Breward speaking to the dismissing manager after the appeal hearing, outwith the presence of the claimant?

8. If the dismissal was unfair under section 98 of the ERA what compensation should be ordered by the Tribunal?

Findings in Fact

9. The respondent is an executive non-departmental public body of the Scottish Government. The respondent is responsible for operating four museum sites across Scotland:- in Edinburgh (National Museum of Scotland and National War Museum), East Kilbride (National Museum of Rural Life) and East Lothian (National Museum of Flight). The respondent employs approximately 460 employees. They are largely funded by the Scottish Government.

10. The claimant was employed full time by the respondent as a Digital Media Content Producer. In that role the claimant reported into the Digital Media Content Manager.

11. The claimant's employment commenced on 17th June 2009.

12. The claimant worked in the Digital Media Department which was part of the External Relations Directorate of the respondent. Ms Ireland was the head of the External Relations Directorate in the period from 2016 onwards.

13. From 2009 to 2019 the claimant was supervised by Elaine McIntyre; from January 2020 to December 2020 the claimant was supervised by Georgina Brookes; from February 2021 to June 2023 the claimant was supervised by Mr Dornan – all of these individuals acting in the role of Digital Media Content Manager.

14. There is a detailed written job description for the role of Digital Media Content Producer. Whilst the role evolved over time (particularly with the growing importance of social media) the primary purpose of the role of the Digital Media Content Producer was to plan, co-ordinate and create new content for the website and social media channels including commissioning and editing content from others. The content could be short, as might typically be the case with pieces for social media platforms (such as Facebook, Linked In, Twitter/X) or long form (perhaps 1500 words) for the respondent's website (e.g. looking into the history of a particular object). Short form pieces might typically link in with other media, such as a film.

15. The regular production of content was extremely important to the respondent. It raised awareness of its activities and helped to encourage members of the public to buy tickets for exhibitions; it encouraged broader membership; it was a revenue generator and was also a means of reaching out to individuals who were unable to attend the museum sites. Both the production of the content and the planning and co-ordination of that with other departments (such as Marketing) was of real importance to the respondent.

16. In the period from 2021 through to June 2023 the claimant reported into Mr Russell Dornan ("Mr Dornan") who was Digital Media Content Producer at the time. When Mr Dornan left in June 2023 the claimant reported into Ms Barton, Head of Digital Media (in the absence of a Digital Media Content Manager).

Ms Barton commenced employment with the respondent in May 2023 as Head of Digital Media.

17. The respondent has a written policy for dealing with performance and in particular instances of poor performance. It is called the Probation and Performance Management Policy and Procedure ("the Performance Policy").

18. The Performance Policy was applicable to all employees of the respondent including the claimant.

19. The Performance Policy provides that there will be a performance review process. This required completion of a performance and development review form ("PDR") both mid-year and at the end of a year.

20. The Performance Policy provides in section 3 that where there is poor performance the employee's line manager may commence an informal process ("the Informal Process"). This involves the manager and employee meeting to discuss concerns using specific examples; together identifying and planning any potential remedies (normally recorded on a personal improvement plan ("PIP")). The manager will advise of the improvement required and the period during which the improvement is expected to be made. The frequency and timing of PIP review meetings should be determined at the meeting at the outset of the process.

21. The Performance Policy also provides that during the Informal Process the initial meeting "*should allow the opportunity to discuss any personal or health issues that may be contributory factors and seek support from Employee Assistance or Occupational Health*."

22. The Performance Policy also provides that during the initial meeting on an Informal Process the "*discussion should include how unacceptable standards of performance…. may lead to a Formal Hearing and possible termination of employment.*"

23. At the conclusion of the Informal Process the Performance Policy provides "*If expected standards of performance….are not reached during the improvement period, the manager should move to the formal procedure*."

24. The formal procedure is set out at paragraph 4 of the Performance Policy. It provides for a Formal Hearing which must be chaired by a Director of Function where dismissal is a potential sanction. There are requirements set out regarding who should attend and the matters that must be included in the invite letter sent to the employee. These matters include "The range of potential outcomes of the Hearing, including if the circumstances are such that the potential outcome may be dismissal".

25. Under paragraph 4.3.4 of the Performance Policy under the heading "*Outcome of the Formal Hearing*" it is provided as follows:- "*The potential outcomes of a Formal Hearing are*:" there is then a tabular format with separate outcomes for Employees on Probation and All other employees. In the table for All other employees the following is provided:-

• *No formal action with or without an updated PIP*
• *A First Written Warning with an updated PIP*
• *A Final Warning with an updated PIP*
• *Dismissal*

26. The Performance Policy provides the employee a right of appeal against any decision in the Formal Hearing – with a right of appeal to the Director, National Museums Scotland, in the case of a dismissal.

27. The Performance Policy was kept on the respondent's intranet site and all employees, including the claimant, had access to it.

28. The claimant was aware of the terms of the Performance Policy.

29. The respondent carried out PDR's for all employees and written records of these were maintained.

30. In the period from 2017 to 2020 there were comments made in the PDR's for those years by line managers Ms Mcintyre and Ms Brookes that suggested some concerns around performance (including coping with pressure, checking quality, accuracy falling short, the need to reduce errors) whilst also being positive about the claimant's performance in overall terms.

31. The respondent's manager, Russell Dornan ("Mr Dornan") had concerns regarding the performance of the claimant once he joined in 2021.

32. In May 2022 Mr Dornan met with the claimant to discuss his concerns regarding her performance. An informal PIP was put in place ("the First PIP") for the claimant in accordance with section 3 of the Performance Policy.

33. Under the First PIP there were three key areas of poor performance identified and in respect of which improvement was required. These areas were (1) Attention to Detail; (2) Follow through and (3) Processes.

34. In the First PIP agreed standards to be achieved were identified. These were in relation to Attention to Detail – reduction in number of errors and noticed increase in quality of work; Follow Through – fewer projects or pieces of work with protracted timelines and more regular content output, and Processes – perform tasks via agreed processes. The First PIP also identified support and resources required to achieve standard.

35. During 2022 the claimant was dealing with a number of challenging personal issues including her mother-in-law having a terminal illness; her sister being diagnosed with cancer and her daughter sitting national school exams.

36. The First PIP concluded in November 2022 without any satisfactory improvement in performance in Mr Dornan's view.

37. In November 2022 Mr Dornan proposed to the claimant that they do a further informal PIP. The claimant was not happy with that proposal. Mr Dornan, then

proposed moving to a formal hearing under the Performance Policy. The claimant was also not happy with that proposal. The claimant explained that there were personal reasons why she had not performed as might have been expected in 2022. Mr Dornan, having consulted HR, his line manager Mr Adam Coulson and Ms Ireland eventually reverted to the claimant with the proposal of a second PIP. It was eventually agreed that there would be a further informal PIP but only after, at the claimant's suggestion, a formal stress risk assessment ("SRA") was carried out by the respondent. When notifying the claimant of the second informal PIP Mr Dornan confirmed by e mail of 16 November 2022 that if there was no improvement the next step would be a formal meeting.

38. The claimant was absent from work in December/January 2022/23 and the SRA was carried out in April 2023. The SRA identified the personal issues that the claimant had experienced in 2022 and highlighted some concerns regarding her relationship with Mr Dornan.

39. The claimant did notify Ms Frazer of the respondents HR department in March 2023 (by e mail) that she felt Mr Dornan "has it in for me" and that she was intimidated by him.

40. Ms Barton joined the respondent on 2 May 2023 as Head of Digital Media.

41. The second informal PIP commenced in May 2023 ("the Second PIP"). It identified three areas for improvement:- Attention to detail; Following through on actions and Following due processes. The same agreed standards were identified as in the First PIP. Support and resources to achieve standard were also identified.

42. Mr Dornan resigned and left the respondents employment on 23 June 2023.

43. In June 2023 the claimant raised with Ms Barton whether in light of Mr Dornan's departure it was necessary to continue with the Second PIP. Ms Barton confirmed that it was as she considered it would help to support the claimant.

44. A PDR for the 6 months from January to June 2023 was carried out with the claimant on 12 June 2023. This identified that objectives that had been set had not been met by the claimant. In particular there had been minimal content produced by the claimant. Further objectives were set for the next six months.

45. The Second PIP commenced on 8 June 2023. Ms Barton met with the claimant to discuss the Second PIP on four separate occasions, 28 June; 20 July; 8 August and 31 August 2023.

46. In June, July and August 2023 the claimant produced only two pieces of content (substantially below what was expected of her) and one of which required significant amendment.

47. During July and August 2023, the respondent engaged three freelancers to support with the work of the Digital Media department and arranged for colleagues from the Communications team to be available to support work in the Digital Media department.

48. The claimant was absent from work, with perceived work related stress issues, in the period from 4 September 2023 through to 11 October 2023.

49. In the claimant's absence Ms Barton an other members of the team picked up the content production that had not been done by the claimant. Ms Barton elected to postpone booked annual leave to support in content production.

50. The claimant attended a welfare check in on 4 October 2023 with Ms Barnton and Ms Fraser from HR. The claimant at that meeting admitted to anxiety about her job. She stated that the anxiety was work related and there were no external issues in August 2023. In response to a question from Ms Barton about further support the claimant confirmed that "*all the mechanisms have been in place. That's not the issue.*"

51. Ms Barton did not consider that the claimant had met the requirements of the Second PIP. In particular Ms Barton considered that required performance

had not been met as there were continued errors around typos, spelling, grammar and proofing; missed deadlines for producing content and a failure to follow processes for work allocation in line with wider team priorities.

52. Upon return to work on 11 October 2023 Ms Barton met with the claimant along with Ms Frazer from HR and Ms Thomson (claimant's TU rep). At this meeting the claimant was notified that she had failed to meet the requirements of the Second PIP. The claimant was notified that a formal PIP process would commence from October 2023 and complete in January 2024. Ms Frazer notified the claimant at this meeting that at the end of that process there could be a formal meeting and the outcome could be dismissal.

53. By letter dated 6 October 2023 but delivered to the claimant on 11 October 2023 Ms Barton notified the claimant that she had not made the required improvements set out in the Second PIP and that "*As a result of not making the required improvements…the formal part of the process will now commence. This will run from October 2023- January 2024. As before, this is a supportive process where I will set out the areas for improvement and we will meet monthly to review progress. In line with the procedure, if you are unable to demonstrate a sustained level of improvement during this time a formal hearing will take place."*

54. A PIP was put in place in October 2023 identifying three areas for improvement:- Attention to Detail; Follow through and Processes ("the Third PIP"). These mirrored the areas for improvement in the First and Second PIP's.

55. By e mail exchange on 12 October 2023 Ms Barton confirmed to the claimant that the Third PIP was a "formal PIP" but that if "consistent and sustained improvements are recorded against the areas of performance outlined in the PIP document, there will not be a formal hearing."

56. A phased return to work plan for the claimant was also put in place for the claimant to return to work over a three week period in October/November 2023 (ending on 7 November 2023).

57. Ms Barton provided the claimant by e mail on 19 October 2023 with a copy of the written Third PIP and with a tasks list and a task tracker to assist her improve her performance.

58. At the meeting to discuss the PIP on 17 November 2023 Ms Barton decided to remove all outstanding historic work from 2021, 2022 and 2023 to "clear the decks".

59. The claimant produced no content during November 2023. Two other team members produce substantial content output in this period.

60. In December 2023 the claimant produced 6 social posts (in comparison to a colleague who produced 73) plus a content plan for the Cold War Scotland project. This was substantially below what was expected.

61. In January 2024 the claimant only produced a revised content plan for the Cold War Scotland project. This was substantially below what was expected.

62. Throughout the period of the Second and Third PIP's the following support was provided to the Claimant:- regular weekly one to one meetings with Ms Barton in addition to the scheduled PIP meetings; a system of peer to peer review was in operation; the claimant was put on a creative writing course. During the Third PIP the claimant was provided with a task list and a task tracker and her historic workload was removed.

63. The claimant was asked on numerous occasions by Ms Barton if there was more the respondent could do to support her. The claimant could not think of any other steps that could be taken.

64. The claimant requested a further SRA and an SRA meeting was held on 12 December 2023 with Ms Barton, the claimant, Ms Frazer from HR and Ms Drummond– the TU rep for the claimant.

65. At the SRA meeting the claimant stated that she had no issues with the demands of her role. She considered the demands fair. She accepted she was unable to meet the demands and was not performing as required. She explained that the main point of stress was the PIP process.

66. The SRA completed in December 2023 and identified that no workplace stress risks were identified other than the PIP process. It also concluded that there were no other external pressures to consider. The advice from the respondent was for the claimant to engage constructively with the PIP process.

67. The Third PIP was discussed between the claimant and Ms Barton on 17 November 2023; 21 December 2023 and 18 January 2024.

68. On 18 January 2024 Ms Barton reviewed the Third PIP with the claimant on a Teams meeting. Also in attendance were Ms Frazer from HR and Ms Thomson as the claimants TU rep. During the meeting the claimant accepted that she needed to completely turn around what she was doing and confirmed that she had been worrying about losing her job. At the conclusion of the meeting Ms Barton notified the claimant that she had not met the requirements of the Third PIP and that the next stage would be a formal hearing. Ms Frazer notified the claimant that an outcome of the meeting could be dismissal.

69. At this point in time (18 January 2024) Ms Barton did not have confidence in the ability of the claimant to perform her role. In particular she had no confidence in her ability to design, co-ordinate and execute required content.

70. By letter of 5th February 2025 the claimant was invited to attend a formal hearing to be held in accordance with the Performance Policy. The hearing to be chaired by Ms Ireland. The letter notified the claimant that the purpose of the meeting was "*to consider your performance and what, if any, further action needs to be taken*." It further stated "*You should be aware that,*

depending on the findings made at the hearing, one possible outcome is the termination of your employment."

71. Prior to the formal hearing proceeding the respondents HR team provided Ms Ireland with all documentation from 2018 to January 2024 relating to the claimant's performance reviews and the First PIP, the Second PIP and the Third PIP, and the SRA's. Ms Ireland reviewed these documents prior to the hearing. Copies of these documents were also provided to the claimant prior to the hearing. In addition, Ms Ireland reviewed a written timeline prepared by Ms Barton. This timeline set out the steps that had been taken with regard to the First, Second and Third PIP process- and highlighted the concerns about non-performance by the claimant. In particular it highlighted the lack of content produced across summer and autumn 2023. A copy of the timeline was only provided to the claimant after the hearing.

72. The claimant submitted a written statement prepared by her to Ms Ireland dated 8 February 2024 along with a written statement from her trade union representative, Ms Thomson. Ms Ireland considered these documents prior to the formal hearing.

73. The formal hearing took place on 12 February 2024 before Ms Ireland. Also in attendance were the claimant, Ms Wright from HR; Ms Gannon as the claimants TU rep and Ms Barton. The claimant and her representative had an opportunity to set out the claimant's position with regard to the alleged lack of capability in her role.

74. At a reconvened meeting on 13 February 2024 Ms Ireland notified the claimant that her employment was being terminated on the grounds of lack of capability. Ms Ireland reached that decision having considered all the evidence around performance since 2018 and in particular over the process of the three PIP's. Ms Ireland concluded that over a significant period successive line managers found consistent issues with the standard of the claimant's work, despite the many allowances and adjustments that were put in place to support the claimant. Ms Ireland was satisfied that the claimant's

work was not at an acceptable standard in the areas of attention to detail; following established processes and following work through to completion, resulting in late or undelivered work.

75. In arriving at her decision to terminate employment Ms Ireland did consider the other alternatives under the Performance Policy but she could not envision how spending more time undergoing a further PIP would produce a different result or be fair to the claimant when she had said that the PIP process itself causes her feelings of stress.

76. In considering the options prior to finalising her decision Ms Ireland did not consider redeployment as her view was that redeployment was only suitable to be considered where there was a breakdown in an employee/line manager relationship. Such a situation was not, in her view, applicable here.

77. The respondent confirmed the termination of employment to the claimant in writing in a letter of 20 February 2024. The letter notified the claimant that she had a right of appeal.

78. By letter of 26 February 2024 the claimant appealed the decision to terminate her employment. The claimant put forward five written grounds of appeal:- (1) the severity of the sanction to dismiss her; (2) the whole process was unfair; (3) there was an orchestrated campaign to dismiss her; (4) The proceedings on 12 February were unfair and biased and in particular as the formal process only commenced in October 2023 earlier matters should not have been taken into account and (5) dismissal was unfair in the absence of previous formal warnings.

79. Prior to the appeal hearing Dr Breward had access to and considered all documentation that had been considered by Ms Ireland along with the notes of the hearing on 12 February 2024 and the dismissal letter of 20 February 2024. The claimant was also provided with this documentation. In addition the claimant submitted to the respondents HR department prior to the appeal a witness statement from her former line manager, Elaine McIntyre and a

note of content produced by her in the period 2017/2024. Dr Breward considered both documents as part of the appeal process.

80. The claimant's appeal was heard by Dr Breward, the Director of the respondent, on 26 March 2024. The claimant attended and was represented by Ms Gannon, trade union official. The claimant called Ms Thomson as a witness at the hearing. Dr Breward was accompanied by Ms Hausrath and Ms Gillies both from the respondent's HR team. At the appeal hearing the claimant had an opportunity to set out her grounds of appeal.

81. At the appeal hearing on 26 March 2024 the claimant's representative specifically raised as an issue that redeployment was not considered. Dr Breward then spoke separately with Ms Ireland on 28 March 2024 to ascertain whether redeployment was considered by her. Ms Ireland did not consider redeployment appropriate as in her view that was only appropriate where there was a breakdown in line management relationship. At that point in time (28 March 2024) Dr Breward discussed with Ms Ireland if any other roles were available. There were some front of house roles available but they did not consider that these were suitable to the claimant given her skillset. They concluded that given the particular skillset of the claimant there were no other equivalent roles available at the time.

82. Dr Breward did not uphold the claimant's appeal on any of the grounds put forward. He confirmed his decision to the claimant in a letter dated 15 April 2024.

83. The claimant received a payment in lieu of her 12 week notice period.

84. The claimants net weekly pay from the respondent was £530.38. In addition there was a weekly employer pension contribution of £174.81.

85. The claimants potential basic award for unfair dismissal is agreed in the sum of £13,503.00 by the parties.

86. The claimant commenced employment in a fixed term agency role with Edinbugh University on 29 April 2024 terminating on 20 December 2024. Her weekly net earnings in this role were £528.01 with a weekly employer pension contribution of £16.53.

87. The claimant has, since November 2024, been actively looking for alternative employment once her role with Edinburgh University terminates on 20 December 2024.

The Law

88. Section 94 of the ERA gives an employee a right not to be unfairly dismissed. Under Section 111 of the ERA an employee has a right to present a claim for unfair dismissal to an employment tribunal.

89. Section 98 of the ERA provides *"(1) In determining for the purposes of this Part, whether the dismissal of an employee is fair or unfair, it is for the employer to show- (a) the reason, or, if more than one, the principle reason for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. (2) A reason falls within this subsection if it (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do…..(3) In subsection (2)(a) – "capability" , in relation to an employee, means his capability assessed by reference to skill, aptitude, health, or any other physical or mental quality… (4) Where the employer has fulfilled the requirements of section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (2) shall be determined in accordance with equity and the substantial merits of the case.."*

90. The test to be applied in deciding whether a dismissal was fair will be whether the employer genuinely believed, on reasonable grounds, that the employee was incompetent to do their job – *Taylor -v- Alidair 1978 IRLR 82*.

91. The other factors that case law has established will be pertinent to whether a dismissal is fair or unfair under section 98(4) of the ERA in a capability dismissal will be whether a fair appraisal process has been carried out; whether the employee has had an opportunity to respond to any criticisms; whether the employee has been given an adequate opportunity to improve; whether there has been adequate warning given to the employee that their employment may be terminated due to capability; whether the employer has fulfilled it's duties by carrying out adequate supervision and training and finally whether it was appropriate to investigate alternative employment for the employee.

92. In capability dismissal cases it is not for the Tribunal to substitute its own view for the competency of the employee for that of the employer. The test is whether dismissal fell within the band of reasonable responses open to the employer in the circumstances.

93. The ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") applies to capability dismissals. Where employers have a separate policy dealing with capability (as in this case) there is still a requirement to comply with the basic principles set out in the ACAS Code. These are:-

(a) Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

(b) Employers and employees should act consistently.

(c) Employers should carry out any necessary investigations, to establish the facts of the case.

(d) Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

(e) Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

(f) Employers should allow an employee to appeal against any formal decision made.

Discussion & Decision

94. The first issue to determine in this case is whether dismissal of the claimant was by reason of capability under section 98(2) of the ERA as submitted by the respondent. The onus to establish this is upon the respondent. The claimant did not accept that capability was the real reason. The claimant submitted that there was an orchestrated campaign to remove her from the business and that performance was not the key issue as she was performing well in 60 to 70% of her role. However, the Tribunal was satisfied upon the evidence that there were clearly concerns about the performance of the claimant in her role. There was an extensive process from May 2022 through to February 2024 where the claimant's performance was under scrutiny. The documentation over that period supported the respondent's contention that there was a genuine concern about the claimant's suitability for the role in light of perceived failings in her performance. There was simply no evidence of any conspiracy or campaign to terminate the employment of the claimant for a reason other than capability. The claimant did refer to what she believed was a poor relationship with Mr Dornan and that he intimidated her. However, that was in the context of going through the First PIP process and in any event it was Ms Barton who dealt with the Second and Third PIP and Ms Ireland and Dr Breward who dealt with the dismissal and appeal. The Tribunal was accordingly satisfied that, based on the evidence heard, it was clear that the reason for dismissal of the claimant was capability. The Tribunal is accordingly satisfied that the respondent has met the onus upon it to establish capability as the reason for dismissal.

95. The second issue is then to consider whether if the claimant was dismissed for such a potentially fair reason did the respondent act reasonably or unreasonably in treating such reason as being a sufficient reason for

dismissing the claimant in accordance with section 98(4) of the ERA? In particular, did the respondent have a genuine belief that the claimant's capability was the reason for the dismissal and did the respondent have reasonable grounds upon which to base such a genuine belief?

96. We will come on to consider the specific issues that the claimant raised concerning the process and whether or not in light of some or all of these issues there was a fair process undertaken by the respondent. However, in the first instance we will deal with the question of whether the respondent had a genuine belief that the claimant's capability was the reason for the dismissal and did the respondent have reasonable grounds upon which to base such a genuine belief?

97. The Tribunal accepted that the evidence given by all of the witnesses was for the most part credible and truthful. This was not a case where there was any material disagreement over the facts. There was a disagreement over the interpretation to be put on the facts but on the whole the essential facts were agreed. It was not disputed that there was a lengthy performance improvement process undertaken by the respondent in the period from May 2022 through to February 2024. The claimant herself accepted that her performance was not to the standard required and she accepted that by January 2024 she was not meeting the requirements of the PIP process (although she considered that there was too much of a focus on areas where she was not performing and not enough on areas where she was performing). The claimant also accepted that the documentation dealing with the Second and Third Pip was broadly accurate. The Tribunal is conscious of the requirement that it must not substitute its own views regarding performance for those of the employer. The test is whether the respondent had a genuine belief and reasonable grounds upon which to base that belief. The evidence of Ms Burton and Ms Ireland was clear on this point. There was no evidence that their belief was not genuine. Did they have reasonable grounds for that belief? They were basing their belief upon the Second and Third PIP processes. There was a consistent pattern of the claimant not performing in

respect of three key areas of attention to detail; follow through and process. This pattern was identified across the entire performance process. The claimant maintained that she was performing across the majority of her role. However, the Tribunal was satisfied that the genuine belief of the respondent was that the claimant was not performing in the areas of her role that were critical to her performance (and in this regard the Tribunal accepted the evidence of the respondent that the key component of the claimants role was to plan, co-ordinate and create new content for the website and social media channels including commissioning and editing content from others) – and that there were reasonable grounds for the respondent to come to that belief.

98. In considering the terms of section 98(4) of the ERA there are a number of other issues related to the process that must be taken into consideration. A number of these were points of particular contention in this case.

99. The claimant submitted that were a number of failures by the respondent that made this an unfair dismissal. These were set out at paragraph 10 of the ET1 and are summarised at paragraph 7 above. A number of these were more material than others.

100. Dealing firstly with the submissions regarding the allegation that the respondents carried out too forensic an examination of the claimant's performance. The Tribunal took this to be a concern that in some sense the focus on her non-performance and failure to consider areas of performance was evidence of a campaign to remove her from the business. The Tribunal can understand why it may have felt that way to the claimant. Going through a performance improvement process will not be an easy thing for any employee and will no doubt cause stress and upset to the employee. It may well feel like the employee is being "targeted". However, the respondent is required, if it is to have a fair process, to highlight to the employee the areas where performance is not being met, to give the employee an opportunity to respond and to set objectives in those areas where performance needs to improve. That is what the respondent did here. That may feel like too forensic

an approach but it is a necessary part of a fair process. The Tribunal did not consider that this objection by the claimant was justified.

101. The claimant also raised a concern regarding the fact that Dr Breward opted to speak to Ms Ireland after conclusion of the appeal hearing on 26 March 2024 to clarify the issue of redeployment. The claimant submitted that this was wholly inappropriate and should only have been done with her in attendance. The Tribunal does not agree that this was a material procedural failing. It is not unusual in any disciplinary or appeal process for the decision maker to seek to clarify issues with witnesses or other parties after the substantive hearing and before issuing a decision. If that enquiry raises a point that it would be appropriate to put to the employee to give that an employee an opportunity to respond to, then a failure to do so may be a material failure of process. Here there was nothing in what Ms Ireland said to Dr Breward that required a response from the claimant. The Tribunal does not accept that there is any substance to this point. There is, however, related to this point, a more material issue regarding redeployment which we will return to.

102. The other issues that were raised by the claimant related to the fairness of the process (alleged failure to take into account personal circumstances and the high staff turnover); the alleged lack of training and support; the failure to provide adequate warning and the failure to consider redeployment.

103. In relation to the failure to take into account personal circumstances there was evidence that there were two occasions when the respondent undertook a stress risk assessment. The first of these was in April 2023. It did identify the difficult personal circumstances that had impacted on the claimant in 2022. Although the claimant maintained in her evidence that the stress on her was the same in 2023 as in 2022 the Tribunal was not convinced on that point. On her return to work in October 2023 the claimant confirmed that her anxiety was work related and there were no external factors. The SRA in December 2023 did not identify any external stress factors. The only stress factor identified at that time was the PIP process. Whilst there were external

stress factors on the claimant in 2022 there was no evidence of these continuing into 2023. Ms Barton did look back to see if performance was an issue prior to the stress events of 2022. There was evidence that it was. Whilst the Tribunal appreciates that there were stressful life events that took place in 2022 Mr Dornan appears to have taken that into consideration in deciding not to go for a formal hearing at that point but instead to go for a further informal PIP (the Second PIP). The Tribunal's view is that the external stress factors in 2022 were taken into account and that they were much more limited in scope by 2023. Accordingly, there was not a failure to take into account relevant personal circumstances.

104. The claimant submitted that one of the reasons for her lack of performance related to changes in the team and lack of resource. However, the evidence established that in the period of the Second and Third PIP additional resource was provided to the team, specifically during July and August 2023, the respondent engaged three freelancers to support with the work of the Digital Media department and arranged for colleagues from the Communications team to be available to support work in the Digital Media department. The Tribunal was not satisfied that any lack of resource had a material bearing upon the claimant's performance or that the respondent failed in any duty to ensure support through additional resource.

105. A reasonable employer will take steps to support an employee, whose performance is falling below the level required, with training and support. The claimant submitted that this was lacking here. The claimant consistently said that she was repeatedly asked what support she wanted – and she did not know what she required. She felt it was up to the respondent to offer further support. At no point was the claimant able to say what that would be. The evidence was that the respondent did provide training and support throughout. In particular, the respondent saw the PIP process as a means of support. There were regular meetings as part of the PIP process. In addition, there were regular weekly one to one meetings with Ms Barton in addition to the scheduled PIP meetings; a system of peer-to-peer review was in

operation; the claimant was put on a creative writing course. During the Third PIP the claimant was provided with a task list and a task tracker and her historic workload was removed. The Tribunal was satisfied that there was both training and support provided.

106. On the issue of redeployment, the claimant submitted that there was no adequate consideration of redeployment – in particular, it was not considered by Ms Ireland. The respondent submitted that this is not a requirement in every case but that in any event it was considered by Dr Breward. Whilst the Tribunal accepts that redeployment is not a requirement in every case dealing with a performance capability dismissal it would be reasonable for an employer of the size and resources of the respondent to at least consider it. At the hearing on 12 February 2024 the issue of redeployment was not considered by Ms Ireland – who thought redeployment was only required if non-performance was due to relationship breakdown. However, following the appeal hearing on 26 March 2024 when the claimant's representative raised the issue of redeployment Dr Breward went back to discuss it with Ms Ireland. She explained to him why she had not considered it. His evidence was that redeployment was considered at that point but rejected because there were no suitable vacancies at that time that would have suited the claimant's skillset. There was no evidence led of any specific vacancies that were or might have been available at the time that the claimant alleged that may have suited her skillset. Whilst Ms Ireland was incorrect if her approach to the issue of redeployment the Tribunal is satisfied that the issue was considered by Dr Breward at the appeal stage – and that looking at the process as a whole the respondent has accordingly considered the issue.

107. On the issue of warnings the claimant submitted that there was a failure by the respondent to follow the Performance Policy and issue formal warnings in line with the Performance Policy prior to moving to dismissal. The claimant maintained that the Performance Policy required that formal warnings be given in an escalatory fashion (first written, final written and only then dismissal) and this was not done. The respondent submitted that the claimant

was given adequate warning that dismissal was a potential outcome. In particular, the respondent referred to the evidence that the claimant was aware in August 2023 that dismissal was a possibility. Further that in October 2023 she was specifically told that as they were now going into a formal process dismissal was a possibility. This was followed up in writing in February 2024 with formal confirmation of dismissal as a potential sanction in the invitation to the Formal Hearing. The Performance Policy itself references dismissal as an option and contrary to the position of the claimant the respondent considered that there was no requirement to follow an escalation – the respondent was entitled to move straight to dismissal.

108. The Tribunal accepts that in a broad sense the claimant was well aware that her job was on the line – certainly by August 2023. However, the claimant maintained that she thought there would be a need for the respondent to follow the Performance Policy and issue written warnings before that dismissal stage was reached. In the view of the Tribunal the respondent has set itself up with a specific policy, the Performance Policy, and the claimant should have been entitled to expect that the respondent would follow that policy. The Performance Policy clearly sets out that there will be an informal PIP stage. At the end of that stage the Performance Policy is explicit in stating that "*If expected standards of performance are not reached during the improvement period, the manager should move to the formal procedure.*" The formal procedure is that procedure set out in section 4 of the Performance Policy. It provides for a formal hearing and the potential for four outcomes. There was quite a bit of debate about whether there was a requirement for these to be sequential. The Performance Policy is silent on that point. Whilst the Tribunal accepts the submission of the respondent that there is no requirement for the "warnings" to be sequential, in the context of fairness under section 98(4) one would expect that it would only be in extreme cases the respondent would move to dismiss after one unsatisfactory PIP without any formal warnings. In this case there have been three PIP's put in place for the claimant. After the first PIP Mr Dornan elected not to proceed with a formal hearing but instead elected to proceed with a further PIP to give the claimant

a further opportunity. Whilst we did not hear from him we have the evidence of the e mails that passed between him and the claimant and it may be that in part that decision was motivated by the personal difficulties the claimant experienced in 2022. In any event there was a further informal PIP that concluded in October 2023. At that point what should have occurred in terms of the Performance Policy is that there should have been a formal hearing at that point. It does appear that there was some confusion within the respondent about how to proceed from this point on – it talked about now going into a formal process but no formal hearing was held at that point (as would be required under the Performance Policy). Instead, a further PIP was instigated. This was referred to as a "formal PIP" – but there is no such concept under the Performance Policy. In reality what happened was that there was a further informal PIP under section 3 of the Performance Policy and accordingly the formal hearing that takes place in February 2024 is the first formal hearing that takes place. Given the express terms of the Performance Policy it cannot be said that the claimant has been given a fair warning as the respondent has not followed the terms of its own Performance Policy. Under the Performance Policy, in the normal course of events, the formal hearing should be focussed on the informal PIP that has just expired. The Tribunal accepts that it was not unreasonable for the formal hearing in February 2024 to consider both the Second and Third PIP but when it comes to the dismissal the Tribunal has to consider whether that was within the band of reasonable responses open to the employer in these circumstances. The Tribunal concludes that it is not as there were no formal warnings issued in terms of the Performance Policy. The claimant has a legitimate expectation that the respondent will follow the terms of the Performance Policy and it would be reasonable to expect at least one level of formal warning prior to dismissal. That did not happen here.

109. In terms of remedy the respondent submitted that, if there was found to be a failure in process, in line with the authority of *Polkey -v- AE Dayton Services Limited 1987 IRLR 503* the Tribunal should determine that the employment would have been terminated in any event after one further 3 month PIP

process. In the view of the Tribunal had the respondent followed the terms of its own Performance Policy it is likely that there would have been a Final Written Warning and further final PIP issued in February 2024 given that there had been two informal PIP's in the period from May 2023 through to January 2024. Had that occurred we do then need to consider, per the submissions from the respondent, what the likelihood is that the claimant would have been dismissed in any event. The Tribunal takes into account that there had already been a lengthy process in the period up to February 2024 (three PIP processes) and no signs of any improvement; that the claimant found the PIP process to be stressful and she herself fully accepted that she was not meeting the required standards. The Tribunal concludes that there was no prospect of the claimant turning matters around and meeting the requirements of a further PIP in the period from February to May 2024. The Tribunal considers that there is a 100% chance that the claimant would have been dismissed in any event as at 31 May 2024. The Compensatory award will be calculated on that basis.

110. The claimant submitted there had been a failure to follow the ACAS Code in respect of the dismissal. The respondent submitted that as there was a formal policy in place, the Performance Policy, the respondent was only obliged to comply with those aspects of the ACAS Code set out at paragraph 93 above. Having regard to those requirements the Tribunal does not consider that there was any breach of the ACAS Code. The claimant had the right of appeal; the right to be accompanied; she knew the case against her and had the right to put forward her views; the respondent carried out lengthy investigations and there was no unreasonable delay and no evidence of any inconsistency.

111. The Tribunal makes an award in the total sum of £22,210.75 to the claimant. The basic award is in the agreed sum of £13,503 and is not subject to any *Polkey* deduction. The Compensatory award is £8,707.75 calculated as follows:-

(a) Loss of statutory Rights = £500

(b) Loss of pay and pension contributions in period from 13 February to 31 May 2024 (15.5 weeks) 15.5 x (£530.38 + £174.81) = £10,930.45

(c) Less pay and benefits from new role from 29 April to 31 May 2024 (5 weeks) 5 x (£528.01 + £16.53) = £2,722.70

112. The Tribunal has not included the payment in lieu of notice in these calculations as it would have been paid as at 31 May 2024 in any event.

113. The Tribunal thanks both Mr Drummond and Ms Howie for their professional advocacy and submissions on behalf of their respective clients.

Employment Judge: S Neilson
Date of Judgment: 5 January 2025

Date sent to parties 06.01.2025