Neutral Citation Number: [2024] EAT 49

Case No: EA-2022-000604-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 January 2024

Before:

HER HONOUR JUDGE TUCKER

- -

Between:

MR G KIKWERA-AKAKA

Appellant

- and -

SALVATION ARMY TRADING COMPANY LIMITED

Respondent

- -
- -

Mr G Kikwera-Akaka the **Appellant** in person
Ms M Murphy (instructed by **Keystone Law**) for the **Respondent**

Hearing date: 25 January 2024

- -

JUDGMENT

SUMMARY

UNFAIR DISMISSAL

An Employment Tribunal did not err in concluding that the Claimant had been fairly dismissed for capability and performance.

The Claimant worked for the Respondent in one of its charity shops. Many of the staff who work in those shops are volunteers and some have additional vulnerabilities. An incident occurred between the Claimant and a vulnerable volunteer, as a result of which he received a final written warning. That stated that further misconduct may result in dismissal. In addition, he was placed on a personal improvement plan (PIP). The Tribunal found that this was specifically linked to the incident with the volunteer: one aspect of his performance which the Respondent made clear needed to improve through that PIP was his interaction with volunteers. The Claimant did not consider that there was anything which he needed to address in that regard. The PIP ended a few days earlier than planned. The Claimant was invited to a performance capability meeting to discuss the PIP. He was expressly warned that dismissal may result. The Claimant's position regarding his interaction with volunteers did not change: he rejected the suggestion that he needed to improve or that he required further training. He was dismissed. His appeal against dismissal, in which he maintained his previous stance, was unsuccessful.

On the facts the Tribunal concluded that the Claimant had been given a fair opportunity to improve his performance: his interaction with volunteers was a significant and important part of his performance, and was also linked to the misconduct which led to the final written warning.

The Tribunal did not err in its approach or in its application of relevant legal principles. Observations upon the differences, and similarities, in a fair approach when an employer considers dismissal for capability compared to misconduct.

HER HONOUR JUDGE KATHERINE TUCKER:

1. This is my decision in respect of an appeal against a decision of an Employment Tribunal sitting in Croydon. The hearing took place on three days in January 2022: 12 to 14 January 2022 and on 25 May 2022. The Tribunal consisted of three members: Employment Judge Nash and lay members Mr. Cockerton and Mr. Harvard. At that hearing the Claimant had represented himself and the Respondent was represented by a consultant.

2. A Judgment was sent to the parties on 8 June 2022 dismissing all of the Claimant's claims. Written reasons for that Judgment were sent to the parties on 25 July 2022.

3. This appeal was lodged by the Claimant. I shall refer to the Appellant as "the Claimant" and to the Respondent as "the Respondent" as they were before the Tribunal.

4. The Claimant made a number of claims: a claim of unfair dismissal, that the Respondent failed to provide written reasons for dismissal contrary to section 92 of the Employment Rights Act 1996 (which I shall refer to as the "ERA 1996"); an allegation that the Respondent directly discriminated against the Claimant because of race; an allegation of harassment related to race; and, an allegation of victimisation.

5. The following amended grounds of appeal have been heard at the full appeal hearing today. First, that the Tribunal erred in ruling that the Claimant's dismissal by reason of capability or performance was fair, in circumstances where he had not been given a fair warning that he might be dismissed on such grounds. In particular:

> 1. That in law a capability dismissal will not normally be fair unless the employer gives the employee fair warning and an opportunity to improve performance.
>
> 2. The Tribunal concluded in paragraph 194 of the reasons that the reason for the dismissal was capability and performance.

> 3. That the Claimant's final written warning had stated that he might be dismissed for any further misconduct as opposed to capability performance. The Tribunal, therefore, erred in reasoning at paragraph 207 of the reasons that it was fair for the Respondent to rely, when dismissing for capability performance reasons, on the final written warning.
>
> 4. The Claimant's performance improvement plan had stated that failure to meet the standard of performance required by that plan may result in a formal capability review as opposed to dismissal.
>
> 5. Accordingly, the Claimant had not been given a fair warning that he might be dismissed for capability or performance.

6. The second ground of appeal was that if the first succeeded, the 'Polkey' reduction (**Polkey v AE Dayton Services Ltd** [1988] AC 344) at paragraphs 213 to 217 of the Reasons, should also be overturned because that finding was based entirely on what would have happened if the performance improvement plan (PIP) had been extended by half a week, as opposed to what would have happened if the Claimant had been given a fair warning that he might be dismissed for poor performance or capability reasons.

7. Those were the amended grounds that were permitted to proceed by Judge Barry Clarke at a rule 3(10) hearing after the Claimant had had the assistance of an ELAAS representative.

8. It is important to record the following three preliminary points. First, in my judgment there has been no dispute between the parties, nor should there have been, that a capability dismissal will not normally be fair unless the employer gives an employee fair warning of the risk of dismissal and an opportunity to improve performance. Secondly, in this case, the Tribunal concluded that the reason for dismissal was indeed capability and performance, not, as asserted at various points, conduct. Thirdly, it was agreed that the Claimant's PIP had stated that failure to meet the standard of performance required by that plan may result in a formal capability review. It did not state expressly that it may result in dismissal. I shall

return to the precise terms of the final written warning and the facts relevant to it in due course.

9. At the appeal today, the Claimant has represented himself. He made oral submission. I have also considered his two skeleton arguments, although he focused on one which was received by the EAT on 5 January 2024. He took me through that, referring to the cases in it. I assured him that I have read it, and I have done so, and considered it in detail. I also read, in advance of the hearing, the other skeleton argument. I read the additional documents he provided during the hearing (in the form of an appendix) which should have been, he said, attached to the skeleton argument.

10. The Respondent has been represented by counsel and solicitors. The Respondent provided a detailed skeleton argument, which I have considered, and the Respondent also made brief submissions.

The facts which led to the claims as they were determined by the Tribunal

11. I turn now to the facts of the case that was before the Tribunal. The Claimant worked for the Respondent, initially in a mandatory voluntary role, from 2016 onwards. He worked in various branches of the Respondent. The Respondent is a trading arm of the well-known charity, The Salvation Army. It operates a number of charity shops. Those shops are staffed by a combination of employees and volunteers. The evidence before the Tribunal was that the volunteer workforce was, and is, a significant one for the Respondent organisation.

12. There were some problems in the Claimant's employment in 2018. In particular, in July 2018, at a time when he was working at the Beckenham store, the Claimant was issued with a final written warning in respect of a staff discount which he had applied. That warning, through an appeal, was eventually reduced to a written warning. The Respondent

organisation described itself as having a compassionate culture, which it appeared to seek to implement when dealing with staffing issues.

13. By the end of 2018, however, a number of other issues had arisen. In particular, the Tribunal recorded that the Claimant had been criticised for his attitude for not being a team player, for rudeness to customers, avoiding tasks, walking off during tasks and failing to carry out tasks with due diligence. The Claimant did not consider that there were difficulties with his work. However, there were clearly differences in the workplace between the Claimant's perception of what was happening and the Respondent's.

14. On 10 January 2019, the Respondent received a complaint about the Claimant from a volunteer who volunteered, and worked at that store. In paragraph 70 and following of the Reasons, that volunteer was described as a vulnerable volunteer. The Respondent provides working opportunities for adults with various different challenges and needs. This particular individual was described as being manifestly vulnerable with significant learning difficulties and special needs. She was described as being physically small, between three and five foot tall. She was always accompanied by a carer or her mother.

15. In the incident, the Claimant asserted that the volunteer had repeatedly touched him, for example on his arm or on both sides of his waist, apparently enjoying him reacting to that in terms of 'jumping' out of surprise or shock, because he had been touched suddenly. The Claimant had stated that he had asked her to stop doing that on a number of occasions, that she had not done so and that ultimately, that led to an incident during which, although there were some disputes about exactly what occurred, the Claimant accepted that he had threatened to punch her in the face.

16. The Tribunal recorded that other volunteers, and that particular volunteer, stated that she was extremely distressed by the incident and that she no longer wished to work with the

Claimant. She was, by then, a very long-standing volunteer, but she stopped volunteering for a period of time and then only worked again on the days when the Claimant was not in the store.

17. That incident led to disciplinary proceedings. A hearing took place. The Tribunal stated this about the hearing:

> "The Claimant said that he had not told his manager about how the volunteer was behaving because the manager was bullying and harassing him. He said he would never tell his manager. He said that at the time he was told that he had made the volunteer upset. He had told another volunteer that he did not care. The Claimant described the vulnerable volunteer as obsessed and malicious. He agreed that he had threatened to punch her in the face but denied that he had raised his fist. When he was told that the volunteer was now scared of him, he said he could not see how his behaviour was threatening. He made it clear at the hearing that he had no regrets. He said about the incident: 'She made me feel upset. How do you expect me to react?' He said: 'It is the volunteer who made me upset and not the other way round'".
>
> That was set out at paragraph 79 of the judgment.

18. At the disciplinary hearing, the Claimant was found to be guilty of gross misconduct. A decision was taken, however, that the appropriate sanction was a final written warning. This was issued to him on 22 February 2019. The witness who gave evidence before the Tribunal about that decision stated that the reason that he did not dismiss the Claimant was because he wanted to give him, that is, the Claimant, another chance.

19. The letter setting out the outcome of the disciplinary hearing, in my judgment, was significant. It provided as follows:

> "Dear Gaston,
>
> **Outcome of Disciplinary Hearing – Final Written Warning**
>
> Further to the formal disciplinary hearing held on 19 February 2019, I write to confirm my decision.

The allegations against you were:

- Using threatening and inappropriate behaviour towards a vulnerable volunteer

A full investigation was conducted and you were invited to attend a disciplinary hearing and given full opportunity to respond to the allegations, ask questions, dispute the evidence, put forward your own evidence and otherwise argue your case.

You attended the disciplinary hearing and you chose to waive your statutory right to be accompanied. You were given the right to submit written representations and chose to do so.

Having listened to all the evidence and taking into account your representations, I have concluded that I believe you are guilty of the allegation against you.

This decision was reached due to following: X poking you in the sides to make you jump, you openly admitted that you told X that you would 'punch her in the face if she did that again' and you showed no acknowledgment of wrongdoing or remorse for the misconduct that was carried out using threatening behaviour. This does not represent SATCoL's Values and also from a duty of care perspective for all staff & volunteers, this behaviour is not acceptable in any part of the business.

As a paid Sales Assistant, we expect you to maintain a positive and supportive working relationship with all of our volunteers and promote a happy working environment to increase efficiency and job satisfaction and this was not adhered to on this occasion.

Although you made us aware through your own disciplinary evidence that there was an escalating issue with both yourself and the volunteer on two previous occasions, in respect to her touching you in a way that did not feel comfortable with by poking you in the sides to make you jump, you did not approach your management team at any time to raise these feelings/concerns so that it could be dealt with in a professional manner.

As the Handbook of Employment cites an example of gross misconduct to be 'Wilfully causing harm or injury to another employee, client, visitor, supplier or customer, physical violence, bad language or grossly offensive behaviour' I have therefore found you guilty of gross misconduct allegations. Having considered dismissal, which is a sanction available in the circumstances in accordance with the Disciplinary Policy in reaching my decision on disciplinary sanction I considered all of the circumstances including any mitigating information you provided. On this occasion, I decided not to dismiss and, accordingly, I decided to place you on a Final Written Warning to highlight to you that this behaviour must not happen again under any circumstances.

This warning forms part of the formal disciplinary process and will be recorded on your personnel file. It will, however, be disregarded for disciplinary purposes after 12 months from the date of this letter, provided there is not further misconduct within that time.

I am also aware that Sarah Trivett spoke to you in further detail regarding your conduct and capability within your position of Sales Assistant following complaints from other members of staff and have decided to place you on an informal performance

> improvement plan to highlight where we require improvements to your performance. As explained to you, this will be carried out by your line manager, Julie Brown.
>
> Further misconduct during the period referred to above is likely to result in a further disciplinary hearing that may lead to dismissal.
>
> If we are asked to provide a reference for you during the 12-month period in which this Final Written Warning remains live, such reference will disclose the existence of this Final Written Warning.
>
> You have the right to appeal if you are not satisfied with my decision. If you wish to exercise this right, you should do so in writing within 7 days from the date of this letter, stating the reasons for your appeal to Salvador Fernandez, Regional Manager, 66-78 Denington Rd, Wellingborough NNS 2QH. If you do appeal, the Company will then invite you to attend an appeal hearing and you must take all reasonable steps to attend.
>
> Yours sincerely"

20. The Tribunal then set out, at paragraph 84, that following the issuing of that warning, the Respondent placed the Claimant on a four-week performance improvement plan or PIP. The Tribunal stated as follows:

> "84. Following the final written warning, the respondent placed the claimant on a four-week performance improvement plan. (PIP). The PIP was specifically linked to the incident with the vulnerable volunteer. The PIP covered conduct, engaging and working with staff and volunteers, insensitivity to volunteer needs, volunteers not being happy to work alone or work with the Claimant, his not being a positive team member and customer service. It also covered capability following procedures, front of house standards and back of house standards such as pricing and sorting donations". (Emphasis added).

21. The Tribunal continued at paragraph 85 and onwards:

> "85. The Tribunal had sight of the minutes of the meeting at which Ms. Trivett discussed the PIP with the Claimant. The Respondent's concerns were fairly general and wide-ranging. The Claimant had not engaged with staff, volunteers or management. He was not following processes front of house and not complying with customer standards. The plan was that the Claimant would meet with his managers every week, who would talk through progress.
>
> 86. Ms. Trivett said that the Claimant walked out of the meeting".

I pause there to note that minutes of the meeting mentioned in this paragraph appears to be the additional discussion referred to in the third paragraph of the letter at page 24 of the supplementary bundle set out above and which stated, "I am also aware that Sarah Trivett spoke to you in further detail regarding your conduct and capability within your position of sales assistant". The Tribunal noted that although the fact that he walked out of the meeting was not specifically put to the Claimant in evidence, it appeared to be consistent with some other evidence that it had heard.

22. The Tribunal found that the PIP started on or around 11 March 2019. It set out its conclusions about how that PIP took place. At paragraph 88 it stated:

> "88. In the review of the first week of the PIP, the Claimant's progress was mixed. He was failing to work well with volunteers who would still not work with him".

The Tribunal also recorded that the second review took place on 29 March 2019. According to that review, volunteers were still reluctant to work with the Claimant. The volunteers had complained that the Claimant had told them to complete a task and had himself just gone back to stand on the till. He had given them good instructions, but they needed more assistance. According to the review, some aspects of his performance were good, such as customer service. However, there were problems in other areas, including Gift Aid, his attendance sheet, stock and tills and with the minimum daily standards form. The Claimant was told that the Respondent needed to see improvement.

23. At paragraph 90 of the Reasons, the Tribunal set out what happened at the final week's review on 5 April 2019. The Tribunal stated stated:

> "This was four days shy of a four-week PIP. In effect the PIP lasted only 3½ weeks before a decision was made. The review found that the Claimant has left floor walk forms unsigned, stock replenishment was unsatisfactory. There were issues with stock, the banking was short, the float was wrong and areas needed immediate improvement. There had

> been a complaint from a customer and there was a serious shortfall in that the Claimant refused to engage with volunteers.
>
> The review, however, also found positives such as the Claimant following management instructions".

24. The Claimant's line manager, together with Ms. Hemmings of HR, decided that the matter should proceed to a capability review. They said his progress on processes was mixed: there had been some improvement on performance but there was a significant concern about conduct, a matter which, as set out in paragraph 84 of the Tribunal's Reasons (set out above in paragraph 20) was a matter covered by the PIP.

25. At paragraph 92 of the Reasons, the Tribunal stated that the Claimant's line manager's evidence was that, during the PIP, she had offered the Claimant training at the review meetings and he had refused this. This was recorded in the meetings, although the Claimant denied it. The Tribunal stated that they accepted Ms. Brown's evidence that training was offered and that, apart from group volunteer training, the Claimant had refused, saying that he had no need for it. The Tribunal found that this supported the conclusion that the Claimant's view was that he had done nothing wrong in respect of the vulnerable volunteer and in effect, had nothing to learn.

26. The Claimant was then invited to a performance capability hearing on 15 April 2019. Significantly, in my judgment, the Tribunal found that letter inviting him to that review expressly warned him of the possibility of dismissal. At paragraph 94 of the Reasons, the Tribunal recorded that the letter stated that the Respondent still had concerns about conduct and capability, particularly engaging with volunteers, taking into account individual needs and customer service. Paragraph 95 of the Reasons stated:

> "95. The letter of invitation enclosed the PIP documents. It asked the claimant to provide any further evidence and invited him to submit a witness statement. The

> hearing procedure was explained. It told the claimant that he had the right to bring a companion and invited him to suggest any reasonable adjustments in case of health issues."

27. The meeting took place on 23 April 2019. Again, in my judgment, the Tribunal's findings about that meeting are significant. At paragraph 97 of the Reasons, the Tribunal found that the Claimant told the hearing that he had received no meaningful training, but also that there were no areas on which he needed more time to improve. He said he did not need training in customer services twice. He said that his line manager could not train him, nor could the assistant manager. He said that he did not need more training with volunteers.

28. At paragraph 98 of the Reasons the Tribunal stated as follows:

> "The Claimant attributed many of his problems at the store to the volunteers. He said the volunteers envied him. When asked why volunteers were reluctant to work with him he said that it did not matter to them. He said that the volunteers were up in arms with him and it was his line manager's job to fix this when asked what he had done to build better relationships with the volunteers. He questioned why it should be him when it was the volunteers who were not getting along with him".

29. The Respondent, a Mr. Sargeant, decided to dismiss the Claimant and set out the reasons for that decision in a letter of 24 April 2019. That decision was based terms on the PIP and on the disciplinary interview. The effective date of termination was 23 April 2019. Mr. Sargeant, in his letter, stated that he believed that the Claimant was aware of what was required of him in his role and was capable of performing.

30. The Tribunal stated:

> "However, the Claimant had chosen to refuse to do tasks, such as working with volunteers. The Claimant had not adhered to standards of conduct in respect of basic customer service. His performance was unsatisfactory. The fact that the Claimant denied needing training meant that there was no or little prospect that further training would result in meaningful employment. The Claimant was on a final written warning for conduct".

The Tribunal found that Mr. Sargeant had taken into account the final written warning.

31. The Claimant was provided with an opportunity to appeal and he did so. He sent two letters in respect of his appeal, one 27 April 2019 and one on 4 May 2019. The grounds of appeal contested the validity of the earlier warnings and also complained about the unacceptable behaviour of the vulnerable volunteer. The Claimant stated that the warning in respect of the volunteer amounted to discrimination because she had not been sacked. He said that he got on well with other staff and wanted to be left alone without spying.

32. The appeal hearing took place on 19 June 2019 and was heard by Mr. Fernandez. Mr. Fernandez asked the Claimant what the issue with the volunteers was. The Claimant said that if the volunteers were challenging the employees, then what was the point in having an employee. He said that the line manager should tell the volunteers that they were there to volunteer and not to discredit the Claimant; that would improve relations. He said that he did not like being challenged unnecessarily when he knew that he was right. He stated that the volunteers did not respect him and that they were on his back and fed back to the manager. He stated that the volunteers were out to discredit and challenge him and that the volunteers at the Beckenham store had turned against him.

33. Mr. Fernandez dismissed the appeal by letter dated 28 June 2019. In particular, he stated that the Claimant's performance and conduct had not improved to an acceptable standard and, significantly, it was reasonable to believe that there was unlikely to be any further improvement. The Claimant had decided not to engage with volunteers, which was essential to the business model and the ethos of the Respondent. It was noted that the volunteer hours had gone down before the Claimant's dismissal and increased after he had left. He found that the Claimant had an impact on volunteers and took that into account.

34. The Tribunal then set out what, in my judgment, was an excellent summary of the relevant legal principles in relation to each of the claims that were before the Tribunal. The statutory principles regarding unfair dismissal were set out at paragraph 114 of the Reasons. The Tribunal correctly set out the relevant legal principles. The Tribunal then went on to analyse the relevant facts and to apply the law to those facts in respect of the various claims before it.

35. The following, in my judgment, were significant paragraphs, albeit sometimes under the headings of the different claims that the Claimant made, but nonetheless, these are significant determinations for the purposes of the appeal before me. At paragraphs 142 to 144 the Tribunal stated as follows:

> "142. The Tribunal found that the final warning in respect of the threat to the volunteer played a part in the decision to put the Claimant on a PIP. The final written warning was for conduct but it went to performance in relation to working with volunteers, in a store with many volunteers, of whom a number were vulnerable. The PIP in terms covered both conduct and capability. The conduct element was particularly focused on working with volunteers". (Emphasis added)

Paragraph 143:

> "143. For the avoidance of doubt, the Tribunal found that the final written warning was justified. The Claimant's conduct was serious. He threatened to punch a vulnerable volunteer in the face. Further, he was entirely unrepentant. There was no reason not to think that he would do this again because he thought he had done nothing wrong. He constituted a real risk in the future".

36. Paragraph 144:

> "144. The Claimant said that he was upset at the volunteer for failing to respect boundaries. In the view of the Tribunal, it was potentially reasonable for him to be upset at her conduct in the moment. However, he told the employer, after threatening to punch her in the face, what else was he expected to do? He said that anyone would have reacted in the same way or worse".

The Tribunal expressed some concern that the Claimant had been permitted to continue to work with vulnerable adults after that incident, but made no further determination about that.

37. At paragraph 150, the Tribunal found as follows:

> "140. Again, …in the view of the Tribunal, the Claimant failed to recognise the problems with his behaviour. He therefore looked for another explanation when he was subject to a complaint, investigation and warning".

Paragraph 151:

> "151. It was not reasonable for the Claimant to perceive the volunteer's complaint as violating his dignity or creating an unlawful environment for him. She was justified in her complaint. She was vulnerable, physically much smaller than the Claimant and the Tribunal accepted that the incident would have been very frightening for her".

The Tribunal dismissed the claims of harassment and race discrimination in relation to that incident.

38. At paragraph 184, in the context of its determination of the victimisation claim, the Tribunal stated as follows:

> "184. The Tribunal had found that the decision to put the Claimant on a PIP was in itself reasonable. At the time, the Claimant was on two warnings following serious issues. A number of members of staff and volunteers had made complaints about the Claimant. The Claimant had failed to recognise his culpability in the vulnerable volunteer incident and therefore had given the Respondent no indication that he would not behave in this way again. The Tribunal found that in placing the Claimant on the PIP, the Respondent was giving the Claimant a chance to prove himself".

39. The more detailed analysis about the claim of unfair dismissal begins at paragraph 189 of the judgment. The Tribunal rightly engaged first with the reason for the dismissal. It noted that there had been some confusion on the Respondent's part, initially stating that the dismissal was for conduct and then for performance. It set out properly that the reason for

dismissal is the set of facts known to the employer or, beliefs held by the employer, which caused the employer to dismiss the employee.

40. The Tribunal set out at paragraphs 191-2 as follows:

> "191. At the time of the dismissal, the respondent stated the reasons were performance and capability. The Tribunal found that this was the best guide as to how the Respondent characterised its reason for the dismissal. The Respondent viewed the Claimant's conduct as an element of his performance. The two matters were interlinked. The final written warning for misconduct was relevant to performance because the Claimant's failure to work well with volunteers was an element of his performance. Working well with volunteers was one of the most important issues in the PIP and it was essential to the Respondent's business model and charitable ethos". (Emphasis added)
>
> "192. The Tribunal was satisfied that the reason that the Respondent placed the Claimant on the PIP was that there were genuine long-standing and material grounds for concern about the Claimant's performance, including his work with volunteers". (Emphasis added)

41. The Tribunal set out at paragraph 194 that, in its view, the reason for dismissal was capability and performance. It then went on to consider reasonableness from paragraph 196 and following. Significantly, the Tribunal was concerned by the decision to cut short the four-week PIP. However, it stated at paragraph 198 as follows:

> "198. Whilst it would unquestionably have been better for the respondent to have given the claimant the full four weeks of the PIP, the Tribunal could not find that this was enough to take the procedure outside the reasonable range. The Claimant was at the time of the PIP subject to two warnings. He had the advantage of three and a half weeks of the PIP with considerable resources and input from management. From the documents, there was no indication that the Respondent had short-changed the Claimant in any other way in which it managed the PIP. The Respondent went through each aspect of the PIP in detail at every meeting. Further, the Claimant had denied that he needed any further training. This made it less likely that a further 4 days added to the end of the PIP, would have been material. Further, the Claimant had the advantage of an independent appeal".

42. At paragraph 200, the Tribunal stated as follows:

> "As to the procedure in general, the Tribunal found it unexceptional. The Claimant had been warned about the possibility of dismissal. Documents were provided in advance of the meeting. He was allowed a companion. He had a dismissal hearing in front of an independent manager and an appeal hearing in front of a further independent manager".

43. The Tribunal then considered the reasonableness of the decision to dismiss. Notably, it found at paragraphs 204-205 that the Respondent was entitled to consider the final written warning. The Tribunal referred to the decision in **Wincanton Group PLC v Stone** [2013] ICR D6 EAT. At paragraphs 206-9 the Tribunal found as follows:

> "206. The Tribunal found that this final written warning was issued in good faith, for the reasons set out above. There were at the very least at first sight grounds for imposing it and there was no question of it being manifestly inappropriate. The Respondent reasonably concluded that the Claimant believed that he was justified in threatening to punch the volunteer, who was physically small and had significant vulnerabilities, in the face. When challenged about his behaviour he said 'I was upset, what did you expect me to do?' He gave no indication that he had any insight into what he had done wrong or that he would not repeat the behaviour".
>
> "207. The Tribunal found that the final written warning was relevant to dismissal because failure to work with volunteers was a matter of both conduct and performance. The warning related to poor performance, the Claimant's failure to work effectively with volunteers who were fundamental to the Respondent's business. The volunteers no longer wanted to work with him and on his own case he took no steps to try to improve or resolve the situation".
>
> "208. In the view of the Tribunal, the reasonableness of the decision to dismiss came down to a simple question. Did the Respondent give the Claimant, who was on a final written warning, enough of a chance to improve? Was that decision within the reasonable range?''
>
> "209. Some of the feedback during the PIP in respect of certain elements was good. However, the dismissing officer took into account the Claimant's inability to work effectively with volunteers. The Tribunal accepted the dismissing officer's evidence that he felt that there was no chance that this was going to improve because the Claimant had failed to accept training and, in terms, blamed the volunteers for his inability to work with them. This was in circumstances in which the volunteers were fundamental to the Respondent's operation''.

And, at paragraph 210:

> "The Claimant in effect had not engaged with the need for the PIP, particularly in respect of volunteers".

44. The Tribunal concluded at paragraph 212 that the decision to dismiss the Claimant came within the range of reasonable responses in all of the circumstances. Nonetheless, the Tribunal went on to consider what lawyers describe as a **Polkey** assessment, i.e., to consider what would have occurred had a fair procedure taken place. Paragraphs 213-4 stated as follows:

> "213. For the avoidance of doubt, the Tribunal went on to consider the position if it had determined that the three and a half week PIP had taken the procedure outside of the reasonable range. In those circumstances, the tribunal would have had to consider whether the claimant would have been fairly dismissed in any event and/or to what extent and when."
>
> 214. The Tribunal would have applied the case of *Polkey*. It directed itself in line with the well-known authority of Elias P. as he then was in *Softward 2000 Ltd v. Andrews* [IRLR] 2007 568. A Tribunal must consider what might have been, had the respondent followed a fair procedure. This inevitably involves a degree of speculation. Nevertheless, the tribunal must speculate – but based on the evidence. It will be a rare case in which there is too little evidence to construct what might have been."

45. In this case, the Tribunal considered what was likely to have occurred had, the one are upon which it had concern (the slight reduction in the PIP of 4 days) not taken place. It then set out at paragraphs 215 and 216:

> "215. On these facts, a fair procedure would have resulted in the PIP being extended by four more days. There would have been a further meeting at which the claimant would have received further feedback and been told that there was a risk that if he did not make improvements in the coming week, his job was at risk.
>
> 216. However, if this had happened, the Tribunal determined that it would have made no difference. On the balance of probabilities, and based on the claimant's own evidence, the claimant would not have changed. The claimant had said he did not need training and any fault lay with the volunteers. He simply did not see anything wrong with his performance and conduct, as shown by his reaction to the final written warning, his walking out of the PIP meeting, and the basis of his case before the Tribunal."

The Tribunal concluded that, even if it had made a finding of unfair dismissal, it would have made a 100 per cent reduction to compensation, had it determined that the dismissal was unfair.

The law

46. Once the employer has proved what the reason for dismissal was, and satisfied an employment tribunal that that reason was a potentially fair one, reason, the determination of whether that dismissal was fair or unfair, is made in accordance with 98(4) of the Employment Rights Act 1996 ("ERA 1996"). That provides as follows:

> "98(4) The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

47. I have been taken to a number of authorities which are set out in the authorities bundle, each of which I refer to below.

48. In **Winterhalter Gastronom Ltd v. Webb** [1973] ICR 245 (page 249, page 7 of the bundle, at E to G) is relevant. That provides as follows:

> "Thus, argues Mr. Sedley, with all these facts at his disposal and bearing in mind his capacity as a director, warning was neither necessary nor could it serve any useful purpose. Mr. Sedley went so far as to submit that a warning can never be appropriate when the reason for dismissing a man is lack of capability. Warning, he says, is appropriate in the case of misconduct, because it lies within the man's own powers to rectify his conduct, but not his capability. We do not agree. There are many situations in which a man's apparent capabilities may be stretched when he knows what is demanded of him; many do not know they are capable of jumping the five-barred gate until the bull is close behind them. No doubt there may be cases in which giving warning to a director would be neither necessary nor achieve any useful purpose. But, each case must depend upon its own particular facts and it is, in the view of this court, quite impossible to say as a matter of law that there can never be circumstances in which it is necessary to give a warning to a director before dismissing him."

So too is the following passage relevant in **James v Waltham Holy Cross Urban District Council** [1973] ICR 398, (paragraph at page 17, E to G):

> "In the field of capability similar problems frequently arise. If an employee is not measuring up to the job, it may be because he is not exercising himself sufficiently or it may be because he really lacks the capacity to do so. An employer should be very slow

> to dismiss upon the ground 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 of improving his performance. But those employed in senior management may by the nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent. Again, cases can arise in which the inadequacy of performance is so extreme that there must be an irredeemable incapability. In such circumstances, exceptional though they no doubt are, a warning and opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the business."

The Claimant referred me to **Abernathy v. Mott, Hay and Anderson** [1974] ICR 323, and in particular the paragraphs at page 25, A to F. These passages address the situation, as arose in this case, where the asserted reason for the dismissal, on investigation, is found not to be the real reason for dismissal:

> "The purpose of the legislation on unfair dismissal was to give the employee a right which he did not have before —a right under the Act to claim compensation for unfair dismissal. It would be surprising if an employer could call the reason for dismissal "redundancy" and then say before the tribunal that he made a mistake in law and produce a reason which he has had locked in his bosom and has not made known to the applicant. An employer cannot change his mind at the last moment and use a different set of facts to justify the substitute label for dismissal. "Unfair" in the Act of 1971 is used as a term of art: see section 116 (1) and (3) which provide a sort of parallel to contributory negligence by providing that in considering compensation for unfair dismissal the tribunal can look at the employee's conduct and may reduce his compensation accordingly. If there is to be a trial, the facts on which the parties rely should be pleaded before the trial. Though lack of capability was put in the alternative in the employers' written defence the main case which the applicant expected to meet was redundancy. The time at which one looks at the reason for dismissal is the time of the dismissal. The tribunal must first consider what the employer treats as the reason and if he gives a reason which comes within the Act the tribunal then considers whether in all the circumstances it was reasonable. If an employer fails under section 24 (1) he never gets to section 24 (6)."

> "Mr. Abernethy is a Fellow of the Institute of Civil Engineers; a Fellow of the Institute of Structural Engineers and a Fellow of the Institute of Arbitrators. After 22 years' service Mr. Abernethy was given notice to terminate his services. The notice was given on February 25, 1972, and expired on March 31, 1972. The firm stated that they dismissed him for redundancy. On that basis the redundancy payment would amount to some £850. But the firm offered to increase it by making an ex gratia payment to him of another £750. Mr. Abernethy was not at all satisfied with the offer. He felt that he had been unfairly dismissed. So he did not accept those payments. He went to the industrial tribunal. He alleged that he had been unfairly dismissed and claimed

> compensation. The industrial tribunal found that his claim had not been made out. They dismissed the claim. On appeal, the industrial court did the same. Now he appeals to this court.
> It must be remembered in all these cases that the appeal from the tribunal is only on law. There is no appeal on fact. Mr. Pain, who has appeared for Mr. Abernethy, takes two points. The first point is that Mr. Abernethy was told that he was dismissed *for redundancy.* Yet it turns out, that when the matter is properly investigated, there was not a redundancy situation. He was, in truth, dismissed for other reasons. Mr. Pain submits that the employers, having committed themselves to the reason of redundancy, cannot afterwards go back on it and rely on another reason. The second point made by Mr. Pain is that the real reason for his dismissal
> was because the employers thought that he was not fit to be promoted to a higher grade. That, says Mr. Pain, is not a sufficient reason for dismissing him. It was therefore an unfair dismissal.
> Now for the facts. It is quite plain that from 1950 Mr. Abernethy was engaged on important work for the firm on various sites, such as the Dungeness generating station, the bridge over the Tamar and a cantilever bridge at Newport in Monmouthshire, a bridge at Newcastle-upon-Tyne, and on the Blackwall Tunnel. But from 1964 he was not working on distant sites. He was engaged on work which he could do from head office. One was the Dartford Tunnel. Another was the Cringle Dock project. In 1971 the work at the Cringle Dock was coming to an end. There was not much for him to do in connection with it. The partners considered on what work they could employ him. They had no more work which he could manage from head office. The only suitable work which they could find for him was in a scheme for raising the banks of the River Thames."

The decision in **Sutton & Gates (Luton) Ltd v Boxall** [1978] ICR 67 case, (page 34 (71 of the report) at G to H) again stresses the importance of warnings and fair time to improve performance in capability dismissals:

> "It is our unanimous view, in accordance with views which have been expressed by the Employment Appeal Tribunal and our predecessor the National Industrial Relations Court, that these cases have to be approached along some such lines as these. A man is falling down in his work to the extent that it is detrimental to the employer's business. In those circumstances, because it is something over which he himself has control, he should be warned of it, probably several times, and given plenty of opportunity to improve hi performance. If it reaches the stage that it becomes obvious that he is incapable—perhaps due to some illness or disability—of reaching his former standard, the employer, provided he handles the matter sensibly, is entitled to say to the man, " We cannot keep you any longer. You are a liability." But the employer should not dismiss the man at sight once he has made up his mind that that is the position. Still more so where the employer is satisfied that it is sheer idleness or sheer negligence on the part of the employee, should he dismiss him without giving him some opportunity and, it may well be, a final opportunity."

The importance of warnings was stressed again in **Auguste Noel Ltd v Curtis** [1990] IRLR 326 (paragraph 10, page 40 of the authorities bundle):

> "Looking at the situation which can exist in an industrial context, it seems to the industrial members sitting with me – and indeed I would respectfully agree – that it can very rarely be said, if ever, that warnings are irrelevant to the consideration of an employer who is considering dismissal. The mere fact that the conduct was of a different kind on those occasions when warnings were given does not seem to us to render them irrelevant. It is essentially a matter of balance, of doing that which is fair and just in the circumstances and an employer is entitled to consider the existence of the warnings. He is entitled to look at the substance of the complaint on each of those occasions, how many warnings there have been, the dates and the period of time between those warnings and indeed all the circumstances of the case. It is quite impossible to lay down any rules nor is it desirable. However it does seem to us that those are matters which an employer is entitled to take into account and to look at."

In **Davies v Sandwell Metropolitan Borough Council** [2013] EWCA Civ 135 (paragraphs 22 to 23, which is page 44 of the authorities bundle) the Court of Appeal stated:

> "First, the guiding principle in determining whether a dismissal is fair or unfair in cases where there has been a prior final warning does not originate in the cases, which are but instances of the application of s.98(4) to particular sets of facts. The broad test laid down in s.98(4) is whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.
> Secondly, in answering that question, it is not the function of the ET to reopen the final warning and rule on an issue raised by the claimant as to whether the final warning should, or should not, have been issued and whether it was a legally valid warning or a 'nullity'. The function of the ET is to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance, which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct."

49. The following paragraphs in **Wincanton Group PLC v Stone and others** [2013] IRLR 178 (paragraphs 14 to 17, page 49 of the authorities bundle) suggest that a dismissal may be fair where conduct or performance has given rise to a final warning, and a further incident, albeit not similar to the prior one occurs, albeit not similar in nature:

> "14. Similarity is not a necessary condition of reliance upon a previous warning, he submitted. In support of that, he drew our attention to the 2009 ACAS Code of Practice in respect of disciplinary and grievance procedures. Paragraph 18 provides that where misconduct is confirmed, or an employee is found to be performing unsatisfactorily, it is usual to give the employee a written warning. A further act or misconduct or failure

to improve performance within a set period would normally result in a final written warning. At para. 20 of the Code:

> 'A first or final written warning should set out the nature of the misconduct or poor performance and the change of behaviour or improvement in performance required (with timescale). [...] The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning [...]'.

15. Neither of those paragraphs makes it essential that the latter misconduct is of the same nature as the former. If it had been intended to limit it, that is what ACAS would have said. There is guidance from 2011 as to the provisions of a disciplinary code. That is to the same effect. Under para. 4.37 it is said:

> 'If the employee has received a final written warning, further misconduct or unsatisfactory performance may warrant dismissal. Alternatively, the contract may allow for a different disciplinary penalty instead [...]'.

16. There is no suggestion within the guidance that misconduct not in itself sufficient to justify a dismissal on its own would have to be found to be of a similar nature to prior misconduct in respect of which there was an extant warning for a dismissal for that misconduct to be justified.

17. He finally pointed to the terms of the written warning itself in this case, dated 12 November 2009, in which the author said to Mr Stone:

> 'Should there be any further incidents of a similar nature during this period, *or indeed any actions of misconduct* [italics added], then further action may be taken at that time.' "

In **Sweeny v Strathclyde Fire Board** [2013] UKEATS/0029/13/JW, which is a decision of HHJ Stacey, as she then was, stated at pages 72 and 73:

> "I do not accept Mr. Bryce's argument that the final written warning requires to be construed as referring only to misconduct taking place after the date of the warning. Rather I accept Mr. Napier's position broadly to the effect that a written warning final or otherwise is a fact which a reasonable employer is entitled to have in mind".
>
> "While it is correct to argue that a warning is an admonition that tells the employee that future misconduct will have certain consequences, it is in my opinion more than that. It is also a recording of the commission of misconduct in the mind of both employer and employee. Mr Napier submitted that a warning is "Janus like" in that it looks both ways."

50. In **Philander v Leonard Cheshire Disability** [2018] UKEAT/0275/17/DA, the EAT stated as follows (paragraph 52 on page 93):

> "The dividing line between conduct and capability can be paper thin and even porous. Some behaviours or acts or omissions which fall within the definition of extreme negligence can be considered as either capability matters or conduct matters and can

> properly be described as either. The Respondent in this case was entitled to consider the Claimant's behaviour as conduct. It could also have concluded it was capability. Even if it had plumped for a capability label it would, on the facts, have been entitled to dismiss, given the extensive recent training on the matters identified in the CQC report and the seriousness of the failings."

Finally, I refer to the **Fallahi v TWI Limited** [2021] EA-2019-000110-JOJ. In that case (paragraphs 50 and 51) the EAT considered the significance of warnings as part of the assessment of reasonableness of a dismissal.

> "It follows that the ET was entitled to find that the warning was not manifestly inappropriate in the *Davies/Wincanton* sense, and that it was within the range of reasonable responses (if there is any practical difference between those two tests, which I doubt).
>
> I also consider that the "manifestly inappropriate" test was applicable when the ET decided whether it could "go behind" the final warning. The authorities show that this approach is not confined to misconduct cases. Ground 2 therefore fails."

Submissions

51. The Respondent's submissions in summary were as follows. A proper analysis of the Tribunal's decision, looking at it as a whole, was that the decision to dismiss was fair. It was submitted that there was significant overlap between the issues which amounted to *conduct* in this case, and issues which amounted to *capability*. This was, on the Respondent's case, a situation where the distinction between those two potentially fair words to describe a reasoned dismissal was paper-thin, perhaps even porous.

52. It was also submitted that whilst warnings are significant, but they are but one factor to consider when looking overall at fairness. It was submitted that it was evidently clear, both to the Tribunal, but most importantly to the Claimant, that he was not working appropriately with the volunteers and that that needed to improve. The Claimant's response, despite the serious incident of misconduct, was that there was nothing he needed to do to improve. He said he did not want to or need to undertake any further training. In those circumstances, the

decision to place him on a PIP but then to dismiss him because of a lack of improvement was entirely within the band of reasonable responses open to a reasonable employer.

53. It was submitted that the Tribunal fairly considered whether or not the dismissal was fair; that there had been enough warning because of the close overlap between the conduct and capability issues in this case. In any event, as to ground 2, it was submitted that it was wrong to describe the **Polkey** analysis and direction as referring only to what would have happened if the PIP was extended by half a week. In fact, what the Tribunal did, when paragraph 216 is read, is to look at what would have happened if, not only the PIP had been extended to the full four weeks, but also to look at what would have happened if the Claimant had been given a further warning that his role was at risk and did not improve. The clear finding of the Tribunal was that nothing would have changed because the Claimant did not believe that there was any change to be made. For those reasons it was submitted that the appeal should be dismissed.

54. The Claimant, in my judgment, set out very well in his skeleton argument the basis for his appeal. He seeks to advance in their entirety the amended grounds of appeal drafted by the ELAAS representative who represented him at the r.3(10) hearing. The Claimant referred to a number of factual issues in his appeal. That appeared to seek to relitigate those factual disputes. Those, as I have explained during submissions, are not something that I can or should look at, because I make this decision on the basis of the facts found by the Tribunal.

55. As to the grounds of appeal which are before me, it was submitted by the Claimant that the final written warning was issued in respect of conduct and the serious conduct described above. It was submitted that that letter did not put the Claimant on notice that his job was at risk because of capability. On the contrary, in terms, it stated that his job was at risk should he commit further acts of misconduct.

56. It was submitted that the issue within the Respondent related to the management of the volunteers and that that was what needed to be addressed. Having regard to the decision in **Abernathy**, and, in particular at page 331, B to C, the terms inflexibility and lack of adaptability, could perhaps have been used to describe the Claimant's approach, rather than misconduct. It was submitted that it was important to look at whether or not there was an adequate or fair warning, which it was submitted there was not: according to the **James** case, an employer should be very slow indeed to dismiss upon a ground that the employee is incapable of performing work which he is employed to do, without first telling the employee of the particular respects in which he is failing to do his job and then giving a fair opportunity to improve performance.

57. It was important, in the Claimant's submission, having regard to the decision in **Sutton & Gates**, that where there is an opportunity that an individual may change their ways or change their way of working because they can control that, that they should be warned, possibly several times, and given plenty of opportunity to improve their performance.

58. The Claimant also made submissions about first or final warnings, referred to his race discrimination claim and also to some matters about management complicity. It was submitted that the programme the Claimant was put on, by which I understand him to refer to the PIP, was flawed as there was no training conducted, no training material produced and he was subjected to unwarranted pressure to perform. He considered that the Respondent, by their actions, made it clear that they were above the rules.

Analysis and Conclusions

59. Turning to my analysis and conclusions, it is important, in my judgment, to be clear that the assessment of the fairness of a dismissal for the potentially fair reason of conduct is different to the assessment of the fairness of a dismissal for the potentially fair reason of

capability, notwithstanding the fact that some key elements of a fair procedure may be common to both. An employer who is confused or unclear about the distinction between those two different reasons for dismissal, or which was the real reason for dismissal, may have some difficulty justifying a dismissal for one reason or the other. That is because a fair conduct dismissal will require a different analysis and approach to that required to when effecting a fair dismissal for capability. Many working in the field of employee relations will recognise the pattern which often emerges in cases where it is alleged that an employee is guilty of misconduct: often something of an adversarial approach is adopted by an employer and is responded to in like manner by the employee: allegations are made against the individual; the individual seeks to defend themselves as best they can, but in the course of doing so, they may become combative and defensive.

60. That type of environment and atmosphere is the antithesis of the type of environment that a reasonable employer would wish to establish when managing performance. When managing performance, and providing a fair opportunity for an employee to improve their performance, an individual should be provided with some reasonable support so that they can admit to mistakes, shortcomings or areas of weakness, engage in reflection on how they can improve and take advice about actions that they could or should take to improve their performance. That is unlikely to be achieved in an adversarial process. It is for that reason that many of the authorities refer to the need in capability dismissals for employers to clearly set out what it is that is inadequate about the employee's performance; set out what needs to change; set out how change will be measured and reviewed, and provide a fair opportunity for the individual employee to develop and to improve. That is why warnings are important in a capability dismissal. It is part of the clarity of communication needed. The employer must convey to the employee that the way the employee is working is not good enough, and that, although support will be offered to improve performance, if nothing changes, or not enough

changes, the employee's employment is at risk. That said, when assessing fairness, the task of the Tribunal is always to apply the carefully chosen and comprehensive statutory language of s.98(4) of the Employment Rights Act 1996 set out above.

61. The common ground, or overlap, between a fair procedure in respect of dismissal for conduct and a dismissal for capability is the need, in each instance, for an employer to be crystal clear about what it is that is putting the employee's continued employment at risk; how that can be rectified and the fair process through which the employer sets out its views, listens to the employee and the employee is given a proper opportunity to respond and alter their performance or approach if they are able or willing to do so. When an employer is not clear about whether the reason for dismissal is conduct or capability, the risk is that they may not, in their own mind, have clarified what the particular issues are that are putting employment at risk. If that is the case, it is less likely that they will have been able to set out those issues properly to the employee.

62. I considered carefully whether, in this case, the Tribunal had properly considered whether the Claimant had been given a fair warning that his employment was at risk because of his performance, his capability, as opposed to that warning being set out in respect of conduct only. Factually, in this case, and as the Tribunal concluded, there was undoubtedly overlap between the conduct issues and the issues that were being considered through the PIP. The Tribunal found that the PIP encompassed capability issues and conduct issues, particularly relating to the Claimant's interactions with volunteers. Through the PIP, and the preceding warning, it was made clear that the Respondent required the Claimant to alter his approach in respect of his working relationships and interactions with volunteers. He was provided advice and guidance through the PIP and offered further training. Further, I re-read the documents and

the Judgment in light of the submissions made during the appeal. Having done so, I am satisfied that the Tribunal did properly consider the question of adequate warning.

63. The Tribunal's conclusion about warnings were set out at a number of paragraphs; in particular, paragraphs 84, 85, 94 and 95 as set out above. Importantly, the Tribunal found, as a fact, that when the final written warning was issued, the Claimant was spoken to separately by Ms. Trivett about the Respondent's concerns regarding his interaction with volunteers. That was also, on the findings of a Tribunal, a specific and important part of that PIP. In addition, after the end of the PIP, the Claimant was expressly warned about the possibility of dismissal prior to the meeting described as a performance capability hearing on 15 April 2019.

64. The Claimant attended that meeting. He did not, at that stage, say that he now acknowledged or could see, given that he had been expressly warned that his employment was at risk, that that there was something, anything, that needed to change about his interaction with the volunteers. Instead, he persisted in the approach that he had taken previously, which was that he did not need to change; it was the volunteers or managers that needed to change.

65. The Claimant was then informed that he was being dismissed because, in particular, of his failure to improve in respect of his working relationship with the volunteers. There was then a further opportunity for reflection by the Claimant. He had an opportunity to appeal. His appeal was not that, on reflection, he could and should think more about how he was reacting to the volunteers; it was, once more, that it was not his fault, it was everyone else's fault but his.

66. Significantly, the Tribunal found that the Claimant's view about the misconduct in relation to the vulnerable volunteer's complaint was not to acknowledge that that involved an incident about his relations with a volunteer, but instead to defend his conduct, to defend threatening to punch someone in the face by saying that he was upset: what else could he do?

67. Having read the decision of the Tribunal, I was satisfied that, reading the decision as a whole, the Tribunal had properly considered all aspects of fairness in respect of the Claimant's dismissal, and, in particular, had considered the matter of whether or not he was given a fair and reasonable warning. Those matters could, perhaps, have been addressed in more specifically at paragraphs 208 and 209 of the Reasons. However, to take paragraphs 208 and 209 in isolation would be inappropriate and not read the Judgement and Reasons as they should be – as a whole. (See for example, **DPP Law v Greenberg** [2021] IRLR 1016.) T The Tribunal has accurately set out the law and it has assiduously set out its factual determinations. The Reasons are detailed and clearly explain the conclusions of the Tribunal. There was no error of law or approach on the part of the Tribunal. It properly considered whether, on the facts of this case, the dismissal was fair within the meaning of s.98(4) of the Employment Rights Act 1996.

68. I dismiss the first ground of appeal.

69. That disposes of the appeal, as the second ground of appeal only arises in practice if the first succeeded. However, in relation to the second ground of appeal, in my judgment, at paragraphs 213 to 216 of the Reasons, fairly read, the Tribunal set out what it considered would have occurred had a fair procedure taken place (214-5 of the Reasons). That would have been that it was likely that, had that taken place, the PIP would have continued and a warning would have been given, expressly informing the Claimant that if he did not make improvements in the coming week, his job was at risk. However, the Tribunal then found (at paragraph 216) on the balance of probability, and based on the Claimant's own evidence, that the Claimant's approach would not have changed and that, therefore, the Tribunal would have made a *Polkey* reduction of 100%: even if there had been unfairness in respect of the shortened PIP period and warning, had that unfairness not occurred, the decision would have been the

same, and dismissal would have taken place, because the Claimant would not have altered his approach. That assessment, in my judgment, on the basis of the evidence as set out in its detailed reasons, was one well within the remit of the Tribunal's decision-making and assessment. Therefore, I would also dismiss the second ground of appeal.

70. Finally, I wish to thank the Claimant for the manner in which he made his submissions today. I know that this outcome will not be the outcome that he had hoped for. I very much hope that he might take a moment to reflect upon what has been said in the appeal. There does appear that there may be a need for some reflection. That may lead to change and then to further work, which I very much hope he finds in the future.

71. That is my decision.