



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**Respondent**

Mr J McDonnell

ADI Gardiner Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT Manchester on 15,16 and 17 August 2018 and in Chambers on 6 October 2018**

**EMPLOYMENT JUDGE** Warren

### Representation

Claimant: in person

Respondent: L A Amartey, Counsel

### **RESERVED JUDGMENT**

The Judgement of the Tribunal is that the claim of unfair dismissal is ill founded and is dismissed

### **REASONS**

#### Background and Issues

1. By an ET1 presented on 14 August 2017, the claimant asserted that he had been unfairly dismissed. The respondent denied the dismissal was unfair

asserting that it was procedurally and substantively fair, on the grounds of capability.

The agreed issues (liability only):-

Unfair dismissal

2. What was the reason for the claimant's dismissal?
3. Was the reason a potentially fair reason within s.98(1) or (2) of the Employment Rights Act 1996 ("ERA")?

4. If so was the dismissal fair within the meaning of s.98(4) ERA i.e.

Was the decision to dismiss the claimant for this reason within the band of reasonable responses to the claimant's capability (not conduct as mistakenly set out in the agreed list of issues) which a reasonable employer could adopt;

and

Did the respondent follow a fair procedure in dismissing the claimant?

5. If the respondent did not follow a fair procedure in dismissing the claimant would following a fair procedure have made any difference to the respondent's decision to dismiss the claimant?

6. If so was the dismissal fair within the meaning of s.98(4) ERA i.e.

Was the decision to dismiss the claimant for this reason within the band of reasonable responses to the claimant's capability (not conduct as mistakenly set out in the agreed list of issues) which a reasonable employer could adopt;

and

Did the respondent follow a fair procedure in dismissing the claimant?

7. Was the decision to dismiss the claimant for this reason within the band of reasonable responses to the claimant's capability (not conduct as mistakenly set out in the agreed list of issues) which a reasonable employer could adopt;

and

Did the respondent follow a fair procedure in dismissing the claimant?

8. If the respondent did not follow a fair procedure in dismissing the claimant would following a fair procedure have made any difference to the respondent's decision to dismiss the claimant?

### The Evidence

9. The Tribunal heard evidence from Julie Amiot ("JM"); Michael Chesworth ("MC"); Colin McGinty ("CM") and Roger Boulton ("RB") on behalf of the respondent.

10. The claimant gave evidence on his own behalf along with Debbie Seddon ("DS"); Andrew Marshall ("AM") and Paul Bagshaw ("PB").

11. There was a helpful list of issues, listed above, and a chronology. The agreed bundle extended to over 615 pages. Page references herein refer to the bundle.

12. The decision was reached using the evidential test 'the balance of probabilities. I did not hear evidence from the claimant's line manager and dismissing officer, Nicky Griffiths, who left the company shortly after the claimant was dismissed. Whilst this was unfortunate, answers to many of the relevant issues were evidenced in document form, and not disputed.

### The Facts

13. The claimant began work for the respondent in 2010 as a procurement clerk. He was line managed throughout his time there by Nicky Griffiths. She only managed the claimant. Together they made up the Purchasing Department. Most of the claimant's work involved data entry, and chasing vendors for credit notes and proof of delivery, ringing the company branches, and producing reports about discounts and rebates.

14. Nicky Griffiths was a forceful and bullying manager, her behaviour was witnessed by the claimant's colleagues who gave evidence in his support.

15. On three separate occasions the claimant complained to other managers about her behaviour, in 2013, 2014 and 2016. Each time he was persuaded not to proceed with a formal complaint. The claimant simply went back to work and shouldered the criticism and belittling. In the end he lodged a grievance in November 2016. However, he candidly explained in his evidence that he did so in the hope that it would stop the performance improvement plan of which he was by then the subject. He confirmed in his grievance that his manager's behaviour had improved in the last 2 years since an office move from Bury to Rochdale.

16. Despite the problems with his manager the claimant worked from 2010 to

2015 without apparent issue. Each year he achieved his objectives and received a pay rise. In January 2015 however, Nicky Griffiths raised performance issues (page 112), and then, in a mid-year review, stated that she wished to see significant improvement in his work (page 114). The claimant does not take issue with the first steps taken in the process, and agreed in his evidence that this was not because of the poor relationship with his manager, but because of his poor performance.

17. At his end of year review for 2015 (pages 122-6) he was advised that he needed to be proactive and 'own his tasks to completion'. The claimant signed the form, he said in his evidence, because his manager was forceful. He agreed that he could have completed the comments box and did not so. On the face of the document he accepted the criticism of lack of proactive behavior, and a need to 'up his game'. Nicky Griffiths set up weekly meetings to monitor progress. The claimant agreed in his evidence that she was trying to help him.

18. In February 2016 the claimant was issued with an informal improvement plan, which he accepted and signed.

19. In May 2016 the claimant was called to a formal performance meeting, and was given a copy of the company's policy on performance improvement. (pages 127 and 128). The issues with the claimant's work had not changed.

20. At the time of the meeting the claimant did not see it as a serious matter. He confirmed that he had read the policy which set out a 3-stage process which could lead to dismissal. He said that he made sure that he improved, and that Nicky Griffiths was reassuring throughout.

21. The claimant agreed that he signed the performance improvement plan and agreed that the objectives were reasonable (page 133). He agreed there were no training issues as he had successfully done the job for a number of years. He said that he signed because his manager's attitude had been controlling and harassing for over 5 years by then. He also agreed that they then met weekly.

22. Progress was reviewed in a meeting on 23 June 2016 (page 140).

23. He did not think there was a difference between the performance improvement plan and his manager's conduct.

24. The claimant gave evidence that he thought the performance improvement plan would go away, he said he was complacent and was happy with his work as he was improving, so he went along with the process.

25. During the stage 1 meeting (page 145), he agreed that Nicky Griffiths acknowledged some improvements, and agreed in cross examination that she

was not trying to get him out. He agreed that he had the chance to challenge her assessment if he didn't agree with it. He further agreed that she offered him help and that her criticisms were consistent. He volunteered that he didn't need help because it was a process he could undertake comfortably, having done so for years. The particular outstanding issues related to particular cases where the claimant had failed to be proactive in chasing outcomes to update the system. Without the update the vendor could not be paid, there was no record of the product in the warehouse, and it could not therefore be sold, alongside late rebate entries which needed proactively chasing.

26. The claimant had been offered the chance to be accompanied in the meeting and chose to attend alone. JA (HR representative), attended with Nicky Griffiths.

27. Nicky Griffiths issued a first improvement notice (page 147) in a letter dated 24 June 2016 in which she praised the improvements she had seen, and offered any help the claimant may have needed to achieve the rest of his objectives.

28. The claimant felt reassured by Nick Griffiths, believing that the process was a formality. It was only later that he realised he may be dismissed.

29. He contacted JA via instant messenger, explaining the fraught relationship between him and his manager. JA met and discussed the problems and then sent him a copy of the grievance procedure. He did nothing further with it at this stage.

30. On the 1 July 2016 the claimant appealed against the improvement notice (page 156). The appeal was based on the improvements he had already made, which were extensive, whilst recognising there were some outstanding issues. He particularly expressed concern that one of his targets had been moved from 4 weeks to 2 – an unrealistic and unattainable target (this was later changed by Nicky Griffiths, back to 4 weeks)

31. The appeal hearing was heard on 12 July 2016 by JB, an unrelated manager, with MC from HR acting as note taker. They were provided with all of the statistics, and data upon which Nicky Griffiths had relied. The claimant had a target that there should be nothing to be chased after 30 days – he should have resolved any issue within that time. He was not looking at the issues until they reached 30 days, and so he was always bound to fail to meet his targets. He felt he was doing all that he could, and that he had been unaware of how serious it was to be on a PIP.

32. The outcome of the appeal was sent to him in a letter dated 25 July 2016 (page 205). JB accepted that the claimant had some measured improvements, but found that there had been insufficient improvement, and decided that the PIP

would remain in place for 12 months from its date of issue.

33. On the 2<sup>nd</sup> September Nicky Griffiths invited the claimant to a Stage 2 review meeting (page 209). He was again invited to take a colleague or trade union representative. He was provided with another copy of the performance management policy, and copies of the evidence she was to rely upon. The claimant was warned that potential outcomes could be a first or final improvement notice, or dismissal.

34. The meeting was held on 8 September 2016. NG pointed out the claimant's successes, but made the point in relation to some, that he had reacted to a line by line appraisal by NG in their weekly meetings, highlighting issues to be resolved. He was nowhere near meeting his target in relation to Status 90 (a series of reports where he still had 23 items outstanding beyond 30 days, with a target of zero). NG wanted him to take control and to be proactive rather than reactive.

35. In a letter dated 9 September 2016 (page 212), NG confirmed that whilst improvements had been made, the targets set had not all been met. She noted that the claimant had not asked for further support, but reminded him to contact her if he needed to escalate any issue with her.

36. He was issued with a final improvement notice, to last for 12 months and reminded that failure could lead to dismissal.

37. A new PIP followed on 12 September 2018 (page 214). The claimant was to have no missing data on spread sheets and no lines on Status 90 reports aged more than 30 days.

38. A formal review (stage 3) was held on 10 November 2016. During the meeting NG raised issues from which she alleged that the claimant had not met his targets. The claimant became upset and had to leave on 2 occasions.

39. On the same date the claimant lodge a grievance about NG, stating that he was under stress, and that he felt she was trying to terminate his employment.

40. His grievance was heard on 30 November 2016 by CM. Cm then interviewed NG and AM.

41. The outcome letter was sent to the claimant on 12 January 2017. The letter (page 256) related to 3 areas of the PIP. CM made no reference to the behavior of NG in the outcome. He proposed that the PIP remain at stage 3 for a further 6 weeks, and that it be redefined with clear objectives, weekly documented reviews, and further support. He was offered a right of appeal, which he did not exercise.

42. The claimant signed a new PIP on 26 January 2017. There were PIP review meetings approximately weekly thereafter. The claimant was also supplied with standard work processes to follow.

43. A stage 3 review was held on 23 March 2017. The claimant had passed some areas of the PIP – rebates and status 90. However, price support updates had fallen behind, and in relation to one the claimant had failed to follow the standard work process.

44. By letter dated 24 March 2017 the claimant was dismissed with immediate effect, because there had been insufficient improvement of his performance against the action items within the PIP. He was paid 8 weeks pay in lieu of notice.

45. The claimant exercised the offered right of appeal on 28 March 2017. By then NG had left the business.

46. The appeal was heard by RB, the claimant attended with an employee representative, PB.

47. JM agreed that he had not appealed the outcome of the grievance, and that he should have done so, describing himself as complacent. He confirmed that he had signed the PIPS, without demonstrating any disagreement. Following the meeting RB conducted an investigation, interviewing CM and LT together, to discuss the earlier grievance process, and JA to discuss the dismissal process. He also discussed the performance process with NG

48. On 16 May 2017 RB wrote to the claimant with the outcome of his appeal. The appeal was rejected. Firstly, because the allegations about NG as a manager had been dealt with in the grievance, the outcome of which had not been appealed, and secondly because there was clear evidence of a lengthy improvement plan, under which, by the end, the claimant still failed to meet the targets which he had signed and agreed.

### The Law

49. Section 98 Employment Rights Act 1996 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 principal 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”

(4) “Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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.”

50. It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the reason alleged. *British Home Stores v Burchell 1978 IRLR 379*. The tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

51. The Tribunal is assisted by the guidance offered in *Iceland Frozen Foods v Jones 1982 IRLR 439* namely:-

a) The starting point should always be the words of section 98(4) themselves.

b) In applying the section the tribunal must consider the reasonableness of the employers conduct, not simply whether they consider the dismissal to be fair.

c) In judging the reasonableness of the dismissal the tribunal must not substitute its decision as to what is the right course to adopt for that of the employer.

d) In many (though not all) cases there is a band of reasonable responses to the employee’s conduct within which one employer might take one view, another quite reasonably take another.



e) The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

f) The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances

### Conclusions

52. What was the reason for the Claimant's dismissal?

53. I am satisfied that the claimant was dismissed because he failed to meet the requirements of an agreed PIP which lasted for 10 months.

54. *Was the reason a potentially fair reason within s.98(1) or (2) of the Employment Rights Act 1996 ("ERA")?*

55. The reason he was dismissed was because he proved incapable of meeting the objectives set within the terms of the agreed PIP. The ground for dismissal was capability which is a potentially fair reason for dismissal.

56. *If so was the dismissal fair within the meaning of s.98(4) ERA i.e.*

57. *Was the decision to dismiss the claimant for this reason within the band of reasonable responses to the claimant's capability (not conduct as mistakenly set out in the agreed list of issues) which a reasonable employer could adopt?*

58. The PIP followed the company procedure. There was evidence that as the claimant improved, elements of the PIP were removed. At dismissal he had met 2 of the 3 objectives, and his success was recognised. He was dismissed for failing to meet the third. Failing to meet one of 3 objectives in a PIP, which had involved a substantial amount of management input over ten months, supporting, prompting, offering help, all of which was rejected by the claimant, led to the claimant's dismissal. The claimant was well aware of the process to be followed, he was warned at various stages that he could be dismissed. He and his manager were firmly of the view that he could meet the objectives, but in reality he failed to do so. He was offered support which he did not take, at every stage, and given every opportunity to evidence success. He actually undertook stage 3 of the process twice, the second time with a very clear picture of what was required of him. At no stage did he disagree with NG about the PIP. He signed each one. In the last 6 weeks the PIP was managed more formally, and again he did not dispute any of the process being followed.

59. There is evidence from which I have established that the claimant was not well treated by NG, and the respondent became aware of it in the grievance investigation. However, the claimant himself confirmed that his performance was a different issue to the earlier bullying by NG. He was satisfied at the outset of the PIP that NG had genuine and reasonable concern for his performance. He believed that raising the grievance would stop the PIP. He did not believe that the PIP was started to remove him from the company, until the grievance was rejected and the second Stage 3 PIP began. By then the statistical evidence was clear to see in the reports he prepared as part of his role.

Did the respondent follow a fair procedure in dismissing the claimant?

60. The respondent tried for over 10 months to improve the claimant's performance, and to some extent the PIP was successful. The claimant was well aware at every stage of what he had to achieve in order to maintain his employment. He did not take it seriously for a long time and failed to show the initiative one would expect of an experienced employee aware of the requirements of his role.

61. At every stage the claimant was offered, but rejected support. He made no specific allegations of bullying by his manager in the second and third stages of the PIP. At every stage he was offered the chance to be accompanied to meetings, and given the chance to have his say.

62. The claimant did not specifically challenge the performance process in any particular detail. He did not appeal any stage after the first warning was given, and his first appeal was rejected.

63. He did not ask for help, and he indicated his agreement to each stage of the PIP by signing them. He was aware at every stage of what the next stage could be, and was clear about what was required of him.

64. The respondent followed a three-stage process, in a relaxed timetable, and then repeated the third stage. At each formal meeting the claimant was offered the chance to be accompanied. There is evidence of many meetings in which NG tried to offer support, and about which the claimant made no complaint of bullying. It is a mystery which even the claimant could not resolve as to why his performance dropped, and then did not improve as both employee and manager expected. It is clear that he could, and did improve in some fields, but was left failing in one area even after very intensive input from NG in the form of weekly minuted meetings over 6 weeks. It is hard to see what else the respondent could have done after such a long PIP. After dismissal the claimant was offered an appeal. There is evidence that it was taken seriously and dealt with independently and objectively, and each of his issues was investigated and he received a detailed and thoughtful response.

65. The claimant was appraised and monitored, warned in writing on several occasions within the process that he was failing to meet the required standards, given time in which to improve, and told the standard he had to meet, and from the outset advised of the risk of dismissal and given 10 months in which to improve.

66. I conclude therefore that the steps taken before, and at dismissal by the respondent fell within the range of reasonable responses one might expect of a reasonable employer in these circumstances.

67. If the respondent did not follow a fair procedure in dismissing the claimant would following a fair procedure have made any difference to the respondent's decision to dismiss the claimant?

68. This does not require an answer in the light of the findings above.

Employment Judge Warren

Signed on 28 November 2018

Judgment sent to Parties on

6 December 2018