



EMPLOYMENT TRIBUNALS

Claimant: Mr S Nakatani

Respondents Working Men's College Corporation

Heard via CVP (London Central) On: 16 and 17 February 2022

Before: Employment Judge Davidson

Representation

Claimant: in person

Respondents: Mr J Feeny, Counsel

JUDGMENT

The claimant's complaint of unfair dismissal fails and is hereby dismissed.

REASONS

The issues

1. The claim is for unfair dismissal. The issues are as follows:

Unfair dismissal

- 1.1. It is accepted that the claimant was dismissed for a reason related to his capability.
- 1.2. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

The evidence

2. The tribunal heard evidence from the claimant on his own behalf and from Julie Paterson (HR Manager), Martin Jones (Vice Principal) and Helen Hammond (Principal) on behalf of the respondent. They each submitted a witness statement and were cross examined and questioned by the tribunal.

3. There was a bundle before the tribunal running to 827 pages.

The facts

4. The facts were largely not in dispute between the parties. The main facts are as follows:
5. The respondent is a national institute of Adult Learning based in Camden. The respondent operates a Lesson and Teaching Observation Policy, under which all teachers are assessed at least annually. It also has a Capability Procedure under which unsatisfactory performance is addressed.
6. The claimant started working for the respondent in September 2000, originally as a sessional teacher and working in the IT team. He was made redundant from the IT team and later became a salaried teacher. At the time of his dismissal he was working as a salaried teacher, one day a week.
7. In more recent years, the respondent's teaching style moved from facilitated workshop style courses to whole class lessons with collaborative working. This change reflected the needs of learners in the current environment and the new inspection framework.
8. On 20 November 2018, the claimant was teaching an ICT course and his lesson was observed as a matter of routine under the Lesson and Teaching Observation Policy. Several issues were identified with his teaching style and he was assessed as 'cause for concern, missed opportunities' in a number of the assessment criteria. The claimant was informed of this assessment in December 2018.
9. On 2 February 2019, the claimant was observed again, due to the concerns identified previously. Similar issues were noted and the claimant was given a copy of the report and offered further support, advice and training.
10. A further lesson observation was carried out on 2 May 2019 following the concerns raised at the previous two observations. On this occasion, issues with the claimant's clarity and organisation in the lesson were noted and he was assessed as 'cause for concern, missed opportunities' in many of the assessment criteria.
11. The respondent decided to invoke its Capability Procedure. On 17 May 2019, the claimant was invited to a first capability hearing to take place on 23 May 2019. He was informed of his right to be accompanied by a work colleague or trade union representative.
12. The claimant requested that the meeting be postponed as he had another commitment on that date and he needed time to contact his union representative. Julie Paterson agreed to postpone the hearing and asked the claimant to provide

her with available dates. Following an exchange of correspondence, the hearing was re-scheduled for 20 June 2019.

13. On 8 June 2019, the claimant asked for a further postponement of seven days as his union representative was not available on 20 June 2019. Julie Paterson refused the request and told the claimant he could be accompanied by a work colleague if he was unable to find union representation.
14. The hearing took place on 20 June 2019, conducted by Diana Teesdale (Director of Learning). The claimant attended alone. After the meeting, Diana Teesdale wrote to Julie Paterson, expressing concern about the claimant's communication abilities and suggesting that he should not be teaching for that reason.
15. The outcome of the first capability hearing was a formal warning and objectives put in place to assist the claimant improve his performance. He was told he could not teach learners until his verbal communications skills had improved. He was offered a place on an ESOL course. A learning plan with eleven objectives (including sub-categories making the total 24) was to be put in place when he started teaching again. He was informed of this on 3 July 2019 and he was told he had the right to appeal, which he took up.
16. The appeal hearing was chaired by Gill Sommers (Acting Director of Learner Services) on 25 July 2019. The claimant was accompanied by his union representative. The appeal against Diana Teesdale's finding that he had poor communication skills was upheld and the suspension from teaching was lifted. An amended plan was put in place.
17. On 20 September 2019, the claimant met with Julie Paterson and Pamela Schievenin (Curriculum Manager) and it was agreed that the claimant would enrol in a teacher training course for Term 1 (AETL) and would teach one class in Term 2, subject to observation. Any further actions would depend on the level of the claimant's improvement.
18. In November 2019, the claimant was told that he would be teaching a class called Computer Skills for Beginners in Term 2, starting in January 2020. He was also told that he would be observed during the second or third week of the term. He asked for somebody neutral to assess him.
19. On Thursday 6 February 2020, the respondent sent the claimant an email informing him that one of his lessons would be observed during the following week. The claimant worked on Wednesdays and did not open emails from the respondent on days other than Wednesdays because he was not paid on any other days and did not consider it reasonable to be expected to open work emails on days he was not paid. He did, however, open post sent to him at his home address. For this reason, many communications from the respondent were sent to the claimant by mail as well as email. On this occasion, the notification was only sent by email in

accordance with the respondent's normal practice in announcing to the teachers the week of lesson observations, although not specifying which lesson will be observed.

20. The observation took place on 12 February 2020 by Lisa Marklew (Director and Learning for Arts & Vocational Skills) and Voula Papadopoulou (Head of Programme Business & Technology at City Lit College). Following the observation, they held a feedback meeting with the claimant and an action plan was drawn up with 11 points for improvement, four of which were regarded as 'key'.
21. On 2 March 2020, the claimant was invited to a second capability hearing to discuss the concerns raised in the most recent lesson observation. For a number of reasons, including the pandemic, the hearing did not take place until 8 September 2020. It was chaired by Caroline Poole (Director of Learning Services). Caroline Poole found that no progress had been made with the four key objectives and he had only met with two out of the eleven objectives. The claimant was asked if there was anything that the respondent could do to assist him and he was unable to think of anything. Following that hearing, the claimant was issued with a final written warning dated 18 September 2020. He was told that a further observation would take place in about four weeks' time. He was told of his right to appeal.
22. The claimant appealed against the decision and an appeal hearing was finally heard on 10 November 2020 by Sarfraz Arfan (Director of Facilities & Estates). The claimant raised a number of issues as his grounds of appeal including allegations that the procedure was flawed, the decision was unreasonable, there had no meaningful support, removing him from teaching was unnecessary and humiliating, the format of the next lesson observation (microteach) was not appropriate and the objectives that had been met were not taken into account. Sarfraz Arfan rejected his appeal and set out the grounds for his decision dealing with each appeal point in turn.
23. On 9 December 2020, the claimant was informed that there would be a further lesson observation on 16 December 2020 by two observers who had no prior dealings with the claimant. This was in the format of a 'microteach' which is a teacher training tool where the lesson is not delivered to enrolled students but to selected individuals (in this case mostly support staff not known to the claimant) who can feed back to the teacher. The claimant was given the profiles of the 'students' in advance of the lesson. The period of the microteach session was 30 minutes. The claimant alleges that the effective time was 18 minutes due to problems with the 'students' logging on to the relevant system, which caused a delay to the start of the lesson.
24. Following the microteach lesson observation, the claimant was invited to a third capability hearing as the assessors concluded that he had not made sufficient improvements based on the action plan. The meeting eventually took place on 24 February 2021 and was conducted by Martin Jones. The claimant's union

representative attended, as did Lisa Marklew and Julie Paterson. The claimant submitted written representations, challenging the microteach process. In particular he referred to the time spent at the outset for the mock students to log on which reduced the observation time to 18 minutes, the inclusion of a beginner in an intermediate class and a note that most of his students enjoy his courses. The claimant focussed on the procedural issues and did not address the underlying performance concerns. Martin Jones was not satisfied that the claimant had made any progress in the preparation and management of lessons. He noted that the claimant said that he would not have presented his lessons any differently, despite the feedback from the observers of his previous lessons.

25. The claimant relied on witness evidence from former students who spoke positively about their learning experience with the claimant. He was not permitted to call one witness, Amanda Blinkhorn, as she was regarded as not relevant. None of the witnesses relied on by the claimant had been students in a whole class teaching or a paired/group working session. Martin Jones did not find this evidence of much relevance because the capability process was addressing the claimant's abilities in whole class environments.
26. At the end of the third capability meeting, Martin Jones took the decision to dismiss the claimant for capability reasons. He took into account that four lesson observations had been carried out by seven different experienced observers, each providing feedback and action plans but this had not resulted in any improvement. The claimant did not appear to see why he needed to improve and he confirmed that he would not do anything different if the lesson observation was repeated.
27. The dismissal was confirmed by letter dated 2 March 2021 and the claimant was given the opportunity to appeal, which he did.
28. The appeal hearing was held on 17 March 2021, conducted by Helen Hammond with the claimant's union representative and Julie Paterson present. The claimant appealed on the grounds that the decision was harsh and disproportionate and that it was unreasonable because he had a good record of lesson observations in the past. He also raised the procedural points he had raised at earlier appeals. He was permitted to call Amanda Blinkhorn at this hearing.
29. After the appeal meeting, Helen Hammond wrote to the claimant on 23 March 2021 informing him that she was upholding the dismissal decision of Martin Jones. She dealt with all the appeal points raised by the claimant but concluded that he had not shown sufficient improvement and she did not think that the evidence of Amanda Blinkhorn was relevant to the matters in issue.

Determination of the Issues

30. It is not disputed that the claimant was dismissed or that the dismissal was for a reason related to his capability. I must assess whether the respondent acted reasonably in treating the claimant's performance as sufficient reason for

dismissal, which includes whether they followed a fair process and whether dismissal was a reasonable sanction. It is not for me to consider what I would have done – I must not substitute my view for the employer. I must consider whether what the respondent did was within the range of reasonable responses.

31. Over time, the method of delivery and the style of teaching adapted. The respondent had concerns beginning in 2018 that the claimant was not adapting and that the quality of his lessons was affected.
32. The claimant went through three lesson observations, the result of which led to the capability process being invoked. This involved hearings, action plans, appeals and further assessments. The conclusion of the process was the third capability hearing before Martin Jones, who took the decision to terminate the claimant's employment. The claimant appealed that decision, but the appeal was rejected by Helen Hammond.
33. The claimant has raised a number of specific challenges to the process. The respondent, on the other hand, asks me to look at the process as a whole.
34. I will consider each of the procedural issues and, if I agree with the claimant that there are procedural flaws, I will consider whether those flaws are sufficiently serious to make the decision as a whole unfair and, if so, whether the outcome would have been different if the procedural flaws had not happened (*Polkey*). If I find that there was an unfair dismissal, I will also have to consider whether the claimant contributed to that dismissal.
35. Dealing with the claimant's submissions in turn:
36. The claimant had a lesson observation on 2 May 2019 but final version not produced until 4 June 2019 and the lesson observation was not based on action plan from the previous lesson observation. It is not clear what the claimant's point is about this and how he says it impacts on the final decision.
37. Not getting enough notice of first capability meeting. I find that the original notice dated 17 May 2019 for a meeting on 23 May 2019 was short. The policy states that the meeting will be held 'as soon as reasonably practicable' and 'without unreasonable delay' while ensuring that the employee has reasonable time to prepare their case. When the claimant said that he did not have enough time to prepare, the respondent put back the meeting to 20 June 2019. The claimant then asked for a further delay of 7 days due to the non-availability of his union representative. The respondent refused. I do not consider that refusal to be unreasonable. The claimant was on notice from 17 May 2019 that there would be a meeting. He had asked for one postponement which was, correctly, granted. He had time to arrange alternative representation and was not sufficiently proactive in doing so. As it was, the meeting took place over a month after the original invitation was sent and the respondent is entitled to have regard to its policy regarding delay

in refusing a further postponement. If I am wrong about this, I am satisfied that the claimant was not prejudiced by the absence of a union representative as he was able to put across his points. I have considered whether the lack of union representation contributed to Diane Teesdale's assessment of the claimant's communication skills being lacking and I find that it did not. Her view was based on hearing the claimant speak and express himself, which he would have had to do even if he had a union representative. In any event, that issue did not lead to his dismissal since it was overturned on appeal.

38. No 'informal process' after 2 May 2019 invitation: taking the capability procedure as a whole, I find that there was an informal stage with the lesson observations in November 2018 and February 2019 prior to the lesson observation in May 2019 (which was discussed with Gareth Schweitzer, a manager) before the formal invitation to a capability hearing was sent on 17 May 2019. I therefore do not find that this is a ground of unfairness. In any event, the claimant has not explained what difference there would have been to the outcome if there had been further informal steps taken prior to the formal procedure being invoked.
39. The claimant was denied union representation on 20 June 2019 meeting: I have dealt with the timing issue but would add in relation to this particular complaint that the claimant was not denied union representation. There was no suggestion that he would not be able to bring a union rep to the meeting. The issue was one of availability of his first choice representative and the claimant accepted that he did not ask the union to provide an alternative representative. I therefore do not find any unfairness in this aspect.
40. Suspension for verbal communication issue in Term 1. I agree that the suspension was not appropriate, as the respondent accepted by allowing the appeal and removing the requirement for the ESOL course. In the event, the claimant went on a course during Term 1 which was intended to help him reach the standards required and improve in the areas identified as requiring development/improvement. I cannot see how this impacted on the final dismissal decision and I therefore do not find that it affects the fairness of the dismissal
41. Supporting plans did not materialise – from what I understand, the supporting plans originally set out on the basis of the suspension for communication difficulties did not happen. That suspension was lifted on appeal and the claimant then went on a teacher training course in Term 1, superseding the original plans. I do not find any unfairness in this aspect.
42. Not enough notice of lesson observation on 12 February 2020: I reject this criticism of the respondent. The claimant was aware that there would be another lesson observation early in Term 2. It was the respondent's practice to announce these on a Thursday morning by email in relation to the following week. It is entirely up to the claimant whether or not to check his emails from time to time, but he cannot complain if he fails to do so that he was disadvantaged. He was aware the lesson

observation was imminent. If he wanted advance notice, it was because he felt that would be to his advantage. If he wants to be advantaged in that way, it is incumbent on him to take steps to put himself in the best possible position. Although I take the respondent's point that all lessons should be prepared properly, not just those which are being observed, I can see the claimant's point that he might present an observed lesson differently to ensure he shows his teaching skills in the best light. Given that this was his view, however, there is a greater onus on him to take steps to ensure that he is able to do this. All that he was required to do was check his emails every few days. His decision not to do that is within his rights but he must accept the downside.

43. Not enough time to deal with objectives; The claimant complains that the microteaching session was not sufficiently long to be a fair process. He also complains that it was not an appropriate method. I agree with him that 18 minutes is a short time over which to assess a teacher. However, the session was for 30 minutes and he was able to show how he deals with a classroom situation over all of those 30 minutes. Part of the assessment was also a lesson plan, which he did not provide. I don't accept that it was not enough time but, even if the claimant is right about that, he has not shown how he would have done anything differently. I disagree with the claimant that microteaching is not an appropriate tool for assessing teachers, only for assessing new hires. In the circumstances of the previous lesson observations, the respondent was entitled to decide that it was not appropriate for him to teach real students until his performance had been monitored and the microteaching was the next best option. It gave him an opportunity to show what improvements he had made. It would not have been necessary to show that everything had been corrected, just that he was taking on board the comments and taking steps to change his teaching methods. Unfortunately, he did not take this opportunity.
44. Issue of witnesses at hearings: the claimant has failed to identify what prejudice he suffered by any decision not to allow this witness evidence to be heard. The witness testimony did come out ultimately and none of it was relevant to the issues under discussion in the capability process as it related to historic years. It is not in dispute that the claimant was a successful teacher in previous years when the techniques and approach were different. The issue for the capability procedure was whether he was able to adapt.
45. Lack of meaningful support: the claimant has not identified what meaningful support he was lacking. He was provided with additional training and, at his request, with a laptop. He was asked during the process if he needed additional support and he could not think of anything. In his submission he refers to there being no support but has not said what support he believes he should have received but did not receive. I do not find that this amounts to an unfairness.
46. Alternative employment: the claimant has not identified any roles for which he believes he should have been considered. It is not unreasonable, as alluded to by

the claimant himself, for an employer who has dismissed an employee for capability not to offer that employee another position in the role which he has just been dismissed from. I do not find any unfairness in this element.

47. In conclusion, the claimant has identified a number of procedural failings. I do not agree that these were substantive failings but, even if I were to accept that there were some procedural flaws, looking at the process as a whole, I must consider whether the respondent acted within the range of reasonable responses. I find that the respondent identified the shortcomings with the claimant's performance. These were identified by a number of independent observers, all of whom reached substantially the same conclusion. The claimant was given several opportunities to improve and a level of support in trying to achieve that. He was consulted at every stage and given an opportunity to put his case, which he did. He was given an opportunity to appeal at every stage, which he did.

48. Throughout the process, the claimant has not properly engaged with the substance of the complaints against his performance. He has not argued that he did in fact achieve the improvements required. He has, on several occasions, indicated that he does not intend to change the way that he teaches. The assessments of his performance have been carried out by a number of experienced observers, who provided feedback to the claimant. He did not appear to accept the feedback and was unable to show whether he had taken any suggestions on board and, if so, how. There was nothing from the claimant which suggested he was interested in adapting his teaching style or engaging with a performance improvement process. In the light of this, the procedural complaints do not address the fundamental issue. I find that, taking all the circumstances into account, the respondent was entitled to treat the claimant's performance as a sufficient reason to dismiss and that they carried out a fair process, with dismissal as an appropriate sanction.

49. In conclusion, the claimant's claim fails and is dismissed.

Employment Judge Davidson
Date 24 February 2022

JUDGMENT SENT TO THE PARTIES ON

25/02/2022.

OLu.....

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.