EMPLOYMENT TRIBUNALS

Claimant: Mr F Ghanaati

Respondent: South West London and St George's Mental Health NHS Trust

Heard at: London South **On: 11 and 12 January 2022**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: in person
For the respondent: Ms Ibbotson, Counsel

RESERVED JUDGMENT

Decision

The claimant's claim for unfair dismissal under S.94/98 Employment Rights Act 1996 is not well founded. The claim fails. The claimant was not unfairly dismissed.

Reasons

Claims, appearances and documents.

1. This was a claim for unfair dismissal under S.94/98 of Employment Rights Act 1996 ('ERA').

2. The claimant appeared in person; the respondent was represented by Ms Ibbotson, Counsel.

3. The Tribunal heard from the claimant and for the respondent, Mr Mervyn Hughes, (currently the Client Server Manager, formerly the respondent's IT Systems Administration Manager and the claimant's line manager) Mr David Lee, (Trust Secretary and the dismissing officer) and Ms Sharon Spain, Director of Nursing and Quality and the appeals officer). All witnesses had produced witness statements.

4. The Tribunal also had an electronic and hard copy bundle comprising 1270 documents.

5. Although the issues were not agreed, it was apparent that the claimant's version contained factual assertions/narrative rather than the pure legal issues. The legal issues were not in dispute. The respondent was asserting capability as its potentially reason for dismissal.

6. At the outset of the Hearing, the Tribunal announced and expressed concern at the size/volume of the bundle and the pre-reading required. The witness statements ran to 70 pages and the Tribunal estimated there may be about 100 or so pages referred to in the witness statements to pre-read. This would take approximately 3 hours leaving the remainder of the day and the morning of day 2 for all the evidence to be completed and submissions too. This was to ensure at least enough time for live deliberation even if delivering an oral Judgment was unlikely.

7. Following lengthy discussion with the parties, it was agreed that the case was to start and complete on this basis, even if this led to a reserved Judgment. Tribunal Deliberation time was to be protected and not encroached.

8. The Tribunal agreed to allow the respondent's counsel 1.5 hours of cross examination time and the claimant between 40 to 50 minutes per witness based on 8 to 9 prepared questions the claimant said he had. The parties were cautioned expressly that the case would be managed to ensure a finish (evidence and submissions) by lunchtime on day 2. If that presented a challenge, now was the time to raise any concern, objection or to make any application, including for a postponement and re-listing. None were forthcoming.

9. Preliminary matters concluded at 11.00 am and it was agreed that there was only enough time for the Tribunal to read witness statements. The Tribunal was not directed to any essential pre-reading. The respondent said only the witness statements were sufficient. The claimant was asked if he considered earlier conduct and subsequent grievance processes relevant. He said they were but did not direct the Tribunal to read any documents at this stage. He said he would take the Tribunal to relevant documents during his questioning of the respondent's witnesses. This discussion on documents was important as if the Tribunal was expected to read several hundred documents within the 1270 page bundle, there was a real risk that the Hearing would not complete in this sitting leaving a highly undesirable prospect of the case going part-heard.

10. The Tribunal of its own volition asked for the page reference for the disciplinary outcome letter in 2016 and the subsequent appeal outcome and was given this – pages 370 & 384.

11. In the end, the claimant spent over 1 hour and 30 minutes with Mr Hughes though this was partly owing to assistance necessary from the Tribunal to steer the claimant to asking questions rather than providing a narrative or commentary.

12. To claw back some time, the Tribunal started evidence at 9.45am on day 2 with the agreement of the parties.

13. The respondent's counsel provided written submissions which were supplemented orally. The claimant provided oral submissions.

Findings of Fact

14. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the relevant evidence/documentation during the hearing, including the documents referred to by the parties and taking into account the Tribunal's assessment of the evidence.

15. Only findings of fact relevant to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if a party referred the Tribunal to the document and it was considered relevant.

16. The claimant was employed as a Band 6 IT Senior Systems Administrator until his dismissal with effect from 17 February 2020. The claimant was previously a Band 7 Deputy Systems Administrator but there was no issue in this case about his move to Band 6.

17. The respondent is an NHS Trust providing mental health services.

18. The claimant reported into Mr Hughes and was part of the Systems Administration team which provided the third level of IT support. This was for the more complex queries. The team consisted of more junior Band 5 employees including Ricky O' Brien and Jason Morgan. The main role of the team was to maintain the servers and applications within the Trust and to ensure connectivity and access to all available systems.

19. Mr Hughes joined the Trust in July 2015. When he joined the Trust he was informed by his predecessors, Marvin Robinson and Ian Rogers he was going to face significant challenges in his role and in relation to the claimant, he was not operating at a sufficiently high level. Mr Robinson who was a contractor in post, described the claimant as not doing the job of a deputy and being of 'no value'; Mr Rogers had also raised concerns and wanted to go down a coaching and mentoring route (page 547 & 553).

20. On 25 January 2016, the claimant was issued with a final written warning for 18 months following a disciplinary process relating to 4 conduct issues (which were performance related). As part of the outcome, a performance/capability process was also recommended (pages 370-374).

21. The final written warning was reduced on appeal to a first written warning, for 12 months. This was on 13 April 2016. The appeal in relation to the most serious allegation relating to neglect of a procedure resulting in 'catastrophic' system failures was rejected. The recommendation for a performance/capability procedure was also reaffirmed. In relation to one of the allegations, it was said

that it did not require a disciplinary process, though the panel were critical of the claimant's communication with his manager Mr Hughes about documents requested by him (pages 387-388).

22. The process into the claimant's performance and capability concerns was commenced in April 2016 (pages 389-390). The claimant was expressly told he needed to undertake the more complex Band 7 (at the time) tasks.

23. There was a dispute in this case about who would allocate work to the Band 5 administrators. Mr Hughes said it was initially the claimant's responsibility, subsequently that members of team could assign tickets to themselves (paragraph 10 of Mr Hughes' witness statement). In addition, that on occasions, Mr Hughes had to assign more complex work to Band 5 employees as he did not consider that the claimant could do it. Mr Hughes had referred to a task relating to a SSL certificate which he had asked the claimant to do, which he could not. So he did it himself. He had also asked questions of the claimant regarding servers and passwords which he had not been able to assist with (page 553). The disciplinary issue which had led to a warning had also occurred early on in Mr Hughes' line management of the claimant.

24. The claimant appeared to suggest that if Band 5 were doing more complicated work, this was because that work had been assigned/allocated by Mr Hughes. Whilst this was not entirely consistent with paragraph 6 of the claimant's witness statement, it was partially correct based on the Mr Hughes' decision to assign work to those Band 5 employees directly.

25. There was a rather inexplicable delay after commencing the process in April 2016 and it being, essentially re-commenced in September 2018, about 2.5 years later. Mr Hughes' explanation was the unavailability, twice, of HR support owing to changes in the team, which the Tribunal found to an inadequate explanation and answer for a delay of this length.

26. The Tribunal were taken to an email exchange in April/May 2018, where it appeared that Mr Hughes was trying to resurrect the process, albeit that he thought he was already at stage 3 in the capability procedure. In oral testimony he accepted this was an error/mis-understanding on his part.

27. When the process re-commenced in September 2018, by this time, Mr Hughes was also receiving complaints from Band 5 System Administrators that they were being allocated/or picking up the more complex tasks which the claimant as a Band 6 should be undertaking. The Tribunal found that the complaints about the Band 5 level of work (from those employees) occurred through a combination of more complicated work being allocated to them by the claimant and Mr Hughes and because of the claimant taking less complex work himself.

28. In his meeting on 6 September 2018, Mr Hughes specifically referred to the example of swapping back-up tapes which he said was a Band 5 function.

29. In oral testimony, Mr Hughes also gave an example of a lower level 'ticket' being the resetting of a password which should not have been work retained

by/undertaken by the clamant at his level. This was not challenged by the claimant.

30. In the informal capability meeting on 13 September 2018, Mr Hughes referred to a complaint from Pharmacy in relation to outage time and he also referred to an outstanding task from July 2017 relating to SSL certificates (pages 427-428). The minutes recorded that the claimant accepted objectives had not been met and these minutes were not challenged.

31. A 4-week action plan was agreed and 4 tasks were set (pages 422-426).

32. Review meetings in relation to those tasks took place between 21 September 2018 and 12 October 2018. At the meeting on 21 September the claimant's BAU work was reduced to 1 hour per day.

33. At the review meeting on 12 October 2018 (pages 432-436), it was noted:

    - that in relation to the 'replacing the Vcenter at Springfield and Tolworth task', only 50% had been completed.

    - In relation to the 'Set up DMZ at Tolworth task' this had not been completed, with several listed tasks outstanding. It was also noted that there was a complaint about the delay in this project.

    - In relation to the Reconfigure VCenter Clusters at Springfields task, no work had been carried out.

    - In relation to the Migrate all Finance team shares to new SAN from netapp storage task, whilst data had been copied over, the task was not complete.

34. The claimant explained he had to undertake research and that there was troubleshooting, further that the nature of IT was to have problems and work through them and that he had to wait on other people too. Mr Hughes remarked in his witness statement that the claimant was very aggressive at this meeting. Whilst not noted in the minutes, in was referenced at the outset of the next meetings (pages 438 & 439) when it was explained why Mr Hughes wished to have an additional person present at the meetings. (Mr Liam Ford, Head of Application Development) attended subsequent meetings).

35. The claimant had a stage 1 capability meeting on 30 October 2018. In the invitation letter, he was sent a copy of the policy too (page 437). The claimant was accompanied at this meeting by his union representative, Mr Suresh Desai. The four tasks had not been completed and the second task had been completed by Mr Hughes. Ms Gurjit Kundhi (HR) was also in attendance.

36. This was conveyed to the claimant in the outcome letter (page 452-453) and the claimant was set 2 additional tasks:

- Windows servers set to receive updates
- Sprhub02-v decommissioned

37. The claimant's performance would be reviewed over 4 weeks (to 30 November 2018).

38. The claimant raised a compatibility issue which affected tasks 1 to 3. Following discussions with Mr Hughes, the tasks were tweaked accordingly and the claimant was given more time (pages 466-468).

39. The claimant had further meetings with Mr Hughes in November and December 2018 in relation to the outstanding tasks. In the meeting on 13 December 2018, Mr Hughes expressed disappointment that in the previous 13 weeks, none of the tasks had been completed and this he would be moving to stage 2 (page 488).

40. A stage 1 review meeting took place on 6 February 2019 (the claimant was accompanied and HR were in attendance) and the claimant was informed that the matter was progressing to stage 2 by a letter dated 12 February 2019 as his 6 tasks remained incomplete. Comments were expressed in the letter in relation to his progress, including where a task was partially complete (page 504-505). This meeting had been delayed due to the festive period and the union representative's unavailability giving the claimant more time. The letter expressly stated that the claimant appeared only to be comfortable with BAU work.

41. On 15 February 2019, the Stage 2 process began and the claimant was put on a third action plan. The claimant was given 7 additional tasks on top of the 5 outstanding (1 had been completed by Mr Hughes):

- Archive old TS servers
- Consolidate Certificate Servers
- Consolidate Terminal Servers
- Reinstall SPRESX08
- Patch VMware estate
- Resolve errors on VNX

42. A formal stage 2 meeting took place on 15 March 2019 and the outcome at that meeting was to issue the claimant with a formal caution about his capability for 12 months. At this meeting Mr Hughes commented he needed technical support and that the claimant's role couldn't come with instructions. He needed someone stronger, he felt his role should be done with ease (page 542). It was mentioned that the claimant may be suited to another role. (In one of the review

meetings (4 March 2019), Mr Hughes had also commented that he may need to take over task 1 (page 533). None of the 12 tasks had been completed.

43. The respondent confirmed the outcome of this meeting by a letter dated 2 April 2019 (page 557-558). This included reference to redeployment option for the claimant to comment on in 5 days. The claimant's right of appeal was also set out. There was a dispute about the claimant receiving this letter, in particular knowing he had a right of appeal. This was addressed in the claimant's appeal against dismissal when the appeals officer found that this would or should have been known in any event as the claimant had previously been sent the policy and was being represented by his union representative from Unison who would have known or ought to have known of the existence of the right (page 773).

44. A review meeting in relation to the tasks was scheduled for 17 June 2019. This was re-scheduled to 6 August 2019 upon the claimant's request for more time owing to the claimant's sickness absence between 25 March and 15 May 2019. This was agreed (1020-1021, 602 – 603).

45. The claimant was asked to focus on 7 tasks at a review meeting on 20 May 2019 (570-574). By this time, the task in relation to Replace Vcenters at Springfield and Tolworth had been completed by Mr Hughes due to the impact of the delay. This was in addition to the DMZ at Tolworth task also previously completed by Mr Hughes. The tasks to focus on were as follows:

    - Reconfigure Clusters
    - Migrate the Finance team
    - Replace SWUS server
    - Decommission SPHUB02-V
    - Archive TS Servers
    - Consolidate Certificate servers
    - Replace DHCP Cluster

46. At a review meeting on 6 August 2019, the claimant was informed that he had completed 3 of these tasks. 4 had not been completed. In particular, the claimant had not completed the finance task (to move finance data to the new storage system). This task was ultimately completed by a band 5 employee. It was decided to move the case to stage 3. The claimant was accompanied at this meeting by his union representative, HR were also in attendance (pages 608-609).

47. A Comprehensive management statement of case was prepared in advance of the stage 3 meeting. This was pages 615-629.

48. The claimant was invited to a stage 3 capability meeting by a letter dated 19 November 2019 to take place on 5 December 2019 before Mr Lee, the Trust secretary. The claimant was accompanied. This letter forewarned the claimant that his employment may be terminated. The letter also referred to redeployment and demotion as alternatives too. The capability procedure was included as well as the management statement of case and the claimant was advised of his right to be accompanied pages 635-636.

49. The minutes of the meeting were at page 637-648. The notes were taken by an administrative officer, Mr Nwafor. The claimant challenged whether the minutes were accurate, in particular, as the claimant said they were not verbatim. That in itself was not in dispute. The claimant was asked at the Tribunal Hearing in what respect the minutes contained a material error or material omission but none were forthcoming. None were notified at the time either. The outcome letter referenced the minutes though it was not clear whether these were enclosed or received otherwise. Mr Cavaye, CIO and Director of digital of an external Trust (Surrey and Borders Partnership) was also asked to attend as an external IT expert. No objection was raised at the time.

50. At the outset of the meeting Mr Lee discussed the claimant's request that the meeting should not take place as he had not been informed of his right of appeal from stage 2. Mr Lee decided not to postpone the meeting noting that it was clear that there was a right of appeal (page 177, 179), that the claimant had received a letter and that the meeting he was conducting itself had a right of appeal. He also had regard to the claimant receiving support from his union representative. (The claimant also said at this meeting that he had been told at the meeting on 15 March 2019 that he could not appeal. There was no comment in this regard from his union representative).

51. At this meeting, the claimant did discuss that he felt the case against him was historical. He made reference to the earlier disciplinary process too. The claimant cited the Windows Migration project in respect of which he believed there had been errors (by others) but that no-one had been taken to task (page 643). He also said he had been asking for VMware training which he said had not been provided (in oral testimony. he said this went to one/his first task only) (page 644). There was a lot of discussion around the finance move task, the issue with which the Tribunal understood to be about the lack of prior testing before the migration. In relation to this the claimant commented "*At that time, because of the time, I didn't have the time to do the checks'* (page 645).). In response to questions about whether the claimant felt he needed support, which he was asked twice, he said he did not need any support. At the Tribunal Hearing the claimant said he understood this question to be about his role generally, not in relation to the tasks assigned (for which he was in a capability process and hearing) (page 646). The Tribunal found this to be a strange remark. The claimant also said he had completed all of the tasks assigned which he must have known to be an inaccurate remark (page 647). He did not address the tasks (task by task) at this hearing. In summing up, the claimant's union representative said the claimant had been culpable, but that there were issues with the wider IT department.

52. A decision was reserved. Thereafter, Mr Lee deliberated on his decision with the support of Ms Akpobome (HR). The input of Mr Cavaye appeared limited to his endorsement that the tasks which had been set for the claimant were at band 6 level. This was in fact discussed at the meeting too (page 646) and the claimant did not say he could not do them. Mr Lee found that Mr Hughes had provided comprehensive evidence of non-performance over a lengthy period which the claimant had not addressed save for anecdotal examples.

53. Redeployment into another role in the same team was considered but rejected based on Mr Lee's assessment of the antagonism of the claimant towards Mr Hughes and also because he was not satisfied that Mr Lee could (continue) to operate at Band 6 level. The Tribunal was not taken to a live/vacant position which existed or how this could, hypothetically, be implemented. Demotion was also considered but rejected as Mr Lee found that the claimant had not demonstrated he had sufficient specialist skills in his current role which would equally be required for a Band 5 role. Again, the Tribunal was not taken to a live/vacant position which existed or how this could, hypothetically, be implemented.

54. Following these considerations, the claimant was invited to an outcome meeting on 17 December 2019, when the decision to dismiss him was conveyed. The Tribunal accepted this was a brief meeting. The claimant was dismissed with 8 weeks' notice, his last day of employment being 17 February 2020. In the light of the performance concerns, the claimant was not required to work out his notice. The outcome letter was at page 649-652. The claimant was given a right of appeal.

55. The claimant exercised his right of appeal. His grounds of appeal were set out in a letter dated 27 December 2019 (pages 655-656). His grounds were as follows:

    - The claimant said he was not given enough time to explain and defend his case fully and there was no consideration of his explanation or the circumstances leading up to the dismissal.
    - Untrue allegations were made by his line manager, Mr Hughes.
    - There was a biased decision at Stage 3 and no investigations were carried out.
    - The Stage 3 Outcome Meeting took only 10 minutes.
    - At the Stage 2 Meeting on 15 March 2019, the claimant was deliberately given wrong information regarding the right to appeal at Stage 2.
    - There had been a breach of confidentiality as the note taker at the Stage 3 Hearing was not a member of the HR Team.

56. The appeal hearing was chaired by Ms Sharon Spain, Director of Nursing and Quality with supporting HR. The meeting was a hybrid meeting (owing to Covid related matters), some attendees were present remotely. The claimant was accompanied by his union representative. The minutes of the appeal hearing were at pages 747 to 767. The claimant challenged whether the minutes were accurate, in particular, as the claimant said they were not verbatim. That in itself was not in dispute. The claimant was asked at the Tribunal Hearing in what respect the minutes contained a material error or material omission but none were forthcoming. None were notified at the time either. The outcome letter did not reference the minutes and it was not clear when these were sent to the claimant, but the claimant did not say he did not receive them at the time.

57. There was a comprehensive statement of case submitted by Mr Lee in advance of the appeal hearing (pages 663 to 740) which the Tribunal found had also

been sent as an 'E-pack' to the claimant and his accompanying union representative. This was apparent from an email thread referring to the E-pack attached in the lead up to the Hearing on 8 July 2020. The Tribunal found there was a delay in arranging an appeal hearing, though noted that the claimant had been unavailable for an appeal hearing on 24 March 2020 which had been the first date set.

58. At the appeal hearing, it was made clear that the appeal hearing was not to re-hear the case against the claimant. The claimant referred to maintaining a diary on his laptop which contained evidence of his work which he had said he had mentioned but which was not referred to at his previous hearing. It had not been provided in advance of that hearing too (page 753). The claimant also referred to other staff of the Trust also putting the Trust data at risk. Mr Lee confirmed he had placed reliance on the views of the external IT expert who had attended the previous hearing (page 755). The claimant also believed that the IT expert (Mr Cavaye) was acquainted because he was from the Surrey and Borders Trust and Mr Dowsett and Mr Hughes had worked in Surrey. This was subsequently discussed at the hearing but without any specificity around the nature of any alleged conflict of interest. In his evidence for the Tribunal hearing the claimant asserted this was about Mr Dowsett's (the respondent's Associate IT Director) wife also working at that Trust. At the appeal hearing, Ms Spain discounted any suggestion of bias as she maintained that individuals were professionally accountable and she had no evidence of actual bias. The claimant was asserting at the time, the possibility of an acquaintance rather than actual acquaintance. It was also noted that it was the claimant's union representative who had actually suggested the attendance/inclusion of an external it expert (759, 762-763).

59. The claimant also made references to the tasks not completed or completed by others were 98% completed by him (759, 764) but he did not break this down by task, other than the finance migration task. The claimant also said he had agreed to do the tasks under protest but was not specific about which action plan/objectives he was referring to and his union representative did not recall being present at such a meeting (764). The claimant said he did not receive the stage 2 outcome letter giving him a right of appeal. His union representative said he did not get the letter ether (765). The union representative did not say that at the meeting on 15 March 2019, the claimant was told he could not appeal.

60. Following the appeal hearing, Ms Spain deliberated and rejected the claimant's appeal. Ms Spain was satisfied that the Stage 3 hearing had lasted for about 4 hours which was a sufficient period for the claimant to state his case. She decided the claimant had not presented evidence that he had completed the 12 tasks set. She rejected there had been any bias or that further investigation was required. He had been given ample opportunity through the capability process in relation to the tasks set, with union support throughout. The outcome meeting on 17 December 2019 had been short (about 10 minutes) but this was simply to convey the decision following deliberation after the hearing on 5 December 2019. In relation to the stage 2 process, Ms Spain referred to the capability process which he been given a copy of (containing his right of appeal), the

issuance of a letter on 2 April containing the right and his support from a union representative throughout the process, thus concluding he would have been aware of his right to appeal stage 2. Regarding the note-taker, Ms Spain concluded there had been no breach of confidentiality. All employees were bound by confidentiality regarding internal proceedings.

61. Ms Spain's outcome letter was at page 769-774.

62. The claimant asked for a copy of the audio recording of the appeal hearing. It was not forthcoming. Indeed, it formed the subject of a disclosure application which was resisted on the basis that the decision was not reached with the aid of a recording. At the Tribunal Hearing, Ms Spain confirmed that the recording had been deleted as it was normal protocol to delete recordings of hybrid hearings. This was accepted.

63. It is right to record in these findings that the claimant had also invoked the grievance procedure in relation to various matters. The Tribunal got little assistance from the parties in this regard, the respondent had elected not to lead evidence on the grievances (they were entitled to not do so) and the claimant made broad assertions that none of his grievances were dealt with. The Tribunal was not directed to read any documents, no page numbers were referenced and the Tribunal had to use its own best judgment to ascertain which documents might be relevant. This was against the backdrop of the Tribunal explaining clearly that it should be directed to read relevant documents only in a Bundle of 1270 pages where there was extremely limited time available to prevent a postponement.

64. The Tribunal understood the claimant had raised a grievance on 16 November 2018 essentially in relation to the manner and fact of the implementation of the capability procedure against him (480-483). His grievance was against Mr Hughes and Mr Dowsett, Associate Director, IT Modernisation.

65. This grievance was the subject of a comprehensive investigation undertaken by Mr Christopher Barton, Associate Director of HR, resulting in reports dated 21 June 2019 (pages 577-601) rejecting the grievances. Whilst there was a recognition that the capability procedure had not been followed as it should have (largely because of the delay in it being invoked/started), the capability procedure was an appropriate course of action for Mr Hughes to take (page 600).

66. This outcome was conveyed in a meeting on 16 July 2019. The claimant appealed and this was acknowledged and a process commenced on 28 August 2019 by Mr Phillip Murray, Executive Director of Finance and performance (pages 613-614). The Tribunal found that it was not concluded thereafter.

67. A separate grievance was raised by the clamant on 20 February 2019, specifically in relation to remarks he said were made to him about his performance during the capability procedure (526). This grievance was combined with the claimant's earlier grievance of 16 November 2018 – this was

clear from the terms of reference (page 589) and from HR's email of 25 February 2019 (1018).

68. A separate grievance was raised on 18 December 2019 about moving from stage 2 to stage 3 without allowing an appeal against stage 2 (page 1119). The Tribunal found this was not concluded. Further, that the respondent's letter of 28 August 2020 closing down the claimant's grievance (page 776) either referred to this grievance or the grievance appeal against the 16 November 208/20 February 2019 grievance – or both.

Applicable Law

69. Pursuant to S. 98 (2) Employment Rights Act 1996 ('ERA'), an employer needs to have a potentially fair reason for dismissal. The burden is on the employer to establish the reason. Capability is one of the reasons and is relied upon by the respondent in this case.

70. Pursuant to S.98 (4) ERA, the Tribunal needs to be satisfied, having regard to the reason shown, that the employer acted reasonably in treating that reason as a sufficient reason for dismissal. This is a neutral burden.

71. In capability cases, the two-stage test from ***Alidair Ltd v Taylor [1978] ICR 44*** may be applied: the Tribunal must be satisfied that the employer honestly believed that the employee was incompetent or unsuitable for the job and the grounds for that belief were reasonable.

72. The Tribunal must also have regard to the 'range of reasonable responses' test. It has long been established that, under section 98(4), a Tribunal must assess objectively whether dismissal fell within the range of reasonable responses available to the employer. Whether or not the Tribunal would have dismissed the employee if it had been in the employer's shoes is irrelevant: the Tribunal must not "substitute its view" for that of the employer. (***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439)***. The range of reasonable responses test applies not only to the question of whether the sanction of dismissal was permissible, but also to that of whether the employer's procedures leading to dismissal were adequate. (***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).***

73. In ***Davies v Sandwell MBC 2013 IRLR 374*** the Court of Appeal confirmed, regarding previous warnings:

"…*it is not the function of the ET to re-open 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.

Thirdly, it is relevant for the ET to consider whether the final warning was issued In good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning. They are material factors in assessing the reasonableness of the decision to dismiss by reference to, inter alia, the circumstance of the final warning."

74. In ***Hadjioannou v Coral Casinos Ltd*** **[1981] IRLR 352** the EAT said in relation to an argument about alleged disparity in treatment:

"It is only in the limited circumstances that we have indicated that the argument [that is the disparity argument] is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar or sufficiently similar to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by [the equivalent of s98 of the 1996 Act]. The emphasis in that section is upon the particular circumstances of the individual employee's case."

Conclusions and analysis

75. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not be cross-referenced below unless the Tribunal considered it necessary to do so for emphasis or otherwise.

76. The Tribunal concluded that the respondent's belief in the claimant's underperformance/lack of capability was genuine. There was no ulterior motive or competing reason before the Tribunal. The claimant's performance had in fact been questioned by both of Mr Hughes' predecessors. The capability process was slow to commence and there was a rather lengthy delay in the prosecution of it. In the end however, the Tribunal concluded this did not work adversely for the claimant at all. The Tribunal was not sitting in judgment on why the employer had taken so long to properly take the claimant through a capability procedure. On the contrary, if Mr Hughes had been orchestrating a campaign to dismiss the claimant, he may well have decided to accelerate the capability process on the back the disciplinary outcome or sought to look for a further performance concern, potentially advanced as a conduct reason, within the live period of the 12 months disciplinary warning.

77. The Tribunal also concluded the respondent had reasonable grounds for its belief. The overall capability process when it was commenced lasted 15 months. The capability procedure was task focused. Ultimately it was not disputed that the claimant had not undertaken 9 of his 12 assigned tasks. Some had to be completed by Mr Hughes and/or reassigned. The respondent did not consider partial completion sufficient. The respondent did not get a task based

or task focussed response from the claimant at the key stages in the capability procedure. That lack of focus became the claimant's key problem at stage 3 and in the appeal thereafter. The respondent expected and was entitled to expect such focus. It was very surprising that the claimant did not realise or appreciate that he was being managed through what became a formal process which required him to assess his performance against each task and manifest in the meetings what he had or had not done with clarity on a task-by-task basis. He was supported and accompanied throughout by his union representative who would have known or ought to have known exactly what was required. This point was made express at the appeal hearing (page 753). He was in a process by stage 3 where termination was option and after that, the claimant was trying to overturn a dismissal. He was the author of his own misfortune in this regard. There was not even cross examination of the respondent's evidence on this basis or by reference to any uploaded comments by reference to each task.

78. The claimant on occasions, referred to his belief in sub-performance or errors by others. There may have been some merit in his assertions, indeed Mr Hughes accepted in testimony that there were some delays/errors with other projects but which the Tribunal understood to be within a margin of acceptance. There was a lack of evidence however, of comparable individual error. The claimant's assertions were anecdotal and provided a wholly inadequate basis for a like for like comparison or argument on alleged disparate treatment. The claimant had responsibility for 12 tasks, 9 of which had not been completed. There was no comparable evidence of others in this regard. The claimant had been on an earlier disciplinary warning; he had also been through an informal stage, a formal stage 1 and formal stage 2 resulting in a 12 months capability warning, by the time of his stage 3 capability hearing (which led to his dismissal). ***Hadjioannou*** applied.

79. In relation to his 12-month capability warning, (to the extent that it was being argued or asserted), the Tribunal concluded that it was not issued in manifestly inappropriate circumstances. It was open to the respondent to do so and it was a legitimate sanction to apply having regard to the respondent's assessment of his under performance by reference to the tasks set and progression through the stages of the procedure. ***Davies*** applied.

80. The Tribunal concluded that the decision to dismiss the claimant was both procedurally and substantively within the range of reasonable responses. The respondent considered but rejected the possibility of redeployment or demotion. It was open to the respondent to conclude that the claimant's skills and performance no longer rendered him capable to be employed as a Band 6 employee or as a Band 5. (The Tribunal did not have evidence to conclude that there was in fact a Band 5 position available). The claimant had not demonstrated sufficiently or at all that the tasks he had been set were unreasonable or unfair in terms of the technical level, timescale or volume. In fact, the claimant did not say the tasks set were not band 6 'level'. In oral testimony, he did say he raised this with Mr Hughes but this evidence was rejected as not being consistent with his position at the time. The Tribunal was not taken to any contemporaneous email, note or document about this. The

obvious time to raise this (at the latest) would have been in his appeal letter (against dismissal), but there was nothing in there about this point. The claimant also accepted that it was not a question of additional support required and his reference to VMware training was narrowed to one task only. The claimant was afforded sufficient time to address the concerns, by the length of time the process took, including unforeseen delays and his sickness absence resulted in a commensurate extension of time. The issue about whether the allocation of the more complex work was down the claimant (or Mr Hughes or the Band 5 employees) ceased to be prevalent. The core issue was about completion of the band 6 tasks the claimant had been assigned/set.

81. The Tribunal had regard to the grievances the claimant had raised and concluded that the key grievance was the grievance raised on 16 November 2018 which formed the subject matter of a comprehensive (independent) investigation and an outcome which confirmed it was appropriate and proper to invoke the capability procedure. Whilst an appeal was not heard, the issues in that grievance overlapped significantly with the capability procedure and the claimant had a right to challenge and defend the case against him before 2 other independent officers – Mr Lee and Ms Spain. The level of separate/independent scrutiny was thus considerable. If there was a conspiracy/witch-hunt, which appeared to be the claimant's case, this would have required the Tribunal to cast doubts on the integrity or independence of mind of Mr Barton, Mr Lee, Ms Spain which the Tribunal rejected. Such a conclusion would also overlook the views of Mr Hughes' predecessors who both had offered views that the claimant was not performing/operating at the level for his position. It would also overlook what the claimant perceived to be the genesis of the issues – the disciplinary warning issued by David Green, Director of Information Management & Technology, upheld (though reduced) on appeal by Mr Mark Clenaghan, Head of Operations. Both of those individuals recommended/supported the instigation of the capability procedure. That would bring further independent senior personnel into the firing line. It was simply not plausible that such all of these individuals had made bad judgments on the claimant's conduct or capability.

82. The stage 2 grievance was essentially addressed through the stage 3 and appeal against dismissal process and a decision was reached which was open to the respondent, the most compelling of which was that (regardless of whether the claimant received the letter of 2 April 2019) his union representative from Unison would have known of his right of appeal against stage 2. Alternatively, the Tribunal concluded that any procedural issue in this regard was cured by the subsequent stage 3 (and appeal against stage 3 process). It was open to the respondent to find that the claimant's capability had not reached a stage 3 matter in any of those subsequent processes.

83. The Tribunal concluded that the historic delay in relation to the capability process, delay in the appeal process and the non-dealing of a grievance appeal, which might have been matters contributing and relevant in say a constructive unfair dismissal or a discrimination complaint, did not, in the circumstances of this case, infect the decision to dismiss.

84. The Tribunal concluded that the presence of Mr Cavaye at the stage 3 hearing and his input did not infect the decision to dismiss by reason of actual or perceived bias. At the time, there was no objection. The Tribunal rejected it was raised at this stage as claimed in paragraph 73 of the claimant's witness statement. If it had been, given the claimant's reliance on the point, he would have, more likely than not cited it in his appeal grounds. By the time of the appeal hearing, the objection was limited to the *possibility* that he *may* be acquainted with Mr Dowsett or Mr Hughes. That was not, without more, sufficient to disqualify his involvement. His contribution was to support the technical aspects of the tasks set, which were not in fact disputed by the claimant. Put differently, it was not the claimant's case he had been set tasks to do above his grade Paragraph 23, Mr Lee's witness statement).

85. The Tribunal formed an overall impression that the claimant felt he was being closely monitored/scrutinised in relation to his performance; but that was the inevitable consequence of being taken through a capability procedure. It is not uncommon for that to be difficult or stressful, but the question of the employer's fairness and reasonableness in so doing, is altogether a separate consideration.

86. The claimant made reference to tasks being 98% complete and in oral testimony he referred to '99 %' but these assessments were either unsupported or lacked any specificity or clarity. The Tribunal attributed such remarks and assertions to the generality and degree of casualness with which the claimant appeared to treat the capability process (he made similar remarks at the Tribunal Hearing stating that 'none of his grievances were dealt with' and he said when he raised the presence of Mr Cavaye at the stage 3 meeting with Ms Spain, she had said 'nothing'. Both of these comments were wholly inaccurate). Alternatively, the respondent was entitled to conclude that the claimant's aptitude was such that the tasks were not completed at all or fully and/or within a reasonable time frame.

87. In pursuance of the foregoing analysis, the claimant was not unfairly dismissed. The claim fails.

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Employment Judge Khalil

21 January 2022