



EMPLOYMENT TRIBUNALS

Claimant: Mr. T. Chisman

Respondent: British Sugar Plc

FINAL HEARING

Heard at: Bury St Edmunds Employment Tribunal (in person)

On: 20 and 21 June 2022

Before: Employment Judge Mason

Appearances

For the Claimant: Ms. Joanna Bradbury, counsel

For the Respondent: Ms. Eleanor Wheeler, counsel

RESERVED JUDGMENT

The decision of the Tribunal is that the Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Background

1. The Claimant had continuous service with the Respondent since July 2009. Latterly his role was Planning Manager.
2. The Claimant was dismissed by the Respondent on 5 August 2020. The Respondent says the Claimant was dismissed on grounds of capability.
3. The Claimant contacted Acas on 27 August 2020 and an Early Conciliation Certificate was issued on 27 September 2020.
4. The Claimant presented this claim on 20 October 2020; he claims he was unfairly dismissed and that his dismissal was unfair both on the merits and procedurally. The Respondent submitted a response on 14 December 2020 defending the claim.

The issues

5. As discussed and agreed with the representatives at the outset, the issues are as follows:
6. What was the principal reason for the Claimant's dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)?:
The Respondent asserts that it was a reason relating to the Claimant's capability which is a potentially fair reason.
7. If the principal reason for dismissal was a fair one, was the dismissal fair or unfair in accordance with section 98(4) ERA, and, in particular, did the Respondent in all respects act within the so-called "band of reasonable responses"?
8. Did the Respondent honestly believe that the Claimant was incompetent or unsuitable for his job and were the grounds for that belief reasonable?
It is not necessary for the Respondent to prove that the Claimant was in fact incapable or incompetent.
9. Did the procedure followed fall within the range of reasonable responses of a reasonable employer?
10. Did dismissal fall within the range of options available to a reasonable employer in the circumstances?
It is the Respondent's conduct which must be assessed and it is not for the Tribunal to impose its own standards
11. If the Claimant was unfairly dismissed and the remedy is compensation:
 - 11.1 Should any compensation awarded be adjusted to reflect any failure on the part of the Claimant to take reasonable steps to mitigate his loss?
 - 11.2 **Polkey:**
If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed on 5 August 2020 or have been dismissed in time anyway?
 - 11.3 Contributory conduct:
 - (i) Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal pursuant to s122(2) ERA and, if so, to what extent?
 - (ii) Did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and, if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to s123(6) ERA?

Procedure at the Hearing

12. The Respondent provided a main agreed bundle of documents (857 pages) and an Addendum (800 pages). The representatives agreed that the documents in the Addendum were not relevant. Any reference to a page number in this Judgment is to the relevant page number (manual) in the main bundle. I have only considered

documents which are referred to in the witness statements and which I was taken to at the hearing.

13. Having agreed the issues and the relevant legislation and case law (see paras 86-93 below) I adjourned for an hour to read the papers and the witness statements. I then heard from the Respondent's first witness, Mr. Taylor (who took the decision to dismiss). The following day, I heard from the Respondent's second witness, Mr. Hitchcock (who heard the Claimant's appeal), and from the Claimant.
14. At the conclusion of the evidence Ms. Bradbury and Ms. Wheeler made verbal submissions. Due to lack of time, I reserved my decision which I now give with reasons.
15. We agreed a provisional date for a Remedy Hearing of 27 September 2022 .

Findings of Fact

16. Having considered all the evidence, on the balance of probabilities I have made the following findings of fact.
17. Silver Spoon is the retail brand of British Sugar PLC (the Respondent) which is part of Associated British Foods Plc. The Respondent employs approximately 1100 employees and has a HR department.
18. The Claimant's employment started in July 2009. He initially worked at the Silver Spoon factory in Bury St Edmunds where he was employed in several roles and ultimately as Planning & Inventory Manager (Beet) on Grade 3/4. His Job Description at that point is set out at pages 40 and 41.
19. On 28 January 2019, Silver Spoon "outsourced" their supply chain to British Sugar and British Sugar took over responsibility for the Silver Spoon factory. The Claimant's role and terms and conditions remained the same. Ms R. O'Brien ("ROB") (Supply Chain Planning & Inventory Manager) became his line manager. ROB reported to Mr Taylor ("NT").
20. On 18 July 2019, the Claimant and another Planner (Cane), Mr. J Flint ("JF") were told they were at risk of redundancy as their roles were to be combined into one new role, Planning and Inventory Manager, Grade 5, with responsibility for both beet and cane.
21. I accept the Claimant's evidence that he discussed the new role with ROB before he applied. I also accept that ROB asked him what he thought would need to change in his current role to enable him to plan both aspects of the factory and the Claimant told her that materials purchasing and management would need to be removed from the new role. I accept that ROB told him that the new role was (in his words) "*just an expansion of my current role, just with a few more products to look after and plan, and raw materials, purchasing and stock management aspect removed*" [w/s para. 4].

22. The Claimant applied for the new role and was successful. He received a letter of appointment from ROB dated 31 July 2019 (page 49) and he started in the new role on 2 September 2019. The letter of appointment states as follows:
*“Further to recent discussions, I am delighted to formally offer you the role of Planning and Inventory Manager, Grade 5, commencing on 2 September 2019. In this position you will report to me, Supply Chain Planning and Inventory Manager, and will be based within the IBP (Integrated Business Planning) Department at British Sugar, Bury St Edmunds.
Your salary in this position will be £41,261 per annum, to be paid monthly in arrears into your bank account. Your next pay review will be January 2021. You will not be eligible for a pay review if you have given or received notice of termination of your employment.
As this position is offered to you as an alternative to your previous role which was declared as redundant, your trial period (during which the suitability of this role will be assessed) will be scheduled for four weeks, during which time you will have regular reviews.
The possible outcomes of this trial period are as follows:
- If you and your line manager are both satisfied with your performance in your role then your employment in that position on the applicable terms and conditions will be confirmed at the end of this period;
- If either you or your line manager feel that you are not suited to the role then you will revert back to the redundancy process at the consultation stage. You will once again be a potential candidate for redundancy subject to consultation and consideration of re-deployment opportunities. Your redundancy package, currently on offer, will remain open for acceptance on the terms as previously discussed.
In exceptional circumstances the trial period may be extended by the company.
Two copies of the Statement of Main Terms of Employment are enclosed. To signify your acceptance of this offer, please sign and return one copy in the envelope provided.
If you have any questions in the meantime, please do not hesitate to contact me. “*
23. The Claimant received the following documents with the offer letter: a job description (pages 59 & 60); Person Profile (page 61); and British Sugar Competencies (page 62).
24. The Statement of Main Terms of Employment cross references the Disciplinary Rules and Procedure as follows:
*“18. Disciplinary Rules and Procedures
Details of the Company’s Disciplinary Procedure can be obtained from the HR Department. The Disciplinary Procedures does not form part of your contract of employment and the Company reserves the right to amend any of the provisions of the Disciplinary Procedure from time to time.”*
25. It is not in dispute that the Claimant had access to the British Sugar Intranet and could thereby access a number of internal policies including the Disciplinary Procedure (pages 40a-i).
- 25.1 Relevant extracts from the Disciplinary Procedure are as follows:
*“1.0 INTRODUCTION
1.1 This procedure applies to all British Sugar employees, including employees whose pay and conditions of employment are determined by collective agreements.
1.2 Disciplinary rules and procedures are necessary for promoting the fair and consistent treatment of individuals and in assisting the Company to operate effectively.
1.3 The rules outlined below are intended as an internal guide to standards of conduct and performance at work. The procedure aims to ensure that standards are adhered to and provides a fair method of dealing with any shortcomings in conduct or performance, via a two way, open process.
1.4 The main purpose of the Disciplinary Procedure is to deal with disciplinary situations including misconduct, poor performance and capability. Informal counselling and discussions will often take place before the need to enter the formal Disciplinary Procedure. Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case.*

2.0 DISCIPLINARY RULES

2.1 It is unlikely that any set of disciplinary rules can cover all circumstances that may arise. The rules set out below are therefore intended as a guide and are not exhaustive.

2.2 Except for situations of "gross misconduct", employees will not normally be dismissed for a first breach of a rule. However, dismissal may follow a final written warning.

Examples of areas where disciplinary action may be taken include:

- negligence;
- unauthorised absence from work;
- misuse of Company facilities;
- inappropriate behaviour;
- unsatisfactory standards of work."

25.2 The Disciplinary Procedure sets out the rules relating to disciplinary hearings, disciplinary action and appeals.

26. There was no separate capability procedure; unsatisfactory standards of work/poor performance were dealt with under the Disciplinary Procedure. I accept NT's evidence (w/s para. 4-6) that in the event of performance issues, a performance improvement plan(PIP) would be put in place. The employee's line manager would set objectives and meet with the employee, usually on a weekly basis. If the employee failed to meet the PIP objectives, a series of warnings would be issued in accordance with the Disciplinary Procedure and ultimately the employee's employment may be terminated.

Trial Period: 4 weeks

27. It is not in dispute that neither the Claimant nor the Respondent sought to exercise the right to revert to the redundancy process at the end of the 4 week trial period. The Respondent did not extend the trial period. The Claimant says he did not have "regular reviews" during this period (as per the letter of 31 July 2019); however, I accept NT's evidence that ROB met with the Claimant regularly to review his progress, albeit informally. It is not in dispute that there were no issues during the trial period and I accept the Claimant's evidence that he did not start struggling in the new role until October/November time.

First PIP: 23 December 2019 for 8 weeks

28. ROB having identified some performance issues with the Claimant's work met with the Claimant informally to discuss this on 29 November 2019 and 13 December 2019. On 23 December 2019, the Claimant was placed on a First PIP for a period of 8 weeks.

29. The First PIP is at pages 72-75. On the first page, it sets out the objectives and process of the PIP. Relevant extracts are as follows:

Employee Responsibilities

- Undertake the agreed performance improvement activities
- Meet the performance objectives outlined in the Performance Improvement Plan within the timescales agreed
- Report immediately any circumstances that may impact on his or her ability to meet the expectations

Manager/Supervisor Responsibilities

- Work with the employee to develop an improvement plan and ensure the appropriate resources are made available to assist the employee in their improvement activities
- Conduct regular review meetings for the duration of the agreement.
- Provide honest, constructive, timely feedback and reasonable support on an ongoing basis
- A PIP should allow sufficient time for the employee to demonstrate an improvement in performance with regular reviews (weekly or fortnightly). The PIP should be updated regularly where appropriate.

- Objectives in the plan should be SMART: Specific; Measurable; Achievable; Results Oriented; Time Bound; and ensure that behavioural shortfalls are captured where appropriate.
- If an employee fails to meet the standards agreed in Plan, s/he may be moved to a formal Performance Management Process.
- If an employee meets the plan standards, the PIP should be signed off by the individual's line manager and kept on their personal file for 6 months.

30. At the end of the PIP there is a part for completion by the manager [ROB] at the conclusion of the plan:

*"*I am satisfied that the above named employee has met the required performance standard/ I am not satisfied that the above named employee has met the required performance standard and recommend they are moved to a formal Performance Management Process. * (delete as appropriate)".*

31. The Claimant confirmed that he understood and agreed to the First PIP; he was "completely on board" with it as he was keen to improve [w/s para. 7]. He says the objectives were clear and S.M.A.R.T (Specific; Measurable; Achievable; Results Oriented; Time Bound Results) and he was happy to proceed as this First PIP specified tasks and reports which he was required to complete.

32. Review meetings took place with ROB every week during the eight week period (3, 10, 17, 24 and 31 January and 7, 14, and 21 February 2020). The Claimant does not express concerns regarding the feedback at the weekly reviews with ROB during this first PIP.

33. At the end of the 8 week period, ROB was not satisfied that the Claimant had successfully completed the First PIP and on 2 March 2020, she wrote to the Claimant to invite him to a Disciplinary Hearing [page 145-146]:

"At the Disciplinary Hearing the question of disciplinary action in accordance with the Company's disciplinary procedure will be considered with regards to your failure to meet an acceptable standard of performance required for the Planning Manager, which we have discussed in your weekly 1 to 1 meetings since 23 December 2019 when you were issued with a Performance Improvement Plan.

The standards you have specifically failed to meet are set out in your performance review plan which was concluded on 21 February 2021.

Failure to maintain satisfactory standards of work is considered to be misconduct in accordance with sections 1.4 and 2.2 of the British Sugar Disciplinary Rules and Procedures ... and may result in a written warning being issued".

The letter advises the Claimant of his right to be accompanied.

First Written Warning: 6 March 2020

34. The disciplinary hearing duly took place on 6 March 2020; the notes are at pages 147-151. ROB chaired the meeting; the Claimant attended without a companion. Laura Fogg (LF) (HR) took the notes. The meeting started at 11.00 and ended at 12.21. ROB explained the purpose of the meeting was to review the First PIP and "look at why you haven't hit the plan". Having discussed the PIP objectives, ROB asked the Claimant if there was anything else he would like to add; he replied: "I think the level of support is helpful. It's pushing me down the right path." He acknowledged "there was room for improvement" and that he needed to be less rigid and ask for help as he tried to do it all himself.

35. After an adjournment, ROB advised the Claimant:
*“I’ve read all of the evidence in the PIP and taken on board everything you’ve had to say. This PIP was set 8 weeks ago and even with significant support from me you have not made sufficient progress against the objectives.
There have been some improvements but lots of inconsistency, particularly in regard to, providing information on time, communication with stakeholders and prioritising your workload.
I am still having to support and intervene on a near daily basis to ensure we are offering a good level of service to our sites and our customers, after 8 weeks of performance improvement meetings, this should not be the case.
I am not currently seeing the required level of proactivity from you that will allow you to be self-sufficient in your role. Therefore, my decision is to issue you with a Written Warning which will remain on your file for 12 months.
I will put some time in your diary for next Tuesday where we will discuss and re-set your PIP. It will be an amended PIP, not just a copy and paste of the last. I will have a think about it and we can discuss at our meeting on Tuesday.
Should you not meet the standard of your new PIP then this may lead to further disciplinary action being taken.
You do have the right to appeal my decision. Full details will be in your letter which you will receive early next week.”*
36. ROB asked the Claimant if he had any questions; he said “no - I know it’s not at the place required and completely understand”.
37. On 9 March 2020, ROB wrote to the Claimant (pages 152-153) to confirm the written warning:
*“At the hearing, I explained the purpose of the hearing was to discuss the Performance Improvement Plan (PIP) set on 23rd December 2019, and why you hadn’t achieved satisfactory progress against the agreed objectives as discussed in our review meeting on 21 February 2020. You discussed each point of the objectives set out in your PIP in turn and gave details on your progress and if you considered each point to be achieved or not. You agreed that although progress has been made in several areas, you still had some way to go to be considered successful. You highlighted that there had been issues with systems which was frustrating, and you believe this did contribute to your lack of progress. We discussed that system issues, although inconvenient, do happen and it is important that work arounds are found and that we communicate with stakeholders to ensure they are aware of any potential delays.
After considering very carefully all matters that were raised at the hearing, my decision was to issue you with a Written Warning, which will remain valid for 12 months from the date of the hearing. This PIP was set 8 weeks ago and even with significant support from me you have not made sufficient progress against the objectives. There have been some improvements but lots of inconsistency, particularly in regard to providing information on time, communication with stakeholders and prioritising your workload. I am still having to support and intervene on a near daily basis to ensure we are offering a good level of service to our sites and our customers, after 8 weeks of performance improvement meetings, this should not be the case.
In addition to the Written Warning, your Performance Improvement Plan will be reviewed, and a further plan put in place for you which will ensure you have sufficient support and opportunity in order to improve your overall performance.
The revised Performance Improvement Plan will be set on Tuesday 10 March 2020 and will be in place for four weeks. Your performance will continue to be monitored and reviewed on a weekly basis, with our first review meeting taking place on Tuesday 17 March 2020.
PIP’s are there to identify gaps in performance and to set clear objectives on what needs to be done to improve your performance to a satisfactory level. If you believe there are other means of support to help you, please notify me during our PIP meetings.
Should you not meet the required standard of performance or meet the objectives that have been put in place in your PIP then this may lead to further disciplinary action being taken under the Company’s Disciplinary Rules & Procedure.
You have the right to appeal against this decision. If you wish to appeal, you should write to me within seven calendar days of receipt of this letter setting out clearly your reasons for appeal.
I’d like to remind you that you can also obtain support from the AXA Occupational Health and Employee Assistance Programme, who provide a wide range of health and wellbeing services – Tel: 0800 072 7072. “*

38. The Claimant did not appeal this warning.

Second PIP: 10 March 2020 period 4 weeks

39. The Second PIP is at pages 155-157. The standard introduction was the same as the First PIP (as set out above). The Claimant says he did not agree this Second PIP; he says all of the criteria were changed and the objectives were no longer SMART.

40. I accept the Claimant's evidence says that during the period of this PIP, the COVID pandemic resulted in panic-buying in the retail sector and increased his workload.

41. Weekly Review Meetings took place with ROB (via Skype) on 17, 23 and 31 March and 7 April 2020.

42. ROB concluded the Claimant had failed the Second PIP and on 8 April 2020 invited him to a disciplinary hearing (page 190). The letter states a possible outcome is a final written warning.

Final Written Warning: 20 April 2020

43. The second Disciplinary Meeting took place on **17 April 2020** by Skype. The meeting was chaired by ROB. The Claimant attended and was accompanied by a fellow employee, Steve Buckmaster (SB), Production Manager. Laura Fogg (LF) (HR Business Advisor) was present as HR Representative and took notes. The meeting commenced at 14.31.

44. The notes (pages 191-196) show that at the start of the meeting ROB gave an overview of "why we're here"

- Oct/Nov 2019, issues crept in regarding performance.
- Provided some coaching and took some work off you to help
- Formal PIP process started in December
- 1st PIP was unsuccessful, and a Written Warning was issued.
- 2nd PIP was set and we've been having weekly meetings via Skype.
- Final meeting last week and PIP deemed unsuccessful"

ROB asked the Claimant if he was happy with this as a summary of events; he responded "yes".

45. The Claimant was asked what was holding him back; he replied the last four weeks had been totally unprecedented and "*there are personal problems causing issues*". He felt that "... 4 weeks or nearer 8 weeks would be enough, but we don't know what's happening".

46. ROB asked the Claimant about the level of support he felt he needed from her:

"Do you need the same level of support from me or can I start to step away?"

"TC: I'm still building capability; don't think you can step away yet.

ROB: As your Line Manager I am happy to support, but the level of support needed currently is high.

It is a difficult time. We've tried to help – allowed you to work in the office safely rather than at home.

It doesn't make the problem go away, but we are trying to help.

Is it helping?

TC: Yes

ROB: Not a problem, if it helps"

47. ROB discussed with the Claimant the tasks required as part of the Second PIP:

“ROB: With this PIP the specific tasks were behaviour based. Are you 100% clear on what is required?”

TC: I know what’s required. There is other stuff I’m still involved in. I’m reluctant to let things go. Purchasing side – doing a lot on that, I’m heavily involved. I’m constantly checking and doing stock checks.

ROB: Stock count – anyone can do that, it doesn’t need to be just your role. Material Accountability is yours; Paul is responsible to complete day to day orders. Have you brought these issues up with Alan?

TC: No. Felt I had to do it as Paul is busy with other projects. I need to speak to him about handover for next week.

ROB: I’m covering your planning next week, but you’ve not mentioned a handover to me yet.

TC: Ok. I’ll try to hand it over to Paul.

ROB: Paul is not a planner. Paul should be doing materials. If he isn’t doing that then you need to manage it and mention it to me or Alan. That needs to be done to allow you to do your role.

TC: I’m getting better at it, but I find it quicker to just do it myself.

ROB: But is it?

TC: Probably not.”

48. ROB asked the Claimant about offers of help:

“ROB: I’ve offered my help, Richards help and HR’s help, but you haven’t taken much help up. What’s the reason?”

TC: Part of the PIP is being self-sufficient and proactive. I’m trying to do that. I want to do the role myself.

ROB: Sometimes getting help gets us there quicker.

TC: I was still learning the role when the 1st PIP was put in. It was a new role.

ROB: Skills from previous role same as current role. It shouldn’t be a capability issue as you should have been doing it already.

TC: Lots of things were added. I’ve developed everything as the planner on site. There are problems with future master. I found some tasks are time consuming as I’m learning them. Pulling production forward is taking lots of time.

ROB: Before current situation happened there were still issues and areas where I had to intervene.

TC: I definitely feel I’ve improved.”

49. ROB said that she had seen an improvement in the Claimant’s attitude and approach in the previous 10 days but was concerned about the hours he had been working. The Claimant said he still had some issues with day to day tasks and that the “ *Reasons why were personal, I didn’t want to mention it*”.

50. ROB asked the Claimant if he felt he had enough planning knowledge of if he needed more training. He replied:

“No, I don’t think I need more training and I understand why I’m doing it.”

ROB said she felt he did not understand or appreciate why his approach was not right. He replied that he understood but confirmed training would help as he had had different managers who had wanted different things and training would also help with his confidence.

51. The Claimant acknowledged he had been communicating information late but said he felt that he would rather it was correct; ROB replied that communications should be both “ *right and timely, you should deliver both*”.

52. The Claimant mentioned he had had issues with confidence and anxiety but that it was slowly improving and coping techniques were briefly discussed and LF reminded him about AXA EAP and encouraged him to “continue openness” with ROB and suggested he speak to his doctor.

53. The Claimant said his main concern was that the PIP was “conflicting”:

“TC: My main concern is the PIP is conflicting

ROB: Why didn't you bring it up before?

TC: I wanted to do it

ROB: They are all needed. To meet all is delivering the role"

54. LF asked the Claimant what he had found difficult to due to the Coronavirus situation:

"TC: Stock levels, lots of changes, ambiguity from Silver Spoon. I've struggled to keep up.

LF: Have these things settled down now?

TC: Definitely more clarity. Settling but not settled yet."

55. At 15.25, the meeting was adjourned and resumed at 16.29. ROB said as follows:

" I've seen some improvement, especially around your attitude and approach, particularly in the last 10 days. However, there are still significant issues around your performance; particularly with:

- Communication with key stakeholders*
- Producing accurate information on time*
- Pro-active behaviour*
- Prioritising your workload*

These continued issues are still requiring me to spend a disproportionate amount of my time intervening to ensure that we are delivering an acceptable service in this business-critical role.

I'm not currently seeing the required level of performance that would allow you to complete your role without significant input from me.

Therefore, my decision is to issue you with a final written warning which will remain on your file for 12 months.

I have taken into consideration that the current circumstances have caused uncertainty and disruption to our normal way of life, and you feel this has negatively impacted your progress on your PIP. Therefore, your PIP will be reset upon your return from holiday and will be for a period of 8 weeks, extended from 4 to allow for these circumstances.

Additionally, I will arrange some training sessions to assist you in your performance improvement. Please do remember the EAP service run by AXA who can support you during this time.

Please also do let us know if there is any further support, we can offer you to assist in your performance improvement.

I will put some time in your diary for when you return from holiday to reset your PIP, which will be very similar to the current one. If you do not meet the standard required by the end of this PIP, this may lead to further disciplinary action being taken which could result in your dismissal.

You do have the right to appeal my decision, full details will be in your letter which you will receive by email next week.

As I said earlier; the last 10 day have showed real improvement and I hope you can carry on in that trajectory. Although I know you'll be disappointed by this outcome today, I would really like to see you improve and pass this PIP.

As I said earlier; please do let us know if there is any further support you may need in order to do this.

56. The Claimant said he had shown consistent improvement in the last four weeks and thought a Final Written Warning was unfair. ROB replied that they had *"been on this road for over 20 weeks"* and whilst she had seen some improvement it was not enough; she was *"picking up multiple things, every day"* and it was not appropriate and could not carry on. The Claimant said he was *"totally committed"* and was working extra hours.

57. On 20 April 2020, ROB wrote to the Claimant to confirm the Final Written Warning [pages 197-198].

"I have been working with you to improve your performance for several months and although I've seen some improvement there are still significant issues around your performance, particularly with; Communication with key stakeholders, producing accurate information on time, pro-active behaviour and prioritising your workload. These continued issues are still requiring me to spend a disproportionate amount of my time intervening to ensure that we are delivering an acceptable service in this business-critical role.

I'm not currently seeing the required level of performance that would allow you to complete your role without significant input from me, which cannot continue as it is simply not sustainable. In addition to the Final Written Warning, your PIP will be reviewed, and a further plan put in place for you which will ensure you have enough support and opportunity in order to improve your overall performance.

I have taken into consideration that the current circumstances have caused uncertainty and disruption to our normal way of life, and you feel this has negatively impacted your progress on your PIP. Therefore, your 3rd PIP will be for a period of 8 weeks, extended from 4 to allow for these circumstances.

As discussed, I will also arrange some training sessions to assist you in your performance improvement. If you believe there is further support that would help you, please notify me during our PIP meetings.

I'd like to remind you that you can also obtain support from the AXA Occupational Health and Employee Assistance Programme, who provide a wide range of health and wellbeing services – Tel: 0800 072 7072.

Should you not meet the required standard of performance or meet the objectives that have been put in place in your PIP then this may lead to further disciplinary action being taken under the Company's Disciplinary Rules & Procedure which could result in your dismissal from the Company. You have the right to appeal against this decision. If you wish to appeal, you should write to me within seven calendar days of receipt of this letter setting out clearly your reasons for appeal. “

Appeal against Final Written Warning

58. On 28 April 2020, the Claimant appealed; his letter of appeal is at pages 199-120. *“As highlighted in the meeting, whilst I understand the PIP process, I would like to appeal the decision of the final written warning as I feel this decision has been made unfairly against me on the following grounds.*

This is a new role, at a higher responsibility level in terms of managing the relationship between British Sugar and Silver Spoon and is not simply my previous role with a few more lines and products. I believed the first PIP was designed to highlight the additional reporting and development required to allow me to succeed in this new role and was there as a support mechanism, this is really feeling like constructive dismissal. I really feel that being placed on a PIP after 3 months of starting a new role without first working on a constructive training plan is unfair.

The criteria for the second PIP were changed and I feel these were not S.M.A.R.T. objectives, and there were no clear success criteria for me to measure my performance against. I provided evidence for each criteria of where I believed to be achieving the objectives and then advised this was not sufficient to pass the objective. Often in order to achieve an objective in one area and then it being held against me in another area. An example of this which I highlighted in the PIP, when I communicated the issues we were having, that were created by the pandemic and that I couldn't get the information for the planning meeting on time, it then got marked against me in time management.

Issues such as this meant I have been very unclear on what success looks like under these objectives.

I have only had follow up communication from 2 of the weekly PIP meetings and one of these was 4 days later which means it's been very difficult trying to review the success and failures of the previous week.

I believe had the criteria/objectives from the first PIP been extended, then I firmly believe would have achieved this PIP review successfully.

The impact from CoVid-19 has had an unpredicted effect on my workload in recent weeks, in which you have confirmed seeing improvements on my performance despite the huge challenges I have faced. I feel that the unprecedented circumstances have impeded my ability to achieve the goals.

I passionately believe the last 4-week PIP stage, that resulted in the Final Written Warning being issued, should be omitted and the next 8-week PIP should represent the 2nd PIP Stage.

In order to achieve in this PIP I feel I need support in the following area's.

Clear Prioritisation, with area of accountability & responsibility to be defined.

Understanding the communication channels, we seem to be overlapping on communications with SS.

Clear Planning Structure –I had felt confident in this area whilst in my previous role under Silver Spoon, as there were no issues with my performance and/or reporting techniques reported to me. This PIP process has knocked my confidence, and I feel further training and insight into the planning process is required.

- I would like to understand where you feel my attitude has not been correct as I am not really sure what this refers to.*
 - Support to hand over work that I should no longer be conducting such as material planning and stock checks.*
 - Clear SMART objectives to be set for the next 8 weeks with a clear understanding of what success looks like.*
 - Quick and weekly summaries after each weekly review so that I can build on the following week.*
 - I would like to Steve Buckmaster to be present in each weekly review so that I have some additional support to ensure that I achieve and meet the PIP objectives.*
- I have been so dedicated and loyal to Silverspoon and British sugar over the last 10 years and believe that my dedication has never been proved more than in my current commitment to trying to pass this PIP review and to progress within the company."*

59. The appeal hearing took place on 6 May 2020. Mr. David Cobbledick (DC) (Engineering & Instrumentation Manager) chaired the hearing; Ms Mags Miller, (HR Manager) attended. The Claimant attended and was again accompanied by SB. ROB attended by Skype.
60. The notes of the appeal hearing are at pages 202-206. On 7 May 2020, DC wrote to the Claimant (pages 207-208) to advise him that his appeal was unsuccessful and therefore the decision to give him a final written warning stood. There was no further right of appeal.

Third PIP: 19 May 2020 period 8 weeks

61. On **19 May 2020**, the Claimant was placed on a Third PIP (pages 212-217). The objectives were the same as the Second PIP. The Claimant did not sign off on this PIP as he "*felt there was no plan in place*" for him to achieve and, again, the objectives were not SMART.
62. On **26 May 2020**, the Claimant emailed ROB (page 218-220) to share his concerns regarding the PIP criteria, specifically that the objectives were not SMART, the criteria was subjective and there was no plan in place to help him succeed. He sought further guidance and clarity as to what was required of him with regard to improving Credibility, Prioritisation, Time Management, Communication and Self-Sufficiency and Proactivity. He concluded:
"I feel I am consistently being told where I have made mistakes and what I am doing wrong, however there is a limited plan to help me achieve the required expectations. As mentioned above, the purpose of a Performance Improvement Plan is just that, it is to be a "plan to assist with improvement". What has been issued to me has fallen short of the plan piece, and focused more on what I have done wrong."
63. On **29 May 2020**, ROB replied [227 and 230-233].
- 63.1 With regard to the Claimant's concerns that the objectives were not SMART, she wrote:
"The point about SMART objectives was raised in the appeal and we have discussed the fact that the first PIP was SMART; and the second PIP was behavioural to help deliver the SMART objectives. The PIP will not be re-issued; but I will look to simplify the objectives to help support you as much as I can."
- 63.2 With regard to Credibility, ROB wrote that she was pleased he had decided to have at least one weekly training session with Richard:
"I am really pleased that you have decided to take this opportunity to work with Richard for further training. It is something I have asked you to do from the beginning of the Pip process to help your development and the achievement of the PIP."

63.3 With regard to Prioritisation, the Claimant had asked for further guidance and requested a formal training session with ROB. ROB replied:

"This is an area we have spent a lot of time on already; with feedback being given as and when required. It is important to note that it is not about 'my' view of what is important – it is about understanding business needs of the role and feeding back on this. I do not believe it is appropriate to design a day to day routine for a role of this scope and grade."

63.4 With regard to Time Management, the Claimant had again asked for guidance on what ROB felt she considered a priority. Again, he asks for a training session with ROB *"... where we develop a standardised list of deadlines for all daily, weekly and monthly communications required of this position. I would also like guidance with what deadlines can be adjusted with changing workloads. During this training session I would like to hear tips from you and hear how you handle the workloads and any tips or tricks you might have for Time Management. Is there any formal time management training available?"*

ROB replied:

"This was set out and discussed in depth as part of the 1st pip review. I provided tips including list writing, using outlook, and making a new list everyday beginning by reviewing the previous days outstanding tasks. I have also directed you to the AB Sugar learning campus where I believe you have completed the time management course."

63.5 With regard to Communication, the Claimant said he had struggled with being given conflicting information as ROB had advised on the reports such Products at risk that he did not give enough analysis however on the capacity review he had been advised he gave too much detail.

ROB replied:

"I have tried to provide feedback on the differing tasks, for which I have provided different feedback relevant to the task involved and the audience receiving the information. This is an important part of being able to deliver the role; and is why this is referenced particularly in the Pip."

The Claimant asked ROB to *"advise what good communication looks like and provide me with any templates/samples that you have so I could use them as guidelines"*.

ROB replied:

"I don't believe there is a standard template that can be used to communicate. I would like to continue to support you with your communication by providing feedback and helping to construct emails etc as and when required. In the future I would expect you to be self-sufficient in this area due to the scope and grade of the role."

The Claimant asks for *"a formal training session or sessions with you to go over what your expectations are exactly per report, and this is where we can review the templates/samples. Thank you for agreeing to share back the negative feedback but I do believe some example of good communication would be beneficial, as would an outline of your expectations"*.

ROB replied *"I will send both positive and developmental feedback as part of the Pip process"*.

The Claimant asked for *"a clear and defined understanding of when situations need to be escalated and to whom"*.

ROB replied that she felt *his "escalation has improved throughout the course of the Pip, however we could discuss a very high level framework to support you. I have touched on this on previous occasions so consolidating into a framework could be a good step forward."*

The Claimant asked for formal weekly follow-ups on his communication; ROB replied: *"Weekly follow ups and communication feedback is already given as part of the Pip process which I will continue to do"*.

63.6 The Claimant mentioned he had enrolled on the AB Sugar Campus for the Assertiveness course *"as this process has shaken my confidence and I have been finding it difficult to express myself without fear of making a mistake"*.

63.7 With regard to Self-Sufficiency and Pro-activity, the Claimant asked for more guidance and a clear plan on how he could more self-sufficient and proactive. He comments that due to lack of training and guidance in the beginning, he was still *"learning the role"*. He mentioned he would be having weekly training with Richard *"*

which will help my ability to become more self-sufficient in the role ...” and asks if there any other courses that British Sugar offer that she felt would support me in his role.

ROB replied: “Formal training was not considered at the start of this role as the role was an expansion of your previous role and did not require any specific training, rather it was consolidating all the BPP planning tasks into a single role. This was discussed in the appeal and I feel the matter is closed.”

64. Weekly review meetings with ROB took place on: 27 May; 3, 10, 17 and 25 June; 2, 9 and 16 July 2020. The meetings were not held face to face due to COVID. In an email to the Claimant dated **22 July 2020**, ROB confirmed the feedback she had given in the final Review Meeting (pages 701-703). She acknowledged that improvement had been made but noted that the Claimant had “not passed” in respect of Credibility, Prioritisation, Time Management and Communication.
65. The Claimant was referred to Occupational Health (OH) who reported on 29 July 2020 (pages 716-717) Hazel Lee, OH advisor, reported:
“I understand from your information as well as from Tim, that the PIP process has finished, so it is hard for me to suggest ways you can support Tim; it is my opinion that OH involvement earlier in the process may have been more suitable. “
And concludes: *“... there is little else I can suggest that will help Tim, apart from more information from the company as to what happens next.*
On cross-examination, NT acknowledged that the Claimant should have been referred earlier.

Disciplinary Hearing and dismissal: 5 August 2020

66. Having failed the Third PIP, on 3 August 2020 NT wrote to the Claimant asking him to attend a Disciplinary Hearing on 5 August 2020 [page 726]. The letter states:
“At the disciplinary hearing the question of disciplinary action, in accordance with the Company’s disciplinary procedure will be considered with regards to your failure to meet an acceptable standard of performance required for the Planning Manager role. The requirements for this have been set out in three Performance Improvement Plans, the third of which was completed in July 2020. The process has also been supported by weekly one to one meetings with your line manager, Becky O’Brien.
Failure to maintain satisfactory standards of work is considered to be misconduct in accordance with sections 1.4 and 2.2. of the British Sugar Disciplinary Rules and Procedures (POL-HR-007, revision 14). You have already received a final written warning for your performance therefore further disciplinary action may result in your dismissal.”
67. NT was appointed to chair the Disciplinary Hearing. Prior to the hearing, NT read the three PIPs and weekly review meetings and reviewed the Claimant’s job description.
68. The notes of the disciplinary hearing are at pages 727-738. The Claimant attended and was again accompanied by SB. Mags Miller (MM) HR Manager took notes. The meeting started at 13.30 and concluded at 17.00 (with breaks).
69. The Claimant said he struggled with the objectives in the Second and Third PIPs
“... as this wasn’t an improvement plan, it wasn’t clear where I was and where I needed to get to. I provided evidence of improvement at every meeting but never seemed to get there, Becky said there was improvement but I still didn’t pass”. These objectives were discussed and after an adjournment, NT advised the Claimant:
“It is clear that you have not managed to successfully complete the PiPs. You have a positive work ethic, have put in effort and worked long hours. However, you are not delivering the role we

require at the level required even though you have had 7 months to show the desired level of improvement. You have a final written warning on file and therefore I have no choice but to dismiss you. You will not be expected to work your notice but will be paid the 12-weeks in lieu of notice, along with any holiday accrued but not yet taken. Our expectation is that you will leave today. You do have the right to appeal this decision, and any letter of appeal should be sent to me within 7 days of the receipt of the letter confirming this decision.”

70. The Claimant then read out a pre-prepared statement and the notes show:
“Tim then read out a pre-prepared statement which covered a number of different areas including:
- His belief that the decision had been pre-determined*
 - It was constructive dismissal and a way to remove him without paying the severance package he would be due.*
 - His PiP was ambiguous and he hadn't had clarity on what was expected*
 - He felt discriminated again in relation to taking his holiday and paternity leave and being asked if this could be changed- should not be used against him*
 - Felt isolated from the team*
 - Believes that the company should pay him the redundancy package which was discussed last year*
- Mags asked if she could take a copy of the statement so the points could be addressed but Tim responded that he had been advised not to give a copy of this to us. “*
71. *“Addendum to minutes following conversation with Tim on Tuesday 11th August.
I am unable to sign the minutes, as you have missed the element regarding the Occupational Health report which states that British Sugar involved them too late to be of any help and had they been involved earlier they would have been able to support me.
Please can you add these to the minutes.”*
72. On cross-examination, NT was asked about para. 28 in his witness statement where he says the Claimant *“... appeared unwilling to move to another (lower grade) role that may be more appropriate, though I had tried during our meeting, to lead him in that direction”* and para 29 *“I was trying to shape the conversation to keep him in employment but move him to an alternative role... and he did not appear to wish to consider an alternative role”*. Any such discussion is not reflected in the notes of the hearing. NT accepted that he did not discuss alternative positions with the Claimant at the Disciplinary Hearing (or at any other time). I asked him if there were in fact any alternative positions available at that time; NT told me there were no positions in his team but he was unable to tell me if there were any vacancies outside his team – he did not make enquiries. On the balance of probabilities, I do not accept the Claimant's evidence that he would have accepted any alternative role rather than dismissal. This is undermined by his assertion that he should have been made redundant at the end of the trial period and his pre-prepared statement in which he stated he believed that the Respondent should pay him a redundancy package; he does not mention alternative positions in his claim form or his witness statement.
73. NT wrote to the Claimant on 7 August 2020 (pages 740-741) to confirm his dismissal:
“At the hearing we reviewed the evidence from your three Performance Improvement plans (PiP) to gain a better understanding of why you had failed to achieve the desired standard of work and in particular:
- Why you were unable to consistently complete all planned and ad-hoc tasks within the agreed timeframes*
 - What had impacted negatively on your credibility, process of prioritisation and time management skills*
 - What was needed to improve your communication and self-sufficiency/proactive behaviours*
- At this meeting you indicated that:*
- The role was larger than you had first envisaged*

- The 2nd and 3rd Pips were not clear plans and you struggled to understand where the gaps in your performance were
- You had not received any training to do the role
- You believed that you had improved in all areas and didn't understand why this wasn't enough to pass the PiP

Having carefully reviewed the circumstances, including the fact that you are already on a Final Written Warning for performance, issued on 17th April 2020, I have decided that, as you are unable to deliver the role to the standard required, dismissal, on the grounds of capability, is the appropriate sanction.

Your employment will terminate as of Wednesday 5th August 2020 and you will not be required to work your notice period. The Company will instead make a payment in lieu of notice to you of 12 weeks. “

Appeal against dismissal

74. The Claimant appealed against his dismissal and his letter of appeal (undated) is at pages 742-755. The Claimant sets out at some length his grounds of appeal and concludes:

“In Summary I am appealing the decision for dismissal on the grounds of Capability as per your letter as I feel this process has been designed to try and make me resign through constructive dismissal. You stated in the meeting on the 5th August 2020 that I could do a job, but not this job. Therefore, in that case I refer back to the letter dated 31st July 2019 where if I was not deemed right for the role I would be placed on redundancy as my previous role was made redundant. The review to determine my capability was never completed by Becky back when she should have done it. As a manager she failed to complete this process accurately and timely. The PIP was not a PIP, there was no Plan to help me improve and the criteria changed deliberately not to be SMART to ensure I could never achieve them.

Becky ensured I failed with next to no training, her refusal to come to site to understand my role, her refusal to offer guidance and understand why I was struggling in the role. This is a new role to the site based on the fact that Julian was made redundant and my previous role was also made redundant and a new role created combining both roles with additional reporting. While I am confident Becky has an excellent knowledge on the planning process her site knowledge and the workings of the site are lacking. As a manager it is her responsibility to know and understand my position, my duties, my skill level and how she can best combine all three to help me be successful. She failed at doing this as a manager. She never once got to know or understand any of those points and never once tried to set me up for success. Becky and British Sugar have failed to consider my welfare and my mental health and did nothing to help me with the long hours, anxiety and confidence but exasperated the situation.

As stated, Becky had decided from the beginning of this process that I was going to be fired. She stated that she knew she did not complete the process properly and did not complete everything in a timely manner. She never gave me an opportunity to succeed, which was apparent with her lack of support, guidance and training. Even speaking to HR about how I was feeling, I was asked if I had considered resigning and was advised I would not be made to work my notice if I did. This further confirms my beliefs that I was never going to be allowed to succeed.

I firmly believe that, had the proper processes been completed in the beginning as per my contract, then if I was not capable of doing the role, as you have dismissed me, I would have been made redundant in October 2019 and I would not have been forced through the last 7 months of anxiety, stress, long hours, rapid weight loss and a poor work life balance. However, I am capable of doing the role with the right support under me and the right support above me, I believe that I could be successful in the role and that this position could be successful. However, with a non supportive manager and an overload of work, which the manager does not know and understand, this position doomed to fail. It is worth noting, that in previous 'consolidation of roles' that I have been through with Silver Spoon, I have succeeded in the new roles as I have had training, support, and a clear view on what 'good' looks like. This was not the case with this process this time.

After 11 years of excellent service I am saddened by my treatment by British Sugar.

75. PH (Head of Factory Organisation) was appointed to chair the appeal meeting. Some days prior to the meeting, PH received and read papers relating to the Claimant's appeal including: the three PIPs and supporting material; notes of the

disciplinary hearings; copies of the written warnings, the dismissal letter and the letter of appeal. He also spoke to NT to check the process and to understand the general background.

76. The Appeal Meeting took place on 24 August 2020; the notes are at pages 747-755. The Claimant attended accompanied by SB. Sophia Cook (HR) took notes. The meeting started at 12.53 and ended at 14.20.
77. PH formed the view that ROB had given the Claimant support “*at informal and informal meetings by giving a lot of feedback and that she had provided multiple routes for him to demonstrate his learning and capabilities*” [w/s para. 10]. He believed that given the time and intervention by ROB, the Claimant “*should have been clear in what good looked like in his new role*”. He was satisfied that the Respondent “*... had clearly communicated the job expectations and how we measured success*”. The Claimant was “*given multiple opportunities to explore and understand his core skills in order to help himself*”.
78. On 27 August 2020 PH wrote to the Claimant to advise him of the outcome of the appeal (pages 756-757). PH advised that he was upholding the decision to dismiss for the following reasons:
- *The conditions within the offer letter dated 31st July 2019 stated you would be provided a four week trial period for both yourself and your line manager to assess whether you were suitable for this role. If not, then you would revert back to the redundancy process.*
 - *This is a statutory right as part of a redundancy process to trial an alternative role for four weeks (or more if agreed in writing), without giving up your right to redundancy.*
 - *During this period no concerns were raised by either yourself or your line manager. At the same time there were no discussions which led to a formal extension of this trial period.*
 - *The redundancy process was not raised at any other point during the PIP process and the trial period has now passed. Therefore I am unable to support an argument for you to revert back into the redundancy process.*
 - *After approximately 12 weeks in post a formal PIP was initiated. I believe the relevant capability interventions were put in place throughout your time in role and throughout the PIP process to support you to achieve the required standards.*
 - *You agreed that whilst you had improved in your role there were still aspects you were failing to achieve. Therefore I uphold the decision from the disciplinary hearing held on 5th August 2020 to dismiss you on grounds of capability.”*
79. There was no further right of appeal.

Post dismissal

80. The Claimant found new employment as a Production Planner in Diss which started on 28 September 2020. (pages 842-844). His starting salary was £34,000 per annum and he was a member of the Company Pension scheme with company contribution to the pension scheme of 3% of salary dependent upon his own contribution being a minimum of 5% of salary. The Claimant said at the hearing that he left this job in November 2020 and took up another role on 7 November 2021 in Thetford as a Senior Planner earning £45,000 per annum.

Relevant Law

81. Under **section 94** of the ERA 1996 an employee has the right not to be unfairly dismissed by his employer.
82. **Section 98 ERA**

*“(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.

(b) relates to the conduct of the employee, ... “

(3) In subsection 2(a) –

(a) “capability” in relation to an employee means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality ...

(4) Where the employer has fulfilled the requirements of 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. “*

83. In **James v Waltham Holy Cross UDC [1973] ICR**, the (former) NIRC held that an employer should be slow to dismiss an employee for incapability without first telling the employee of the respects in which he was failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance. In other words, there should be:

83.1 proper investigation/appraisal of the employee’s performance and identification of the problem;

83.2 warning of the consequences of failing to improve; and

83.3 a reasonable chance to improve.

84. In **Alidair v Taylor [1978] ICR 445**, the Court of Appeal said that the test of a fair capability dismissal (aside from procedure) has two elements:

84.1 Does the employer honestly believe the employee is incompetent or unsuitable for the job? And

84.2 Are the grounds for that belief reasonable?

85. Recently in **Fallahi v TWI Ltd (Unfair dismissal) [2021] UKEAT 0110_19_1709**, the EAT upheld the Tribunal’s decision that it could not look behind a final written warning which was not “manifestly inappropriate”.

86. A Tribunal has to decide whether there was sufficient material in front of the employer which satisfied him of the employee’s competence or unsuitability and for which it was reasonable to dismiss. An employer must therefore produce evidence of poor performance and show that this was the real reason for dismissing the employee.

87. Alternative employment:

87.1 An employer will not be expected to create a new post for an employee in a capability case but if a suitable alternative job is available it may be unreasonable not to offer this post to the employee rather than dismiss him

87.2 There is no general principle that an employer will be acting unreasonably if it does not consider alternative employment or demotion before dismissing. However it may be unreasonable in the circumstances not to do so, depending on the size

and administrative resources of the employer (**Gair v Bevan Harris Ltd [1983] IRLR 368 and Bevan Harris Ltd (t/a The Clyde Leather Co) v Gair [1981] IRLR 520**)

This is a question of fact and evaluation for the employment tribunal in every case.

87.3 The correct test is not whether a reasonable employer would have considered demotion or alternative employment rather than dismissal, but whether dismissal fell within the range of options available to a reasonable employer in the circumstances; the Tribunal must not substitute its own view for that of the employer, but must assess the employer's conduct against the range of reasonable responses.

88. In the ACAS Code of Practice on Disciplinary and Grievance Procedures, the introduction to the code states that it is designed to help employers and employees deal with disciplinary and grievance situations in the workplace and confirms that disciplinary situations include poor performance. The code contains the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide employees with an opportunity to appeal.

Submissions

89. On behalf of the Claimant, Ms. Bradbury made the following submissions:

89.1 The Respondent could not honestly have believed that the Claimant was incompetent or unsuitable for the job; alternatively, if it did, the grounds for that belief were not reasonable:

- (i) The Claimant's role was created from combining two roles and was "shoehorned" into the Job Description at page 59. The Claimant was told that his role was an expansion/extension of his previous role but ROB did not know what his previous role was – there was no assessment of his old role prior to the decision to merge the two roles and clearly that should have been done. The Claimant's only recourse was to persistently ask for guidelines as his Job Description on page 59 was of no assistance and he was constantly criticised for doing jobs not in that Job Description although those extra duties were part of his old role, so how could he discard them?
- (ii) He was working very long hours and the Respondent says this was partly due to him making mistakes and partly because he was doing tasks outside his job description. But there was no audit or investigation of what he was or was not doing and the Respondent cannot say how long he was taking on tasks.

89.2 The dismissal was procedurally unfair:

- (i) Both warnings were manifestly inappropriate. With regard to the First Written Warning, the Claimant had no idea he would be warned if he failed the PIP (although she accepts he did not appeal). With regard to the Final Written Warning, the process was so flawed that it cannot be relied upon. His workload had increased during the PIP and he was not genuinely given an opportunity to improve; he had no idea what "good" looked like. The decision whether the Claimant passed or failed a PIP was up to ROB alone and ROB "combed through the minutiae" for small mistakes.
- (ii) Formal training was not considered or offered to assist the Claimant with the new expanded role, despite his requests.

- (iii) The Claimant's well-being was flagged up in the Second PIP and at that point, ROB should have changed course and her failure to do so renders the whole process unfair.
- (iv) NT failed to consider alternative employment; he says he thought about it but then didn't take any steps to enquire because of the Claimant's pre-prepared statement.
- (v) Polkey is not applicable; if the procedure had been carried out correctly, the Claimant would not have been dismissed. There should be no discount in compensation for contribution.

90. On behalf of the Respondent, Ms. Wheeler made the following submissions:

90.1 There has been no real challenge to the Respondent's assertion that the principal reason for the Claimant's dismissal was capability. The Respondent does not have to prove that the Claimant was not capable, only that it had an honest belief that he was not capable and that that belief was held on reasonable grounds:

- (i) There is no sensible challenge to the assertion that NT and PH genuinely believed the Claimant could not do his job.
- (ii) What the Claimant believed the scope of his role to be is irrelevant; the important thing is what was in the mind of NT and PH as to what the Claimant's role was. It is obvious both NT and PH believed the Claimant did not carry out his role as per his job description (page 59). He was doing other things outside this remit but the role he was employed to do was as per his job description.
- (iii) The grounds relied on were reasonable. There was a significant amount of evidence of the Claimant's capability: three well documented PIPs and in-depth feed-back emails. The Claimant accepted he was going wrong despite trying.

90.2 With regard to the procedure, this was fair:

- (i) There was an investigation and appraisal of his performance as demonstrated by three detailed PIPs which were designed to address the things the Claimant was struggling with. He was asked if he was clear what was expected of him in the Second PIP and he said "yes". It should have been obvious in any event what was expected of him as he was an experienced production planner.
- (ii) The Claimant says the First PIP did not make it clear that this could lead to a disciplinary warning; but the Claimant should have realised and in any event this was very clear by the Second and Third PIPs.
- (iii) He was given a reasonable chance to improve, specifically 7 months. The Claimant could not reasonably expect the process to continue indefinitely. There is reams of correspondence where ROB gives the Claimant feedback and with specific examples demonstrating what was required. The Claimant acknowledged this support but said ROB should have gone through his emails and tasks each day. This is a totally unreasonable expectation and contradicts his assertion that he felt he was "constantly watched" and undermines his assertion that he lacked support. He had training with Richard Jones and OB pointed him towards a time management course.
- (iv) The Claimant was working 12/14 hours per day but wanted to things himself rather than delegate and was doing things he shouldn't have been doing because they were outside his Job Description. He also made mistakes which took time to correct and his time management was poor. The Respondent was trying to address these issues with the Claimant and hence the PIPs.
- (v) With regard to alternative employment, there was no obligation on the Respondent to find alternative employment; the Claimant was in a specialist role with knowledge of production planning and there were no vacancies in the team. The

Claimant does not mention in his witness statement that alternative positions were available.

- (vi) With regard to the 4 week trial period, it is accepted that there was no formal review but NT says ROB was informally reviewing throughout. In any event, the Claimant says there were no problems in that period so it made no difference that there was no formal review.

90.3 Remedy:

- (i) Polkey: The Claimant says he was not aware that failure of the First PIP could lead to a written warning. But he knew by the Second and Third PIPS that this was the case and this makes no difference to the eventual outcome. The Claimant says the Second PIP should have been extended to 8 weeks but the Second PIP was followed by the Third PIP which was 8 weeks. The Third PIP would have been put in place in any event so again it would have made no difference to the outcome.
- (ii) Contributory fault: the Claimant contributed to his own dismissal by working in ways which the Respondent did not approve of and ultimately his dismissal was because he did not undertake his role.

Conclusions

- 91. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions.
- 92. I am satisfied that the principal reason for the Claimant's dismissal was capability which is a potentially fair reason. I have reminded myself that it is not necessary for the Respondent to prove that the Claimant was in fact incapable or incompetent and that I must decide whether there was sufficient material in front of NT which satisfied him of the Claimant's competence or unsuitability and for which it was reasonable to dismiss. The test in **Alidair v Taylor** is met as I have no doubt that NT and PH honestly believed that the Claimant was incompetent or unsuitable for his job and that the grounds for that belief were reasonable:
 - 92.1 Before the Disciplinary Hearing NT reviewed the three PIPs, the weekly review meetings and the Claimant's job description. The disciplinary hearing lasted from 13.30 to 17.00 (with breaks). This was sufficient material to provide reasonable grounds for NT's reasonable belief that the Claimant was unsuitable for his job.
 - 92.2 PH, as the Appeals Officer, considered the Claimant's lengthy letter of appeal and read the papers to include the three PIPs and supporting material, notes of the disciplinary hearings, copies of the written warnings, and the dismissal letter. The appeal hearing lasted from 12.53 to 14.20. Again, this was sufficient to provide reasonable grounds for PH's reasonable belief that the Claimant was unsuitable for his job and to therefore uphold NT's decision to dismiss.
 - 92.3 The Claimant says in the Particulars of Claim in his ET1 (page 16) that he believes there was "*a plan to remove both planners... but BS [the Respondent] were not willing to cover both employee's (sic) redundancy*" but given the wealth of evidence before me regarding the capability process and the Respondent's concerns, I agree with Ms. Wheeler that there has been no real challenge to the Respondent's assertion that the principal reason for the Claimant's dismissal was capability.
- 93. The Respondent acted reasonably in treating the Claimant's capability as a sufficient reason for dismissal and the procedure followed fell within the range of reasonable responses of a reasonable employer. Whilst the procedure was not perfect, none of the procedural failings whether individually or collectively render

- the procedure outside the band of reasonable response; dismissal still fell within the range of options available to a reasonable employer in the circumstances
- 93.1 It is accepted that there was no formal review at the end of the 4 week trial period, but both sides agree that there were no problems in that period. The job subsequently evolved (which is not uncommon) but I do not accept that the failure to hold a review at the 4 week point made the Claimant's dismissal some 7 months later unfair.
- 93.2 The Claimant was in a senior position and had 10 years' experience as a Planner when he was appointed to the new role. Taking this into account, I accept that the Claimant was provided with considerable support from ROB in the form of the three PIPs and weekly 1 to 1 meetings and offered training. He was given a reasonable chance to improve and I agree with Ms. Wheeler that he could not reasonably expect the (resource intensive) process to continue indefinitely. He had training with Richard Jones and ROB pointed him towards a time management course.
- 93.3 Despite the fact the Claimant's job evolved and may not have matched his expectations when he started or the job description, it was reasonable for NT and PH to conclude that the Claimant understood what was expected of him in order to pass the three PIPS.
- 93.4 It was not spelt out to the Claimant that failure to achieve the objectives in the First PIP would lead to disciplinary action. However, the Claimant had the opportunity to attend a disciplinary hearing and say his piece before a warning was issued; notably, he did not appeal the first warning and he does not take issue with this in the ET1 or in his witness statement.
- 93.5 The Covid pandemic placed additional pressure on the Claimant during the four week period of the Second PIP but this was addressed by putting the third PIP in place for an extended period of 8 weeks. By the time he entered the Second PIP he was certainly aware of the consequences of failing the PIP, specifically disciplinary action. I do not accept that the final written warning was "manifestly inappropriate" entitling me to look behind it.
- 93.6 NT acknowledges that the referral to OH should have been earlier but I do not agree with Ms. Bradbury that failure to do so renders the whole process unfair. Hazel Lee, OH adviser, makes it clear that the Claimant was taking active steps himself to manage his anxiety and there was "little else" she could suggest that would help. There is nothing before me to indicate that the advice would have been any different if the referral had been made earlier in the process.
- 93.7 NT would perhaps have been prudent to make enquiries about alternative positions outside his own team however, there is no absolute obligation on an employer to consider alternative employment. I have taken into account the Respondent's size and administrative resources (which are not insignificant) but concluded that in these particular circumstances, this does not make the entire procedure unfair. It was reasonable for NT to conclude from the Claimant's pre-prepared statement that his goal was a redundancy package rather than to stay in the Respondent's employment("*Believes that the company should pay him the redundancy package which was discussed last year*"). I draw support for this conclusion from the fact the Claimant (an experienced, senior Planner with specific skills and experience) did not mention the possibility of alternative roles at the disciplinary hearing, in his letter of appeal or at the appeal hearing. I fully accept the onus was on the Respondent but the Claimant's silence on this point is significant and he has not provided evidence in these proceedings that any suitable alternative roles were in fact available at the time of his dismissal.

94. I have no doubt that the Claimant was a hardworking and loyal employee but dismissal in these circumstances for reasons of capability fell within the band of reasonable responses. Another employer in the same circumstances may well have chosen to give the Claimant further time to improve but I cannot say that the Respondent's decision to part ways with the Claimant after three PIPS lasting a total period of 20 weeks backed up with regular 1 to 1 meetings, was outside the band of reasonable responses. The test in **Alidair v Taylor** is met as I have concluded that the Respondent honestly believed that the Claimant was unsuitable for the job and that the grounds for that belief were reasonable. The requirements in **James v Waltham Holy Cross** are also met: ROB properly investigated and appraised the Claimant's performance and identified the problems; the Claimant was told of the respects in which he was failing to do his job adequately; the Claimant was warned of the possibility of dismissal and given an opportunity to improve his performance.
95. The Claimant's claim of unfair dismissal fails and is dismissed. The Remedy Hearing provisionally listed for 27 September 2022 will be vacated.

Employment Judge Mason

Date: 1 July 2022

Sent to the parties on:

5 July 2022

For the Tribunal Office: