EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Stobart

Respondent: Zen Internet Limited

HELD AT: Manchester **ON:** 14 & 15 March 2024, (with an additional day in chambers on 26 April 2024)

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Mr S Brittenden (counsel)
Mr C Booth (solicitor)
Respondent: Mr Van Zyl (solicitor)

JUDGMENT

The judgment of the Tribunal is that:

(1) The claimant was unfairly dismissed, which means that the claim is successful.

(2) Although the potentially fair reason of capability was correctly raised by the respondent as the reason for the decision to dismiss, they rendered the dismissal unfair by failing to follow a fair procedure.

(3) However, the claimant would have been fairly dismissed by no later than 31 May 2023 had a fair process been applied by reason of the claimant's capability arising from his poor performance.

(4) The case will therefore be listed for a separate remedy hearing on a date to be confirmed in the Manchester Employment Tribunal with a hearing length of 1 day.

REASONS

Introduction

1. These proceedings arose from the claimant's employment as a Chief Executive with the respondent company and the termination of his employment on 31 March 2023 following his dismissal on 23 March 2023.

2. He had been appointed to this role on 1 October 2018 by Mr Richard Tang who had established the respondent company in the 1990s and who was at prior to this date the Chief Executive. The claimant was initially brought in as a mentor to Mr Tang and he also became the Chairman of the respondent company board. However, an agreement was later reached to swap roles so that the claimant became Chief Executive and Mr Tang became Chairman.

3. Following his dismissal on 31 March 2023, the claimant presented a claim form to the Tribunal on 21 June 2023. This was following a period of early conciliation from 11 April to 23 May 2023. He brought a single complaint of unfair dismissal contrary to Part X Employment Rights Act 1996.

4. The respondent presented a response on 11 August 2023 resisting the claim and arguing that the claimant had been fairly dismissed for the potentially fair reason of capability and/or some other substantial reason.

5. The Tribunal issued standard case management orders and the case was ready for the final hearing on 14 and 15 March 2024.

Issues

6. The parties had not produced a formal list of issues, but as it was accepted that the claimant was employed at the time of his dismissal and had more than 2 years continuous employment, I was being asked to deal with a straight forward unfair dismissal complaint where the respondent relied upon the potentially fair reasons of capability and/or some other substantial reason.

7. Accordingly, I applied the standard Tribunal list of issues for a complaint of this nature and the issues relating to liability were as follows:

   <u>Dismissal</u>

   a. Can the claimant prove that there was a dismissal? *There is no dispute that the claimant was dismissed by the respondent.*

   <u>Reason</u>

   b. Has the respondent shown the reason or principal reason for dismissal? *The respondent relies upon capability and/or some other substantial reason.*

c. Was it a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

d. If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

Capability (performance) dismissals

e. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

i. The respondent adequately warned the claimant and gave the claimant a chance to improve;

ii. Dismissal was within the range of reasonable responses.

Some Other Substantial Reason cases]

f. What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely [ ].

g. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

Remedy

8. Remedy would be dealt with at a later stage at a separate remedy hearing if relevant.

Evidence used

9. As the respondent accepted that the claimant was an employee and dismissed by them, it was agreed that the respondent would give their witness evidence first during the hearing.

10. The respondent called two witnesses, who were as follows:

a) Mr Richard Tang (current Chief Executive Officer and at the material time Chairman of the respondent company board).
b) Mr Phil Male (director)

11. The claimant gave evidence to the Tribunal and was the only witness whom he called to give evidence in support of his claim.

12. Documents were contained in an 851 page bundle which was divided into 2 lever arch folders. It was agreed by the parties and it contained the usual documentation including the Tribunal proceedings and Notices, the contract of employment, performance documentation, correspondence and policies and procedures.

13. The claimant had produced a chronology. This was not initially agreed by the respondent but is proved to be a helpful timeline to assist me in understanding the history of the claimant's and Mr Tang's working relationship. However, it is not evidence as such and was not used in my determination of the findings of fact.

14. There was insufficient time for me to hear closing arguments, as well as deliberate and deliver an ex tempore judgment. I made case management orders for both representatives to provide written closing arguments within 7 days. I then arranged for time in chambers on 26 April 2024 to deliberate and produce a reserved judgment and reasons shortly afterwards.

15. I am grateful to both Mr Brittenden and Mr Van Zyl for their detailed submissions which were provided within the 7 days following the final hearing.

Findings of fact

16. There was a great deal of evidence in this case to consider, both in terms of witness statements and oral evidence and the documents within the hearing bundles. I have sought to keep my findings to those matters which are relevant and relate to the list of issues above, concerning liability. Findings are made based on balance of probabilities, with me having first weighed up the available evidence relating to the potential finding under consideration.

<u>The respondent</u>

17. The respondent (Zen) is an internet technology company which was incorporated in the 1990s by Mr Tang. It is understood that until recently, its history has been one of continued success with annual increases in income and the business increasing in size.

<u>The claimant</u>

18. The claimant (Mr Stobart) has had a long career in business and had a history of occupying senior management roles. He had developed a good reputation in terms of improving the performance of those companies which he managed and increasing brand awareness and expanding them. He was recruited initially as the Chairman of the Zen Board of Directors and also as a mentor to Mr Tang who was the CEO at the time and also the majority shareholder of the company.

<u>The claimant's appointment to CEO</u>

19. He was appointed as CEO as he suggested to Mr Tang that Zen had potential and in this role he could achieve results for the company and increase profitability. In the 5 year strategy plan produced on 27 September 2018, revenue was projected as having year on year growth for the financial year 2019 to 2023 of 15/16% each year and year on year increases in profit of between 3% and 9% each year, (p59). Reference was made to EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortisation) and which I understood to be the standard measurement banks use to judge whether a business is performing well or not. EBITDA was projected to increase during this period from £5,567 to £19,868 and while bold in its ambition, involved an expression of Mr Stobart's confidence in Zen once he was in the senior leadership role. Unfortunately, these aspirations were unfulfilled during this period. He was offered a generous salary which I understood reflected the confidence that the Board initially had in Mr Stobart to improve Zen's performance in the way he described.

20. On 10 September 2018, Mr Stobart entered into a CEO service agreement with Zen, (pp33-55). The interpretation section of this agreement confirmed that staff policies and procedures applied to him, (p36). Paragraph 2(i) that termination of the appointment could take place with either party giving 12 months' prior written notice, (p37). Salary, expenses, bonuses and healthcare benefits were outlined as well as a car allowance. Paragraph 24 reminded Mr Stobart that he was subject to Zen's Disciplinary and Grievance Procedures, (pp51-2). He was appointed with effect from 1 October 2018 until his dismissal on 31 March 2023.

21. Concerns about Zen's profitability were first raised in Mr Tang's Working Together document which he produced on 13 February 2022, (pp281-6). It was towards the end of this document on page 285 that he raised concerns about Zen returning to profit.

22. There was evidence of some disagreements between Mr Stobart and Mr Tang in terms of decisions being made in the business, but Mr Stobart's performance reviews seemed to have both Mr Tang and him acknowledging differences may have taken place but that they were resolved. Understandably, Mr Tang felt that Zen was very much his business which is fair, given that he contributed to its creation in the 1990s and its ongoing success and profitability. It must have been difficult for him to pass responsibility for the CEO role to Mr Stobart, but it does appear that there was a mutual determination to make the new relationship work. This did, however, result in insufficient clarity being given regarding any underlying concerns and disappointments that Mr Tang had with Mr Stobart. While as a very experienced executive Mr Stobart must have understood what success for Zen would look like while he was CEO, he would quite naturally look for other external factors to justify performance being less than anticipated.

23. Consequently, any loss of confidence by Mr Tang in relation to Mr Stobart was not clearly expressed until the final months of his employment as CEO. Until that time, while there may have been frustrations building up, Mr Tang left Mr Stobart in the position where he felt that he had his confidence in him as CEO.

Issues relating to profitability at Zen

24. In terms of profitability, Zen continued to experience problems. While the 2019 financial year secured a profit, of £669,000 before tax, losses continued from 2020 to 2023. From the available evidence however, the extent of the losses did appear to reduce each year. Nonetheless, these were losses experienced by a business which was historically profitable and during a period when Mr Stobart was CEO.

25. Mr Tang was raising his concerns with Mr Stobart about profitability from August 2020 onwards. His anxiety that *'we might bumble along at break-even for years'* and which he recorded Mr Stobart accepting that this challenge was a fair one, (p105). The concerns were raised within the ongoing performance reviews that Mr Tang undertook with Mr Stobart. However, I noted that these reviews covered a wide range of matters and remained very positive about his overall performance as CEO. The importance of profitability was confirmed to Mr Stobart and illustrations of this are contained in the review documents for the year to October 2020, (p125) and full year to September 2021, (p244). Indeed in his performance review for the half year to March 2022, Mr Stobart opens with recognising the importance of returning Zen to profitability in line with Zen's values, (p309),

26. The Board Report Finance produced by Matt Kay in October 2022 confirmed a full year loss before tax of £900k (£900,000) before adjustments. At the board meeting on 25 January 2022, the minutes recorded the underlying profit being £2,000 despite it being budgeted as £60,000, (p641). The Board Report Finance produced in February 2023, included in its summary a commentary that so far in the 2022/23 financial year, Zen was suffering a loss of £270k (£270,000). This was identified as being £95k behind budget. Moreover, the EBITDA being £652k which was £151k behind budget, (p653).

27. Mr Stobart's final performance review before Mr Tang took place on 30 October 2022 and it utilised the usual performance review table with Mr Stobart raising the *'highs & lows over the past twelve months and how I rate each on a scale of 1-7 (1= you felt terrible and 7= you felt great)'.* There were a number of columns for the employee to insert their score from 1 to 7 and the final column being space for *'Manager's Comments',* which in this case was Mr Tang. This was then followed by a section providing 4 columns with a summary of the objectives set at the previous review, how the objectives would be considered *'achieved',* whether they had been achieved and the manager's feedback. There was a final section to allow the employee to describe their previous 6 months, the one thing that they might do differently, good and bad behaviours, a review of training and a manager' summary of performance and future objectives, (p497-519).

28. I did agree with Mr Van Zyl's submission that the lack of profitability was a concern for Mr Tang during this performance review and in the conclusions section of the document, he recorded that:

'Today, we are not financially sustainable. We are at "amber" – break-even. We have the 135 plan, and you are confident that we will deliver the plan, but I would not advise you not to count your chickens before they have hatched. From my perspective, you have expressed equal confidence in previous plans that have ended up not delivering,' (p510).

29. However, this was in a document where Mr Tang also described himself as being content:

'Overall, I'm very happy with where the business is and where is is going, and the job that you are doing to get it there,' (498).

He felt that:

'Technology is in the best shape that its been in for as long as I can remember, which is great! (p503).

30. Communication was positive and scored at 7, as was Coaching, (p504). This continued with Mr Tang acknowledging that while Sustainable Profitability had not been achieved, he stated that:

'Achieving break even is very welcome. A very welcome relief.' (p506).

The overall performance category was described in two words as being *'Very good',* (513). This *'dissonance'* between profitability concerns and overall performance, as identified by Mr Brittenden in his closing arguments, could certainly be observed from these documents.

31. It is my finding that during these performance reviews, Mr Tang was describing some concerns with regards to profitability, but within a review which was largely very positive. It is difficult to see how Mr Stobart was being informed of actual concerns regarding his performance which might threaten his ongoing position of CEO. However, I must also acknowledge that Mr Stobart was cautioned at each review by Mr Tang that profitability was the primary concern for Zen. Mr Stobart would have been aware from his considerable business experience that this was fundamental element when running any business and it was something that would need to improve.

<u>Mr Tang's decision that he should swap roles with Mr Stobart in 2023</u>

32. Following concerns about ongoing profitability and a belief that he have prevented these issues arising, Mr Tang had a discussion in early 2023 with Mr Stobart, explaining his belief that it would be prudent for Mr Tang to assume the role of CEO and for Mr Stobart to revert to being Chairman.

33. Mr Stobart emailed Mr Tang on 24 February 2023 at 4:59pm, questioning whether this proposal was the best way forward and suggesting an alternative proposal to ensure that Mr Tang could become more involved in business decisions at Zen, (pp783-784).

34. Mr Tang sent an email to Mr Stobart on 24 February 2023 at 9:43pm and insisted that the swap of roles is in:

    'Zen's best interests, and I am keen that this happens at the end of the current financial year', (pp782-3).

    While recognising Mr Stobart's talents he stated that:

    'I've lost confidence in your ability to lead the business back to sustainable profitability. I have lost count of the number of times you've represented profitability goals to me (and the board) that you have then not delivered. I'm not prepared to give you any more chances. Sorry'.

35. It was from this date that Mr Tang had clearly informed Mr Stobart that he could no longer remain in the CEO role and he attributed this to lack of confidence in his abilities to run the business and return it to profitability. Mr Stobart was of course an experienced businessman who had a long history of occupying senior leadership roles and would have understood the importance of business leaders being able to ensure long term profitability and to have confidence of those responsible for his appointment.

36. Mr Stobart's email which was sent to Mr Tang on 3 March 2023 at 4:28pm confirmed that he was willing to swap roles and proposed what he described as:

    'an elegant transition plan, and one that will avoid prolonged discussion, upset or conflict at either Board…or Executive level.'

    Importantly, he recognised the proposal which had been made by Mr Tang. He did not actively challenge it, but instead provided a lengthy list of his achievements and how he added value to Zen, (pp780-782).

37. In an email sent by Mr Tang to Mr Stobart on 4 March 2023 at 12:18, he expressed his pleasure at Mr Stobart's agreement to swap roles with him but confirmed that he found the proposed terms unacceptable. He recorded his surprise that:

    '…you have taken very little if any personal responsibility for the company's dismal financial performance during your tenure as CEO.' (pp 779-780).

    A formal offer was made to swap roles on 30 September 2023 with payments of his CEO salary and benefits until this date. Then, from 1 October 2023, Mr Stobart would be 'employed' as Chairman using standard non-executive terms and remuneration. At that time they were £26,522 per year plus an additional £5,000 per year for him occupying the role of Chairman. This would of course, involve a significant reduction in Mr Stobart's levels of remuneration with Zen.

38. Mr Tang went on to acknowledge that the CEO service agreement required 12 months' notice before termination. The abridged notice which had been given considered that the usual notice period was:

'weighted against my unrecoverable loss of confidence in your ability to perform a critically important element of your role.'

He was willing to recognise the achievements and successes but reminded Mr Stobart that:

'Any self-funded business like Zen must make a sustainable level of profit, otherwise it will get into financial difficulty and ultimately go bust.'

39. Mr Tang was clear that the offer remained open for acceptance until 13 March 2023 and if no acceptance was received by that date, the offer would be withdrawn. He cautioned Mr Stobart by stating that:

'This offer is made as an attempt to resolve amicably an irreparable failure in your performance. It is made without prejudice to any disciplinary action that the company may take should you choose not to accept this offer.'

40. I found that Mr Tang was clearly of the mind that he was unhappy with the way in which Mr Stobart was managing Zen as CEO. He expressly identified that this failure related to his actions and was endangering the financial viability of Zen. It was his belief that while he still valued Mr Stobart to some extent and did not want to lose him, he had concluded that he could no longer remain employed as a CEO. Instead his talents could be best utilised by him returning to the Chairman role of Zen.

41. A discussion took place on 14 March 2023 between Mr Tang and Mr Stobart. On 15 March 2023 at 12:20, Mr Tang emailed him to confirm what had been discussed. A chain of emails then followed ending with Mr Tang's email sent on 19 March 2023 at 20:26, (pp796-804). It was during this period that Mr Stobart was informed of the proposal to terminate his employment as CEO and discussions took place regarding the contractual requirements of giving notice under his service agreement.

42. In the meantime, Mr Tang sent an email to the Board of Directors members earlier that morning at 9:48, giving notice of an exceptional board meeting that afternoon at 3:30pm taking place remotely by Teams, (p810). Mr Tang had then discussed the question of Mr Stobart's service agreement with fellow Phil Male and Shaun Parker (non executive directors) shortly afterwards that morning. In his email which he sent to Mr Male and Mr Parker at 11:05, Mr Tang confirmed what had been discussed. This included reference to the analogy of whether Mr Stobart's role as CEO was comparable to that of a football manager or airline pilot, (pp805-809). I understand that this meant the high level of responsibility expected for success and failure.

43. He referred to four matters in the email that they had discussed which Mr Tang felt he would have done differently. He said that he would not:

'…have crashed the business into £5m [million] of trading losses'.

This led him to summarise the question of *'whether we should exercise our right under Paul's [Mr Stobart's] service agreement to dismiss him before the*

end of March and put him on PILON' and provide a list of pros and cons in this decision being made, (p808-9).

44. These pros and cons included a perceived saving in Mr Stobart's early dismissal and the opportunity for Mr Tang to assume the role of CEO as soon as possible against the surprise to others within the company and losing the *'good things that Paul would bring to business over the remainder of the FY [financial year]'.* He concluded by confirming that he remained willing to offer Mr Stobart the role of Chairman as a swap. Mr Tang emphasised that the proposed dismissal was *'…not personal – it would be just about acting in the company's best interests).* His final sentence was *'Let's have a discussion'.*

45. A few hours later at 3:30pm, the Board Meeting took place and the minutes were included within the hearing bundle, (pp811). The meeting was quorate and consisted of Mr Tang, Mr Kay, Mr Parker and Mr Male and the minute recorded that each had received notice of the meeting. Mr Stobart had given notice of his apologies. Mr Tang was recorded as having lost confidence in Mr Stobart's ability as CEO to:

    '…run the company at a sustainable level of profitability, and that sustained profitability was critical to the financial viability of the Company.'

    He therefore proposed:

    '…that the Company issue 12 months' notice to terminate the CEO's Appointment, in accordance with his service agreement.'

    Although Mr Parker and Mr Kay were recorded as not sharing Mr Tang's loss of confidence, the minute recorded their belief that:

    'RT's [Mr Tang's] loss of confidence was a very significant factor, and so supported the proposal in consideration of RT's position. The proposal was APPROVED.'

    Mr Tang was instructed to serve notice of termination to Mr Stobart.

46. The Notice of Termination was prepared and signed by Mr Tang on 17 March 2023 and sent to Mr Stobart, (p812). He confirmed their recent discussions and that following board approval that day by stating:

    'I hereby issue 12 months' notice to terminate your Appointment in accordance with clause 2(i) of your Director's Service Agreement dated 10 September 2018. The last day of your appointment will therefore be 17 March 2024.'

    Mr Stobart was further informed that it was anticipated that he would work *'a proportion of your notice period, and that the remaining portion will be paid in lieu of notice in accordance with clause 19 of your Director's Service Agreement – details and dates to be confirmed.'* He was reminded that in the meantime he would continue to perform his duties as CEO.

47. Following a further Board Meeting on 20 March 2023 at 5:15pm, it was confirmed to those present that the letter directed to be provided terminating Mr Stobart's employment had been sent, (pp813-4). Mr Tang proposed that Zen terminate Mr Stobart's employment on 31 March 2023 and pay the remainder of his notice period in lieu of notice. Mr Tang would then assume the role of CEO from 1 April 2023 with him remaining as Chairman until a successor was found as it was now clear that Mr Stobart was not interested in the job swap which had been previously proposed. This was confirmed by Mr Tang in an email sent to Mr Stobart on 20 March 2023 at 18:07. A further termination of appointment letter was sent on 23 March 2023 and that clause 19(ii) allowed an early termination with sums due being sent in equal monthly instalments, (p817).

48. Mr Stobart believed that the bringing forward of the effective date of termination from 12 months on 17 March 2024 to 31 March 2023 was a device to avoid the liability of Zen to pay a bonus which would become due on 1 April 2023. While it is understandable that Mr Stobart reached this conclusion, I was not persuaded that sufficient evidence was available to demonstrate on balance that this was the real reason behind this proposal by Mr Tang and its approval by the Board. I determined that it was something which might have happened because of the early termination but the decision to terminate was not prompted by it. There needed to be something more evidentially to persuade me that this was a significant reason for the decision to bring forward the termination and this was not supported by the available documentary evidence. Indeed, the pre meeting email on 17 March 2023 sent by Mr Tang to his non-executive directors suggested the balancing of disruption caused by making a decision at short notice against his ability to change direction and seek to improve profitability as soon as possible.

49. While this was undoubtedly a stressful process for Mr Stobart, it arose from a point being reached where Mr Tang no longer had confidence in him as CEO. This was on balance because of ongoing concerns about profitability and his belief that he was no longer capable of achieving the sustainable levels of profitability that had been promised upon his appointment. While there were clearly unexpected events such as Covid, Mr Tang did not use the impact of these events to 'engineer' an early dismissal and Mr Stobart was allowed to continue as CEO until 2023, with positive recognition being given in his performance reviews by Mr Tang to his overall good performance. Nonetheless, it was clear and indeed logical that healthy and underlying profitability must exist and Mr Stobart's failure to change this situation sufficiently between 2019 and 2023 prompted Mr Tang to propose to the Board that he be dismissed.

50. Mr Tang understandably retained a great deal of scrutiny in what was effectively his company and having spent so long in post as CEO he would compare Mr Stobart's performance with his. Ultimately the evidence before me demonstrates that the decision was one relating to concerns about improving profitability and keeping it sustainable.

51. The decision to dismiss was properly considered by the Board, albeit with Mr Tang being the dominant person who persuaded the other directors to agree

with termination. Nonetheless, this was a decision that was properly reached by the Board and then quickly communicated to Mr Stobart following the meeting taking place. Boards of directors often have imbalances of power, especially given that some directors can have a greater history of involvement with a company. However, directors still have a duty to the company's interests and considering the relevant minutes, the other directors were clearly satisfied that supporting Mr Tang's proposal was the correct thing to do.

52. Mr Tang undoubtedly wanted to return to the CEO role and was comparing how he would have performed during the period that Mr Stobart occupied the role. But on balance of probabilities, this understandable emotion given Mr Tang's long involvement with Zen, was not allowed during Mr Stobart's performance reviews to undermine his support of his CEO. Even when he proposed Mr Stobart's dismissal to the Board, the documentary evidence involving emails and board minutes persuades me that it was the failure to secure sustainable profitability which he believed was integral to the CEO role. But while this was the case, he recognised the contribution to the business and that he could still fulfil a role within the business as non-executive director.

53. Mr Stobart was concerned as to the timing of the decision and whether it was made to reduce the obligation relating to his bonuses. While matters did move quickly following Mr Tang expressing his loss of confidence in February 2023, it did result in discussions regarding his move to the role of Chairman. Based upon the evidence available, I was not satisfied that there was an ulterior motive behind the decision.

54. Mr Tang did accept that he was aware of the Zen disciplinary and grievance procedures and that they applied to capability issues, requiring that an investigation be undertaken if capability became an issue, holding a hearing where the employee could put their case and in the events that they were unhappy with the outcome of the process, they could seek an appeal. The Zen procedure was not included within the hearing bundle but there was no suggestion that it would not reflect the broad principles of the relevant ACAS Code of Practice.

55. While Mr Tang disputed that Zen had not followed its procedures when deciding to dismiss Mr Stobart, I do not accept that this was the case. There had been discussions taking place by email between them in February and March 2023, but they did not take the form of a formal process and they did not involve a separate and more independent investigating manager. Mr Stobart was informed that he was the subject of a process investigating his capability. The decision of the Board did not involve Mr Stobart being able to make representations either in writing or verbally and he was not provided with a right of appeal.

56. I do have some sympathy with Mr Tang and the Board at Zen in that they were dealing with a CEO, who was in a senior leadership role, who normally attended Board meetings and where they would look at issues through the 'lens' of company leaders remaining effective and furthering the interests of

Zen as a company. But while this might be the case, Mr Stobart remained an employee and whose contract of employment confirmed that he was subject to the company's policies and procedures including the application of the disciplinary and grievance procedures. This placed not only Mr Stobart under an obligation to Zen, but also placed Zen under an obligation to Mr Stobart as his employer.

Law

57. Part X of the Employment Rights Act 1996 ('ERA') deals with complaints of unfair dismissal. Section 94 of the ERA confirms that an employee has a right not to be unfairly dismissed.

58. Under section 98(1) of the ERA, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held.

59. In terms of case law, Mr Brittenden and Mr Van Zyl referred me to a number of cases which I have provided below with their citations.

60. Mr Brittenden referred me to the following cases in his closing submissions:

    a) *Taylor v Alidair Limited* [1978] ICR 445 – where Denning MR explained that when considering whether a dismissal was fair or not (in a capability/incompetence case), it is sufficient for an employer on reasonable grounds to believe an employee was incompetent. It is not necessary for the employer to prove that that was the case.

    b) *Leach v OFCOM* [2012] IRLR 839 – where Mummery LJ cautioned when relying upon some other substantial reason for dismissing an employee, an employer should not simply rely upon 'breakdown of trust', to justify dismissal there must be 'substantial reason' in relation to that breakdown.

    c) *West Midlands Co-operative Society Limited v Tipton* [1986] ICR 192 – where the House of Lords held that an otherwise fair dismissal could be made unfair where an employer refuses the employee a right of appeal.

    d) *Polkey v AE Dayton Services Limited* [1987] ICR 142 – this well known case is where the House of Lords held that a Tribunal could consider where there is a failure of an employer to follow the necessary procedural steps before dismissing an employee, whether following those steps would have made any difference to that decision.

    e) *James v Waltham Holy Cross UDC* [1973] ICR 398 – where the employer is considering capability, it should be slow to dismiss without first raising the question of performance with the employee and giving them an opportunity to improve.

f) *Stoker v Lancashire County Council* [1992] IRLR 75 CA – where Dillon LJ in the Court of Appeal considered that an employer should follow its own disciplinary code when dealing with an internal appeal.

g) *ACAS Code of Practice on Disciplinary and Grievance Procedures* – while not case law, Mr Brittenden correctly referred to the Code as applying to all employers and employees and the Tribunal should consider the Code when determining whether or not a dismissal was fair. This includes consideration of whether a proper investigation has taken place, an employee understands the issue under investigation and can put their case forward and that they are permitted to be accompanied at any final hearing, with a right of appeal being available should the employee be dismissed. Mr Brittenden noted that cases which predated 1987 should be considered carefully as they predated the application of the ACAS Code.

61. Mr Van Zyl referred to the following cases in his closing submissions:

a) *Abernethy v Mott, Hay & Anderson* [1974] ICR 323 CA – defines the meaning of the term 'reason for dismissal', being a set of facts known to the employer or even beliefs held by them which are the cause for the decision to dismiss.

b) *Gilham & ors v Kent County Council (No2)* [1985] ICR 233 CA – in terms of the level of 'inquiry' to be carried out is something which deters and employer from dismissing employees for trivial reasons. If the reason given could justify the dismissal, then it is a substantial reason which progresses onto the consideration of reasonableness under section 98(4) ERA.

c) *Alidair Limited v Taylor* [1978] ICR 445 CA – Mr Van Zyl repeated the decision of Denning MR which was originally referred to in Mr Brittenden's closing arguments, (see above).

d) *EC Cook v Thomas Linnell & Sons Limited* [1977] IRLR 132 – where the EAT noted that when dealing with performance by management, where there is a genuine concern by an employer, over a reasonable period of time, that competence is brought into question, they should look to see if there is any supporting evidence.

e) *Iceland Frozen Foods Limited v Jones* [1982] IRLR 439 – where the test to apply when considering whether the decision to dismiss was reasonable is whether the decision fell within the range of reasonable responses available to a reasonable employer in those circumstances which led to the dismissal.

f) *Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 82 – which reminds the Tribunal that it must not substitute its own view for that of the employer when applying the test of reasonableness.

g) *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23 – similarly, the Tribunal must not consider whether they would have investigated matters

differently, but instead should consider whether the investigation was within the range that a reasonable employer would have carried out.

h) *Chubb Fire Security Limited v Harper* [1983] IRLR 311 – accordingly, it is the reasonableness of the employer' conduct, which was key, not whether the decision to dismiss was unjust.

i) *Polkey v AE Dayton Services Limited* [1987] ICR 142 – like Mr Brittenden, Mr Van Zyl referred to this well known case and asserted that if the Tribunal finds that the dismissal was unfair on procedural grounds, consideration should be given as to whether the claimant would have been dismissed in any event had the correct process been followed. It is acknowledged that in such an event, compensation may still be awarded, but adjusted to allow for the additional period/percentage chance when a fair dismissal could have taken place.

Deliberation

62. This was a case where the actual history of Mr Stobart's employment with Zen was not really in dispute between the parties. The focus of this claim involved the real reason behind the decision to dismiss and how it was made by Mr Tang and Zen.

63. There was no dispute that Mr Stobart was dismissed by Zen and that the decision was reached on 17 March 2023 following a decision of the Board. This decision was communicated to Mr Stobart in writing by Mr Tang the same day with notice initially being consistent with the minimum 1 year period provided by his contract. For the avoidance of doubt however, this was a dismissal with the effective date of termination being revised by the Board to 31 March 2023 with a payment for the balance of the notice period being agreed in lieu.

64. Zen as respondent and employer have relied upon the reason for the dismissal being capability and/or some other substantial reason. Both of these constitute potentially fair reason under the ERA.

65. In terms of some other substantial reason, I did note that in February 2023, Mr Tang had informed Mr Stobart of his loss of trust and confidence with Mr Stobart in relation to his failure to return Zen to sustainable profit during his 4 plus years as CEO. This was something which was also raised with the Board on 17 March 2023 both in relation to discussions with non executive directors, but also during the subsequent Board meeting that day when the decision to dismiss was reached.

66. Mr Van Zyl asserted that Mr Tang as the effective dismissing officer only had to demonstrate a genuine belief that there was a sufficiently substantial reason which could justify a dismissal and that he had reasonable grounds for believing that he was *'incompetent'.*

67. However, while Mr Tang was undoubtedly concerned that Mr Stobart had no longer been able to persuade him that he could be trusted to return the

company to profit, he was seeking to remove him from the CEO role and to swap and with him and return him to the Chairman of the Board role that he had occupied since 2018. Even at the Board meeting he was still willing to allow Mr Stobart to continue working with Zen. This demonstrated that the real concern that he had was one of his performance and his capacity to achieve profitability in a business which in the past, with Mr Tang has CEO, had achieved consistent and continuous growth.

68. Employers may often rely upon some other substantial reason in the alternative to other potentially fair reasons when dealing with unfair dismissal complaints. Usually, this is out of a concern that a dismissal might not neatly fit into the most commonly encountered potentially fair reasons, namely conduct, capability and redundancy. But some other substantial reason is by its very nature a 'catch all', which recognises that employment relationships do not always end in a dismissal for one of those three typical reasons. Sometimes, the employment relationship simply becomes impossible and an employer and employee can no longer function together in the workplace and if sufficiently substantial, the employer may fairly dismiss the employee.

69. In this case however, the evidence before me clearly identifies the owner and former CEO of a company being persuaded that he should step aside and swap roles with the Chairman whom he has brought in as mentor and whom he places a great deal of trust and confidence in, believing that they have the ability to add value to the company. Mr Stobart clearly had many qualities which were of use to Zen and it was a question of providing him with the best role to allow him to support the company. Unfortunately, despite asserting positive performance from 2019 onwards following his appointment as CEO, Mr Stobart was unable achieve the profitability he sought despite ongoing patience on the part of Mr Tang.

70. It is fair to say that Mr Tang did reach a 'final straw' in February 2023 where he believed Mr Stobart's performance as CEO was no longer acceptable. But the evidence of the performance reviews, the emails and minutes in February and March 2023 reveal an overall contentment with his work, with questions relating solely to his capability for the role of CEO. This was the real operative reason behind the decision to terminate. This was an available potentially fair reason, it was appropriate and indeed it had been relied upon by Zen as respondent in their defence to this claim. As this is available, I do not accept that some other substantial reason was the real reason for the dismissal and the reason which was in the mind of Mr Tang as the person recommending dismissal to the Board.

71. I considered whether Zen acted reasonably in all the circumstances in treating capability as a sufficient reason to dismiss Mr Stobart from his CEO role and given that it related to performance (as opposed to a health related absence), I was concerned about whether the respondent adequately warned Mr Stobart and gave him a chance to improve and that dismissal was within the range of reasonable responses.

72. As has already been discussed within the findings of fact and submitted by Mr Brittenden, there was a dissonance in the performance review documents. This

was that while concerns were being raised regarding profitability following Mr Stobart's appointment as CEO, by Mr Tang, the documents produced at these meetings also provided many positive comments about performance and did not suggest he was going to face any intervention from the Board or Mr Tang.

73. It was only in February 2023 that Mr Tang's dissatisfaction and overall lack of trust were clearly expressed and where the job swap and potential disciplinary action was raised.

74. The role of a CEO as an employee is a curious one and especially the case where they work for a large organisation with a Board of directors or trustees and there are dominant shareholders who had been involved in the creation of the business. The CEO is at the pinnacle of the organisation and the analogy of a football manager made during discussions between Mr Tang and non executive directors on 17 March 2023 is a reasonable one to make. The CEO leads the organisation, is aware that there is a heavy weight of expectation and that their remaining in the role can be precarious based upon the performance of organisation they lead.

75. It is for these reasons and taking into account Mr Stobart's considerable experience, he should have been aware that an ongoing failure to achieve profitability over a period of more than 4 years, could well affect his position as CEO. The nature of the relationship between Mr Tang as majority shareholder, creator of the company and former CEO and Mr Stobart as his mentor, experienced business leader and former Chairman, was a complicated one. It is perhaps understandable that Mr Tang tried to balance his ongoing frustrations with profitability against the other positive achievements and also his struggles with 'letting go' from the CEO role which he had occupied for many years. Such are the tensions that exist where an individual has created and nurtured a business from scratch and who may have an emotional attachment far beyond someone who is simply paid to be a CEO or director.

76. This explained why he operated in the way that he did engaging in discussions and emails with Mr Stobart and then eventually involving the Board. He saw his concerns as being a leader, shareholder and director matter as opposed to a traditional employer and employee matter. Mr Stobart had of course begun his relationship with Zen as a mentor, non executive director and Chairman of the Board.

77. But Mr Stobart as CEO was an employee and there was no dispute that he enjoyed access to the same Zen policies and procedures as other more junior employees within the company. Once Mr Tang became aware of his loss of trust in Mr Stobart's performance, he should have raised the matter with the Board and HR and arranged for a meeting with Mr Stobart to explain the concerns, rather than simply making vague reference to disciplinary procedures as he did in one of his emails during February/March 2023.

78. I agreed with Mr Brittenden's submission that the ACAS Code of Practice on Disciplinary and Grievance Procedures applies to all employees regardless of seniority and the Tribunal should consider its application when determining whether a dismissal was fair. Paragraph 1 of the Code makes clear that

disciplinary situations can include poor performance although an employer may rely upon a separate capability procedure if one exists. While I am aware of a disciplinary and grievance procedure being used within Zen as respondent, there was no evidence that a capability procedure document had been produced separately. Mr Tang's emails with Mr Stobart included reference to disciplinary procedures and it is these documents which should have been considered when he felt it was necessary to take such action.

79. The ongoing performance documentation, financial information produced for Board meetings and other correspondence involving Mr Tang and Mr Stobart provided much to demonstrate a failure to achieve profitability during the latter's tenure as CEO. But nonetheless, Zen should have taken steps to formally establish the facts, inform the employee of the problem , arrange meetings where he could be accompanied and put his case, decide upon outcome and to allow him an appeal. None of these steps were taken and while there may have been good reasons to end Mr Stobart's employment as CEO, the failure to apply a fair investigation which considered whether capability existed, whether steps should have been taken short of dismissal and allowed Mr Stobart to improve were not deployed. Accordingly, I must conclude that the decision to dismiss him was procedurally unfair.

80. The parties however, will not be surprised to read following the above discussion that while the dismissal was procedurally/Polkey unfair, there was nonetheless a likelihood that Mr Stobart would have been fairly dismissed had a fair procedure been followed. In this case, I believe that it would have been almost certain that the utilisation of a fair procedure would have resulted in a fair dismissal taking into account the available evidence and time elapsed where profitability had not been achieved. Under these circumstances, had Mr Stobart been the subject of a formal investigation under Zen's procedures, a fair dismissal would have taken place a little over two months following the 17 March 2023 Board meeting and certainly by no later than 31 May 2024. Dismissal on grounds of capability would have been within the range of reasonable responses available to the decision making manager in this case taking into account the period where profitability had been an issue and the role of CEO occupied by Mr Stobart.

81. For the avoidance of doubt, I did consider the application of contributory conduct or fault on the part of Mr Stobart in accordance with sections 122(2) and 123(6) Employment Rights Act 1996. However, as this is a case which involves the question of Mr Stobart's capability arising from performance rather than his conduct and the latter having not been asserted as a potentially fair reason by the respondent in any event, these sections will not apply to my decision in this case.

<u>Conclusion and Remedy</u>

82. Accordingly, my finding in this case is that Mr Stobart as claimant was unfairly dismissed by the respondent Zen Internet Limited in that although the potentially fair reason of capability was correctly raised by the respondent, they rendered the dismissal unfair by failing to follow a fair procedure.

83. However, the dismissal would have been fairly dismissed by no later than 31 May 2023 had a fair process been applied by reason of the claimant's capability arising from his poor performance.

84. Remedy will therefore need to be considered at a separate remedy hearing on a date to be confirmed in the Manchester Employment Tribunal with a hearing length of 1 day.

85. Notice of remedy hearing will be sent to the parties separately and should they require further case management orders to ensure that the case is ready for the remedy hearing, they should jointly write to the Tribunal and provide an agreed proposed list of orders for me to consider and approve.

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Employment Judge Johnson

Date: 30 April 2024

JUDGMENT SENT TO THE PARTIES ON

3 May 2024

FOR THE TRIBUNAL OFFICE

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