



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Jordan  
**Respondent:** Costain Engineering & Construction Ltd  
**HEARD AT:** READING ET **ON:** 13<sup>th</sup> & 14<sup>th</sup> July 2017  
**BEFORE:** Employment Judge C Wynn-Evans

## REPRESENTATION

**For the Claimant:** In person  
**For the Respondent:** Mr R Hignett, Counsel

## JUDGMENT

The Judgment of the Tribunal is that:-

1. The Claimant was dismissed by reason of conduct, being a potentially fair reason for dismissal falling within section 98 of the Employment Rights Act 1996.
2. The Respondent acted fairly in all of the circumstances of the case in treating that conduct as a reason to justify the dismissal of the Claimant.
3. The Claimant's claim of unfair dismissal fails and is dismissed.

## REASONS

### Introduction

1. In this case Mr Kevin Jordan claims unfair dismissal against Costain Engineering & Construction Ltd further to an ET1 lodged with the Employment Tribunal on 16<sup>th</sup> December 2016 which claim, by way of an ET3 dated 21<sup>st</sup> December 2016, the Respondent contests. There were no

points to consider in terms of the Claimant's eligibility to bring this claim, early conciliation or compliance with applicable time limits.

2. The Claimant represented himself and the Respondent was represented by Mr Hignett of Counsel. I heard evidence from the Claimant on his own behalf and, on behalf of the Respondent, from Ms Cuconato, the dismissing officer, and Mr Matthew Harris, the appeal officer.
3. I had before me a draft chronology prepared by Mr Hignett, the statements of the witnesses from whom I heard, a two volume agreed bundle of documents and two volumes of documents described as the disputed bundle, whose relevance was disputed by the Respondent and to which in the event neither party referred during their evidence. The disputed bundle was referred to in passing by the Claimant in his closing submissions but in my view the document to which he referred at that stage did not add or detract from either parties' positions or contribute anything of assistance to the evidence or arguments put to me. It had been agreed at the outset of the hearing that I would not rule on the relevance of the very large number of documents contained in the disputed bundles, not least as the time which that exercise would have taken would be inconsistent with the overriding objective in the context of a case listed for hearing only over two days only and on the basis that the parties would specifically refer me to any document in the disputed bundle upon which they wished to rely.

### **Issues**

4. The issues to be determined in this case were as follows:-
  - (1) Was the Claimant's dismissal fair?
  - (2) If not, should compensation be reduced on the basis that the Claimant could have been dismissed in any event had a fair procedure been followed?
  - (3) Did the Claimant contribute to his dismissal by his conduct to any extent?

### **The Law**

5. The test of whether a dismissal is unfair is set out in section 98 of the Employment Rights Act 1996 ("ERA 1996") as follows:-

*(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—

.....

(b) relates to the conduct of the employee,

(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.

6. In applying the statutory test under section 98(4) ERA 1996 I need to bear in mind a number of key principles established by the relevant case law as follows.
7. In terms of identifying the reason for dismissal, *Abernethy v Mott, Hay & Anderson* [1974] ICR 723 makes clear that the Tribunal must identify the set of facts known to the employer or beliefs which cause him to dismiss the employee.
8. *HSBC Bank Plc v Madden* [2000] ICR 1283 confirms, as originally established in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439, that the test as to whether the employer acted reasonably in accordance with Section 98(4) ERA 1996 is an objective one and that the Tribunal must decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.
9. As the Court of Appeal reiterated in *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, at all stages of its inquiry the Tribunal is not to substitute its own view for what should have happened but judge the employer against the standards of a reasonable employer bearing in mind there may be a band of reasonable responses. The function of the Tribunal as an industrial jury is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the bounds of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal is outside the band it is unfair. The Tribunal must avoid slipping into the "substitution mindset" (*London Ambulance Service NHS Trust v Small* [2009] IRLR 563 at paragraph 43). Only if the Respondent acted as no reasonable employer could have done is the Claimant's dismissal unfair.
10. In *British Homes Stores v Burchell* [1980] ICR 383, the Court of Appeal set out the approach to be applied by Tribunals in cases of dismissal by

reason of misconduct. First, the Tribunal should consider whether the employer had an honest and genuine belief that the employee was guilty of the misconduct in question. Secondly, the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Third, at the stage at which the employer formed its belief, the Tribunal must consider whether the employer had carried out as much investigation of the matter as was reasonable in all of the circumstances.

11. In addition to its submission that the Claimant's dismissal was fair, the Respondent argued (to paraphrase) that, if the Claimant's dismissal were unfair, the compensation to be awarded to him should be reduced to reflect his conduct and on the basis that any procedural defect in its dismissal process made no difference to the end result of dismissal.
12. In light of these submissions I must also have regard to the relevant provisions of sections 122 and 123 ERA 1996 with regard to adjustment to the basic and compensatory awards for unfair dismissal. Section 122 ERA 1996 provides that "[w]here the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly." Section 123(6) ERA 1996 provides that "[w]here the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."
13. In relation to section 123(6) ERA 1996, as *Nelson v BBC (No 2)* [1980] ICR 110 clarified, the relevant action must be culpable or blameworthy, it must actually have contributed to the Claimant's dismissal, and it must be just and equitable to reduce compensation by the proportion specified.
14. With regard to the argument that compensation should be reduced to reflect the argument that any defect in procedure on the part of the Respondent made no or little difference to the end result of dismissal, *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 established that compensation could be reduced to reflect the likelihood that the employee would have been dismissed in any event had a proper procedure been followed - in effect a "no difference rule". Nonetheless *King & Others v Eaton (No 2)* [1998] IRLR 686 made clear that, when considering arguments based on *Polkey*, a Tribunal cannot be expected to embark upon a "sea of speculation". In *Software 2000 Ltd v Andrew* [2007] IRLR 568, EAT it was made clear that the Tribunal must have regard to all relevant evidence, that there are limits to the extent to which the Tribunal can reconstruct what would have happened, but that the Tribunal must have regard to any material and reliable evidence that may be available. The burden of proof in relation to *Polkey* arguments rest with the employer as it does in relation to reductions to compensation to reflect contributory conduct.

15. Whilst I have had regard to the provisions of the ACAS Code on Disciplinary and Grievance Procedures which are relevant to the Tribunal's assessment of the fairness of dismissal and unreasonable breach of which can lead to adjustments to the compensation awarded in relation to a successful claims, neither party made any specific submissions alleging breach by either party with the applicable requirements nor did I find there to be any breach of the applicable requirements.

### **Findings of Fact**

16. My findings of fact by reference to the evidence which I heard are as follows. I have not made factual findings on each and every matter that was debated before me but rather have confined my factual findings to those matters which are germane to the issues which fall to be decided in these proceedings. had no reason to doubt the evidence given by the witnesses from whom I heard. In particular Ms Cuconato and Mr Harris were clear and cogent witnesses whose testimony was credible and consistent with the documents. The one observation I would make about the Claimant's evidence was that his refusal to countenance his being assessed by the Respondent's assessment of his role and responsibilities in 2016 during this hearing demonstrated an unyielding approach to the matter which was consistent in my judgment with Ms Cuconato's assessment of the Claimant's approach to the issues which led to the termination of his employment
17. The Claimant was employed by the Respondent as a Construction Manager from 19<sup>th</sup> April 2007 until his dismissal by reason of gross misconduct on 23<sup>rd</sup> September 2016.
18. The Claimant's job description and his role and responsibilities were central to the dispute which arose between the Claimant and the Respondent and which ultimately led to his dismissal. The Claimant's repeated refusal to accept that his performance could be assessed and managed against any description of his role other than his original job description and the legitimacy and accuracy of the role and responsibilities document relied upon by the Respondent in the performance management process which it followed in relation to him were key aspects of the performance and conduct issues which led to his dismissal.
19. The Claimant had countersigned a job description of 8<sup>th</sup> May 2007 which recorded his role at the Surrey Quays site at which he initially worked at the start of his employment by the Respondent. The content of this job description included day to day management of the site, quality and technical programmes, health and safety, environmental Issues, the monitoring of commercial and budget issues, the monitoring of quality and progress, and the production of progress reports.
20. The 2007 job description had been signed by the Claimant but it was not at any subsequent stage formally updated, whether with his specific

agreement or otherwise. However, as part of the performance improvement plan (“PIP”) process which ultimately led to the Claimant’s dismissal, a key roles and responsibilities document was produced by the Respondent on 14<sup>th</sup> June 2016. This document purported to set out the Claimant’s current role and responsibilities as a Construction Manager at that time. At no stage prior to June 2016 was the Claimant provided with an updated job description or asked to agree one. To his credit in his evidence Mr Harris acknowledged that this was a deficiency on the part of the Respondent.

21. I am satisfied by reference to all the evidence that I heard that the role and responsibilities document produced in June 2016 constituted, in terms of the Respondent’s expectations and requirements of the role in question, an accurate reflection of the duties of a Construction Manager, being the role which the Claimant by then performed. I also accept on the basis of the evidence that I have heard that both the dismissing officer, Ms Cuconato, and the appeal officer, Mr Harris, genuinely and justifiably considered the 2016 roles and responsibilities document to be an accurate reflection of the role of Construction Manager within the Respondent’s business as it had evolved over the period since the Claimant’s initial job description was issued in 2007.
22. Whilst I had no reason not to accept the clear, credible and cogent evidence of the Respondent’s witnesses on this issue, I note in particular in support of this conclusion that the respective job descriptions are not in substance dissimilar to a very significant extent save for the location-specific aspects of the 2007 job description. Whereas the 2007 job description referred to day to day management and control of sites, monitoring of commercial and budget issues, progress reports, issuing of updated construction programmes, monitoring and developing of construction programs and daily management and control of the construction site and the monitoring of quality and progress, the 2016 roles and responsibilities document referred to management of direct reports and site teams, ensuring engineering management and sub-contract works were undertaken in accordance with the conditions of the requirement of the contract, managing/reviewing/driving the resource construction schedule, monitoring and driving SHE performance on site, ensuring all health and safety regulations are adhered to, controlling costs against budget and forecast, and various other matters. Without addressing each and every item of that updated 2016 job description, the Claimant acknowledged in cross examination that it did contain a number of responsibilities which he agreed were his. For the Respondent’s Counsel to contend as he did in effect that the Claimant accepted that some 60% of the June 2016 job description reflected his role at that time was in my view rather to overstate the position as a statistical matter. However, it is clear to me that there were material aspects of that 2016 job description which the Claimant accepted were his responsibilities such as working with the Design Manager, working on the construction schedule, playing a part in driving value engineering on a project and other matters. In any event, it is clear that this document was a generic description of the

Construction Manager role and I am satisfied that it properly and accurately reflected the Claimant's roles and responsibilities at the relevant time.

23. The Claimant had a clean disciplinary and performance record prior to 2016. By letter dated 9<sup>th</sup> June 2016, the Claimant was invited to a performance improvement meeting with Colin Howe and Paul Clough, who were more senior managers within the Respondent's organisation with responsibility for the Claimant and his functions, which was scheduled for 13<sup>th</sup> June 2016. The Claimant's own notes of that meeting, which I accept as accurate if not comprehensive, confirm that he requested specifics of the performance concerns being raised with him as he had not been provided with that detail in advance. The Claimant also stated that he was not prepared to comment as he considered the accusation that his performance was not up to scratch to be unfounded.
24. At the meeting on 13<sup>th</sup> June 2016 the Claimant was presented with the role and responsibilities document referred to above which Mr Clough had put together. Mr Clough and Mr Howe proceeded to discuss with the Claimant the roles and responsibilities document with the Claimant together with a PIP document. These documents had not been shared with the Claimant in advance. I am satisfied that at the meeting of 13<sup>th</sup> June 2016 the Claimant stated that he was not prepared to comment on the documents presented to him as he had not seen them before but that he listened to what Mr Clough had to say in any event. In the absence of any prior disclosure to him of the Respondent's concerns or the documentation produced to him and without time to prepare, the Claimant can hardly be criticised for that approach.
25. The PIP document was emailed to the Claimant on 14<sup>th</sup> June 2016 after some further amendments had been made to it by the Respondent following the initial meeting and after Mr Clough had shared the document both with Colin Howe and with Jenna Grace of the Respondent's HR Department earlier on 14<sup>th</sup> June 2016. The PIP document set out a number of tasks relating to the Respondent's Essendon and Dorchester sites together with applicable target dates. The PIP document expressly stated on its face that, if the employee did not meet the performance plan goals, disciplinary action may result up to and including termination. The improvements/developments expected of the Claimant in respect of the Respondent's Essendon site included completing installation within 2 weeks using a supply chain of the Claimant's preference and agreeing a final account on all elements relating to Essendon within 6 weeks, defect free and with the landowner's sign off. The improvements/developments expected of the Claimant in respect of the Respondent's Dorchester site included agreeing current design remedials and liability within 2 weeks, completing any remedial actions required with 6 weeks using a supply chain of his preference and the final account within 8 weeks without further defects.

26. In light of the adjournment of the meeting of 13<sup>th</sup> June 2016, Jenna Grace of the Respondent's HR department wrote to the Claimant on 14<sup>th</sup> June 2016 to schedule the re-convened performance improvement meeting for Friday 17<sup>th</sup> June 2016. On this occasion the Respondent's Capability Procedure was enclosed, the updated PIP document having already being emailed separately to the Claimant.
27. At the performance improvement meeting on 17<sup>th</sup> June 2016, the Claimant confirmed that he did not agree with the accusation that his performance was not meeting the required standard. He declined to comment in detail other than to say that the performance information provided did not align with his terms and conditions of employment. When asked, in the context of Mr Clough explaining that the Claimant's performance had been assessed against the job description given to him on 13<sup>th</sup> June 2016, what he considered his roles and responsibilities to be, the Claimant declined to comment and indicated that he was not sure when he would be able so to comment. The Claimant's reply was "No comment" when asked about a programme of works that he had been asked for and whether he had responded in that way because he did not consider it fell within his role and responsibilities.
28. A further performance improvement meeting was held on 27<sup>th</sup> June 2016. The Claimant had not replied to the invitation to that meeting and, when asked at the outset why he had not done so, he responded that, as he had stated in the previous meetings, he did acknowledge the title Performance Improvement or the roles and responsibilities which he was being measured against. The Claimant contended that the advice which he had received was that he should be measured against the 2007 job description role and responsibilities and not the 2016 role and responsibilities document that he had not previously seen.
29. In relation to the specific performance issues raised with him the Claimant's position was, to paraphrase, as follows. So far as the Essendon site was concerned, the installation was not complete and cause of delay continued to be the quality and attitude of the supply chain and colleagues. The Claimant was not prepared to commit to a programme not least as he had no idea when the first day of work would start. The Claimant would not commit to a duration for the project. Neither of those objectives had been achieved by the date set of 24<sup>th</sup> June 2016. So far as the Dorchester site was concerned, the Claimant considered that liability for the remedials remained with sub-contractor SBC, and therefore that measure had not been achieved.
30. As the Claimant's own notes of the meeting of 27<sup>th</sup> June 2016 confirm, the Claimant stated as previously that he did not acknowledge or agree with the Construction Manager roles and responsibilities document of June 2016 and that his role was as per the job description of 8<sup>th</sup> May 2007. The Claimant did not acknowledge or agree with the performance concerns raised with him which he considered did not reflect his role and responsibilities. The Claimant did nonetheless put forward the contention



that the target dates within the PIP documents were not realistic given that suppliers were not appointed and in place to deliver the relevant elements.

31. The Respondent confirmed the outcome of the PIP meeting of 17<sup>th</sup> June 2016 by letter to the Claimant dated 27<sup>th</sup> June 2016. This letter records the fact that the Claimant did not agree with the Respondent's concern that his current performance was falling below expected standards as well as the fact that the Claimant disagreed with the Construction Manager roles and responsibilities given to him on 13<sup>th</sup> June 2016 because they differed from the terms and conditions received by him in 2007. The letter of 17<sup>th</sup> June 2016 also recorded that the Claimant disagreed with the objectives proposed but would not say why this was the case other than that they did not align with his terms and conditions of employment of 2007. In this letter it was stressed that the Respondent was fully committed to supporting the Claimant in achieving his objectives but that this needed to be a two way process and that therefore, if he felt that he could benefit from any additional support or training, the Claimant should contact Paul Clough or Colin Howe of the Respondent. Whilst the Claimant confirmed in evidence that no specific support or training was offered by Paul Clough or Colin Howe, he also confirmed that he did not seek any additional support or training from the Respondent despite the offer set out in the letter of 27<sup>th</sup> June 2016.
32. The Respondent also recorded the outcome of the PIP meeting of 17<sup>th</sup> June 2016 in its letter to the Claimant of 30<sup>th</sup> June 2016. This letter was in very similar form to that of 27<sup>th</sup> June 2016 and indeed both letters confirmed explicitly to the Claimant that it was important to note that, if he did not meet the objectives put in place for him, the Respondent would move to the next stage in its capability process.
33. A further PIP meeting was held 8<sup>th</sup> July 2016 attended by the Claimant, Colin Howe and Paul Clough. I had before me the Claimant's diary extract from that meeting which he provided to Ms Cuconato as part of the disciplinary process. Unfortunately, the Respondent did not keep any notes of this meeting. In this further discussion, as recorded by his own notes, the Claimant stated that he did not acknowledge or agree with the suggestion that his current performance was not meeting currently expected standards. He updated Mr Howe and Mr Clough with regard to the Essendon and Dorchester sites. As there was no contractor in place, progress was not being made in relation to Essendon. The delay in completing the Dorchester matter was, to paraphrase, the responsibility of the contractor NBC Limited. The Claimant indicated that the flowmeter at Essendon could be installed within 2 weeks if he could get an order placed with Bridges. With regards to Dorchester, design remedials and reliability had not yet been agreed.
34. An updated document was then produced by the Respondent setting out the status of the Claimant's PIP as at the 8<sup>th</sup> July 2016, and this noted that the various objectives set for the Claimant had not been achieved. Again it was explicitly confirmed by the updated PIP document that, if the

Claimant did not meet the PIP goals, disciplinary action up to and including termination of employment might result.

35. I was referred to a document produced by the Respondent dated 29<sup>th</sup> July 2016 which I understand to have been prepared by the Respondent's HR Department and which is a summary of the situation as at that point in time from the Respondent's perspective. In this summary of the position, it was noted that it was now extremely difficult finding a next role for the Claimant because, to quote he "does not demonstrate capacity to complete what is minor works". The document noted the commencement of the PIP and the Claimant's response including his responses of no comment, his refusal to acknowledge the PIP and his insistence that his performance should be managed against his 2007 job description. Having considered the evidence I heard from Ms Cuconato, I am satisfied that, whilst the document of 29<sup>th</sup> July 2016 evidences the frustration which had been growing within the Respondent on the part of managers who dealt direct with the Claimant, Ms Cuconato addressed the disciplinary hearing which she conducted with an open mind. In my judgment the existence of this document does not indicate that any specific decision had been taken by the Respondent at this stage as to how it wished to deal with the Claimant. Rather, the document demonstrated the significant concerns which the Respondent had at that stage with regard to the Claimant's performance of his duties and his willingness to engage in the PIP process. In my view this document not only constitutes cogent evidence of the Claimant's attitude to his dealings with the Respondent in relation to his performance in the period prior to that document being created, the views which it expresses are also consistent with, and in my judgment supportive of, the reasonableness of the assessment made by Ms Cuconato about the Claimant's conduct during the disciplinary process which ensued.
36. It appears that discussions then ensued within the Respondent as to how to address its concerns with regard to the Claimant about which no detailed evidence was available but which led to Ms Cuconato being asked to invite the Claimant to a disciplinary hearing to consider an allegation of potential gross misconduct. The Respondent's HR adviser, Jenna Grace, provided Ms Cuconato with a detailed pack of information including the correspondence with the Claimant, complaints from landowners and increased costs, correspondence and documents relating to the PIP process, details of costs incurred on the Dorchester and Essendon contracts and a supplier review. Having reviewed these documents, Ms Cuconato, who could have decided that disciplinary procedures should not proceed, agreed that there were grounds to proceed to disciplinary hearing. She considered that she did not need any further investigation at this stage and had sufficient information on which to proceed. That Ms Cuconato concluded that there was a disciplinary case to answer does not in my view indicate any predetermination on her part of the result nor does it in any other way in my judgment prejudice the legitimacy of her decision.

37. The Claimant was therefore invited by letter of 12<sup>th</sup> August 2016 to a disciplinary hearing. In this letter, it was clarified that the disciplinary procedure was being implemented in respect of the allegation that the Claimant's conduct had not met the expected standards for the following reasons:-
- (1) The Claimant's performance had fallen below the expected standard for his role as Construction Manager and, despite all efforts to help him achieve expectations, his performance remained unacceptable.
  - (2) As a result of this the JV had been subjected to additional costs, delay in meeting year 1 deadlines, potential damage to client brands and community relations.
  - (3) Throughout this process, in which the Respondent considered that it had attempted to help the Claimant improve his performance, his attitude and behaviour had been below the expected standard for any role within the company.
38. The disciplinary hearing was scheduled for Tuesday 16<sup>th</sup> August 2016. The invitation letter included the evidence which Ms Cuconato had reviewed in deciding to proceed. The Claimant was informed in the letter of 12<sup>th</sup> August 2016 that he had the right to be accompanied to the meeting and that the meeting could result in a disciplinary warning being given or indeed might lead to dismissal.
39. The Claimant chose not to be accompanied to the disciplinary meeting with Ms Cuconato. The Claimant stated that he did acknowledge or agree with his conduct or performance being below standard. He sought clarification of the efforts made to help him. Whilst he suggested that he had not been given sufficient time to prepare an answer, there was discussion about the objectives that he had been given. The Claimant indicated that accountability lay with others with regard to the additional costs suffered in relation to the relevant projects the relevant third parties being Costain Strategic Partners, NBC, Z-Tech and Bridges. The Claimant indicated that he had replied no comment in the first PIP meeting because he had not had sufficient time to answer the allegations being put to him.
40. I accept Ms Cuconato's evidence that, given the Claimant felt he was not responsible for the relevant delays, she spent a considerable period of time in the disciplinary hearing trying to "get to the bottom of" what the Claimant believed he was responsible for, although he was unable to give a clear answer. I accept that, when Ms Cuconato asked the Claimant what he felt his role as Construction Manager entailed he said "I will have to assess this and come back to you". When Ms Cuconato asked the Claimant who was responsible for pushing the supply chain to get a result he gave the response no answer and, when she asked him whether he had made any attempt to meet the objectives, he said that he had made attempts to get the work finished but provided no further detail. The Claimant confirmed that objectives put in place June 2016 had still not been met.

41. In my view prudently and fairly, Ms Cuconato adjourned the hearing and asked the Claimant to provide further information. She asked him to provide copies of his diary notes with regards to the previous meetings, his correspondence with John Todd-Pitman, a relevant counterparty, and a clear list of his accountabilities and responsibilities. Jenna Grace emailed the Claimant on 17<sup>th</sup> August 2016 confirming what was requested and the deadline of 25<sup>th</sup> August 2016 giving him the opportunity to suggest a more suitable time frame if that was not possible.
42. The Claimant sent copies of his diary extracts, email exchanges and notes with John Todd-Pitman to Ms Cuconato on 25<sup>th</sup> August 2016. With regard to the question of his role and responsibilities as a Construction Manager, the Claimant referred (only) to the job description of 2007. I accept that Ms Cuconato was frustrated and disappointed by this response and that she considered that she had given the Claimant an opportunity to clarify what he thought his role entailed and to demonstrate that he could comply with what she saw as a simple request for information.
43. Before Ms Cuconato reached her decision, on 22<sup>nd</sup> September 2016 Paul Clough sent her evidence on the costs incurred to date on both the Essendon and Dorchester projects. The Essendon budget was £35,000 whereas cost incurred to date were £172,000 on which the Claimant had spent 964 hours which was far in excess of the time spent by other individuals on the project. The Dorchester project had also been budgeted at £35,000 and costs were £76,000 to date. The Claimant's involvement alone amounted to costs of £25,000. In cross examination, whilst the Claimant had not seen this documentation prior to the disclosure process in these proceedings, he acknowledged that, whilst he would have argued that the figures needed further investigation in order to verify them, he had spent material amounts of time on those projects and indeed confirmed in relation to Dorchester that it was 300-400 hours. On that basis I have no reason to doubt the cost figures which were produced by the Respondent and which Ms Cuconato took into account in making her decision. Unfortunately, these costs documents were not shared with the Claimant prior to Ms Cuconato making her decision and that the Claimant was not given an opportunity to comment upon the specifics of those documents. The Respondent can be criticised for not sharing that additional cost information with the Claimant and affording him the opportunity to comment on it before reaching a decision at the disciplinary stage. However, the Claimant was aware of, and did not contest that there was, a degree of cost overspend information from the paperwork which had been provided to him prior to the disciplinary hearing.
44. In light of the Respondent's submissions on the basis for its decision and the authority of *Abernethy v Mott* referred to above it is important for me to determine what I consider to have been Ms Cuconato's reason or reasons for deciding that the Claimant's employment should be terminated. My conclusions, on the basis of the evidence I heard, are as follows.

45. I accept Ms Cuconato's evidence as to the basis for her decision to terminate the Claimant's employment. Ms Cuconato formed the view that the Claimant had failed to provide her with any good reason as to why the 2016 role and responsibilities document was not a fair description and assessment of his role and for the objectives set for him not being a reasonable request. Ms Cuconato formed the view that the Claimant was hiding behind the 2007 role profile document. On the basis of the evidence which I heard I have no reason to doubt the reasonableness of Ms Cuconato's view that the objectives set for the Claimant were reasonable given her experience of and role within the business as a Business Support Manager whose role is to ensure that the Head of the relevant Joint Venture and Senior Leadership team is suitably supported in discharging their responsibilities in relation to the projects of which those the Claimant's work formed part. I also accept that Ms Cuconato concluded on reasonable grounds that the Claimant refused to take responsibility for any delays and that he failed to admit that he was struggling or give any explanation for his poor performance. Ms Cuconato genuinely considered that the Claimant was capable of improving his performance but chose not to do so. I also accept that Ms Cuconato took the view that the Claimant was being obstinate and difficult, had made his own mind up to reject the PIP process and not to engage with it on any level, and had repeatedly refused to comply with what was expected from him as Construction Manager.
46. Ms Cuconato concluded that the Claimant's conduct, as she found it to have been, was serious enough to amount to gross misconduct given his seniority and experience. In determining the appropriate sanction, I accept that Ms Cuconato took into account the consequences for the business of the costs incurred on the projects in question. Moreover, and crucially, it is a clear indication to me of the seriousness with which Ms Cuconato viewed the Claimant's attitude to the PIP process, and that this was the primary reason for her decision to dismiss the Claimant that, when she conveyed the decision to terminate the Claimant's employment to him at the disciplinary hearing on 23<sup>rd</sup> September 2016, she did not in her opening words refer to the Claimant's poor performance or failure to improve. Rather she stated that, having reviewed the evidence, she was left with no alternative but to conclude that the Claimant's conduct constituted gross misconduct because he had continually displayed instances of insubordination including refusal to carry out his duties and follow reasonable management requests.
47. I accept that Ms Cuconato did consider carefully whether there were suitable alternatives to dismissal or whether a final written warning as an alternative would have been appropriate. I also accept that Ms Cuconato considered, when deciding what action to take, the fact that the Claimant had been employed for a long time and had a clean disciplinary record and had no prior issues over his performance.
48. Following confirmation of his dismissal in the re-convened hearing on 23<sup>rd</sup> September 2016, the Claimant's dismissal was confirmed by detailed letter

of 23<sup>rd</sup> September 2016 in which it was confirmed that the allegations set out in the original disciplinary meeting were upheld. In this letter Ms Cuconato confirmed that she had reached the conclusion that the Claimant was appropriately placed on a PIP and that the objectives and tasks set out of the Claimant were appropriate to his role within the capabilities of a Construction Manager and set with the intention of supporting him to operate at the level expected. The letter also again confirmed that what gave rise to most concern from Ms Cuconato was the Claimant's complete refusal to engage with the PIP process and failure on several occasions to follow reasonable management instructions which she considered to be deliberate decisions taken by him and which she considered clearly amounted to serious misconduct rather than a failure relating to capability. It was on this basis that Ms Cuconato concluded that she was left with no alternative but to conclude that the Claimant's conduct constituted gross misconduct because of the Claimant's insubordination including refusal to carry out duties and follow reasonable management requests. The letter of 23<sup>rd</sup> September 2016 confirmed that the appropriate sanction was considered to be termination of employment with immediate effect and confirmed the Claimant's right of appeal.

49. By letter dated 5<sup>th</sup> October 2016, the Claimant appealed against his dismissal. In his grounds of appeal, the Claimant did not accept the accusation that his performance had fallen short and considered that no help had been given to him to improve his expectations. He repeated the point that he considered that the unacceptable poor performance of others had resulted in additional costs, delays etc. and that no evidence had been provided to substantiate the performance concerns levelled against him despite his previous requests. The Claimant contended he had provided information and documentation when requested and reiterated that he did not agree with the PIP which he contended was set to fail with its target dates not being realistic, taking into account those ultimately responsible and accountable. The Claimant again argued that the assessment of his performance was measured using a job description document which had not been brought to his attention until 30<sup>th</sup> June 2016 and which he did not acknowledge or agree with on the basis that this was not as consistent with the terms and conditions of his employment from 2007.
50. By letter dated 10<sup>th</sup> September 2016, the Claimant was informed that Mathew Harris was appointed as the Appeal Hearing Manager. Mr Harris confirmed, and I have no reason to doubt, that he had the authority to overturn the decision of the Ms Cuconato if he felt it necessary. Mr Harris received a pack of all the documentation considered by Ms Cuconato including the performance improvement documents and the information sent from the Claimant to Jenna Grace after the disciplinary hearing.
51. Mr Harris decided to carry out some further investigation by speaking to Paul Clough, Colin Howe, Ms Cuconato and Jenna Grace. In my assessment the discussions which Mr Harris had with Jenna Grace and Ms Cuconato verified the basis on which disciplinary proceedings had been commenced and the decision to dismiss reached. The discussions

with Paul Clough and Colin Howe sought to - and indeed did - verify the performance concerns which had led to the PIP process being implemented. I accept Mr Harris' evidence that Mr Clough confirmed that the Claimant was not prepared to attend performance improvement meetings unless they were called progress meetings, that assistance was always on hand, and that there had been very little progress in performance terms because the objectives were only met haphazardly. I also accept Mr Harris' evidence that Mr Howe confirmed, amongst various other matters, that the Claimant had refused to engage with anyone and did not seek advice either from him or Paul Clough as his managers. Mr Howe provided documentation with regard to supplier concerns.

52. On 10<sup>th</sup> September 2016, Mr Harris invited the Claimant to an Appeal Hearing. The Claimant was informed of his right to be accompanied to this meeting. Mr Harris prepared a note of the questions which he wished to address in this meeting. During the appeal meeting, of which full notes were taken but which were not shared with the Claimant, the Claimant confirmed that he considered that the reason to dismiss was unfair because his work had always been good, he was always up against it on the projects in question and that he had issues with the sub-contractors and yet he seemed to be the one taking the hit and being dismissed. There was also discussion of whether the Claimant was responsible for time and costs spent on projects or whether it was the fault of the supply chain.
53. In the course of the appeal meeting the Claimant stated that he was not willing to accept the job description and the responsibilities outlined in that document even though he wanted his job back. The Claimant indicated to Mr Harris that he had some evidence that he wanted him to consider, and Mr Harris requested that this be sent to him by Monday 24<sup>th</sup> October 2016.
54. Whilst the documents which were then provided by the Claimant on 21<sup>st</sup> October 2016 were considered by Mr Harris, Mr Harris concluded that they demonstrated that the Claimant was sending emails and chasing individuals but had not demonstrated input into the project and that on the Claimant's part there was no ownership and delivery of his objectives.
55. Mr Harris conducted some further investigation by way of correspondence with Matt, Crabtree, a Project Director on the Respondent's Severn Trent Project. He confirmed that the roles and responsibilities document was absolutely typical for a Construction Manager role within the Respondent.
56. Mr Harris decided that he should reject the Claimant's appeal. I accept that in essence Mr Harris found that the Claimant had deliberately refused to comply with lawful and reasonable instructions and without good reason. He concluded that this was serious enough to amount to gross misconduct, in these circumstances being satisfied that the requests made of the Claimant in the PIP were straightforward. Mr Harris did not consider that it was credible that the Construction Manager would have no responsibility whatsoever for the projects he was involved in and could

pass responsibility to third party contractors. Mr Harris considered that the Claimant was wilfully and persistently disobedient and was satisfied that the Respondent had given the Claimant several opportunities to engage with the PIP but that on each occasion he had refused to engage. Whilst Mr Harris took into account what he considered to be relevant mitigating circumstances, such as the Claimant's length of service and the fact that no job description had been provided until 13<sup>th</sup> June 2016, he concluded that a final written warning would not have led to an improvement in the Claimant's behaviour, that the Claimant could not work in a more junior role, that the Claimant would not accept responsibility for construction delivery and that therefore dismissal was the most appropriate sanction.

57. Mr Harris set out his detailed reasoning in a letter to the Claimant of 25<sup>th</sup> October 2016. In summary this letter recorded Mr Harris' conclusions that the Claimant unreasonably failed to carry out the duties set out in the accepted job description of what a Construction Manager should do, did not follow the PIP which Mr Harris considered to be a reasonable management instruction, that there were no mitigating circumstances and therefore the finding of gross misconduct should be upheld as the refusal by the Claimant to engage was wilful to the point of being obstructive and was serious so as to warrant the finding of gross misconduct. Mr Harris confirmed that he had considered in detail the alternative options of the Claimant returning to the role of Construction Manager, returning to the Respondent in a more junior role and the termination of his contract which he concluded was the correct decision given the circumstances.

### **Submissions**

58. I have considered the submissions of both parties carefully in reaching my decision, bearing in mind that, whilst the burden of proof with regard to demonstrating the reason for dismissal lies with the Respondent, the burden of proof with regard to the dismissal decision itself is neutral.
59. The core of the Claimant's case is that the PIP process was unfair because he was being assessed against a job description which he did not agree with, which he had not agreed and which was, in terms of the objectives that were set, set up to fail. The Respondent argues that Ms Cuconato dismissed the Claimant fairly for the principal reason of his misconduct, referencing the case of *Abernethy v Mott* as the applicable test in terms of what was in the minds of those taking the decision to terminate the Claimant's employment.
60. The Respondent argues that the Claimant's dismissal was principally by reason of misconduct, rather than performance, and that there were four elements to the Claimant's misconduct. The first was the Claimant's failure to engage in constructive dialogue over what his accountabilities and responsibilities were and, as it put it, steadfastly refusing to accept the updated 2016 job description as being applicable to him even though he accepted that a material number of the responsibilities did fall within his remit. The second aspect of the Claimant's gross misconduct was his



failure to co-operate with the PIP process. The Claimant did not engage in any meaningful dialogue about his objectives and refused to acknowledge the situation. He could have suggested alternative time frames for objectives being set but did not do so. The objectives set by the Respondent were achievable in the reasonable assessment of the dismissing officer - not least as they were completed shortly after the Claimant's dismissal) - and, in the Respondent's reasonable assessment, had reasonable timescales attached to them. This was a conduct rather than capability matter because the Claimant refused to engage in discussing a timetable for achievement of his objectives and refused to be held accountable for failure to meet them. The third aspect of the Claimant's gross misconduct was his failure to seek to improve his performance and taking no steps to address the concerns which had been raised with him. The Claimant had taken the position that his focus was to try and get the job done. The fourth aspect of the gross misconduct on which the Respondent relied in justifying dismissal was the overspend in terms of additional costs and delay caused by the Claimant's failure to perform his duties properly. The relevant projects had, on the Respondent's case, overrun by a staggering amount.

61. The Respondent contended that those making the dismissal and appeal decisions had held a genuine belief that the Claimant had committed gross misconduct. On its case it was clear that what occupied their minds was the four aspects of conduct described above. The Respondent argued that the dismissing officers held a genuine belief that the Claimant had committed gross misconduct and that this was a belief which was reasonable and had been reached after a sufficient and reasonable investigation. With regard to the criticisms of its investigation which arose during the course of the hearing, the Respondent's position was as follows. Not to share with the Claimant the further detail which was obtained as to the overspends on the relevant contracts and give him the opportunity to comment on them did not, on the Respondent's case, take its procedure and dismissal decision outside the range of reasonable responses because there was no doubt in any event - or indeed dispute with the Claimant on the basis of the information that he did see - that there had been a significant overspend. Consequently, further detail was not required to evidence that concern in terms of establishing a reasonable belief in that regard.
62. The Respondent's response to the argument that it should have investigated in more detail the reasons for the delays in the relevant projects being completed was that its dismissal decision was based not on the Claimant's capability but was rather his conduct, and that therefore the reasons for the delays were not material given the Claimant's refusal to engage with dealing with these matters or to take any accountability for them.
63. With regard to the investigation, Mr Harris interviewed a number of people in relation to his appeal process including Mr Howe and Mr Clough. The Respondent contended in effect that it was a measure of the seriousness

with which Mr Harris approached his task that he, unprompted, took the decision to conduct further investigations and to seek by way of verification through his discussions with Mr Clough and Mr Howe the underlying issues with regard to the Claimant's failure to engage properly with the Respondent's PIP. The Respondent argues that the way in which the original disciplinary hearing was handled by the Respondent and approached by the Claimant did not oblige Ms Cuconato to or mean that it was a requirement of reasonableness for her to interview those two individuals.

64. So far as the reasonableness of the sanction applied is concerned, the Respondent acknowledged that the Claimant was an employee of good character with no previous conduct issues, but contended that that was no defence to accusations of misconduct which should be dealt with on their merits. The Respondent argued that it took the proper matters into account and reached a decision which was open to it on the basis of the facts available to it and indeed considered at length alternative sanctions. Both Ms Cuconato and Mr Harris explained in detail why they had considered that dismissal was appropriate in these circumstances. The Respondent also made the point that it was not clear on what basis Mr Harris could ever have offered the Claimant his job back when he was not even at the appeal stage prepared to accept the job description in question.
65. In so far as the *Polkey* aspect was is concerned, the Respondent's argument was that if there were any procedural fault, the Respondent could have safely dismissed in a reasonable period of time as a result of the Claimant's conduct issues and that, even if it were not reasonable to dismiss for conduct, it could have dismissed fairly for performance within a couple of months. This was of course without prejudice to its primary contention that the dismissal decision was fair in substantive terms and that any procedural defects identified were cured by the substantive and detailed appeal which Mr Harris conducted.
66. So far as contributory fault is concerned, the Respondent contended that all four strands of gross misconduct upon which it relies on are conduct issues in respect of which the Claimant was blameworthy and which contributed to his dismissal because they were taken into account by the Respondent in its decision. The Respondent therefore contended that if dismissal was to be found to be unfair, there should be a reduction in compensation of 90%.

### **Decision**

67. This is a case in which the reason for dismissal is central. I am satisfied by reference to the evidence I have heard that the principal reason for Ms Cuconato's decision to dismiss the Claimant was his conduct as opposed to his capability. More specifically, I accept that the principal basis on which the Respondent decided that the Claimant's conduct warranted dismissal was the Respondent's finding, which I find that it reached on

reasonable grounds, that the Claimant refused to engage with the PIP process and failed on several occasions to follow reasonable management instructions. Ms Cuconato considered these to be deliberate decisions taken by the Claimant which she considered amounted to serious misconduct rather than a failure relating to capability. I accept that the Claimant's performance gave rise to the PIP process in the first instance and formed part of the basis for the decision to terminate the Claimant's employment but, applying the statutory test set out in section 98 ERA 1996, I accept that the Claimant's conduct as described above, as opposed to than his capability/performance, was the Respondent's principal reason for dismissal.

68. Applying the test set out in *British Homes Stores v Burchell* I am satisfied by the evidence that I heard that the Respondent held an honest and genuine belief that the Claimant was guilty of the misconduct in question. I accept Ms Cuconato's oral evidence in that regard as supported by the documentary evidence which I saw. In light of the documentary evidence which was before her at the hearing and the Claimant's conduct at the disciplinary hearing itself I consider that Ms Cuconato had reasonable grounds upon which to sustain that belief. In light of the evidence available to her at the end of the disciplinary hearing, I accept that Ms Cuconato had, at the point where she made her decision, carried out as much investigation of the matter as was reasonable in all of the circumstances. Whilst it was not an allegation that the Claimant made expressly, I reject any suggestion that the result of the disciplinary process was pre-determined by the Respondent. As I have already described, Ms Cuconato made strenuous efforts to engage with the Claimant over his role and performance before making her decision and Mr Harris likewise considered the appeal in considerable detail. In my judgment, both individuals took their own decisions independently and genuinely.
69. On the basis of these findings as to the basis for Ms Cuconato's decision to dismiss the Claimant, the question then to be determined is whether it was within the range of reasonable responses for the Respondent to apply the sanction of dismissal. In relation to the substantive fairness of the decision to dismiss the Claimant, and reminding myself of the statutory test set out in section 98 ERA 1996, I am satisfied that the Claimant's dismissal was fair. To terminate the employment of a long serving employee with a clean disciplinary record in circumstances such as these before concluding a formal performance process might appear to be harsh. Indeed, as I set out below, had the Claimant's dismissal been by reason of performance I would have found it to be unfair. However, in my view, given the Respondent's conclusions concerning the Claimant's approach to the PIP process and the disciplinary meeting, the Respondent's decision to terminate the Claimant's employment by reason of his conduct fell within the range of reasonable responses open to the Respondent. The decision may have been a severe sanction and the Claimant may have been the author of his own misfortune by virtue of the approach he took to the PIP and disciplinary processes, but it is not for me

to substitute my judgment as to what was appropriate for that of the employer.

70. In reaching its decision the Respondent considered carefully the Claimant's conduct, the surrounding circumstances his length of service and clean disciplinary record and I am satisfied that in the circumstances the decision to terminate the Claimant's employment was one open to a reasonable employer. This was a situation where the Respondent could reasonably conclude that the Claimant's conduct in relation to the PIP process, including the issue of his job description, was such that termination of his employment was an appropriate step. I am satisfied from the procedural perspective that there were no further investigations which a reasonable employer would have needed to conduct before making the decision which Ms Cuconato did. The conduct of the Claimant upon which she based her decision was clearly evidenced by the documentation before her and the Claimant's approach to the disciplinary hearing. I accept that it was within the range of reasonable responses for Ms Cuconato in effect to decide that the Claimant's conduct, by way of his attitude towards and approach to the PIP process, as further reflected in his approach to the disciplinary hearing made his position untenable.
71. The appeal process which the Respondent conducted in my view reinforced the fairness of the Respondent's decision. I do not consider that the fact that Mr Harris focused in part on the Claimant's shortcomings in performance terms undermines the argument that the principal reason for the Claimant's dismissal was his conduct. I consider that Mr Harris took his responsibility very seriously and wished to explore the dismissal decision in depth and that to review the performance aspects of the situation in the way that he did enabled him to be satisfied that the PIP process, which was the source of the Claimant's conduct, was legitimate and appropriate. In my view, the Claimant's repeated refusal to accept the 2016 job description at the appeal stage only reiterated and reinforced the fact that the decision that Ms Cuconato reached was one which was open to her on the facts before her and was one which a reasonable employer could reach.
72. In a couple of respects the Respondent's handling of the issues which led to the Claimant's dismissal are open to criticism but the deficiencies identified in the course of the hearing and this judgment do not in my view take the Respondent's decision outside the range of reasonable responses. As noted already, the Respondent can be criticised for not sharing the costs information Ms Cuconato was sent with the Claimant in order to afford him the opportunity to comment but I do not consider that this failure, while regrettable, undermines the fairness of the Claimant's dismissal given that the costs issues principally related to the Claimant's performance rather than the conduct issues which formed the basis for his dismissal. Likewise, Mr Harris could have passed the costs figures which he obtained to the Claimant and given him the opportunity to comment upon them. Since the decision to terminate was based on the Claimant's conduct rather than performance and the fact that there had been a

material overspend was understood by all concerned in any event, I do not consider that this takes the decision of the Respondent outside the range of reasonable responses. Notes could have been taken of the meeting of 8<sup>th</sup> July 2016 and the Claimant could have been supplied with a copy of the appeal meeting notes. However, whilst regrettable and far from best practice, in my judgment these are minor issues of no substantive impact and do not undermine the fairness of the decision to terminate the Claimant's employment. Even if these issues had led me to conclude that the Claimant's dismissal was (procedurally) unfair, I would have applied the *Polkey* principle described above on the basis that any such defects would have made no difference to the eventual result and therefore any compensation due to the Claimant in respect of unfair dismissal would have been reduced by 100 per cent.

73. Having made the findings set out above, I do not need to determine the extent to which the Claimant contributed to his dismissal by his conduct. Suffice it to say that, since it was the Claimant's approach to the PIP process that constituted conduct justifying his dismissal, had I needed to make a finding in that regard I would have accepted the Respondent's submission that the Claimant contributed to his dismissal although I would have sought further representations from both parties on the extent of that contribution and any consequent reduction to the basic and compensatory awards for unfair dismissal had that been necessary.
74. I should also record that, had the Respondent's decision to dismiss the Claimant been based on the Claimant's performance as opposed to his conduct, I would have found that decision to be unfair. By reference to his performance alone, I would have found that no reasonable employer would have dismissed the Claimant at the stage that the Respondent did without affording to the Claimant further opportunities to improve in the course of a disciplinary process in which failure to meet specific targets was explicitly a condition of avoiding formal warnings and ultimately dismissal. Moreover, I do not consider that I would have been able to conclude, had it been necessary for me to do so, whether and at what point the Respondent could otherwise have fairly dismissed the Claimant for poor performance. I do not consider that there was sufficient direct evidence put to me to enable me to determine that issue. However, the Respondent's reason for dismissal was the Claimant's conduct and its decision was, for the reasons I have set out above, within the range of reasonable responses.
75. The judgment of the Tribunal is therefore that:-
1. The Claimant was dismissed by reason of conduct being a potentially fair reason for dismissal falling within section 98 of the Employment Rights Act 1996.
  2. The Respondent acted fairly in all of the circumstances of the case in treating that conduct as a reason to justify the dismissal of the Claimant.

3. The Claimant's claim of unfair dismissal fails and is dismissed.

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Employment Judge C Wynn-Evans, Reading.

3 October 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS