EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. I. Birins	v	**Tesco Stores Limited**

Heard at: **Birmingham via CVP** **On:** **16,17 & 18 November 2021**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **In Person**

Respondents: **Miss. Swords-Kiely, Counsel**

JUDGMENT

1. The claim of unfair dismissal is not well founded and is dismissed.
2. The claim for outstanding holiday pay is not well founded and is dismissed.
3. The claim for wrongful dismissal is well founded and the claimant is awarded £619.95.
4. The claim for unlawful deductions is well founded and the claimant is awarded £212.46

REASONS

1. By claim form dated 11 July 2020, the claimant brought claims of unfair dismissal, holiday pay, wrongful dismissal and unlawful deductions of wages. At the commencement of the hearing the respondent conceded that the claimant was owed monies for wrongful dismissal. Counsel was awaiting further instructions before making any further concessions about this.

2. The issues identified at the beginning of the hearing were as follows :-
   Unfair dismissal
   (1)What was the reason or principal reason for the dismissal (the respondent accepts it dismissed the claimant but asserts it was for the admissible reason of capability namely performance);
   (2)Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant including whether
   (a)it gave the claimant adequate warnings about his performance;
   (b)the claimant was given an opportunity to improve his performance;
   (3)Was the dismissal within the band of reasonable responses.
   (4)Would the adoption of a different procedure resulted in a different outcome;
   (5)Did the claimant cause or contribute to his dismissal.

   Holiday pay
   (6)Was the claimant owed any holiday pay at the date of termination;
   (7)If so, how much.

Notice pay
(8)Was the claimant given the correct notice pay ?
(9)If not, how much is he owed.

Unlawful deductions
(10)Was there a shortfall in the claimant's pay?
(11)If so, how much.

The hearing

3. The hearing took place over video platform. The Tribunal was provided with an electronic bundle of 1,400 pages. The respondent called three witnesses Mr. Robertson, dismissing officer and former warehouse service shift manager; Mr. Fuller, Chair of Appeal (1), Distribution Centre Manager and Mr. Potter, Chair of Appeal (2) and packaged Stream Distribution Director. The claimant gave evidence. The respondent submitted an opening note which the claimant expressed no objections to the Tribunal reading.

4. At the commencement of the hearing the Tribunal having read the claimant's witness statement, the Tribunal noted that the claimant had said he had a lack of understanding about the English language. On questioning of the claimant, he confirmed he did not require an interpreter to participate in the proceedings. The respondent was reminded about the Equal Treatment Bench book and the need to ensure questions asked of the claimant were not complicated as English was not his first language. The claimant was given time in the hearing to consider his submissions. The respondent gave their submissions first so that the claimant had notice of the issues they sought to raise. The parties identified documents and statements to be rads prior to the hearing of the evidence. At the conclusion of the case the claimant confirmed he had been given a fair opportunity to put his case before the tribunal.

The relevant law

5. The burden rests upon the respondent to establish the reason or principal reason for dismissal. Capability is an admissible reason pursuant to section 98 of the Employment Rights Act 1996. It is sufficient for the employer to honestly believe on reasonable grounds that the claimant is incapable and incompetent; it is not necessary for the employer to prove that he is in fact incapable or incompetent **(Alidair Limited v Taylor 1978 ICR 445).**

6. If the respondent is able to establish that the claimant was dismissed for an admissible reason, the overall fairness of the dismissal must be considered under section 98 (4) of the Employment Rights Act 1996. A neutral burden applies. The Tribunal is not permitted to substitute its view for the employers and whether a dismissal for the reason of capability was fair is whether the dismissal fell within the band of reasonable responses (**British Leyland UK Limited v Swift 1981 IRLR 91**).

7. Pursuant to section 98 (3)(a) of the Employment Rights Act 1996 capability is defined as "assessed by reference to skill, aptitude, health or any other physical or mental quality..". It is for the respondent to set the standards

required of its employees and tribunals cannot substitute their own view of an employee's competence (**Fletcher v St. Leonard's School EAT 25/87).**

8. In respect of an employer's reliance on a final written warning; the starting point should always be section 98 (4) of the ERA namely whether it was reasonable for the employer to treat the reason for dismissal as sufficient to dismiss the claimant. It is not for the tribunal to reopen the final warning and consider whether it was legally valid or a nullity. Only rarely would it be legitimate to go behind a final written warning given before a dismissal taking account of whether the warning was issued in good faith, whether there were prima facie grounds for imposing it and whether it was manifestly inappropriate are relevant to the question of whether the dismissal was reasonable (**Davies v Sandwell Metropolitan Borough Council 2013 IRLR 374).** To go behind a warning, the warning would have to be manifestly inappropriate. In the case of **Wincanton Group plc v Stone ICR 6** it was held that a tribunal must remember that a final written warning always implies subject only to any contractual terms to the contrary that any subsequent misconduct of whatever nature will usually be met with dismissal and only exceptionally will dismissal not occur.

9. In respect of general fairness the Tribunal's task under section 98 (4) of the ERA is to assess the fairness of the disciplinary process as a whole which includes any appeal (**Taylor v OCS Group Limited (2006) EWCA Civ 702.**)

10. Compensation must be reduced where a different procedure would not have resulted in a different outcome to reflect that a claimant could have been fairly dismissed (**Polkey v AE Dayton Services Limited 1988 ICR 142**). Further pursuant to section 123(6) of the ERA where 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. A similar provision is contained in section 122 (2) of the ERA 1996.

FACTS

11. The Tribunal has found the relevant facts proportionate to the live issues in this case.

12. The respondent is a retailer operating across the UK with over 3,400 stores and employing approximately 300,000 people. It operates Distribution Centres throughout the U.K.

13. The claimant was employed by the respondent from 27 June 2011 as a team member/part time flexible warehouse operative in the respondent's Daventry distribution centre. From January 2017, the claimant worked at weekends (two days) and he was trained in two skills namely as a picker and a forklift truck driver. As a picker the claimant was required to follow an assignment and pick required items (up to 800 items). As forklift truck driver he was instructed to move particular pallets.

14. His hourly rate from 1 April 2019 was £10.30 plus 25% because he worked Saturday and Sundays (the weekend premium rate). He worked 7.5 hours per day from 6 a.m. until 2 p.m. He was entitled to 13 days holiday plus one personal day. Further on termination he was entitled to 9 weeks notice.

15. The claimant's contract of employment was subject to the Daventry Grocery Site Agreement (pages 59-114). The agreement at pages 71 to 72 makes a distinction between conduct and capability; the latter being described as employee incapable of performing to an acceptable level.

16. The respondent uses a process called My Performance (pages 173-249) as a means to manage the performance of employees. Employees are subject to a 4 weekly performance review period. The process requires employees to perform to a target of 100% performance indicator. The process is set out in some detail and provides for four stages of performance.

17. The levels of potential achievement as follows (a)exceeding : achieving above 92% performance during their performance period; (b)achieving : consistently it is achieving 92% performance (c)more to do : achieving 85-91.99% performance and (d)missing below 85% performance. The process was devised by an independent company which carried out an assessment of the different tasks in the warehouse. The process allocated the time that tasks needed to be completed. The timings were agreed by the respondent and by the trade union. The performance measures take into account weights of items, location of items, numbers of items and going to the toilet and the washing hands. The time for each assignment is unique; there is no average time to complete the particular task.

18. The claimant's role required maximum efficiency and the standards were applied across all team members. On coming on shift, an employee wears a device which allocates particular tasks to him and also provides a timescale for the tasks to be completed. The expectation is that a worker will complete the tasks within the time allotted.

19. Where an employee receives a "more to do" performance rating, their Team manager will initially seek to manage them informally over a period of 8 weeks in order to establish if there are any training needs or any particular support required by the employee. Once training has been completed the colleague will be given a set of targets to achieve. If an employee's performance does not improve to the achieving performance rating after 8 more weeks they will be moved to the missing performance path (pages 195-197). The employee should be offered support through coaching and training and if their performance does not improve, an employee can be subject to different types of warning ranging from verbal to final written warning. Where an employee's performance improves to an achieving rating, the employee can be taken off the process of performance management. If an employee's performance has not improved whilst the

colleague has a live final warning, the process provides that they may be dismissed after 16 weeks.

20. The process refers to meetings as “disciplinary meetings” but this process is used solely to manage employees who are underperforming and not matters of misconduct. Employees dismissed after a final written warning and ultimately dismissed are dismissed on the grounds of capability.

21. The claimant had worked satisfactorily for the respondent from the commencement of his employment in 2011. He worked 5 days per week without issue. The claimant suffered from a back problem from 2014 to 2016 but during that time his performance did not deteriorate. In January 2017 the claimant began to work part time, Saturdays and Sundays. From 2018, it was noted that the claimant’s performance began to drop. He was managed under the My Performance procedure from April 2018 until December 2020. The claimant was subject to a number of investigations and disciplinary sanctions. The claimant was not able to give any explanation as to why his performance dropped during this period and he was unwilling to disclose to the respondent where he was working during the week. The respondent exercised its discretion to extend the process and he was given a greater period of time to improve than the policy stated.

<u>The claimant and the capability process</u>

22. The claimant, along with other colleagues, was provided with a My Performance Booklet (pages 173-249). This booklet set out the process of assessment. The Tribunal found that the claimant understood the process and was not satisfied from the claimant’s evidence that he was unclear about this. The claimant conceded in cross examination that he knew it was his performance that was in issue and not his conduct. Also, the claimant was invited to a number of meetings and he was made aware of the assessment process applied to his performance.

23. The claimant in his evidence was critical of the respondent and alleged he was not provided with training. The Tribunal found that the claimant understood how to do his role; he was experienced but was simply too slow in completing tasks within the allocated timescale.

24. The claimant also suggested that he did not understand what “still time” was; the Tribunal rejected this evidence taking into account the level of the claimant’s experience. The claimant was also critical that the respondent did not provide him with any evidence that he was actually underperforming; the Tribunal rejected this and was satisfied that the claimant was aware from his dealings with management that he was not meeting targets and this was explained to the claimant at the meetings.

25. The claimant requested that the respondent should have provided him with “an alternative skill” namely an opportunity to learn another skill suggesting that he was given only heavy work to do by the respondent which was difficult because of his back issue. The evidence of Mr. Fuller and Mr.

Robertson was that there were other employees who were only trained in one skill and needed to be trained in a second skill so those employees were given priority; there was no business need for the claimant to be trained in a third skill and the claimant due to his weekend working was not available for further training in another skill. The Tribunal found these explanations credible. The Tribunal found that the claimant's back issue had no impact on his working and there was no evidence that the claimant was unfairly allocated work; he was simply working slowly.

26. The claimant complained he was not provided with training or coaching to improve his performance, he did not understand what he needed to do to improve and he did not accept the levels of performance he was given. The tribunal reached the conclusion that the claimant understood far more than he was willing to accept. He was an experienced FLT driver who had worked for the respondent since 2011. The claimant was informed consistently by the respondent he needed to reduce his still time, not leave his shift before the end of the time and speed up. Observations of the claimant's working by experienced members of staff (page 510, 764 and 767) was that he worked at a "pedestrian pace". The Tribunal was not satisfied by the claimant's evidence that an experienced picker was unable to do the task in the time allocated. The performance standards were applied to all colleagues. The claimant understood he needed to work faster to meet acceptable standards. He was taken to the expected targets at page 186 of the bundle and the claimant accepted he was aware of them The Tribunal rejects the claimant's evidence that he was set unrealistic targets. The Tribunal was satisfied that target times are fixed by the process and applied to all colleagues. The Tribunal also rejects that the claimant did not know how to request information about his performance because of bad English. The claimant had very good English and specifically did not require an interpreter. The claimant was also represented so that ET don't find this credible. The claimant in his evidence relied upon the Myperformance manager guide at page 181 which explained the standard time is 23.3 seconds per item. However, that is not the correct interpretation. The guidance is clear that this is simply an average for some tasks but does not indicate the timing that might be given to a colleague on any one day because so much is dependent on the tasks required to be completed that day. The Tribunal was not persuaded that the claimant really misinterpreted this.

27. In evidence the claimant stated he was unclear about the amount of time he had to complete a relevant assignment but the Tribunal did not accept this. From the start of his shift, the claimant accepted he was allocated a particular amount of time to complete the work.

28. The claimant gave evidence he was unaware how he could improve. The Tribunal did not accept this. On a number of occasions, the respondent informed the claimant he was too slow; on 4 November 2018 (page 400) the clamant was informed that he was taking extra breaks and clocking off early. He was also told at page 409 he was essentially too slow. At his disciplinary

hearing (page 434) Mr. Cunningham informed the claimant that it was "down to will and not skill". On page 441 the claimant was advised that his performance was not improving and needed to minimise the time he was losing. He was advised at page 452 that he needed to go faster and have less breaks. Although it was put to the claimant in cross examination it was unlikely a manager would make these observations about his performance up, the claimant was unwilling to accept any of these comments. At page 473 another manager surmised that the claimant was taking excessive still time and breaks. At page 489 the manager concluding that the claimant was not improving and he had excessive still time. At page 554 it was suggested that the claimant had excessive still time and took no responsibility for his performance. By page 597 the third disciplinary the claimant was issued with a third verbal warning by Mr. Harris who established it was not a skill issue; the claimant provided no mitigating circumstances. In June 2019 page 611 the claimant objected in his evidence that he was having too much still time. At the fourth investigation meeting on page 630. It was considered that the continued under performance was a will not a skill issue. Page 693 it was indicated that the claimant needed to move faster and at page 703 it was skill and not will. At page 698 the claimant was informed by Mr. Waseem that he needed to work with his weakness which was still time.

29. The claimant raised a number of grievances in the course of the My Performance process (page 386). Mr. Robertson heard the claimant's grievance on 13 April 2019 (page 504 to 509) and concluded in his outcome at page 518 to 523. He also held a further grievance meeting with the claimant on 14 September 2019 (page 704-6) and determined that page 710-11. The claimant did not appear to accept he was poorly performing, despite the fact that all of the observations and recorded times indicated that the claimant was not performing to an acceptable standard.

30. On the balance of probabilities, the Tribunal did not find the claimant's evidence credible. The Tribunal found that the respondent informed the claimant he was taking too long to complete the allocated tasks. Further, the Tribunal rejected the claimant's contention that the respondent simply just wanted to get rid of him. The policy indicated that a minimum period to dismiss someone for failing to achieve standards was 16 weeks. The process applied by the respondent here was to give three verbal warnings and one written warning. The process was extended for the claimant to a period of 20 months.

Warnings/final written warning; manifestly inappropriate?

31. The claimant received a number of warnings for his poor performance. On 9 December 2018 the claimant was subject to a verbal warning (page 437) which would expire on 3 February 2019. On 7 April 2019 he was subject to a verbal warning (page 484) due to expire on 2 June 2019. He was subject to a further verbal warning on 15 June 2019 (page 607) which would expire on 10 August 2019. He was subject to a first written warning on 21 July 2019

(page 664) due to expire on 20 October 2019 and final written warning on 6 September 2019 (page 748) due to expire on 5 April 2020.

32. All of the warnings were given to the claimant following an investigation meeting and disciplinary meeting where the claimant was accompanied by a representative. The claimant's requests to adjourn meetings were granted by the respondent except for the fourth disciplinary meeting with Mr. Markey and the appeal of his final written warning where his chosen companion was unable to attend. Mr. Markey considered that the claimant was seeking to stall the meeting so that his verbal warning would lapse (see pages 646,656 and 666). The Tribunal found that this was a reasonable conclusion for the respondent to reach in the circumstances. Further the claimant was given 24 days notice of the appeal hearing of his final written warning; the Tribunal found it was reasonable of the respondent to expect the claimant to make alternative representation arrangements particularly as he had used 6 different representatives in the course of the process.

33. The claimant was given an opportunity to appeal all his disciplinary warnings (except his first written warning). No appeal was successful. The claimant was critical in his evidence as to not being given the opportunity to appeal his first written warning but this was appealed outside the time scale for an appeal and the Tribunal found that it was reasonable for the respondent to impose the timescale set out in the policy.

34. The claimant's performance was managed by twelve different managers who reached the conclusion that the claimant's poor performance was related to time wasting namely excessive still time, breaks or moving at a slow pace or logging off early. An observer of the claimant's performance noted that the claimant was able to meet the performance target if he tried (page 524).

35. The Tribunal concluded that the claimant was taken through the process in accordance with the respondent's capability procedures. The final written warning imposed on 6 October 2019 was imposed in good faith; there were prima facie grounds for imposing it and there was no reason for the Tribunal to consider that it was manifestly inappropriate.

Dismissal

36. From the date of the final written warning on 6 October 2019 until the claimant's dismissal the claimant was given six shifts to improve. Taking account of the experience of the claimant and the time he had been subject to assessment under the capability procedure, the Tribunal finds that this was a reasonable period.

37. The claimant's performance was assessed as "missing" for weeks 35, 36 and 37. By letter dated 27 December 2019 (page 857) the claimant was invited to attend a My Performance disciplinary meeting. The claimant was unable to attend the proposed meeting date (p.858) so the meeting was re-arranged for 4 April 2020 (page 859). The claimant provided available dates

from April onwards because he took a “lifestyle break” which is a type of sabbatical arrangement available at the respondent between 5 January 2020 and 29 March 2020 (page 860).

38. At the disciplinary meeting on 4 April 2020 (page 871-887) the claimant was represented. Mr. Robertson chaired the hearing. The claimant’s performance rating was between 66% and 67.5% in weeks 35,36 and 37 namely his performance was “missing” under the process.

39. In the course of the meeting, some of the claimant’s fork-lift truck assignments were reviewed. When asked by Mr. Robertson if there was anything else that could have been done to help the claimant to receive an achieving performance rating, the claimant did not respond. The claimant asked about the external company who calculated the timings for the various tasks because he considered the timings allocated to each task were incorrect. Mr. Robertson suggested the claimant contact head office about the company’s details.

40. Mr. Robertson asked the claimant how long he needed to improve his performance to an achieving rating and the claimant replied it would take him a “couple of years” (see page 885). At page 878 it was suggested to the claimant that it was will rather than skill.

41. Mr. Robertson reviewed the My Performance process and noted that an employee could be dismissed after a period of 16 weeks (page 200). The claimant had been in the process for a period of about 18 months so had been provided with an extended period to improve his performance. He took into account that the claimant had been provided with coaching and support from meetings with managers. The claimant had been observed by colleagues at pages 510, 764 and 767 and had been advised as to how to improve his performance. Mr. Robertson concluded that the respondent had done everything it could have done to assist the claimant to improve his performance. Mr. Robertson took into account the claimant’s 9 years of good performance whilst employed by the respondent; he concluded that the claimant was aware of how to do his role and what was required to meet acceptable performance. The claimant did not put forward any mitigation for his drop in performance. Mr. Robertson concluded that it was unlikely that as the claimant’s performance had not improved over the last 18 months it would improve; the claimant also said he required years to improve. Mr. Robertson concluded that he would dismiss the claimant with pay in lieu of notice. Mr. Robertson accepted that he incorrectly completed paperwork at page 888 and referred to misconduct. This error meant that the claimant was not paid appropriately because he was entitled to payment in lieu of notice. He confirmed his decision in a letter dated page 889.

42. By letter dated 14 April 2020 (page 890-892) the claimant appealed his dismissal. The appeal was heard by Mr. Fuller. He took account of the final written warning. He spoke to the claimant’s line manager. He considered that the decision to dismiss in the circumstances was reasonable. The claimant’s appeal was unsuccessful. In his evidence Mr. Fuller accepted an

error had been made in the calculation of monies paid to the claimant at the termination of his employment. He gave evidence that the claimant was owed monies for those 2 days of holiday. He further accepted that the claimant was wrongly not paid in lieu when he should have been.

43. By letter dated 5 July 2020 the claimant appealed to stage two. Mr. Potter heard the appeal. The claimant said the respondent should have looked at occupational health. The claimant said his point about the bonus was not dealt with. He responded that the appeal lodged by the claimant on 30 August 2019 at page 669 was out of time. At page 75 the claimant had 5 working days to appeal and his appeal fell outside this timescale. The claimant had an opportunity to state his case. Mr. Potter's remit was to consider whether the appeal process at stage 1 had been satisfactory. He concluded that it was.

44. The Tribunal rejects the claimant's suggestion that he was dismissed because he pointed out to the respondent that it was responsible for failing to follow an unfair process.

Submissions

45. It was determined that the respondent would provide its submissions first so that the claimant, as a litigant in person, could fully understand how the respondent was summarising its case. The respondent provided a written submission and supplemented this with oral submissions.

46. The respondent submitted that the respondent had a reasonable belief that the claimant was incompetent or unsuitable for the job; a belief which was shared by managers Mr. Robertson, Mr. Fuller and Mr. Potter and others who had assessed the claimant in the process. It was submitted that the belief was reasonable as the claimant's performance was measured against performance standards. The respondent conducted a reasonable investigation to form that belief. It was submitted that the Tribunal should not go behind the final written warning unless that warning was manifestly inappropriate and the respondent submitted it was not. The claimant was significantly and consistently underperforming against the performance targets set by an independent company and accepted by the trade union. The claimant was experienced; he was observed and informed to increase his speed and not waste time. A fair process was applied; he was warned about his poor performance and he was given more than 16 weeks namely about 20 months to improve. Alternatively, there should be a deduction for Polkey or contributory fault.

47. The claimant should have been paid for shifts on 29 March 2020 and 4 April 2020. In error those monies were clawed back by the respondent who considered that the claimant was overpaid for 5 and 11 January 2020; he was not; the claimant was taking his personal day and holiday. The value of the shifts was £106.23 (basic pay of £77.25; weekend premium of £19.32 and 10% covid bonus). This equates to a shortfall owed to the claimant of £212.46.

48. The respondent conceded the claimant's wrongful dismissal claim. The claimant's contract of employment did not contain a PILON clause. He was wrongfully dismissed. The claimant was dismissed on 4 April 2010. He was entitled to 8 weeks' notice. In July the respondent paid the claimant £1390.50 which represented 9 weeks basic pay. The claimant is owed £156.33 of annual bonus due on 29 May 2020. He was also entitled to a covid 19 recognition bonus paid in respect of work until 30 May 2020 (the last day of the claimant's notice period) £154.50 (that is 10% of £1545.12) plus a weekend premium for 8 weeks calculated at 16 by £19.32 total of £309.12. The wrongful dismissal totals £619.95.

49. The claimant submitted that he had worked for the respondent for many years and he was loyal. He suffered from back pain. The claimant submitted that the respondent said he was underperforming but he is not a robot. He said he was provided with heavy work and he was set up to fail and not trained. He was pushed away from the company.

Conclusions

50. The starting point is the reason for the dismissal. There is a significant amount of material before the Tribunal which shows that the claimant was subject to a number of warnings and a final written warning. Following the disciplinary hearing on 4 April 2020 the claimant was dismissed in circumstances where the claimant's performance had not improved. On the balance of probabilities the respondent dismissed the claimant for the reason of his poor performance and capability is an admissible reason pursuant to section 98 of the Employment Rights Act 1996.

51. The Tribunal was satisfied that the final written warning for capability imposed on 6 October 2019 was imposed in circumstances which cannot be said to be "manifestly unfair". The respondent had a process of managing performance pursuant to the "My Performance Process". The respondent followed that process. The claimant was made aware of his drop in performance; management met with him to discuss this; he was observed at work by a third party who concluded that this was an issue of the "will" of the claimant; he was experienced and capable of meeting performance targets but he needed to manage his time more efficiently. The Tribunal rejects the claimant's case that the imposition of the final written warning was manifestly unfair and does not in the circumstances seek to go behind it.

52. At the point of weeks 35, 36 and 37 the claimant's performance was categorised as "missing". By letter dated 27 December 2019 the claimant was invited to a My performance disciplinary meeting but was unable to meet on the proposed date. The respondent adjourned the meeting date to a time convenient to the claimant following his lifestyle break.

53. At the meeting on 4 April 2020 the claimant was represented. He was informed about his drop in his performance. The claimant was given an opportunity to provide an explanation as to the drop in performance but did not provide an answer but confirmed it would take him a couple of years to meet this (page 885). The Tribunal concluded that the respondent formed a

genuine belief in the claimant's incapability on reasonable grounds following a reasonable investigation. It was reasonable for the respondent to conclude that it should not provide the claimant with years to improve his performance taking into account the level of experience the claimant had. By this oint the claimant had been given some 18 months to improve his performance and had been given feedback in terms of working faster and cutting down on breaks. The Tribunal concludes that the decision to dismiss the claimant for the reason of capability fell within the band of reasonable responses taking account of the period allowed for improvement; feedback received; the experience of the claimant at the job; the reason for the incapability was due to slow working and not lack of skills. The claim of unfair dismissal is not well founded and is dismissed.

54. The respondent has rightly conceded that it failed to pay the claimant notice pay and holiday pay.

55. The claimant was not paid for two shifts on 29 March 2020 and 4 April 2020. The value of the shifts was £106.23 (basic pay of £77.25; weekend premium of £19.32 and 10% covid bonus). This equates to a shortfall owed to the claimant of £212.46. The claimant is awarded this sum.

56. The claimant was wrongfully dismissed. At the date of his dismissal on 4 April 2010. He was entitled to 8 weeks' notice. In July the respondent paid the claimant £1390.50 which represented 9 weeks basic pay. The claimant is owed £156.33 of annual bonus due on 29 May 2020. He was also entitled to a covid 19 recognition bonus paid in respect of work until 30 May 2020 (the last day of the claimant's notice period) £154.50 (that is 10% of £1545.12) plus a weekend premium for 8 weeks calculated at 16 by £19.32 total of £309.12. The wrongful dismissal totals £619.95 and the claimant is awarded this sum.

04/01/2022

Employment Judge Wedderspoon