



EMPLOYMENT TRIBUNALS

Claimant: Mr R Patel
Respondent: IBM UK Limited
Heard at: Reading **On: 30 and 31 January 2018**
Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Mr Freddie Popplewell (FRU)
For the Respondent: Ms Karenza Davis (Counsel)

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

1. In a claim form presented on the 25 April 2017 the claimant complained that he had been unfairly dismissed by the respondent. The respondent defends the claim.
2. The issues between the claimant and the respondent have been limited to the following matters: whether the redundancy selection criterion 'Performance' was fairly applied? Whether the redundancy selection criteria of 'Performance' and 'Criticality to Business' were unfair in themselves and unfairly applied to the claimant?
3. The claimant gave evidence in support of his own case. The respondent relied on the witness statements of Ms Gwenyth Mary Moore, Mr Harpreet Singh Puri, Mr Geoff Shuttleworth and Mr Anthony Peter Timmons. All the witnesses produced written statements which were taken as their evidence in chief. Mr Shuttleworth also produced a supplemental statement. I was provided with four volumes of documents running to 1793 pages, most of which were not relevant to the issues I have had to decide and were not referred to.
4. I made the following findings of fact.

5. The Respondent, IBM United Kingdom Limited (“IBM”) provides IT, technology, hardware, software, new business solutions and services. It employs about 2000 people in the United Kingdom.
6. The Claimant’s employment with the respondent commenced on 5 July 2011, initially as a Systems Integration Programme Manager. There is a dispute between the parties as to what the claimant’s role was at the time of his dismissal. The respondent contends that the claimant was a Delivery Project Executive (“DPE”) in Global Business Services.
7. The respondent is organised into discrete business units to which its employees are assigned. These business units operate independently of one another. Each has their own management and team structure, budgets, profit and loss accounts, and HR support. The Claimant was assigned to the Global Business Services (“GBS”) business unit.
8. The claimant contends that he transferred to the Global Technology Services (“GTS”) business unit from August 2014. The respondent contends that the claimant throughout remained employed in GBS as a DPE. I am satisfied that the evidence of the respondent is the correct position on this issue.
9. GTS and GBS both have DPE’s within their business units. They have the same core skills that are portable between business units. While the claimant was employed on GTS projects from August 2014 he remained as an employee in the GBS business unit. The claimant requested a transfer from GBS to GTS. This was agreed by his line manager Mr Puri. The claimant was informed of the GTS business PBC Goals, Measurements and Attributes document (p167A) when it was thought that the claimant would transfer to GTS. The GTS business unit did not agree to the transfer and the transfer never took place. While the claimant worked on GTS projects from August 2014 he remained a DPE in the GBS business unit.
10. The formal performance appraisal process used by the respondent was called the Personal Business Commitments (“PBC”).
11. Employees were given a PBC rating, the scoring scale for which was “1” (being the highest score), ‘2+’, “2-”, “3” and “4” (being the lowest score). PBC ratings must be appealed within 60 days of receipt and employees can also raise a second appeal.
12. At the start of the calendar year, the first line manager gives the previous year’s PBC rating to the employee. If the employee achieves PBC 3 or PBC 4, they undergo a performance improvement process (“PIP”).
13. If an employee fails a PIP, they are given an interim PBC 4 and undergo a disciplinary process. An employee can appeal a disciplinary sanction. If an

employee gets two PBC 3s in a row, this is generally converted into a PBC 4 and results in a disciplinary process.

14. The Claimant's last three PBC ratings were: in 2013 PBC3, in 2014 PBC3 and in 2015 PBC4.
15. The claimant did not appeal his PBC rating for 2013. The Claimant's 2013 PBC 3 rating resulted in the Claimant having to go on a PIP. This was handled by Mr Puri. The Claimant failed the PIP and his PBC 3 rating was converted to an interim PBC 4. The Claimant was subject to a disciplinary process to review the Claimant's failure of the PIP.
16. The disciplinary hearing took place on the 7 November 2014. The hearing was conducted by Mr Puri with Ms Moore (who at the time was a HR Partner) taking notes. The claimant was accompanied by his trade union representative. The disciplinary hearing was adjourned for Mr Puri to carry out further investigations as to whether the PIP process had been followed and to give the claimant the opportunity to provide positive feedback that he had received and documentation to support the verbal feedback that the claimant had received.
17. On 28 November the claimant asked for a change of his first line manager. This was refused because at that time there was a freeze on people management moves.
18. The disciplinary hearing resumed on the 28 November 2014. It was decided that no disciplinary sanction would be imposed on the claimant. Instead, a programme of one-to-one coaching was to be implemented.
19. On 27 January 2015 the Claimant again asked for a change in first line manager.
20. In early 2015 the claimant received his PBC rating for work done in 2014. This was PBC 3. Two PBC3s in consecutive years results in the second PBC3 being automatically converted to a PBC4. The Claimant appealed his 2014 PBC rating. In addition to appealing his PBC rating the claimant raised a grievance about Mr Puri's role as his first line manager.
21. Mr Geoff Shuttleworth became the Claimant's second line manager and Miss Fiona Wallace became the first line manager.
22. The claimant considers that the PBC score did not accurately reflect his contribution and performance. The claimant says that he was assessed by reference to the wrong criteria. The claimant was assessed by reference to GBS goals and objectives. He considers that as since August 2014 he had been working on GTS projects he should have been assessed on the basis of GTS goals and objectives. The claimant points to the fact that he was provided with the GTS business PBC Goals, Measurements and Attributes document (p167A).

23. On 23 April 2015, Mr Shuttleworth met with the Claimant to discuss the PBC appeal and the informal grievance.
24. Following the meeting Mr Shuttlework spoke to Mr Puri and obtained feedback from three other people for the purpose of considering the claimant's PBC appeal. On 2 June 2015, Mr Shuttleworth sent the Claimant the outcome of the PBC appeal. Mr Shuttleworth informed the claimant that the appeal was not upheld, explained his reasons and informed the claimant that he had the right to appeal his decision.
25. Mr Shuttleworth investigated the issues raised by the claimant in the grievance meeting and on 16 June 2015 sent the Claimant the outcome of the grievance. The claimant was informed that his grievance against Mr Puri was not upheld, he was told the reasons why and informed that he had the right to appeal against Mr Shuttleworth's decision.
26. As a result of the claimant's PBC 4 rating for 2014 the claimant was invited to a disciplinary hearing with Miss Wallace on the 1 June 2015. The purpose of the disciplinary hearing was to consider the claimant's consistent history of low performance. The claimant stated that his performance was better than Mr Puri had found it to be and gave examples. Miss Wallace decided to impose a first written warning and place the claimant on a PIP. The claimant was informed of his right to appeal the decision. The claimant emailed an appeal to Mrs Moore on the 3 June 2015.
27. The claimant also appealed the decision in relation to his PBC appeal (i.e. Mr Shuttleworth's decision).
28. Mr David Briggs was appointed to handle both the claimant's appeals. The claimant failed to contact Mr Briggs or provide him with grounds for an appeal and after about six months Mr Briggs treated the appeal as closed.
29. The Claimant was absent from work due to ill health from 23 June 2015 to 31 August 2015. The claimant was further absent from work due to ill health and compassionate leave from 17 September 2015 until 19 February 2016. The claimant was also absent from work due to ill health as a result of a knee injury following a car accident from 20 June 2016 to 3 July 2016.
30. For the year 2015 the claimant was given a PBC 3 rating. This was automatically converted to a PBC 4 as the claimant had received another PBC 3 rating the previous year. Due to a combination of compassionate leave and sickness absence the claimant's PBC review was delayed until the summer. The claimant was informed of his PBC rating on 4 July 2016. The claimant did not appeal this PBC rating.
31. The claimant's PBC rating meant that the claimant was to be placed on a PIP. However, in the period from July to September the claimant was

absent from work due to sickness. Although a PIP process was commenced this was put on hold due to the redundancy process.

32. In July 2016 IBM announced a redundancy programme in which, with limited exceptions, all GBS employee were in scope. A process of collective consultation took place via an Employee Consultation Committee.
33. It was decided to reduce costs in the GBS business unit by a headcount reduction. In the collective consultation the scoring criteria and weightings were agreed with the employee representatives. The scoring criteria were; criticality to business, performance and market value. The maximum scoring for criticality to business was 50, performance 30 and market value 20. The highest possible score was 100.
34. In relation to the performance criterion, the poorer the PBC rating the lower the score and the fewer points for the performance criterion. Each of an employee's last three PBC ratings, 2015, 2014 and 2013, were given a score, and the better the PBC rating the higher the score. The scores were weighted so that in general the most recent PBC was given a higher score than the previous PBC's. The higher the total score, the more points an employee would be awarded for performance criterion. The claimant's three PBC ratings resulted in a performance score of 10 resulting in 0 points for the performance criterion.
35. The criticality to business criterion was an evidence based score, which reflected a combination of current contribution, future potential and track record. Sources of data to determine the appropriate score included client feedback, PIP's and disciplinary actions. Employees were awarded a 'core' score of 0, 5, 15, 25, 35, or 45 and then employees with a core score of 5 or more could get 5 additional points. Managers were required to categorise employees into one of five categories of roles. The category determined the description applied for the purpose of determining an employee's criticality to business score.
36. Once the first line managers had scored the employees a three stage process of normalisation took place. First the scores were reviewed by the employee's second line manager. Second the scores were reviewed by the relevant service area leader. Thirdly the scores were reviewed by the service line leader. This process was intended to ensure consistency and fairness in approach, including checking whether all managers had been working on the same basis and that the documented evidence was consistent with the final score.
37. Mr Timmons scored the claimant on the criticality for business criterion. In arriving at his score Mr Timmons considered feedback regarding the claimant. Mr Timmons reviewed the claimant's PBC ratings, focussing on the written content, to get a sense of his feedback and also reviewed the feedback that Ms Wallace had given of the claimant on her handover of his line management. The claimant's feedback on his then current project

was good. While it was positive the project had been for a relatively short period.

38. In categorising the claimant's role, given that the claimant had been performing a role in GTS rather than GBS, Mr Timmons decided it was appropriate to assess the claimant based on how he had performed rather than assessing him against his formal job role skills, as he had not been performing a role of that type for some time. The claimant's core score for criticality to the business was 15. He received 2 additional points resulting in a score of 17.
39. The market value score was determined by reference to Percent Market Reference. This is a measure that indicates pay competitiveness through market value. It is a measure of the extent to which an individual is well or less well paid, relative to their skillset and the external market. Paying in excess of the market range for salaries is determined by an external third party. The market value criterion is automatically calculated. The claimant's market value score was 20.
40. The claimant's total score was 37. All employees with a score of less than 51 were provisionally selected for redundancy.
41. The claimant was invited to an at-risk meeting to take place on 7 October 2016. The meeting was deferred because the claimant had suffered a family bereavement and in due course took place on the 11 October 2016.
42. At the at-risk meeting the claimant was informed that the scoring process had taken place, that he had been provisionally selected for redundancy and that the meeting was the start of a two-week consultation period during which time the respondent would assist the claimant in seeking suitable alternative employment.
43. On the 13 October 2016 the claimant was provided with the latest extract from the respondent's internal vacancies database. The claimant's personal consultation period was extended to the 28 October 2016. On the 17 October 2016 Mr Timmons applied for three positions on the claimant's behalf.
44. On 21 October the claimant's first individual redundancy consultation meeting took place by telephone.
45. On 25 October 2016 the second redundancy consultation meeting took place. The status and outcome of the claimant's application for roles was discussed.
46. On the 28 October 2016 the final consultation meeting took place and the claimant was formally dismissed. It was confirmed that the claimant's employment would end on 6 January 2017. Mr Timmons continued to assist the claimant in his efforts to find the claimant employment.

47. The claimant appealed the decision to terminate his employment. There was a delay between December 2016 and the June 2017 when the appeal was heard. The delay was not caused by the claimant's circumstances. The appeal was heard by Ms Linnet Sen. The claimant's appeal was not successful.

The claimant's submissions

48. The claimant states that in Williams v Compair Maxam [1982] I.C.R. 156, it was held that a reasonable employer should ensure that the redundancy selection criteria are fairly applied. It is submitted that the 'Performance' redundancy selection criterion was unfairly applied. Between August 2014 May 2016 the Claimant was working in the GTS business unit.
49. It is said by the claimant that irrespective of which unit employed the Claimant, during the period in question, the substance of his work was exclusively for GTS. The GBS and GTS business units are entirely different, undertaking different types of projects with different clients. GBS is a consultancy business which provides project management to clients. GTS is a service provider for data centres and networks. The Respondent's division of labour into distinct business units clearly reflects the fact that each unit undertakes a different type of work. If the units were substantially similar, no such division would be necessary.
50. As a result, the two units have distinct PBC objectives. These different PBC objectives reflect the units' different functions, and the different goals and expectations for employees working within those units. Accordingly, there are separate and substantially different documents which set out the PBC objectives for the two business units.
51. The business objectives are different for the two business units, and accordingly the assessment criteria for employees within those two units differ significantly. The Claimant working in GTS he was assessed against GBS criteria for his 2014 and 2015 PBC's. It is said that he was assessed against the wrong criteria.
52. As a result of assessing the Claimant against the wrong criteria in 2014 and 2015, his PBC scores were inaccurate and did not properly reflect his contribution to the Respondent's business activities. Accordingly, in 2014 and 2015 it was unfair to assess the Claimant against a set of PBC objectives for an entirely different unit of the business than that in which he worked.
53. Adopting the inaccurate 2014 and 2015 PBC scores for the 'Performance' criterion was an unfair and unreasonable application of that redundancy selection criterion.
54. It is said by the claimant that there was unfairness in using one factor to mark down the Claimant in two redundancy selection criteria. In Carclo Technical Plastics Ltd v Jeyanthikumar EAT/0129/10/CEA, it was held that

the use of one incident to mark down the employee in two categories was a fundamental and obvious error in the application of the redundancy selection procedure.

55. The claimant submits that he was 'double marked' insofar as his PBC scores were used to mark him down in both his 'Performance' and 'Critical to Business' selection criteria. The Claimant's PBC 2013-2015 scores exclusively formed the basis of his 'Performance' score. In addition, the Claimant's PBC 2013-15 scores formed part of the Claimant's score in the Criticality to Business criterion.
56. It is argued by the claimant that marking down the Claimant based on one factor in two categories was a significant error in the application of the redundancy selection procedure which rendered the criteria, and their application, unfair.
57. It is said that had the respondent not acted unreasonably the claimant would not have been selected for redundancy. The Respondent provisionally selected for redundancy all employees who scored below 51/100 points in its redundancy selection process. The claimant states that if the Respondent had fairly conducted the PBC scoring process, then the Claimant would very likely have scored at least a '2' in both the 2014 and 2015 PBC ratings. This would have meant that he achieved a total PBC score of 55 points. Had the Claimant not been marked down in the Criticality to Business criterion for his PBC's, he would have scored much more highly in that criterion. Had the Respondent fairly and reasonably applied the 'Performance' and 'Criticality Business' criteria and not 'double marked' the Claimant, a conservative estimate of his total score would have been 52/100. Therefore, it is said he would not have been selected for redundancy and dismissed.

The Respondent's submissions

58. The respondent argues that the claimant's PBC scores were not used in the calculation of his criticality to the business, reference was made to the feedback contained in the PBC forms among several other things. The scores and the feedback are different types of information. There was no double counting.
59. The respondent argues that the feedback received as part of the PBC process was only one of many possible sources of feedback to determine criticality to the business. In determining criticality of the business current contribution was to be weighted more highly than track record. Criticality to the business was a judgment which needs to be underpinned by objective evidence.
60. The respondent states that the assessment of the claimant against GBS objectives was not unfair. It was common for GBS employees to be employed on projects in GTS and they could assess performance against objectives that had been set. GTS and GBS objectives were broadly

similar so there is little risk that GBS employee working on GTS projects will be prejudiced by having GBS objectives. The claimant was a GBS employee it was appropriate for him to remain subject to the procedures and management of GBS.

61. The claimant's performance in each of the years 2013-2015 was poorer than that of the majority of his peers. The claimant had a pattern of consistent poor performance and low contribution in comparison with his peers.
62. The claimant submitted a first appeal but never pursued his second appeal in relation to his PBC scores for 2014. The claimant never pursued an appeal for the 2015 scores. It was reasonable for the respondent to rely on the PBC ratings to score the redundancy.

Conclusions

63. The claimant's case in putting forward an argument that there has been unfairness has been very narrowly argued. It has been limited to three issues.
64. The first issue is the unfair application of the performance redundancy selection criteria.
65. It is correct that the claimant worked on GTS projects from August 2014. It is also the case that the GTS and GBS objectives are different. There is also a difference in the way they are drafted in that the GTS objectives appear to contain empirical targets. However, they are in my view broadly similar. Whether the claimant is undertaking work on GTS or GBS projects the basis of determining whether his objectives have been achieved is the same, it is based on his performance. The role that the claimant performs is the same role whether he is working on GBS or GTS projects. There is no reason why on a fair consideration of his performance it cannot be assessed whether he has achieved his GBS objectives from considering his work on GTS projects.
66. There has been no argument presented before me that there was any failure to fairly consider the claimant's performance, other than in the case of Mr Puri. Mr Puri denied that he acted unfairly towards the claimant when he acted as his line manager. I found Mr Puri a credible witness and I was not able to ascertain any sense that he had any malice towards the claimant which might have led to him acting unfairly towards the claimant. I also note that the management of the claimant by Mr Puri was considered in the claimant's grievance. The grievance was investigated by the respondent and it was rejected.
67. The claimant complains that in his PBC for 2014 no account was taken of his work at GTS. Mr Puri denies this stating that he did take it into account. Mr Puri accepted that there was no specific mention of the client the claimant worked on the GTS project or any GTS managers. There was

some positive feedback but it did not outweigh overall poor feedback when considering the whole period.

68. As for 2015 the claimant complains that there was a failure to take into account his work on GTS. This is disproved by the evidence of the PBC form for 2015. Unlike the 2014 PBC form the 2015 PBC makes explicit reference to the claimant's work with the GTS client. It also recognises that the feedback on the claimant was good "relationships and communications", and also that the project meant that the claimant could not demonstrate one of PBC goals about delivery of leadership due to the nature of the role. More importantly the document shows that the claimant's goals specifically included the ability to take into account "support signings of within line or sector (within IBM-AMS or GTS)"; it specifically points to GTS project work as a means of achieving this GBS goal and objective.
69. I am satisfied that it was reasonable for the respondent to use the claimant's PBC scores from 2013-2015 in the redundancy process. The way that the respondent determined the PBC scores in my view has not been shown to be unreasonable or unfair.
70. The second issue relied on is the unfairness of using one factor to mark down the claimant in two redundancy selection criteria. In my view this contention is not factually correct. While the feedback comments contained in the PBC's were considered by Mr Timmon in his consideration of the claimant's criticality to the business, they were not the sole basis of his determination. I accept the respondent's position as correct where it is said that the claimant's PBC scores were not used in the calculation of his criticality to the business, reference was made to the feedback contained in the PBC. The double counting suggested by the claimant in my view in fact did not take place.
71. The third issue relied on by the claimant is the contention that had the respondent acted reasonably the claimant would not have been selected for redundancy. The claimant's point on this issues rests on the contention that there was a failure to properly assess the claimant's PBC scores. I am not satisfied that there has been such a failure. The submission relies on there having been a double counting of the PBC scores. I am also not satisfied that has been established. I am therefore unable to accept that the respondent has acted unreasonably in this regard.
72. The claimant has the right not to be unfairly dismissed by the respondent. A dismissal on the grounds of redundancy is a potentially fair dismissal. In this case the claimant accepts that there was a redundancy and that was the reason for his dismissal.
73. Section 98(4) of the Employment Rights Act 1996 provides that where the employer has shown a potentially fair reason for dismissal, 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.

- 74. The respondent warned about redundancy. The respondent entered into collective consultation and in that consultation agreed selection criteria for the redundancy. The respondent devised selection criteria that was reasonable and the claimant was selected by the respondent in the fair application of that selection criteria. The claimant was consulted by the respondent in respect of ways to avoid a dismissal. No alternative to dismissal was found and the claimant was dismissed on notice. In the circumstances I am satisfied that the claimant's dismissal was fair.
- 75. The claimant's claim of unfair dismissal is not well founded and is dismissed.

Employment Judge Gumbiti-Zimuto
Date: 5 March 2018

Sent to the parties on:

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For the Tribunals Office