



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr M Douglas

British Telecommunications plc

Heard at: London South Employment Tribunal

On: 22-23 May 2019

Before: EJ Webster

Appearances

For the Claimant:

Ms J Cargill (Solicitor)

For the Respondent:

Mr H Sheehan (Counsel)

JUDGMENT

1. The Claimant's claims for unfair dismissal is not upheld.

REASONS

The hearing

1. By an ET1 dated 3 July 2018 the claimant brought a claim for unfair dismissal. By an ET3, submitted to the tribunal on 16 August 2018, the respondent defended the claim.
2. I was provided with 2 bundles, one large one prepared by the respondent's representatives and one smaller one prepared by the claimant's representative. There had clearly been a large amount of antagonism between the parties about the content of the bundle. Nonetheless both parties were willing to go ahead with the bundles as they were and both parties accepted that they had had adequate time to consider the documents.

3. I heard from 5 witnesses; the Claimant and Mr W Richards for the claimant and Ms J Nandra, Ms C Clarke and Mr T McDonagh for the respondent. Each witness provided a written witness statement and gave evidence to the tribunal.

Issues

4. The issues were agreed with the parties at the outset of the hearing.

Unfair Dismissal

5. What was the reason for the dismissal? The respondent asserts that it was capability which is a potentially fair reason as set out in section 98(2) Employment Rights Act 1996.
6. If the respondent can demonstrate that the dismissal was for a potentially fair reason, the respondent must be able to prove it acted reasonably in treating that reason as sufficient to justify dismissing the employee. This will depend on all the circumstances including the size and administrative resources of the employer's undertaking and shall be determined in accordance with the principles of equity and substantial merits of the case.
7. Did the Respondent carry out a full investigation (which in the case of capability would be an investigation into the claimant's capabilities and performance which would include allowing proper opportunity to improve) and follow a fair procedure to dismiss the Claimant?
8. Did the Respondent's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?
9. If no fair procedure was followed would the respondent have dismissed the claimant in any event?
10. If the claim succeeds what remedy should be ordered?
11. If a finding of unfair dismissal is made should any reductions to compensation be made under s122(2) and 123 (6) of the ERA 1996 and if so to what extent?

Factual Findings

Background

12. The claimant was employed by the respondent from 15 February 1988 until 5 May 2018. At the time of dismissal he was working as a Fibre and Cable Control Allocator for the Openreach section of the respondent. This role involved ensuring that the engineers in the field were allocated jobs. The claimant worked in a particular a 'patch' in London. Using various software packages, his job was to ensure that the engineers were fully utilized and knew what job they were going to when. Each patch was allocated jobs by a pod of Controllers – some pods were made up of one controller but they could have up to 3 people in each pod. Generally speaking high performing controllers worked in 1 person pods and where people needed additional support or time they worked in 3 people pods.

13. Prior to being a Fibre and Cable Control Allocator the claimant had been Cable allocator. In May 2017 the region was reorganized so that the claimant had to become skilled in both cabling (sometimes called copper) and fibre (sometimes called jointing) allocation.
14. There were two different types of job for the engineers – ‘fluid’ and ‘non-fluid’. Fluid jobs meant that they had no problems associated with them and could be completed right away. Non-fluid jobs meant that there were potential difficulties and issues with getting the jobs finalized. The claimant had to allocate both types of job and make notes on the software system about the jobs and any updates to its status.

Informal Performance Improvement Plan (‘PIP’)

15. The claimant’s line manager, Ms Nandra, received a complaint about the claimant’s work in March 2017 because an engineer had been sent to do a job that had already been done. She checked why this had happened and it appeared to have happened because the notes on the job had not been updated by the claimant. She also found that there had been previous occasions where the claimant’s performance had been poor and decided that it needed addressing. Her concerns centred around the volume of jobs the claimant was completing, the fact that the notes were incomplete or inaccurate and that he was leaving work at the end of the day without ensuring that the engineers were fully allocated for the following day. She also found that although it had ‘expired’ because it had occurred in October 2014 and could not be counted against him, the claimant had previously received a warning for poor performance.
16. After a period of stress related sickness absence and a holiday (21 March -15 April 2017) the claimant came back to work on a phased return to work and started working full hours again from 15 May 2017. From the claimant’s return to work Ms Nandra monitored his work to see if it continued to be a concern and went through a tick list with him on a daily basis to help understand what he needed to do and when. I accept that this was a coaching exercise and not done with the intention of being a performance plan without the formality.
17. Once the phased return to work had been completed and after the daily coaching had not moved his performance on sufficiently in Ms Nandra’s view, the claimant was put on an informal performance improvement plan from 5 June 2017 to address the issues raised by the complaint in March. The claimant stated at tribunal that the informal plan only lasted 3 weeks when it ought to have lasted 4 weeks. Whilst the start and end dates at page 179 only span 3 weeks, I find, based on the evidence from Ms Nandra and the documents in the file (p183) setting out which weeks the claimant was assessed for – that it did last 4 weeks.
18. The claimant was tasked with the objective of reaching a target number of jobs which increased each week of the 4 week plan and of updating each job with an accurate note on the system.
19. The claimant failed every week of the plan. Although he did manage to achieve the right number of jobs he did not manage to update the notes

sufficiently accurately on each occasion. The respondent states that he was provided with the following support during that informal PIP:

- (i) Sitting with the team leader (Joe F) who would show him what the fluid jobs looked like and how to use the different systems to find them
- (ii) Support from the training lead, Diane
- (iii) Weekly one to one sessions with Ms Nandra

20. The claimant stated that he ought not to have been put on this informal PIP and that the support he received during it was inadequate for several reasons:

- (i) He was new to his job and company policy states that PIPs should not be used in the first 6 months of a new role;
- (ii) There had been a significant gap between the training he received on the software and actually starting the role and the training itself was inadequate;
- (iii) He had just returned from sick leave when he was put on the PIP which was contrary to policy;
- (iv) The systems did not work properly
- (v) There were significant personal difficulties within the team and the claimant was being intimidated by another team member
- (vi) That another team member had been placed on a PIP and because he had complained about the Claimant, the Claimant was also put on a PIP.
- (vii) That the target number of jobs set was too high
- (viii) That he did not know that he still had to use fluidity notes

21. Whilst the claimant raised these concerns at this early stage, he continued to raise some of these concerns (as well as others) throughout the formal performance management plans and before the tribunal at the hearing. Therefore, I have made findings below that address these points by reference to the whole period (where relevant) from the commencement of the informal PIP until the claimant's dismissal.

22. I do not accept that the claimant was new to his job. I accept that this was a new joint role that involved allocating work for two different types of field work. However I accept the respondent witnesses' evidence, that was confirmed by all three witnesses, that the mechanics and systems involved were broadly the same - namely that he had to find work for the engineers to do in the field and update the notes to record that. Prior to the merger of the roles there were fibre allocators and cable allocators. Both did almost exactly the same thing, using similar software, but for different types of fieldwork. After the merger the allocators still allocated work for engineers.

23. The claimant did not have to complete double the workload because there were now two different types of fieldwork involved – he just had to carry out the same tasks for two different types of fieldwork.

24. The claimant was trained on the new software which was introduced in August 2016. That new software was EMP, Sharepoint and EW. He started his new role using that software in April 2017. The claimant states that he did not use

that software in between the training and starting his new role and therefore struggled to use it properly. The ways in which the claimant stated that he struggled varied. Whilst I accept that a gap of that period of time could lead to difficulties in using new software, I also find that the claimant was given appropriate training and support on the system once the informal PIP commenced and throughout the 3 PIP periods. I do not accept that the fact that the training had been some time earlier, meant that he should not have been put on a PIP at all. The informal PIP was meant to try and provide the claimant with additional support to make up for any time lags or anything he had forgotten in between the classroom training and doing the job.

25. The respondent witnesses stated that the claimant was given training by their dedicated trainer, Diane and that he was sat next to his line manager Joe. The claimant stated that Diane did not give proper training because she was not a formally accredited trainer and did not have sufficient time for the claimant. I do not accept this. Diane was clearly allocated by the respondent to work almost exclusively as a trainer. Whilst I accept she may have pitched in more than was ideal in carrying out actual work when the teams were short staffed, the claimant acknowledged that he had some time with her and that she showed him what to do. I do not accept that her lack of formal accreditation meant that she could not be a good trainer. There was no formal qualification available for this type of trainer and I was provided with no evidence that suggested that the training the claimant received from her was substandard or unclear. Instead the claimant had confirmed that the training he received was helpful.
26. I find that the claimant was sat next to Joe and able to ask him questions when he needed support. I also accept that Joe was probably very busy and was not able to dedicate large amounts of uninterrupted time to the claimant. Nevertheless I do believe that the claimant could and did ask Joe for support when he was unsure of things and that the level of support received was reasonable in the circumstances. There are emails about the training from Diane and Joe, thanking them for their help, confirming that he understood their training and assistance and that it had helped him.
27. The claimant said that the systems did not talk to each other properly and kept crashing. The respondent provided evidence of one of the systems and what failures it had experienced at the relevant time. Further the respondent witnesses gave credible evidence that even if one of the systems crashed it would slow things down but not destroy any work. Further they stated that there were other ways of accessing and completing the notes even if one of the systems did go down – which I accept.
28. I believe the claimant that there were occasions, (probably more than the respondent witnesses accepted) when the systems crashed and as with all new software and integrated systems, I am also sure that there were occasions when they did not dovetail perfectly together and that work slowed down and that this was frustrating. Nevertheless I was provided with no evidence that the volume of system outages was so extensive that it could reasonably be expected to prevent the claimant from completing the work he needed to do to pass the PIPs. Further any such outages would prevent the claimant from completing the right number of jobs when the reason he failed the various PIPs was because he was not updating the notes correctly. The respondent witnesses gave clear evidence that

notes could and were updated through a number of different methods and that one system going down would not prevent someone completing notes because they were accessible in other ways. Therefore any system outages would not cause the performance problems which caused the claimant to fail the PIPs.

29. The claimant stated that the volume of circuits he was expected to complete was unrealistic. There was significant discussion at the hearing about whether the claimant had been told that he had to find only fluid jobs as part of his targets or whether he could find both fluid and non-fluid jobs. I accept that the claimant was initially told, for the first week of the informal PIP, that he should find 15 'fluid' jobs. I also accept that this was clarified by Ms Nandra in the second week that he could use both types of work thereafter. This was confirmed in an email to the claimant and is referred to in the minutes of the PIP meetings thereafter. In cross examination the claimant accepted that he had been sent the email referring to this. It is therefore not clear why the claimant continued to assert that he was not clear as to what type of jobs he was meant to find.
30. I conclude that the volume of between 15 and 25 of either type of job, was a reasonable target. Each circuit was estimated to take between 10 and 20 minutes and the claimant accepted this time estimate in cross examination. I also base this conclusion on the fact that for the majority of the weeks in the subsequent PIPs the claimant did find and complete the target number of circuits. The issue that meant he failed in those weeks and which did not change, was his ability to update the notes accurately.
31. There was some concern raised by the claimant and his union representative Mr Winston Richards, about the minutes of the meetings, in particular the minutes of the meeting with Ms Nandra on 8 August (pg 196-198). Despite the email at page 193 in which Mr Richards states that the minutes seemed broadly accurate to him, both the claimant and Mr Richards stated that it omitted to mention that they had asked for the claimant to be referred to Occupational Health because he was suffering from significant levels of stress. Ms Nandra states that this was not brought up at that meeting and that had it been raised she would have considered sending him to OH and it would have been recorded in the notes.
32. I accept Ms Nandra's evidence in this regard. Mr Richards and the claimant were given the opportunity to review the minutes of the meeting. I do not accept that if something so significant as a request for a referral to OH had been omitted from the minutes, Mr Richards in particular would not have raised it at the time. He was an experienced union representative and he states in his follow up email that he read the minutes and found them broadly accurate. Ms Nandra's letter after the review makes no mention of it despite being an otherwise full letter addressing all of the claimant's concerns (p200-202). Further, there were no follow up requests from Mr Richards or the claimant for a referral to OH when it was not forthcoming. The levels of stress now being relied upon by the claimant were not referred to again until the appeal hearing with Mr McDonagh. I believe that had such a request been made and then ignored both of them would have asked why the claimant had not received an appointment with OH.
33. Mr Richards and the claimant raised was that Ms Nandra was unapproachable as a manager. Before the tribunal Mr Richards stated with some

emphasis that Ms Nandra should not have been managing the process because she had not developed an appropriate rapport or good communication with the claimant and in his witness statement he states that she was inexperienced. The claimant also stated in evidence that he did not feel supported by Ms Nandra. When asked in cross examination why she was unapproachable the claimant appeared to suggest that it was because she was a woman though he then back tracked on that statement. It is not clear what either Mr Richards or the claimant wanted Ms Nandra to do that she did not do. I understand that the claimant may have felt reluctant to divulge to her how much he was struggling with his mental health and that this reluctance to talk to Ms Nandra could have been a barrier to him asking for more help or properly articulating his need for more training. Nonetheless it was not evident from what he or Mr Richards said, as to what Ms Nandra had done or not done to cause this response and no details of that were given to me in evidence nor were any specifics of poor behaviour by Ms Nandra given to her, Ms Clarke or Mr McDonagh during the PIP process.

34. Mr Richards says in his witness statement that Ms Nandra did not communicate well with the claimant because the claimant did not always understand what he needed to do to improve, that the parties did not agree the basis for or the substance of the improvement programme, that Ms Nandra refused to record in the review meetings what concerns he was raising and that she refused to recognize that the targets were unrealistic.
35. As stated above I have no evidence to suggest that the notes of any meetings were incomplete or inaccurate and no specifics of how the claimant states that they were incomplete or inaccurate. No details or concerns were raised with Ms Nandra to this effect at the time either. It is therefore impossible for me to determine what has been missed out (if anything) that has any significance for the claimant. In her letter following the First Formal Meeting Ms Nandra apologises to the claimant if he has found her unapproachable and reiterates that he can come and see her with any concerns at any time both at pg 201 and 202.
36. I understand that the claimant felt that the targets were unrealistic and that he wanted to agree what was included in the PIP. Nonetheless, as I address below, I do not accept that, in principle, it was unreasonable for Ms Nandra to set out a PIP and require the claimant to try to reach it regardless of whether he accepted that his performance needed improving or the detail of the PIP. It is common for managers to impose PIPs without the agreement of the individual as it is the nature of most people that we are reluctant to accept that we are not doing as well as we might hope and need monitoring.
37. The claimant felt that his working relationship with two of his colleagues (Justin and Crispin) were very difficult. His concern with Crispin was dealt with by Ms Nandra before the PIP started (p201) which the claimant conceded in cross examination. This involved separating the claimant and Crispin and after that the claimant did not have to work in the same pod as Crispin again. The claimant's concern about Justin was his threatening behaviour. The claimant worked in a pod of 3 people including Justin. The claimant alleged that he was threatening and difficult and on one particular occasion deliberately pushed his chair into the claimant's desk in an aggressive manner. The claimant raised this with Ms Nandra. As a result Ms Nandra sat down and spoke to them both. Ms Nandra

followed up with an email and the claimant responded a couple of days later that things were now better with Justin and there was no need to move him.

38. The incident with the chair occurred at a time when the claimant was suffering significantly with stress and I am sure it was difficult and anxiety provoking for him. However, when he raised it, Ms Nandra took it seriously, spoke to the individuals involved, asked the claimant if he was okay and could continue working with the other person. She had also dealt with the concerns about Chrispin and moved them apart. Whilst I recognize that having difficult working relationships with a team member can be hard to manage and cause upset, once raised with Ms Nandra it appears that she took appropriate action. Further, the claimant expressly stated that he was happy to work with Justin after Ms Nandra had spoken to him.

First Formal PIP

39. After the claimant failed the informal PIP/coaching plan, Ms Nandra had a meeting with the claimant and Mr Richards on 8 August. He was invited to that meeting by a letter confirming the purpose of the meeting and of his right to be accompanied (p177-178). It was at this meeting that they raised the above concerns. Ms Nandra considered those concerns at the meeting and decided that she still needed to issue a first formal warning and to move the claimant onto a formal PIP. This also lasted 4 weeks and the targets were identical to the informal PIP. Ms Nandra continued to arrange for the claimant to receive support from Diane and Joe. She also continued to have weekly one to ones with the claimant.
40. Unfortunately the claimant did not reach his targets in any one week (pg 218.07). Although he did on occasion complete the correct number of jobs, there were significant numbers of circuits being incorrect because the notes were not accurate. This document also records the fact that the claimant's performance was being reviewed and fed back to him on a weekly basis by Ms Nandra. I have no reason to disbelieve the accuracy of these notes.

Second Formal PIP

41. The claimant was invited to another formal meeting. Mr Richards did not attend this one as the claimant did not tell him about it – the claimant was informed that he was entitled to be accompanied at that meeting. As a result of that formal meeting Ms Nandra issued the claimant with a final formal warning and put the claimant on a third, four-week PIP. This third PIP ran from 15 November until 14 December. Unfortunately the claimant failed that PIP as well for the same reasons that he had failed the first two. As a result of that Ms Nandra passed the situation to her line manager, Ms Clarke, to determine what the next steps ought to be.

Dismissal Decision

42. The claimant stated that Ms Clarke ought not to have been the decision maker at this stage because she was not independent of Ms Nandra. It was put to the respondent witnesses that they must have been discussing the claimant's performance between them and that therefore there was no independent decision made at this point. Ms Clarke stated that she was aware that the claimant was on

a PIP and that Ms Nandra had been managing that situation – but maintained that she had not been involved on a day to day basis with the management of the situation and that she was coming to the situation ‘afresh’.

43. I suspect that the reality was somewhere between the two. It is unlikely that Ms Clarke was not aware that the claimant had been, in the view of Ms Nandra, struggling and that he had failed 3 consecutive PIPs. I am sure that in their management discussions they would have discussed how the situation was developing. Nonetheless, it is not essential for an entirely independent person to make a decision at this stage. Frequently the line manager themselves is the person who would make that decision and no independent person is called in. However I find that even if not entirely approaching the situation ‘afresh’ Ms Clarke did make a considerable effort to understand the situation from scratch, to examine the evidence of the claimant’s performance and to understand the situation in detail. She met with the claimant to understand what had been happening for him and considered the position in full.
44. At the meeting Mr Richards and the claimant raised the following points (paraphrased by me) of concern about the process:
- (i) Training and support had been inadequate.
 - (ii) Points raised by the claimant during the review meetings had not been documented.
 - (iii) He did not know whether he ought to be finding fluid or non-fluid jobs.
 - (iv) The target of 25 jobs per week was unrealistic
 - (v) The speed of the system meant that the job target was unrealistic.
 - (vi) He found it challenging to unlearn his previous job of allocating cabling work and
 - (vii) He was working with a difficult person in his pod.
45. She concluded as follows:
- (i) That the claimant had had adequate training and that the claimant had not, during his meetings with Ms Nandra, cited any lack of support.
 - (ii) That the notes of each meeting had been sent to Michael and he had not challenged them at the time
 - (iii) That Ms Nandra had verbally told the claimant that he could find either fluid or non fluid jobs and that she had followed this up with an email (p183). Further that the claimant had been taken through reviews of his jobs at the review meetings and both fluid and non fluid jobs had been reviewed at the time.
 - (iv) She found that only having to complete 6-7 jobs a day (the claimant worked a 4 day week as did all controllers) was achievable given that (as the claimant agreed in evidence) each job took between 10-20 minutes.
 - (v) That the claimant had not raised any concerns about the speed of the system at the time that it was slowing and that this was possible and that controllers knew how to do this. Further she would have been aware of there had been significant slowing of the systems and she had not been aware of them occurring for more than a couple of hours at a time so that ought not to impact on overall performance over either a 4 week or a 12 week period.

- (vi) She concluded that the claimant had indicated that he was okay working with the disruptive individual after Ms Nandra had spoken to him and the claimant appears to confirm this in the meeting notes.
46. She decided, on the basis that the claimant had not passed any single week, in any of the 3 separate PIP periods that dismissal was the appropriate decision. She stated in evidence that she considered whether there was any alternative to dismissal but felt that the claimant had had a large amount of support and training in the 12 weeks of the PIPs, that he had had very low, manageable (in her view) targets throughout the PIP and that this was not an entirely new role but one that was similar to his previous role. In light of that she felt he had had ample opportunity to prove himself and had not done so. Therefore she felt that as opposed to extending the PIP, that dismissal was the appropriate response given the impact on customer service and the teams in the field.
47. She therefore felt he could not continue in his role. She served him notice and the claimant was assisted with applying for other roles by Ms Nandra and someone from within Ms Clarke's team but this was unsuccessful.
48. I find that Ms Clarke clearly considered the picture in the round. She took note of and investigated all the concerns by the claimant but found that they were either unfounded or not significant enough to warrant a different conclusion.

The Appeal

49. The claimant appealed against his dismissal. Mr McDonagh heard the claimant's dismissal. He is a General Manager of Openreach and was Ms Clarke's line manager.
50. The claimant stated that he ought not have heard the appeal because he was not impartial as he had known the claimant beforehand in what Mr Richards suggested was a negative light following an incident in the office - and because he was Ms Clarke's line manager so would have known about and been involved in the original decision.
51. The incident that Mr Richards to the witnesses was negative, was an incident where the claimant had interrupted a meeting that Mr McDonagh was leading and notified him that there was a problem with the system and that he needed help. However, in cross examination it was put to the claimant and Mr Richards, that the incident was raised at the appeal meeting as a positive – i.e. that Mr McDonagh should remember that the claimant was a dedicated member of staff and that he knew that because the claimant had knocked on his door to get the job done. I accept, given the notes of that meeting, that this was correct and that this incident was not portrayed as a negative but as a positive by the claimant and his representative at the time. This was not an indication that Mr McDonagh was biased at the time. I find that Mr McDonagh was not biased or lacked independence due to this incident. I accept that as Ms Clarke's line manager he would have been fully aware of the original decision made and probably the reasons behind that decision. However I do not accept that this meant he could not fairly consider any appeal.

52. Mr McDonagh invited the claimant and Mr Richards to an appeal hearing. Mr McDonagh says that at that hearing the claimant raised two new issues of concern:
- (i) That he had back and neck problems that had impacted on his performance; and
 - (ii) That he ought to have had a passport which was an internal document which employee's kept detailing their health and caring responsibilities and what adjustments were in place for them. For example, the claimant left early to collect his son from nursery/school and this would have been recorded on the passport.
53. Mr Richards (as confirmed by the notes of the meeting) states that they also raised the following points:
- (i) That Ms Nandra had ignored the claimant's health problems;
 - (ii) That the claimant had not been full trained on the new systems before being put on a PIP
 - (iii) That there was a hostile work environment because the claimant had been forced to work with the disruptive individual;
 - (iv) That the claimant had had problems with Gantt's charts which was part of his role in updating jobs.
 - (v) That the claimant was under a huge amount of stress which caused pain in his shoulder arms and neck;
 - (vi) That Ms Clarke was not aware of the full facts regarding the claimant's health when she dismissed the claimant; and
 - (vii) That a PIP ought to be based on work that the claimant already knows how to do, not on new information and that they ought to have reduced the claimant's workload to allow him to get better at the areas he was being performance managed on.
54. The notes of that meeting clearly reflect that a lot of emphasis was placed on the claimant's health and state of anxiety. Mr Richards and the claimant stated that he had been prevented from raising his health concerns and problems and had shied away from confrontation with Ms Nandra or Ms Clarke because of his health issues and his state of anxiety. He stated that he had been 'coping' on his own with the anxiety and the physical impact this was having on him but that he could not raise directly at the time, the extent of the problem that he faced. This is why he did not challenge the PIPs, or chase an OH referral, or tell them of his health problems and how it impacted on his work.
55. Mr McDonagh considered these points but felt that they had not been raised at any point with Ms Nandra during the process or with Ms Clarke at the dismissal hearing. He did not think that the claimant reasonably felt that he could not have raised his health issues with either Ms Nandra or Ms Clarke. Ms Nandra and Ms Clarke also addressed these points in evidence.
56. I understand that raising health concerns can be difficult, particularly if you are struggling with stress and anxiety. Nonetheless, the claimant did not raise it as a significant issue at any stage prior to the appeal hearing and he had the support of Mr Richards at all but one meeting. He knew that the respondent knew that he suffered from stress on previous occasions because this is why he had been signed off earlier in the year. He stated that he did know how to raise

concerns yet I find that he had raised his concerns about working with Justin and Chrispin which Ms Nandra then dealt with it in a way which he said at the time, was sufficient and he had raised significant other concerns about the process earlier, including that he found Ms Nandra unapproachable which could have been a very difficult point to make directly to someone in a meeting.

57. The claimant's flexible working arrangement so that he could finish early and collect his child was understood by everyone and does not appear to have been an issue – certainly I was not taken to any evidence of it being a problem. The claimant had not asked for an adjustment to accommodate his stress and anxiety other than a phased return to work, which was agreed at the time. So it is not clear what having a passport would have achieved and I was not informed by the claimant or Mr Richards as to how they said this would have affected the performance management process.
58. It is possible that Ms Clarke was not aware of the extent of the claimant's stress levels at the time but this was because the claimant had not raised it as a contributory factor to his performance throughout the 3 PIPs or at his dismissal hearing. He gave no convincing answer of why he had not done this particularly given that he was supported by a trade union representative and that the respondent already knew about his stress as he had had previous sickness absences due to stress and anxiety which they had helped him return from.
59. Mr McDonagh stated in evidence that in his view the claimant's role was an 'evolution' of his previous role as opposed to a whole new role and I accept this given his helpful description of the different roles and the work involved when I asked him about it. He also stated that finding 25 jobs ought to have been 'easy' given someone of the claimant's experience and length of service. I accept that it appeared to be a reasonable target given that the claimant accepted that each job would take approximately 20 minutes.
60. I spent some time understanding the interaction between the various software programmes and what was entailed. The claimant specifically raised the Gantt charts as a problem. The Gantt charts formed part of updating the history of a job so that subsequent controllers could see what had happened. It was a way of mapping the progress of a job. The claimant did not identify to me what training he expected in terms of training on the Gantt charts. He states in an email that he found the training from Joe on Gantt charts helpful. I therefore do not accept that he had received too little or unhelpful training on this matter.
61. The other software problem raised was the slowing of the system preventing the claimant completing work. As well as being taken to the system outages that were reported during the PIP period I was told how any system issues could be and were reported by any users at all levels. There were no reports made by the claimant that I was taken to and the claimant could not recall if he had made any reports. The claimant could give no evidence of any systems problems or reports that he had made at the relevant time. As discussed above I do accept that there probably were some systems problems but not to the extent that meant the respondent ought to have disregarded the failure of every week of the PIP period. Further the respondent witnesses explained to the claimant at the time and in emails (e.g. pg 356) that any systems slow downs would not impact on the ability to complete Gantt charts or other notes because of the way the

system was structured and I accept their verbal evidence to the tribunal which explained how this was the case.

62. Whilst Mr McDonagh's letter is brief. He addresses the two main additional issues which had not been raised with Ms Clarke or Ms Nandra. Having reviewed those points and the original decision made by Ms Clarke, Mr McDonagh concluded that the decision to dismiss was a fair and reasonable decision in the circumstances.
63. Throughout the claimant's notice period he was provided with access to the workplace to carry out job searches. I was taken to evidence that Ms Nandra had directly emailed colleagues across the business to see if they had any vacant suitable roles. Further the claimant was, with support from Ms Clarke's team, encouraged to apply for other roles across the business. He was unsuccessful. I accept that he may have been hampered in that search because of his dismissal from his previous role for poor performance. Nonetheless I find that he was given the opportunity and encouragement to apply for roles during his notice period and that Ms Nandra had taken direct action to see if there were vacancies across the area.

The Law

Unfair dismissal

64. S98(1) Employment Rights Act 1996 ('ERA'), an Employer must show that they have dismissed an employee for a potentially fair reason.
65. Section 98(2)(a) ERA
- "A dismissal is potentially fair if it "relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do".*
66. Capability should be assessed by reference to an employee's *"skill, aptitude, health or any other physical or mental quality"* (section 98(3)(a), ERA).
67. Where the employer has fulfilled the requirements of s98(1), whether the dismissal is fair or unfair must consider the following factors.
- (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.
 - (b) Shall be determined in accordance with equity and the substantial merits of the case.
68. As set out by the Court of Appeal in Alidair Ltd v Taylor [1978] IRLR 82
"Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent".

69. What amounts to reasonable grounds are echoed in the statutory ACAS code. A capability process should be followed during which an employee should be given at least two opportunities to improve, be notified of the possibility that a failure to improve could result in dismissal, and a realistic time scale set for improvement. During the procedure the employee should be given appropriate support or training Steelprint Ltd v Haynes EAT/467/95 and progress should be reviewed, monitored and discussed.
70. The procedural steps that the ACAS code encourages are confirmed by James v Waltham Holy Cross UDC [1973] IRLR 202 which confirms that an employee must be told in what respects he is failing to do his job adequately, warning him that he may lose his job if he does not improve and giving him the opportunity to improve.

Conclusions

71. I conclude that the respondent followed a fair procedure. At each stage of the process the claimant was told, clearly, that he was not performing and what he needed to do to improve namely increase the number of jobs he completed to 25 and complete the notes and charts that accompanied those jobs. There is clear written evidence of the fact that he was told this both with regard to the minutes of the meetings, the letters and emails that followed those meetings and the various outcome letters that set out the PIPs to the claimant.
72. At each stage of the procedure the claimant was told of his right to be accompanied at the meetings and he was accompanied to all but one of the meetings. He was told of the potential seriousness of the situation if he failed to improve and was given a formal written warning, a final written warning before the situation progressed to potential dismissal. The claimant was also given the right to appeal.
73. I find that the personnel making the decisions at each stage were appropriate and it was not necessary for the decisions to have been taken by line managers more removed from the claimant than those that did. These managers understood the claimant's role and work and I find that Ms Clarke and Mr McDonagh examined the evidence and the previous decisions and made their decisions accordingly.
74. I find that the claimant was given reasonable training during that period in the form of a day's classroom training in August 2016 and then, when he struggled to remember that training he received one to one training with a dedicated trainer (Diane), support from Joe who he sat next to and one to ones with Ms Nandra who took him through his work on a weekly basis. Diane and Joe gave the claimant support regularly throughout each PIP and I conclude that their training was relevant and helpful because the claimant said so in his emails at the time.
75. I do not think that the issues raised by the claimant as the situation progressed or before the tribunal today affected the reasonableness of the

support and training or the process followed by the respondent in the circumstances. Addressing each in turn I conclude as follows:

76.

- (i) I believe that the claimant received a reasonable level of training and support.
- (ii) I do not accept that he was put on a PIP as soon as he returned from sick leave. He had been back at work for 2 months before the PIP started. He had no medical recommendations in place which suggested he could not do his job or that reasonable adjustments needed to be made. He did not request any adjustments to his role due to his health at any time until the appeal hearing.
- (iii) I do not accept that the systems or the software failed to such an extent that it rendered the targets or work required of the claimant unreasonable.
- (iv) I was provided with evidence that any issues with other members of staff was dealt with at the time to a level which the claimant was content with.
- (v) I was not shown any evidence that the claimant was placed on a PIP because a colleague was.
- (vi) I do not accept that the number of jobs set was too high given that the claimant accepted that he only had to complete 6-7 twenty minute jobs in a day and given that I accept that he had been told that these could be fluid or non fluid jobs, this seems like an objectively reasonable target.
- (vii) With regard to fluidity notes – as stated above I find that the claimant was given a reasonable amount of training in the circumstances.
- (viii) I do not accept that this was a new role – this was an evolution of his role that did include new responsibilities but not an increase in workload and not a significant change in systems for which he did not receive training.
- (ix) I accept that the claimant was stressed and anxious at the time but I conclude that he did not raise this as a problem impacting on his work or his ability to communicate properly with his line manager. Further I accept that he did not raise any physical health issues until his appeal meeting.
- (x) I do not find any evidence that Ms Nandra behaved in such a way that the claimant could not approach her or ask for her support.

77. I therefore find that it was reasonable for the respondent to conclude, after 12 weeks of PIPs none of which the claimant passed, that he was not able to perform his role adequately.

78. The process of the PIPs was fair and reasonable and they had fair and reasonable targets for the claimant to reach with appropriate training and opportunities to improve. Whilst I believe that where someone has been employed for as long as the claimant has been, extra attention to the possibility of improvement ought to be considered, I believe that this was done because each PIP's targets remained the same and were objectively clear and reasonable, 3 PIPs were carried out and training and support was given during each and once the dismissal was confirmed, the claimant was given support and opportunities to find alternative roles at the respondent within the 12 week notice period.

79. I have to assess whether the respondent's decision to dismiss the claimant was a reasonable decision based on a reasonable 'investigation' or assessment of the situation. I am not assessing whether I agree with the

respondent's decision or would have taken the same steps. I find that the performance assessment process or investigation was appropriate, that the claimant knew at all times of the possible outcome if he did not succeed with the plans, that he was given reasonable opportunity to improve accompanied by reasonable training. I also find that it was reasonable, in circumstances where the claimant continued to fail each and every week across 12 weeks, for the respondent to conclude that dismissal was the correct reasonable.

80. I therefore conclude that the dismissal was fair and the claimant's claim for unfair dismissal fails.

Employment Judge Webster

Date: 23 June 2019