EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
v	
Mr G Godden	**Coty UK Limited**

PRELIMINARY HEARING

Heard at: **London South Employment Tribunal**

On: **24-25 March 2022**

Before: **EJ Webster**

Appearances
For the Claimant: **In person**
For the Respondent: **Mr Ellison (Employment adviser)**

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not well founded and fails.

HEARING

The hearing

1. The hearing was a hybrid hearing with everyone appearing in person before me save for one witness who appeared via video link on the first day.

2. The parties had agreed a digital bundle which was provided to me. The claimant also provided several additional documents on the first day which the respondent agreed could be added. The claimant also provided a sick note on the second day which we was also added, by agreement, to the evidence considered.

3. I was provided with witness statements for:

(i) The claimant
(ii) Ms M Pizzey - the claimant's TU representative
(iii) Ms E Adams – HR representative for the respondent
(iv) Ms C Arnaud – the claimant's manager and decision maker at the time of dismissal
(v) Mr R Tomsa – a Director for the Respondent who considered the Claimant's appeal

Issues

4.1 What was the reason or principal reason for dismissal? The respondent says the reason was capability (performance). The claimant accepts that the reason was capability but that he had been pushed into roles that he was not capable of.

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

4.2.1 The respondent adequately warned the claimant and gave the claimant a chance to improve;
4.2.2 Dismissal was within the range of reasonable responses.

Facts

5 It was agreed that the reason behind the claimant's dismissal was capability. It is rare that a claim so readily accepts that he was not capable of the role from which he was dismissed. Many of the facts of the case were not in dispute.

6 The claimant was employed from 28 January 1991 until 2 June 2020. He worked as a manufacturer/operator for 22 years. In 2017 he was promoted to a manufacturing night shift supervisor. In June 2017 the respondent asked the claimant to go on secondment to Ireland for one year. The terms of the secondment were meant to be that he would be returned to his old role of night shift supervisor at the conclusion of the secondment. The respondent says that contractually he did return to his old role for a brief period of time but concedes that practically, he never went back to work in his old role. Instead, he was promoted to warehouse manager in July 2018. He was then moved to the role of Project Manager in October 2018 from which he was ultimately dismissed on 2 June 2020.

7 The claimant states that in his last two roles (Warehouse Manager and Project Manager) he struggled and that he should never have been put in either role as he did not have the necessary skills or training. He says that he only accepted them on the basis that he would be provided with training. He also says that he was given no choice but to accept the warehouse manager role as his old role had been backfilled when he was seconded. There were emails that confirmed his role had been backfilled.

8 The claimant's main allegations of unfairness regarding his dismissal were (in no particular order) as follows:
(i) He should never have been placed in the role of warehouse manager

(ii) Subsequently he should not have been moved to the role of project manager
(iii) Once in the role he was not supported to improve
(iv) He was not told what the job entailed until after he had started and he did not receive a proper job description until after he started 'failing'
(v) He was not provided with appropriate training
(vi) His manager bullied him
(vii) Redeployment was not sufficiently considered
(viii) His ill health was not properly taken into account

Changes in roles

9 The claimant states that he only accepted his secondment because he was promised that he could return to his old role. There was email evidence in the bundle to suggest that he was reluctant to accept it. I accept that he was told that he would return to his old role once the secondment was complete. However I also consider that the claimant willingly accepted the secondment and the pay rise and bonus that went with it.

10 On his return, the claimant did not return to his old role. It is possible that this was in breach of the contractual promise that the respondent made the claimant before he agreed to the secondment. However, I also consider that the new role of Warehouse Manager was not presented to the claimant as a take it or leave it threat – rather it was presented as a promotion opportunity which the claimant accepted. It was accompanied by a pay rise. Given the claimant's longevity at the company, had he in fact been placed in the threatening position he says he was placed in when he returned from secondment, I consider that he would have questioned it as opposed to feeling that he had no option but to take a role he did not want. He gave evidence that he had supported his colleague, the previous warehouse manager, in securing alternative employment within the company because his predecessor was so stressed by the warehouse manager role. He therefore knew of, and had taken active part in, individuals being moved around the company if roles were unsuitable or needed to be changed.

11 It was agreed that the claimant did not do well in the Warehouse Manager role. The evidence from Ms Arnaud was that this was because the company was in crisis and that anybody at that level would have struggled with the warehouse at the time. This is supported by the fact that the claimant knew that the previous person in the role had stepped aside because he was suffering from work-related stress in the role. Ms Arnaud stated that even she struggled to get the warehouse to 'work' and she was a warehouse logistics expert. The claimant did not disagree with Ms Arnaud's assessment of the warehouse situation and the company being in crisis at this time.

12 Therefore, when the claimant told Ms Arnaud (new to the respondent at that time) that he was struggling in the warehouse manager role, she accepted his explanation and agreed to move him to a role that was more suited to his skills. The Project Management role was created for the claimant though it was to complete work that the respondent needed doing. Ms Arnaud felt that it would

combine his technical knowledge with the project skills he had gained during secondment.

13 The claimant states that he only accepted this role on the basis that he would receive appropriate training. Whether he did or not, I address below. However I find that the claimant willingly agreed to being moved to the new role. I accept that he did not like or do well in the Warehouse Manager role, but that does not mean that he did not accept the project management role that he was offered. He says now that he would not have accepted it if he knew what it entailed and that it was only offered to him on the basis of a fundamental misunderstanding of his project role whilst on secondment.

14 The claimant put to Ms Arnaud and Mr Tomsa that he had not in fact gained the project skills they believed he had whilst on secondment. He stated that he had in fact worked in the same capacity that he had for the respondent for the previous 22 years and was entirely within his comfort zone. This was not evidence given in his witness statement so was not challenged by the respondent in cross examination. I see no reason not to accept the claimant's case in this regard though I believe that the claimant, in retrospect, has begun to downplay his skills and achievements across a successful 26 years of employment at the company to fit his narrative of why he ought not to have been put into the role at all. I believe that this has occurred because of the blow to his confidence that this situation has caused as opposed to being a deliberate attempt to mislead. Nevertheless, given the secondment job title it was not unreasonable for Ms Arnaud and Mr Tomsa to form the view that it included some sort of project management or similar skills. Further I think that it was reasonable for them to conclude that the claimant was capable, after many years working for the company, of learning new skills.

15 The claimant performed the performance management role without difficulty for the first 4 months or so. He then started to experience difficulties when Ms Arnaud gave him more complicated and varied project work.

16 It is not in dispute that the claimant started to struggle at this point. He made a mistake and felt humiliated by Ms Arnaud's approach to his mistake. Overall, I do not accept the claimant's description of Ms Arnaud as a bully. I accept that she may have been direct in her criticism of the claimant and his performance – but not that she was rude or sought to undermine him. There was no evidence of that in her email communication with him nor in her evidence to this Tribunal. I am of course aware that bullies do not always display their behaviours in public but I do not consider that the claimant would simply have accepted the level of negativity he suggests she aimed at him during this process. I also note that English is Ms Arnaud's second language, and with no disrespect intended towards Ms Arnaud, I consider it more likely than not that this could have led to Ms Arnaud being quite blunt on occasion in her expressions and this may have led to misinterpretations by the claimant at a time when he was feeling vulnerable.

17 The claimant says that he did not raise her behaviour before (and many other aspects of the case he now relies upon) because he says he is a proud person who did not like complaining or speaking out. I find instead, that the claimant's pride made his realisation that he was finding his job challenging very difficult to accept

and process. However the claimant was clearly quite open with the respondent about many aspects of his difficulties and emotions, particularly after he became unwell. Given that he was willing to share that level of information and vulnerability at several meetings, I consider it more likely that had Ms Arnaud been bullying him to the extent that he now suggests, that he would have raised those concerns with HR at the time.

18 An informal PIP was commenced on xxxx. The claimant says it was not until this time that he received written confirmation of what the expectations were for him in the role. [**doc xxx]** The respondent did not dispute that. However Ms Arnaud said that the requirements would have been explained to him verbally which I accept. It was not in the respondent's interests to fail to tell the claimant what they wanted him to achieve and deliver. This was a role they had created for him, which needed doing and which they thought he would be able to do. Further it is clear that the claimant knew and understood some aspect of his role as he performed without difficulty for the first four months and subsequently he delivered a different project as well. The claimant states that this was because they were small, short projects within his area of knowledge. That may have been the case but it was reasonable for the respondent to form the view that he understood what his job was and could deliver some aspects of the role.

19 From a procedural point of view the claimant was put through an informal PIP followed by a formal PIP. There were two significant periods of sickness absence for the claimant. Firstly during the informal PIP when he went off for 5 weeks with stress and secondly 9 days after starting the formal PIP when he went off with Sarcoidosis. This second absence lasted 4.5 months.

20 The claimant seemed to suggest that the paused formal PIP recommenced too soon after his return to work and that this was partly due to a failure by the respondent to allow him more than a two weeks phased return to work.

21 It was not in dispute that his GP recommended a 4-6 week phased return and the OH adviser recommended at least a 4 week phased return. The claimant had used up all his contractual sick pay. The respondent agreed to pay him for an additional two weeks during his phased return. They refused to extend his pay any further. The claimant states that they also refused to allow him to work reduced hours thereafter. He bases this on the email (p131) from Ms Arnaud which states

> I am glad to see that you have been able to manage your full hours this week.
> As you know, you are in your first week complete after 2 weeks of phase return.
> You wanted to have an extension that we denied as only 2 weeks were agreed due to the fact you used all your sickness entitled time. Also we wanted to make sure you were really fir for a full time return.
> At this time nothing was mentioned about your eye appointment or a need of holiday.
>
> That s the reason why I have denied the holiday request for your appointment yesterday and the reason why I am denying as well this holiday request for tomorrow. I hope you understand.
> The leave policy also recommends **a month notice** and emergency holidays must remain exceptional.

22 The highlighted sentence states that they have denied him more than 2 weeks. The respondent's explanation for this was that they were not denying him a phased return but that they were confirming that they would not extend his sick pay during

this period. They say that this is what had been discussed at the meeting and is reflected in the minutes of that meeting and a previous email from Ms Adams (p129) which reads:

> Following up on our welfare meeting today please see summary below;
>
> - You are feeling stronger and the early shift has helped
> - You are hoping to do full hours next week but might need to do some 6 hour days, I have confirmed that you have no company sick pay and shortened days beyond the agreed 2 week phased return would be unpaid sickness.
> - Please keep us updated on your health
> - Caroline confirmed she is happy for you to attend your regular check ups and make time back up.

23 The relevant part of the minutes of the welfare meeting on 14 February (128) are as follows:

> GG- Would like to do an additional adjusted week. EA confirms that any shorter days next week will be unpaid as the paid element of phased return was only agreed for two weeks and Gary has no CSP.
>
> GG- Intention is to do full hours next week but will report back to Caroline if he feels he needs to do less hours.

24 On balance I conclude that the claimant was aware that he could, if he wanted, work fewer hours in the weeks that followed but that he would not be paid for his full hours. That is clearly set out in the minutes and the email from Ms Adams. The fact that another email from Ms Arnaud says that an extension was denied does not override the fact that he was aware of what had been previously agreed. I do not consider that this email sought to override what had been agreed – though perhaps the language around it is clumsy. And I do not believe that the claimant genuinely believed that this is what Ms Arnaud intended. I conclude that the claimant chose to work full time from this point onwards because he wanted to prove that he was fit to be back at work. He was however given many opportunities to say that he was not well enough to work either at all or full time; and he knew that if he needed to do, he could work fewer hours with less pay.

25 The claimant also agreed that he was well enough for his formal PIP to continue. He said to the Tribunal that this was because he wanted to get it over with. I do not doubt that. The claimant thought that the outcome of the PIP would simply determine whether he went back to his old role or a similar alternative role or remained in the current role. He did not at any point believe that failure of the PIP could result in him being dismissed.

26 The claimant submitted that he felt unsupported by Ms Arnaud during the PIP – formal and informal. That took various forms including a lack of training and no support to improve.

27 I do not agree. The claimant did not receive any formal training but he received extensive coaching from Ms Arnaud. The claimant did not find this sufficient. However he also stated in his cross examination of Ms Arnaud that without her support he would have failed a lot earlier. It is of course possible to have a very supportive manager who nevertheless delivers not very useful training. I conclude that the claimant did not find Ms Arnaud's style of coaching particularly enlightening. However I find that Ms Arnaud provided structured, focussed

feedback. This was evidenced in emails and confirmed by Ms Arnaud in her evidence to the Tribunal. When she provided the claimant with the equivalent of 'To Do' lists he produced good work. It was when she took away the support of telling him what to do (as opposed to how) that he struggled. It is clear from all the notes during the formal and informal PIP process that the issues the respondent had with the claimant concerned his ability or willingness to take responsibility for solving problems or suggesting solutions or taking ownership of the projects rather than doing what he was told. Their view (as reflected in the PIP documentation) was that he needed to take that step into 'owning' the projects and being a manager as opposed to him being incapable of the work required to actually do the projects.

28 I accept that the claimant was not reminded about the existence of the Coty Academy online learning tools that he could have accessed. However the claimant had been at the respondent for well over 20 years and a union representative for a considerable period of that. He gave no explanation as to why he did not ask about accessing further training. He did ask for one specific type of training that was refused by Ms Arnaud. **FIND THIS AND EXPAND.**

29 The claimant maintained that he could not access the portal on which the online training could be found and had not been able to do so for some years – but he took no steps to ensure that he was reconnected and gave no reason as to why he did not do that even when he realised his job was at risk.

30 As the claimant stated on several occasions, by this time he had given up. He did not communicate this to the respondent at the time – but I accept that it was true. This meant however that the claimant failed to try or consider accessing any online tools or even ask for assistance in accessing any additional training resources which he could have done.

31 I do not accept that the respondent was setting the claimant up to fail. Had they wanted to do that they would have kept him in the warehouse manager role rather than offering him another opportunity. Ms Arnaud may not have offered the support that the claimant now considers would have worked – but he did not ask for it at the time and I do not consider that the training and support offered by Ms Arnaud was unreasonable or intended to be unsupportive. It is a great shame that the claimant did not respond well to it and improve across the board. However he did improve in some areas and Ms Arnaud said that. Further he delivered some projects indicating that he had the ability to do the job on some occasions. His retrospective view that all the coaching and assistance provided by Ms Arnaud was worthless is not plausible in light of the progress he made.

32 He also seemed to suggest that they ought to have changed the approach when what was being provided did not work during the informal PIP. Again, there is no evidence that what Ms Arnaud provided was insufficient or unreasonable.

33 The claimant states that he was unaware of the PM role entailed and that as soon as he was provided with a proper job description he said that he would never have applied for the role and that he would never be able to do it. The respondent clarified at the meeting **on xxxxx** that what they were supplying was a generic PM job description and that he was not expected to deliver, nor being measured

against, the technical engineering aspects of the role. In evidence I asked the claimant to go through the job description and tell me which aspects of the role he knew he would not be able to do. The respondent stated that every aspect that he referred to was engineering-related and not something that the claimant was expected to do to pass the PIP.

34 There are two key points here that form the foundation of the claimant's claim:

(i) That he would never have applied for the PM role had he seen the job description; and
(ii) That he could not perform to the appropriate standards because he did not know what was expected of him.

35 Whilst it may be correct that the claimant would not have applied for the role – the claimant accepted his new job knowing that it was a project management role combining his technical knowledge and expertise with some of what he learned on secondment and expanding on it. He knew it was at management level and he continued to be paid at that level. Had he not accepted it he would have been performance managed within his warehouse management role which would have led, by all accounts, to an earlier dismissal for the same reason. The claimant's real anger is directed at the fact that when his secondment ended he was not allowed to go back into his old role. However I consider that this anger is retrospective. I think that at the time he was offered a promotion he was pleased and accepted it. I also think that he believed, wrongly, that were he to fail in the new roles, he would be found an alternative within the company and was willing to take the risk accordingly.

36 With regard to not being able to perform to the appropriate standards because he was not told what he needed to do – I disagree. He had clear requirements set out and on many occasions he reached them. It was on the occasions where he was left to his own devices to manage a project that he fell short. He did not have the confidence to manage and take responsibility – something that was clearly written down and told to him on several occasions.

37 The claimant criticised the respondent for not redeploying him. He accepted at the time that there were no vacancies for his old job. He did not put forward that he ought to have been considered for any other specific alternative role at that time. Ms Arnaud gave evidence that there was a hiring freeze and people were being made redundant. The claimant did not challenge that evidence. He seemed to suggest that he ought to have been redeployed earlier but it is not clear when or to what. The respondent's representative stated that there had been vacancies in his old role during his PIP – though as the claimant pointed out and it was accepted by the respondent, there is a policy which prevents people moving within the respondent if they are subject to a formal PIP.

38 The claimant put forward that he had not been able to advance his case at the appeal hearing. This was supported by his union representative, Ms Pizzey. She and the claimant stated that Mr Tomsa frequently interrupted the claimant thus flustering him and preventing him from properly putting his case and his concerns.

39 The minutes of the meeting show that Mr Tomsa did question the claimant closely and did not allow him to outline his position in full before asking questions. This may have been difficult for the claimant and put him off his stride. However from the notes of the meeting it is also apparent that the claimant did say everything that he wanted to say. He put forward no arguments to the Tribunal that there was something specific that he wanted to convey but did not manage to do or that Mr Tomsa failed to consider some crucial aspect of the appeal. He also raised no criticisms before the Tribunal of the process (beyond the tone and interrupting nature) that Mr Tomsa followed or the investigation he undertook.

40 Whilst the claimant may well have found the meeting difficult that does not mean that he was not given the opportunity to say what he needed to say. I find that Mr Tomsa did not allow the claimant to set out his case in an uninterrupted statement. Nevertheless the claimant did not provide me with evidence as to what he would have said had he not been interrupted, nor how the questions or information that Mr Tomsa was seeking were inappropriate or irrelevant. The claimant was represented at the meeting (albeit remotely) and Ms Pizzey was able to tell Mr Tomsa what the claimant's case was and neither she nor the claimant have said what information Mr Tomsa ought to have considered that he did not. They objected to the format and tone of the meeting but not the content.

41 From Mr Tomsa's evidence I find that he did consider the grounds of the claimant's appeal reasonably. He asked about the training received and followed up on this point independently. He also took into account the claimant's frank acceptance that he could not do the job and had not been able to do the job throughout. In the fact of that he considered whether redeployment had been considered which it had. For those reasons he did not uphold the claimant's appeal.

The Law

42 Capability is a potentially fair reason for dismissing an employee. An employer can dismiss due to an employee's "skill, aptitude, health or any other physical or mental quality" (*section 98(3)(a), ERA 1996*). The capability must relate to the work that the employee was employed to do (*section 98(2)(a), ERA 1996*).

43 Before dismissing for capability it is established that the respondent must provide the employee with a proper opportunity to improve and their decision to dismiss must be within the range of reasonable responses based on a reasonable investigation of the claimant's capability.

Conclusions/Discussion

44 The claimant's main issue with the fairness of his dismissal was that he ought never to have been placed in the role in the first place. Ms Pizzey suggested that the claimant ought to have been made redundant and, in submissions, the claimant also suggested that at the point at which the respondent realized he could not do the job, they ought to have made him redundant or allowed him to resign given his length of service and unblemished career.

45 It is possible that the respondent could have fairly dismissed the claimant by reason of redundancy at the point at which his secondment ended and his original role was no longer vacant. I am not saying that the respondent ought to have done so, nor that this would have been an open and shut fair dismissal had they done so – but it's reasonable to suggest it was a possibility at that point. It is also possible to suggest that a dismissal for 'Some other substantial reason' could have been considered at that point. My observation about this possibility are the same as for redundancy.

46 However, the claimant accepted a new, promoted role. He did so knowing the situation with his old role. His evidence was that he was not given a choice about the new role because his old role had been backfilled. I have not found that he was in effect 'threatened' but he did know that his old job was not going to be offered to him. He did not object to that. He did not appeal against the decision to offer him a new role nor did he raise a grievance. He says he felt under pressure – but it's not clear why at this stage given that he now says that he would prefer to have been made redundant at that point rather than continuing in employment for another 1.5 years. His rationale for that is that the reason for dismissal would not prevent him getting other work. This is wholly understandable – but it does not detract from the reality that at the point that he moved to the warehouse manager role – he agreed to it.

47 He also agreed to the move to the PM role and voiced no concerns with that move. He performed well in the role for 4 months.

48 Based on this I find that if there was a breach of the claimant's contract at the point at which he was redeployed on either occasion – the claimant waived that breach by continuing to work without complaint.

49 I did consider the possibility that this was a Hogg v Dover College type situation where an employee might have been dismissed but continued in employment under protest. But clearly this is not the case because the claimant did not object to the changes – he accepted promotions on both occasions against a backdrop where he knew that his old role was no longer available.

50 It was therefore reasonable for the respondent to performance manage him against the new role's requirements. He had agreed to do that job and they needed it doing well.

51 I conclude that although it would have been better if they had actively reminded the claimant of the existence of the training portal – the claimant also took no responsibility for suggesting alternative methods of training.

Steelprint Ltd v Haynes EAT/467/95 is an example of a case in which the employer's failure to offer appropriate support or training meant that the dismissal was unfair. The employee failed to meet the required standard of efficiency (in typing) following the introduction of new computer systems, an aspect of her job which was new to her and for which she received no training.

For an example of a case in which it was reasonable for the employer to dismiss a manager, recently promoted from salesperson, without first offering him management training, see *Queensway Discount Warehouses Ltd v McNeall EAT/569/85*.

Reviewing progress

It will be important for the employer to diarise the review period. Having notified the employee that their performance will be monitored and discussed (usually halfway through the timescale set for improvement), it is likely to be unreasonable if the employer fails to adhere to this.
In *Williams v Pembrokeshire County Council ET/1602049/03*, the employer's failure to use the review period effectively, in particular adopting a "backseat" approach to supervision and not setting measurable targets for improvement, rendered the dismissal unfair.

While there is no absolute obligation on an employer to consider alternative employment or demotion before taking the decision to dismiss, it may be unreasonable in the circumstances not to do so, depending on the size and administrative resources of the employer. This principle was stated in *Gair v Bevan Harris Ltd [1983] IRLR 368*, a case in which a small employer had not been obliged to consider demotion or alternative employment, despite the fact that the employee had 11 years' of previous good service. The EAT followed *Bevan* in *Awojobi v London Borough of Lewisham UKEAT/0243/16*, confirming that there is no general principle that an employer will be acting unreasonably if it does not give an employee the opportunity of alternative employment in a less demanding role, even if it were the employer who placed the employee in the more demanding role. This is a question of fact and evaluation for the employment tribunal in every case.
In *Sonvadi v Superdrug Stores Plc ET/57554/94*, a manager of more than four years' service was dismissed fairly when his employer took the view that his failure to communicate and motivate staff meant that his promotion to manager would not work, despite the fact that he had been successful as an assistant manager. There was no obligation on the employer to consider demoting him to his previous position.

Employment Judge Webster

Date: 25th April 2022