



EMPLOYMENT TRIBUNALS

Claimant: Mr Peter Sabourin
Respondent: BT Group PLC
Heard at: East London Hearing Centre
On: 1, 2 & 28 February 2024
Before: Employment Judge Comfort

Representation

For the claimant: Ms Laura Halsall, counsel
For the respondent: Ms Meryl Hanmer, BT legal

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant was not unfairly dismissed. He was dismissed for a fair reason (capability) following a fair procedure. His claim for unfair dismissal is dismissed.

REASONS

Introduction

1. The claimant, Mr Peter Sabourin, was employed by the respondent, BT Group PLC, from 1 July 2009. His employment ended with him being dismissed purportedly on grounds of capability effective on 1 May 2023.
2. The claimant says that his performance was not the true reason for his dismissal; the real reason was redundancy.
3. The claim to be determined by the Tribunal is whether the claimant was unfairly dismissed. The respondent denies the claim.
4. The claim was heard over three days. I heard evidence and received witness statements from the claimant and from his former line manager, Mr Simon Binning. For the respondent I heard evidence and received witness statements

from: Mr Ian Chown, BT senior manager of Data Projects and Risks; Mr Matthew Dalby, BT Director for the Data, Compliance and Assurance (“DCA”) team; Ms Manasi Goel BT HR business partner; and Mr Paul McDermott, BT Senior Manager, building services.

5. I was provided with: an agreed hearing bundle comprising 540 electronic pages; an agreed list of issues; and an updated list of job searches undertaken by the claimant.
6. Both representatives provided written and oral closing submissions. The Tribunal reserved judgment, taking time to deliberate.

Issues

7. At the outset of the hearing, the parties provided an agreed list of issues. These can be summarised as:
 - (i) Can the respondent establish a potentially fair reason for dismissal falling within section 98(1) and (2) of the Employment Rights Act 1996? The respondent states that the reason was capability. The claimant disputes this and says that his dismissal was as a result of redundancy.
 - (ii) If the reason was capability, applying section 98(4) of the Employment Rights Act 1996, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

Law

8. In an unfair dismissal matter such as this, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) and (2) of the Employment Rights Act 1996 (“ERA”), which states:-

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it:-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do... “

9. Section 98(3) (a) of the ERA defines capability as *..”in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.”*

10. If such a potentially fair reason is proven, and in this case BT say it is capability, then the next question is whether the decision to dismiss was fair. Subsection (4) of Section 98 of the ERA states:-

“(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

11. The range of reasonable responses test applies in capability dismissals not just to the decision to dismiss but also to the procedure that the employer follows when reaching that decision (***Pinnington v City and Country of Swansea and anor EAT 0561/03***).
12. The Tribunal must be satisfied that the employer honestly believed that the employee lacked the capability for the job and the grounds for that belief were reasonable (***Alidair Ltd v Taylor [1978] ICR 44***).

Findings of fact

13. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in these reasons. In reaching my findings, I have considered and taken into account all of the evidence. I have included the salient evidence where appropriate in my findings.

Employment history

14. The claimant was employed by the respondent, BT Group PLC, from 1 July 2009 (following a transfer of employment from Fujitsu Services) initially as a service manager and from 2016, as a project manager. The claimant has a PRINCE2 qualification. PRINCE2 is a methodology that is used by individuals and organisations to manage projects effectively and in a structured manner.
15. In August 2021, the claimant was notified that he was at risk of redundancy as his role as a project manager in BT Group Business Services was being offshored. On 31 August 2021, the claimant applied for voluntary redundancy. His application was accepted and communicated in a letter from his then line manager, Mr Binning, on 1 September 2021.
16. Mr Binning was the consulting manager responsible for the claimant during a restructuring from March to September 2021 He said that the claimant was a

reliable team member who achieved the rating of “Good Work” in the years 2019/20 and 2020/21.

17. The claimant decided not to take the offer of voluntary redundancy and instead applied for a new role with the respondent’s DCA team. Mr Dalby explained that he joined this team as its Director, and only member of staff, in August 2021. In effect it was a new team.
18. In or around November 2021, the claimant joined the DCA team as a project manager. I was provided with a copy of the job description for this role. The claimant’s role as a project manager within the DCA team was to manage the respondent’s highest risk or impact projects. He was directly managing some of these project and providing oversight to others.
19. On 1 December 2021, Mr Chown joined the DCA team. The claimant then reported to Mr Chown who in turn reported to Mr Dalby.
20. The claimant’s job title was changed to Projects and Risks Specialist in or around April 2022. Although there was no letter confirming this, it was agreed that this did not change the responsibilities of the claimant and did not affect his employment in any way.

Initial concerns

21. Mr Chown said that he initially became aware of the claimant’s underperformance in or around February 2022, following some feedback from other stakeholders regarding projects that the claimant was running. He decided to use a coaching and positive affirmation route instead of the formal performance review process.
22. Mr Chown accepts that he did not take any notes of any coaching sessions or meetings between himself and the claimant prior to initiating the respondent’s performance review process.
23. I was mindful that this was in effect a team of two with regularly daily meetings. It is understandable, therefore, why notes were not taken at this stage. In the absence of notes, I have considered the evidence of the parties and am satisfied that it is more likely than not that Mr Chown had concerns about the claimant’s performance early in 2022 and decided to address this through the use of coaching and positive affirmation. Mr Darlby confirmed that Mr Chown discussed this with him on several occasions from March to July 2022. Although the claimant says that he was not made aware of any concerns, he accepts that there were regular meetings where he would discuss a range of topics with Mr Chown who would support him with his work.

‘Good work’ rating

24. On 6 June 2022, the claimant received a ‘Good Work’ rating in his 2022 performance review. The claimant says that this is an indication that there were no concerns about his performance prior to this date. He submits that if there had been it would have been reflected in his performance rating.

25. I was provided with a copy of the performance review text. It starts by saying:
- “...My rationale for why I have positioned Peter as 'Good Work' is that we are a new team and organisation still setting up are processes, reporting and working practise's [sic]. Peter has been a great help in setting up some of our governance and tracking DLA Projects. Peters Old Line manager has fed back that he had a good year. “*
26. Mr Dalby explained how he had approached the performance review process. He said that the feedback from Mr Binning, who was the claimant's line manager up to November 2021, would have been “Good Work” given the restructuring that had taken place. He said that it would have been unfair to assess the claimant's performance from November to December 2021 as this period when he was the claimant's line manager was too short.
27. He said that a provisional view of performance ratings has to be obtained in February each year. This also meant that Mr Chown would have had limited time as the claimant's line manager. In the circumstances, he thought it fair and the ‘right thing to do’ to use Mr Binning's performance assessment.
28. I found this to be a credible explanation for a performance rating for a period that covered three line managers and I draw no inference from it.

Informal performance review

29. Mr Chown concluded that the coaching with the claimant was not effective, who, he says, was not receptive of feedback and new ways of working. As a result, he initiated an informal performance review process in August 2022.
30. On 8 August 2022, he had a face-to-face meeting with the claimant in Birmingham where he explained his vision for the team and set expectations for performance. I was provided with a copy of the slides used at that meeting. They refer to ‘DCA PMO expectations’. (There was much discussion in the hearing about the difference between a project manager and a project management office manager(PMO), which I have address later).
31. The slides set out clear expectations of the claimant:
- “We are creating a culture where our team can be at their best, to do this I require Peter to:....standards...accuracy...reporting...accountability...decision-making...*
- I therefore need Peter to ensure that we have appropriate governance in place for Project and Risk. (i.e. project plans, change control and reporting)...*
- I expect Peter to be held accountable. for the entire governance framework for projects and risk management.”*
32. Mr Chown said that many stakeholders would raise issues about the progress of the claimant's projects. He said that when looking into these issues, it was

apparent that they were a result of the claimant's underperformance. Examples of these were: the claimant was not up to date with progress of the projects; not understanding the main point of the projects; and not ensuring that the correct people were involved. Mr Chown provided details of specific projects where he says that the claimant was under-performing.

33. The claimant says that between his positive review in June 2022 and 18 October 2022 neither Mr Chown nor Mr Dalby indicated they were unsatisfied or had any issues with his performance. He said that he did not recognise the slides relating to PMO expectations and that while the document covers parts of his role it is not reflective of his job role as a whole nor his job description.
34. I note that the expectations set out on the slides replicate the expectations set out in the text of the performance review undertaken earlier in the year when the claimant had a 'Good Work' rating. They were not challenged at the time and were not new to the claimant.
35. When asked about the meeting in August, the claimant said that he did not recall it. He was referred to the letter from Mr Chown dated 25 November 2022, which sets out coaching dates including 9 August 2022. He said that he still did not recall the meeting. He accepted that he did not challenge the content of the letter at the time.
36. On a number of occasions the claimant repeated that he did not recall any coaching days or any coaching that took place. He said that he was not saying that these days did not happen.
37. I have considered this issue. I am satisfied on the evidence provided that it is more likely than not that the meeting took place in August. The slides are as described by Mr Chown. They set out clear expectations of the claimant. They replicate those set out in the claimants performance review. The meeting was referred to in the letter of 25 November 2022. This was not challenged at the time by the claimant.

PM or PMO

38. The claimant said that from 2021 to 2022, his role as a project manager (PM) increasingly morphed into one of a project management office manager (PMO). He said that PMO is a specialist position which establishes and maintains standards for managing projects across the business. He said that it is a specialised discipline, which he had not previously performed. He said that Mr Chown never recognised this, maintaining that PMO was the same or similar to project manager. He said that he informed both Mr Chown and Mr Dalby on several occasions that he had never previously performed the PMO role, nor had training in this specialised discipline, but would continue trying his best .
39. Mr Dalby said that although the claimant was hired as a project manager, the wider team may have used the term PMO when referring to him. He said that PMO is a very common term used in the organisation and could refer to few different roles (project management office, project management officer or programme management office) and is often misinterpreted. He said that the first

two are interchangeable with project manager. He said that the claimant's responsibilities were to manage projects and not programmes, and that was made clear to him throughout. He said that the claimant's qualification was more than sufficient to perform this role and no further formal training was required. At no point did his job description or responsibilities change.

40. Mr McDermott that he had looked at the claimant's job description and did not consider it to be a PMO role. He said that training in PRINCE2 would be sufficient to undertake the role. He said that he did not consider it unreasonable for the claimant to be asked to undertake the work he was doing.
41. Mr Binning said that there was some degree of overlap between a project manager and a PMO and it depends on the size of the project.
42. I have considered the claimant's job description and the evidence provided by the parties. I accept the evidence that in small teams or organisations it is likely that aspects of a PMO role will be incorporated into the role of a project manager. The claimant's job description appears to capture the administrative and governance functions that have been described for a PMO. I do not accept the claimant's assertion that his role as project manager had changed and that he was being asked to undertake work of a different kind for which he was not qualified.
43. I have considered the issue of training. I accept the evidence that the claimant was an experienced project manager who held a PRINCE2 qualification. I am satisfied that it was more likely than not that this was sufficient to undertake his role effectively and that additional training was not required. I am satisfied that the coaching provided by Mr Chown would have provided the necessary professional development and support for the claimant to enable him to undertake his role.

The Performance Improvement Plan

44. On 18 October 2022 an informal Performance Improvement Plan ("PIP") was agreed, which set out nine areas where the claimant was expected to improve:
 - (i) Be present and Lead conversations;
 - (ii) Ensure the right people are answering the right questions;
 - (iii) Reporting is up to date All content is up to date before meetings;
 - (iv) Actions and notes are taken and documented in all meetings;
 - (v) Task owners are aware, tasks and risks are linked correctly;
 - (vi) Updating Senior leaders;
 - (vii) DLC&A project governance lead and specialist;
 - (viii) Strategic thinking; and

- (ix) DLC&A projects knowledge call;
45. I was provided with a copy of the PIP and reviewed the goals. Although (i)-(vi) are reasonably clear and measurable (vii)-(ix) need explanation as to what they mean. That explanation is given elsewhere in the PIP.
46. For example *DLC&A project governance* lead and specialist has a descriptor:
“Ensure the team understand good project management. When creating new projects work with DLC&A. ensure each project has milestones and subtasks.”
47. Similarly, for *Strategic thinking*:
“Plan the strategy day for the DLC&A team in December. Clear and well thought through agenda, material and content to ensure that the strategy day is focused on the right discussion points.”
48. The claimant accepts that he agreed the goals in the improvement plan. In the decision meeting Mr Dalby asked “.. do you think those objectives and actions were reasonably achievable and if not any thoughts as to why not?” The claimant responded “... you are saying they would be achievable. I think I was already achieving them ... as objectives they are pretty simple, straightforward and bread and butter. So I believe I was delivering those as I have said over and over again every week.”
49. Ms Goel said that in the course of the grievance hearing she had asked the claimant about the PIP. She said that he had explained that he thought that the goals that he was assessed against were inconsistent with his role and reflected a PMO role instead. She said she asked the claimant if he had disputed these goals in the beginning of the formal PIP process in October and he said he had not and in retrospect he should have objected them then. She said she had asked the claimant whether he thought that the goals were difficult to achieve or unrealistic. She said that he explained that it was the opposite and that the objectives seems very straight forward and that he thought that he was already achieving all of these.
50. I have considered the goals set for the claimant. He accepts that he agreed them and that he understood them. Although not the best example of SMART targets, I am satisfied that they were understood by the claimant, were realistic, achievable and capable of measurement.

First formal meeting

51. Mr Chown said that despite reviewing these goals on a weekly basis with the claimant for over a month there was no improvement. As a result on 23 November 2022, a first formal meeting was held and the PIP was formalised, with the number of goals reduced from nine to seven (removing the bottom two). I was provided with a copy of the letter inviting the claimant to the meeting, a transcript of the meeting and the agreed meeting notes. The claimant was represented. The meeting lasted for over two hours.

52. Mr Chown explained how he discussed with the claimant performance against each of the goals that had been set out in the informal PIP. He gave specific examples of where there were concerns.
53. The claimant says that at this meeting Mr Chown said that he had not seen the claimant's job description. The claimant says that he raised concerns that he did not know what was expected of him as a PMO and requested to attend the P3O training programme. I have reviewed the relevant part of the transcript of that meeting and, although it is not an easy read due to the way it has been recorded, I am satisfied that the thrust of the conversation was Mr Chown trying to explain the governance aspect of the project manager role that he expected the claimant to undertake.
54. At the conclusion of this meeting, Mr Chown decided to issue the claimant with a first written warning. He said this was because, whilst improvement had been made this was not enough to meet the responsibilities of this role in full.
55. The claimant was informed of this decision in a letter dated 25 November 2022. I was provided with a copy of that letter, which informed the claimant of his right to appeal against Mr Chown's decision within seven days. It also invited the claimant to a second formal meeting, which was to take place on 05 January 2023.
56. The claimant accepts that he was given the opportunity to appeal this warning. He did not.

Second formal meeting

57. The PIP was reviewed again on 5 January 2023. I was provided with a copy of the letter inviting the claimant to the meeting and a transcript of the meeting. The claimant was represented. The meeting lasted for over an hour.
58. The claimant says that for this meeting he provided comprehensive evidence that he was achieving the objectives associated with his job description and career level D. I was provided with a copy of this documentation.
59. Mr Chown explained how he systematically went through each of the goals in the PIP, identified areas of concern and discussed these with the claimant.
60. Mr Chown decided that the progress the claimant had made was not enough to conclude the PIP and issued the claimant with a final written warning.

The final written warning

61. The claimant was issued with a final warning in a letter dated 9 January 2023 and given the opportunity to appeal this within 7 days. I was provided with a copy of that letter. The letter was signed by Mr Dalby. Mr Chown said that this was due to an issue with the HR system. He said that he informed the claimant that this was a mistake and that the letter was meant to be sent from him.

62. It was suggested in submissions that this matter reflects on Mr Dalby's credibility and implies an unfair process. I have given this careful consideration. I accept Mr Dalby's explanation that he was acting on the advice of his HR department. I am satisfied that Mr Chown conducted the second formal interview and that is supported by the transcript. I am also satisfied that Mr Chown made the decision to issue a final warning to the claimant. I have no reason to doubt the evidence given by either Mr Chown or Mr Dalby in relation to this matter.
63. The claimant attempted to appeal the final warning but his appeal was refused by Mr Dalby as it was out of time. I was provided with a copy of the claimant's appeal email and Mr Dalby's response.

Decision meeting

64. A final decision meeting was held on 20 January 2023. I was provided with a copy of the letter inviting the claimant to the meeting and a transcript of the meeting. The claimant was represented. The meeting lasted for around one hour. It was chaired by Mr Dalby.
65. The claimant was informed of the decision to dismiss him in a letter dated 26 January 2023.

Timing of the decision meeting

66. I was provided with and have considered the respondent's Improving Performance Policy and Improving Performance Procedure. These documents set out clearly the process to be followed to address underperformance; it starts with an informal stage and moves progressively to a first formal, then second formal then decision meeting with usual monitoring periods of four weeks.
67. The final warning letter was issued on 9 January 2023 and advised that a decision meeting was to be held on 20 January 2023. This gave the claimant 10 working days to provide evidence of his improved performance.
68. I have reviewed the policy which states "*usual monitoring is 4 weeks, may differ depending on role/circumstance.*"
69. I have considered the timing of the decision meeting in the context of the overall performance improvement process. I am satisfied that the respondent's policy and procedures were followed throughout.
70. I agree with Ms Goel that the final part of the process was 'speedy'. However, I also accept her evidence and that of Mr Dalby that the claimant was an experienced project manager who had been in the role for over 12 months. He was in a high risk area where failure had the potential to have an adverse impact on the respondent's business. He had been subject to the PIP for a number of weeks and slightly more than provided for in the policy. He had not shown signs of improvement and from the evidence did not believe that the PIP was required. In all of the circumstances, I consider that the PIP process was fair.

71. From the evidence, I am also satisfied that Mr Dalby considered alternatives to dismissal. Demotion was not an option as the team was too small. Both he and Mr Chown looked for alternatives within the respondent's organisation and gave the claimant time, whilst on garden leave, to apply for any in-house vacancies.

The restructure chart and redundancy

72. On 28 February 2023, the claimant received a departmental restructure chart that showed a 'Manager - Data PMO' plus two full-time project manager roles offshored to India. I was provided with a copy of this revised organisation chart.
73. I was not provided with any evidence that genuinely supported the claimant's claim, save for the assertion he has made following his sight of the revised organisation chart. It is clear from the evidence that there was no reduction in the workforce or any significant change of role. I do not accept the submission that in some way the respondent fabricated a capability dismissal to avoid the cost of redundancy. There is no evidence to support this.

Grievances and appeals

74. The claimant appealed his dismissal and also issued a grievance. The dismissal appeal and grievance were unsuccessful. The dismissal appeal was heard by Ms Goel alongside a grievance hearing. Mr Goel was not employed in the same area of business as Mr Chown or Mr Dalby and had no previous knowledge of matters. She was advised by EmpowER to conduct the appeal and grievance together. She heard the grievance first. I was provided a copy of the claimant's appeal and grievance and the letter of 23 February 2023 inviting the claimant to the meetings. The claimant was represented.
75. The meetings were held on 2 March 2023. The claimant was represented. The claimant's grounds for his grievance were: discrimination on account of disability and age; bullying and ostracism; excessive workload making his job impossible; unfair performance review process; and he felt singled out and micromanaged.
76. Having heard Ms Goel's evidence and considered the documentation I am satisfied that she conducted a fair grievance hearing and disciplinary appeal. I do not accept the submission that she was 'rubber stamping' what had gone on before. She gave the claimant the opportunity to put his case and discussed all matters with Mr Chown and Mr Dalby. I have no reason to doubt that she formed her own view.
77. On 16 March 2023, the claimant raised a second grievance including the respondent's mislabelling the reason for his dismissal as capability when it was, he said, redundancy. I was provided with a copy of the claimant's documentation regarding the second grievance.
78. The grievance outcome was subsequently appealed. This was heard on 31 May 2023. The appeal was heard by Mr McDermott. The claimant was represented. I was provided with a transcript of the grievance appeal meeting, the grievance appeal letter and the grievance outcome letter.

79. Having heard Mr McDermott's evidence and considered the documentation I am satisfied that he conducted a fair grievance appeal meeting. He was not employed in the same area of business as Mr Chown, Mr Dalby or Ms Goel. He was allocated by EmpowER to conduct the meeting and had no previous knowledge of matters. I do not accept the submission that he was 'rubber stamping' what had gone on before.

Conclusion

80. I have considered the evidence relating to the reason for dismissal and the finding of facts set out above.
81. I am satisfied that the principal reason for the claimant's dismissal was capability and that this is potentially a fair reason under section 9(2)(a) of ERA.
82. I have no reason to doubt the reliability of Mr Chown's evidence. He set out clearly what he had done to investigate the failings in the claimant's performance and the steps he had taken to address this.
83. I am satisfied with the explanation given by Mr Chown and Mr Dalby regarding the 'Good Work' assessment provided in June 2022 and do not consider that this suggests that the concerns from February 2022 to January 2023 were not honestly held.
84. I am satisfied that the respondent honestly believed that the claimant lacked the capability to do the job; and that the grounds for that belief were reasonable. I am also satisfied that there was adequate evidence of the claimant's lack of capability at each stage of the PIP process including at the decision meeting when the claimant was dismissed.
85. I am satisfied that the respondent carried out a thorough and reasonable investigation before coming to that conclusion. The PIP process was fair and in accordance with the respondent's Improving Performance Policy and Improving Performance Procedure. Including the informal process, it provided the claimant with over 4 months to improve.
86. Realistic, measurable and achievable goals were agreed and reviewed on a weekly basis. Mr Chown monitored the claimant's performance directly, either face-to-face or remotely, through daily meetings, and through gathering feedback from stakeholders.
87. Throughout that time the Mr Chown provided regular support and coaching to support the claimant to do his job properly. The claimant was an experienced project manager with an industry standard PRINCE 2 qualification and I accept the respondent's position that the claimant should have been capable of undertaking the work without additional training.
88. I am satisfied that the respondent considered alternatives to dismissal and provided the claimant with opportunities to apply for alternative employment within its business. I consider that in all of the circumstances dismissal was within

the band of reasonable responses that an employer may be reasonably expected to take.

89. Finally, I am satisfied that the respondent provided opportunities for the claimant to appeal decisions and register any grievances. The appeal meetings were conducted fairly by individuals with no prior knowledge of the circumstances and no involvement in the claimant's area of work.
90. In conclusion I find that the claimant was dismissed for capability and that the respondent acted reasonably in treating it as a sufficient reason for dismissing the claimant.

**Employment Judge Comfort
Dated: 4 June 2024**