



EMPLOYMENT TRIBUNALS

Claimant**Respondent**

Mr Mark Cole

v

Micro Focus Software UK Limited

Heard at: Reading

On: 2, 3, and 4 June 2025

Before: Employment Judge Gumbiti-Zimuto

Members: Mrs M Harris and Mr P Miller

Appearances

For the Claimant: In person

For the Respondent: Mr M Green, counsel

JUDGMENT

The claims in this case are not well founded and are dismissed.

REASONS

1. In a Claim Form presented on 8 March 2024 the Claimant made complaints of unfair dismissal and direct race discrimination.
2. The Claimant gave evidence in support of his own case and he relied on the written Statement of Susan Marston who did not attend to give evidence.
3. The Respondent relied on the evidence of Jenny Amanquah-Sauter, Mark Tilley and Russel Vise.
4. The Claimant and all the Respondent's Witnesses provided written Statements as their evidence in chief. The Tribunal was also provided with a Bundle of documents comprising 647 pages. We have considered all these sources when reaching our conclusions in this case.

5. The Claimant was employed by the Respondent, a company specialising in providing information management software solutions, as an IT OM Sales Enablement Specialist from 4 January 2022 until 27 February 2024.
6. At a Preliminary Hearing, in respect of the complaint of age discrimination the Claimant explained that he was age 61 and that his age group is 'over 60 years' and that he compared his treatment with the group 'under 60 years'.
7. The acts of discrimination about which the Claimant complains are:
 - 7.1. That he was placed on a Performance Improvement Plan (PIP) in October 2023;
 - 7.2. That he was placed on a further PIP in January 2024; and
 - 7.3. That he was dismissed on 27 February 2024.
8. The Claimant says that there was less favourable treatment because of his age, that the treatment was a detriment and that it was not a proportionate means to achieve a legitimate aim.
9. At the Preliminary Hearing stage the Claimant was comparing himself with Drew Wollam and Giuseppe Gigante who he says were treated better than he was. In the evidence before the Tribunal the Claimant has not produced evidence to show that there was no material difference between him and the comparators but that he was treated less favourably.
10. The Respondent admits that the Claimant was placed on a PIP in October 2023, that he was placed on a PIP in January 2024 and that he was dismissed in February 2024. The Respondent denies that the Claimant's treatment was in any sense whatsoever because of his age.
11. Therefore the issue in relation to the age discrimination case is to determine whether the Claimant's treatment was because of his age and if it was, whether there was less favourable treatment. Finally, if he was treated less favourably because of his age, whether it was a proportionate means of achieving a legitimate aim.
12. In respect of the complaint of unfair dismissal it was agreed that the Claimant was dismissed. The Respondent contends that the reason for the Claimant's dismissal was capability (performance).
13. The Claimant accepts that he was dismissed because of capability. However, he says that the dismissal was unfair in all of the circumstances including the fact that his role had been changed, he should not have been placed on a PIP, the PIP was unfair and unreasonable and that it was being used to manage him out of the business rather than giving him a genuine opportunity to improve his performance and remain in employment. The Claimant argues that the dismissal was in all the circumstances unfair.

Findings of Fact

14. The findings of fact we make in this case are as follows.
15. The Claimant's employer, Micro Focus Software UK Limited was acquired by Open Text and this resulted in the need for a harmonisation process between the two companies.
16. Jenny Amanquah-Sauter was appointed to Lead Sales Enablement. She set up a series of meetings with the Claimant and his Sales Enablement colleagues to discuss and create an updated job description. There is a dispute between the Respondent and the Claimant about whether there were multiple workshops or one workshop and a series of one to one meetings between Jenny Amanquah-Sauter and members of the Sales Enablement Team. Resolving that dispute is not necessary to decide this case because it is accepted that out of that process there emerged the updated job description which the Claimant accepts is an aggregate of what everyone did.
17. There is a further dispute between the Claimant and the Respondent as to whether the Claimant complained about the job description at the time, whether the job description reflected his role or was a different and expanded role. The Claimant says that he did complain. The Respondent does not accept that there was a complaint about the job description.
18. However, the Tribunal note that in their discussion with Jenny Amanquah-Sauter on 18 October 2023, the Claimant stated that the job description "*sounds like him apart from the administrative side of things*". Further, there is no contemporaneous complaint by the Claimant recording an objection to the job description.
19. Apart from expressing a dislike of the administration side of the role during the discussions about his performance, the Claimant did not complain that his role after the acquisition was a different role to that he had previously carried out before the acquisition or that the role had been considerably expanded.
20. The Tribunal conclude that the updated job description created in July 2023 was in line with the Claimant's original job description, recognising that there were changes to certain tasks that had been part of the Sales Enablement role that had been removed. We also accept as the parties submitted to us, that the merger of the two teams and the resultant need for harmonisation would have created a temporary spike in the amount of work that was required to be done. There is no evidence that the Claimant had more work than his colleagues.
21. The Respondent contends that the Claimant had fewer courses to complete than his colleagues but the Claimant was not able to accept this, or alternatively to dispute it. It is agreed that the Claimant was required to produce a number of pieces of work relating to courses and that he had

set deadlines for completion of these between August and October 2023. However, the Claimant missed the deadlines.

22. On 9 October 2023, Jenny Amanquah-Sauter received feedback from the Claimant's internal clients who were saying that they had concerns with the claimant's performance and the level of support that he was providing them.
23. On 10 October 2023, Jenny Amanquah-Sauter discussed the feedback she had received and followed this up with an email to the Claimant, setting out the issues raised by the clients. Jenny Amanquah-Sauter then set up a call the same day with two other colleagues to discuss issues with the Claimant. She asked the Claimant to take notes and to provide a summary email of the agreed action points. The Claimant failed to do this and on 17 October 2023 Jenny Amanquah-Sauter chased the Claimant for the email summary notes that he had failed to produce.
24. About this time there was then also a call between the Claimant and Jenny. The Claimant said that he could not do the task being asked of him, that he was unable to set out the monthly Microsoft Team ITOM Stakeholder calls with his Stakeholders or set out three live sessions a month. Jenny Amanquah-Sauter asked the Claimant if he meant he could not physically set them up or that he did not want to set them up.
25. This was accepted by the Claimant in part and in part it was not contested during the course of his evidence. Why he did not contest was because he could not remember whether it was said or not. In his evidence to the Tribunal, the Claimant said that what he was telling Jenny Amanquah-Sauter was that he was not able to do all the actions; *"there were too many."* The Claimant explained, *"They were administrative repetitive tasks, I self-identify as being not good at admin as my skills are elsewhere. I was not offered assistance in being made good at them..., I am not a project manager, I have no ambition to be a project manager and I was not offered training in new project management."*
26. It was stated by Jenny Amanquah-Sauter that there was training available, that it was online and that the training would have assisted the Claimant with these aspects of his work. She said that the Claimant did not make use of the online training.
27. It is not disputed that during the call of 17 October 2023 the Claimant then said that he saw two options: that he was moved somewhere else within the business, or that Open Text managed him out of the business. It was the Claimant, not the Respondent, who mentioned being managed out of the business.
28. On the next day, 18 October 2023, the Claimant had a one to one meeting with Jenny Amanquah-Sauter when they went through the Claimant's job description. It was during this meeting that the Claimant stated that the job description sounds like him apart from the administrative side of things. The Claimant confirmed in his evidence to the Tribunal that he did say this.

Also in this meeting, the Claimant said, *"We both know where this is heading"*. Jenny Amanquah-Sauter at this meeting told the Claimant that it was in the Claimant's power to improve and she told him that she would support him.

29. Jenny Amanquah-Sauter also consulted with HR and discussed putting the Claimant on a PIP. In consultation with HR she prepared a PIP and on 31 October 2023 she met with the Claimant accompanied by Mark Tilley from HR and went through the PIP. During the meeting the Claimant did not dispute what was on the PIP, or its achievability. The Claimant did not say at the time, as he did during this Hearing, that it was an unmanageable workload.
30. In the course of November and December 2023, Jenny Amanquah-Sauter says that she continued to support the Claimant and had one to one meetings with him to discuss his improvements. It is agreed that the Claimant had meetings with his Line Manager when they discussed his progress on the PIP, the Claimant however says that he was denied support during his first PIP period.
31. The Tribunal has attempted to identify that support which the Claimant sought and to determine whether it was denied or supplied. There are two points which appear to emerge from the evidence of the Claimant. The first relates to a situation where due to Covid the Claimant was having problems with his voice and he was asking for support by using something called BLADE but this was not made available to him. The reason for this was explained to him by Jenny Amanquah-Sauter.
32. We also note that this was not a matter which arose from the PIP.
33. The other matter that the Claimant complains about is related to the compilation of data. This was required for the Claimant to complete one of the tasks set out in the second PIP. The Claimant suggested that providing him with someone to manipulate the data would have been an easy win because this was something that was not part of his strength. In answering this criticism at the time she was being questioned by the Claimant Jenny Amanquah-Sauter said, *"The only person who could get the data is you. You say it was conflicting data and you needed to go through the data. I had no one or any one else in the team that had admin support to assist. You had to go through the data and prepare an executive summary."*
34. The conclusion of the Tribunal is that the Claimant was not denied any support that he requested in order to complete the tasks in the PIP. The issue with the BLADE was not something that arose from the PIP and the issue with the data, as we understand it, was not a contemporaneous request, it was the Claimant's observation of something that could have been done.
35. On 18 December 2023, the Claimant met with Jenny Amanquah-Sauter to discuss the outcome of the PIP. In discussion it emerged that the

Claimant had not completed the two courses he had been asked to complete. He told her that he was 90% and 75% finished in relation to the two. This, however, was not established beyond the Claimant's assertion in the meeting. The Claimant had been requested to provide Jenny Amanquah-Sauter with what he had produced so far but he did not do so after the meeting. The Claimant, in the course of his evidence to the Tribunal agreed that he had not told Jenny Amanquah-Sauter that he needed more time to complete the work. In fact what he did say was that he did not feel able to perform certain core tasks. Again, something which during the course his evidence he confirmed having said.

36. Jenny Amanquah-Sauter concluded that the Claimant had failed the first PIP by a significant margin. The Claimant admitted that he expected to be put on another PIP. The Claimant, following this meeting, was given a Final Written Warning and the Respondent says that this was reasonable in circumstances where not only had the Claimant failed to achieve the majority of the tasks but he could not provide any evidence at all of working towards one of the items and had explicitly said that he did not feel able to perform certain core tasks, referring to them as the boring or admin side.
37. We observe at this stage that in introducing the PIP to the Claimant it was made clear that an outcome of the PIP could be that the Claimant was given a Final Written Warning. The Claimant appealed the Final Written Warning. In his Appeal he said that he was not appealing the PIP itself. In the Appeal he did not complain that he did not have enough time to do all the tasks on the PIP. In the Appeal he said that he believed that it was "*a genuine attempt*" from the Respondent to help him improve. In the course of the evidence in this case, he said that the note of the meeting contained an error in that it failed to record the word 'not' so that it read that it was "*not a genuine attempt*" from the Respondent to improve him. This was put to Mr Vise who was clear and emphatic that the way the matter was recorded in the notes was accurate.
38. We note that until the Claimant was giving his evidence, there was no indication that the Claimant considered that what he said in that Appeal Meeting had been incorrectly recorded. It is not a matter that is expressed in the Claimant's Witness Statement. The Tribunal are satisfied that the record of the Appeal produced by Mr Vise is an accurate representation of what was said in that Appeal.
39. The Claimant expressed during the Appeal that his view that he did not like project management and he admitted that he was not keen on certain tasks that he was required to do, referring to the taking of minutes. The Respondent says this was a case where the Claimant was saying that he will not do these things, rather than a scenario where the Claimant was saying he cannot do these things.
40. In his oral evidence, the Claimant accepted that he did not think some of the PIP tasks were a good use of his time. In his Appeal the Claimant did

not say that he was over worked, or that he was appealing against the PIP itself.

41. The Claimant was put on the second PIP and the Claimant failed to complete it. He only completed one of the tasks. He expressly said that the metrics summary was not a good use of his time, notwithstanding that it was one of the matters that he was required to carry out in the PIP. The Claimant was then dismissed following his failure to complete the PIP. He was dismissed on the basis of capability (performance).
42. As a result of failing the PIP, the Claimant stated that the Respondent had alternative ways of dealing with him which did not involve dismissal and he relied on the possibility of redeployment, being offered voluntary redundancy or early retirement.

The Law

43. The Law that we considered is contained in the Equality Act 2010 and the Employment Rights Act 1996.

Direct Discrimination

44. Direct discrimination is set out in s.13 of the Equality Act 2010 which provides at subsection 1:

13. Direct Discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

45. Section 136 of the Equality Act 2010 provides that the burden of proof first falls upon the Claimant to show that there are facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place.
46. It is not enough to show a difference in treatment and a difference in status, there must be a 'something more' to connect the treatment to a protected characteristic. In this case something to show that the conduct is because of or related to the Claimant's age.
47. Where the Claimant does not establish this then the claim will fail. If the Claimant does establish this as being the case, then the burden of proof shifts to the Respondent to show a non-discriminatory explanation. If the Respondent is able to provide that explanation the claim fails, if not, the claim succeeds.
48. The explanation for the less favourable treatment advised by the Respondent does not have to be a reasonable one, it may be that the employer has treated the Claimant unreasonably but the mere fact that the

Claimant was treated unreasonably does not suffice to justify an inference of unlawful discrimination.

49. In a case of age discrimination, it is also a defence for the employer to show that the treatment of the employee, notwithstanding that it was less favourable treatment because of age, was a proportionate means of achieving a legitimate act.

Unfair Dismissal

50. Turning to the Law in unfair dismissal, this is set out in s.98 of the Employment Rights Act 1996. It is for the Respondent to show the reason for the dismissal and in this case the Respondent relies on capability.
51. The question for the Tribunal then is therefore whether the Respondent acted reasonably or unreasonably in all the circumstances in treating this as a sufficient reason for dismissing the Claimant having regard to the substantial merits of the case.
52. In capability dismissal the test is whether the employer honestly believes the employee is incompetent or unsuitable for the job and whether the grounds for that belief are reasonable. This means there has to be some evidence put forward and in respect of this the burden is on the Respondent to show that it was the real reason for the dismissal. It is for the Respondent to set the standards asked of employees and Tribunals are not to substitute their own view of the employee's competence. Furthermore, standards of performance are liable to change as the business develops or a person's role develops.
53. The Tribunal must ask themselves whether dismissal was within the range of reasonable responses of a reasonable employer. Again, it is not for the Tribunal to substitute its own view.

The parties' submissions

54. To summarise the way that the case was argued by the Claimant as we understood it, the Claimant argues that his case is not one of capability but that it is a case of unfair dismissal caused by unreasonable workloads and a failure by the Respondent to properly manage change following the acquisition of Micro Focus by Open Text. The Claimant argues that he did not refuse to work and he did not under perform through any lack of will and that he was faced with an ever expanding workload that became unmanageable despite his reasonable warnings and requests for assistance which were disregarded and reframed as a personal failure. The Claimant points out that the Respondent failed to carry out any formal workload assessment. The Claimant argues that his role changed significantly before and after the acquisition. Before, he had worked with a colleague and had administrative support, after the acquisition his colleague left and he was deprived of administrative support. The Claimant spoke of the legacy of 36 ITOM courses that he had to audit and

redesign, 5 courses were new and additional tasks created by the system migration and the net result of this was an overload of work.

55. The Claimant contends that his Performance Appraisal for the year 2022 and for the year 2023 showed that he was rated as successful in the role and that this was the second highest out of five possible ratings.
56. However, he says that when he raised concerns about unmanageable workloads he was subjected to a PIP and that this was in fact punishment for raising workload concerns. The PIP itself, he says, was rigid and lacking flexibility and there was no review of his tasks carried out. When he requested additional support this was refused. He says there was no assessment of whether the deadlines were realistic and when the Claimant raised concerns about the achievability of the deadlines, he was ignored.
57. Of the Appeal, the Claimant says that this was an opportunity to step back and assess the process that he had been through. However, this did not take place and there was no meaningful assessment process, merely an acceptance of the management's line.
58. The Claimant concluded that his dismissal arose not from any failure of his but because of being required to work in an impossible position, that he was treated unfairly for raising concerns, that the Respondent was subjecting the Claimant to unconscious bias by characterising the Claimant as resistant to change and that the Respondent refused reasonable suggestions for support or compromise. The performance process was not genuinely supported and that the Respondent failed to conduct a fair and proper Appeal process.
59. The Respondent provided written submissions which I need not repeat here. The Respondent replied to the Claimant's submissions by saying that the Claimant's emphasis in this case has been on the lack of workload assessment and the achievability of his PIP. The Respondent says that it is different to the focus or the position during the period of the PIP itself. In response to the suggestion that the Claimant was subjected to age discrimination because of his perception, the Respondent says that he was resistant to change, there was no question of perception and that it was the reality because that is what the Claimant himself said to his Manager.

Conclusions

Age Discrimination

60. Firstly in relation to age discrimination which we deal with quite shortly.
61. The Claimant makes claims of three acts of alleged age discrimination:
 - 61.1. Being placed on the PIP in October 2023;

- 61.2. Being placed on the PIP in January 2024; and
- 61.3. Being dismissed in February 2024.
62. The Claimant failed to provide any evidence to show that there is a 'something more' to link these three acts to age. It is important to remember that the burden is on him to do so.
63. What the Respondent says is that there are in fact a number of facts that point directly away from age having anything to do with it. They point to the Claimant having been recruited at the age of 58 years. That the Claimant was replaced by somebody older than himself and that Jenny Amanquah-Sauter, whose actions he complains against, was of a similar age to the Claimant.
64. We note that the Claimant did struggle to explain why he was claiming that age was a factor in the imposition of a PIP and in his dismissal. At one stage he in fact said that being placed on a PIP was not an act of age discrimination. When trying to explain he also largely appeared to be imposing age stereotypical comments on himself; he used the expression at one stage "you can't teach an old dog new tricks" referring to himself.
65. It is important to emphasise none of these things are any that weigh on the part of the Respondent. It came from the Claimant himself. It appears to be his perception of himself rather than the Respondent's expectations of him.
66. The Claimant also failed to show that he had less support than his colleagues. Jenny Amanquah-Sauter's evidence was that everyone was able to access the same resources. The only matter the Claimant was able to point to was whether he was told that he could not have BLADE's assistance to record voice over at a certain point when his voice was hoarse. Jenny had requested this but had been told that BLADE was not available. She even went as far as telling the Claimant that more licences for the Software that BLADE would have used were being requested. In any event, the Claimant doing a voice over in this regard was not in respect of a task that was related to achieving the PIP. We recognise of course that in addition to the PIP the Claimant had all his other work to do and that this was as important as the matters on the PIP.
67. However, overall our conclusion is that the Claimant has not established a prima facie case. The claimant has not shown that there are facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent was discriminating against the claimant on the grounds of his age.
68. Therefore the claim for age discrimination fails.

Unfair Dismissal

69. The conclusion of the Tribunal is that Jenny Amanquah-Sauter reasonably concluded that the Claimant had failed the PIP by a large margin. The Claimant admitted that after the first PIP he expected to be put on another.
70. It is reasonable, in our view, in those circumstances for the Claimant to have been given a Final Written Warning. He had failed to achieve the majority of the tasks on the PIP and said that he did not feel able to perform certain core administrative tasks.
71. The Claimant was specifically asked by Jenny in correspondence whether he needed any specific additional support. It is a matter of note, bearing in mind the Claimant complains of a lack of support, that he did not in fact ask for any.
72. The Claimant appealed the Final Written Warning saying in his Appeal that he was not appealing the PIP itself. It is instructive to note the way that Russell Vise summarised the Claimant's approach in the Appeal and he said this in his Witness Statement, *"During the appeal meeting on 11th January 2024 the Claimant confirmed that he understood the reasons for the PIP and explained that he felt the plan was a genuine attempt from the Respondent to help him improve his performance in the role. From the outset he explained that he felt that he wasn't suited for the new changes, particularly in respect of the task management element of his role. In particular citing the move from team based objectives to a more individualised approach as something he struggled with. The Claimant understood the expectations but explained he was not fully clear on how he associated performance."*
73. The Claimant, we note, did not say that there was not enough time to do all the tasks on the PIP or that he was overloaded with work. During his oral evidence the Claimant said that he did not think some of the PIP tasks were a good use of his time. This in our view is consistent with the way that he is recorded as having reacted to the PIP or worked during carrying out the PIP. We note that he did not prioritise what he was instructed to do.
74. The Claimant now complains about specifically having to set up Teams meetings but the Claimant did not avail himself of the possible help from the Communications Team or use the training that was available for employees online which would have assisted him in being able to carry out his function.
75. We agree that it was reasonable to put the Claimant on the second PIP given his failures in respect of the first PIP. In the second PIP he only completed one of the tasks. While the Claimant now says in respect of one of the tasks that because the statistics he had conflicted he needed help and it would have been an easy win to provide him with such help. However, the Claimant did not ask for clarification at the time and there is no record of him asking for help.

76. With one of the items in the second PIP and item 4 in the first PIP, which he said that he had 75% completed in December and by the time the second PIP had come about he admitted he had gone backwards on that. Additionally he had, in any event, failed to provide any work that he had done in respect of that as he had been requested to do.
77. We are satisfied that Jenny Jenny Amanquah-Sauter had a genuine and reasonable belief in the lack of capability on the part of the Claimant. We also accept her account of how she discussed with the Claimant the tasks, that she offered him support and that she gave him every opportunity to improve.
78. The Tribunal have also considered the Respondent's Capability Policy and note that throughout the Respondent has followed the correct Policy in dealing with the Claimant.
79. We concluded that it was within the range of reasonable responses for the Respondent to dismiss the Claimant in these circumstances.
80. The Respondent needed the Claimant to perform his role, it was not a redundant role. It was quite reasonable for the Respondent not to consider voluntary redundancy or early retirement in the circumstances. We note in any event that early retirement is not something that the Respondent offers.
81. The Claimant also says that he should have been redeployed. However, as the Claimant was failing the PIP and when we consider the way that he responded to the PIP, it was not unfair for the Respondent to take the view that it was not appropriate to offer him redeployment.
82. The conclusion of the Tribunal is that the Claimant's dismissal was not unfair and in the circumstances the Claimant's complaints are therefore not well founded and are both dismissed.

Approved by:

Employment Judge Gumbiti-Zimuto

Date: 22 July 2025

Sent to the parties on: 25/07/2025

For the Tribunal Office.

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>