



EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Williams
Respondent: British Telecommunications plc
Heard at: Leicester
On: 31 January 2018, 2 and 3 July 2018
5 July 2018 (in chambers)
Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: In Person
Respondent: Ms Hirsch of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed.
2. The issue of remedy shall be listed for hearing in due course.

REASONS

1. In these proceedings Mr Williams brings a complaint of unfair dismissal. Until his dismissal in March 2017 the Claimant had been employed by British Telecommunications plc ("BT") for over 30 years. His dismissal came after a fairly protracted performance management process culminating in a final meeting on 3 March 2017 with notice of dismissal being issued on 9 March 2017. The effective date of termination is agreed as 31 May 2017. Mr Williams 'presented' his Claim on 8 May 2017 having complied with the ACAS early conciliation process.

2. In coming to my decision in this case I take into consideration the evidence of the Claimant (who has represented himself throughout these proceedings) Mr Richard Jennings, who was the dismissing officer, Mr Jason Stanton who was the appeal officer (who is no longer employed by BT) and Ms Emma Wilkinson the Claimant's line manager in the latter stages of the Claimant's employment.

3. At the start of this one-day listed case Miss Hirsch explained that the Respondent did not in fact intend to call Mr Stanton. The reason appeared to relate solely to the fact that he was no longer employed by BT though he was clearly traceable and it was not suggested that he was unco-operative. Given that two most important witnesses in unfair dismissal cases are usually the dismissing officer and the appeal officer, his absence was somewhat surprising. However, when the case went part heard, the Respondent took the opportunity to obtain a witness order for his attendance. His evidence was clearly relevant.

4. Ms Wilkinson was another witness whom the Respondent had initially felt it could do without. Ms Wilkinson was not a decision maker in the formal sense but her assessment of the Claimant's performance was critical in the stages leading to the decision to dismiss. Her evidence was also very relevant. After a clear indication from the Tribunal that it would be helpful to hear from her, Ms Wilkinson attended to give evidence following the part-heard adjournment.

5. The facts of the case are relatively straightforward and unless otherwise stated are not in dispute. BT employs a number of Advisers who deal with both commercial and domestic customers. These Advisers work at different levels in the hierarchy depending on the complexity of the work. Some Advisers are based in the UK and others at call centres abroad. Their function is to deal with any connection issues to BT telephone lines and Broadband installation as well dealing with the placing of orders and any queries relating to them. They work closely with one of BT's business partners, Openreach, in order to ensure that the line or connection is installed within realistic timescales. They also deal with customer queries. BT is keen to ensure that Advisers undertake a minimum of 'effort' (that is the time spent on each matter) wherever possible. Mr Williams was employed as what is known as a CAMP3 Adviser which involves acting as a case handler on more complex connection cases. His work involved significant direct contact with customers and suppliers.

6. There is no dispute that the Claimant was at all times a highly conscientious and committed employee. There is also no dispute that he has always had the best interests of BT customers at heart and that he always attempts to do his level best to ensure complete customer satisfaction in line with BT's expectations. There is no suggestion that Mr Williams was lazy, slow or intellectually incapable of undertaking what was required of him. Whilst there are allegations against him that he made unnecessary contact with customers, there is no suggestion that he did so to avoid having to do the more difficult or complex tasks.

7. On the Claimant's side there is no suggestion that being put into the BT performance processes was as a result of any ulterior motive on the part of BT or his line managers in an effort to dismiss him. He does not challenge the honesty of the views held by the Respondent's officers though he does not agree that all of the criticism was justified.

8. BT's internal performance procedure has an informal and a formal stage. The informal stage involves having one or more discussions with the employee on any shortfalls in performance. If this does not resolve the problem it goes formal. The formal process is itself divided into two stages – an initial formal warning ('IFW') and the final formal warning ('FFW'). Arguably there is a third stage which is the decision to dismiss though at that stage it is, to put it bluntly, all over bar the shouting. An underperforming employee at that stage will either be dismissed or moved to another role. Meaningfully, an underperforming employee has up to the FFW stage any real chance to save his job.

9. The Claimant had been line managed by several people during the relevant period both immediately prior to and during the performance procedures. Those were Ms Guthrie (until August 2016) Ms Ramji (from August to October 2016) and finally Ms Emma Wilkinson from 31 October 2016 until dismissal. There have also been informal coaching sessions and reports by other managers when the formal line managers were on leave or unavailable.

10. In December 2015, the Claimant was placed on an informal coaching plan. There was no direct evidence at this hearing as to what the reason for the coaching was and the only information is from the documentation. The Claimant's line manager then was Ms Guthrie. Mr Jennings made his assessment based entirely on notes kept by Ms Guthrie rather than any personal discussion with her. There is no direct statement from Ms Guthrie as to the Claimant's perceived deficiencies in work performance. There is nothing in Ms Guthrie's notes that suggests there were deficiencies serious enough to merit Mr William's employment being put at risk though the need for coaching in itself would undoubtedly have flagged a cause for concern.

11. At the end of the coaching plan, which lasted for approximately 6 weeks, there was a review in February 2016 followed by a meeting between Mr Williams and Ms Guthrie on 3 March 2016. Ms Guthrie appears to have read from a script at the meeting to say that whilst there had been improvements there were still areas of 'opportunity' as she calls it. She decided to issue an IFW to the Claimant which clearly suggests that at that point the Claimant was in the formal stage of the process. Somewhat oddly, after she had issued the IFW Ms Guthrie asked the Claimant to make representations on his performance. Many employers might have done it the other way round but nevertheless Ms Guthrie decided an IFW was appropriate unless she was persuaded otherwise, which she clearly was not. Accordingly, Mr Williams was issued with an IFW on 10 March 2016 and placed on a Formal Performance Plan ('FPP') from 22 March 2016.

12. Mr Williams appealed against the IFW but his appeal was dismissed. He was then absent from work on sick leave from 12 May to 22 August 2016 due to high blood pressure. On his return he began a period of phased return to work. His line manager changed to Ms Ramji in August 2016. There do not appear to have been any issues of note reported by Ms Ramji.

13. In November 2016 Ms Wilkinson took over the line management of the Claimant. She inherited a group of employees who were viewed as requiring support which included the Claimant. Ms Wilkinson read the Claimant's file notes and the coaching sessions held. She believed the issues to be around the way in which the Claimant handled customer calls, not as a result of a failure to meet targets. It should be said that there is no suggestion that the Claimant was rude or discourteous to customers or suppliers. The concerns were principally that Mr Williams was either taking too long on customer calls or that he was contacting

customers more often than he should. Ms Wilkinson would ordinarily have placed the Claimant into the process for making a decision affecting his continued employment but because he had been absent for some time, Ms Wilkinson decided to hold fire at that stage.

14. Over the next few weeks Ms Wilkinson organised coaching sessions with the Claimant and herself and others and an observation with a colleague to demonstrate what was expected. By the end of the month Ms Wilkinson was of the view, the reasons for which are not clear or explained, that the Claimant was not performing at the expected level.

15. On 9 December 2016 Ms Wilkinson held a meeting with the Claimant and his union representative to discuss performance concerns. It was really a meeting to say that she did not feel the Claimant's performance was up to scratch and wanted to know why she should not issue a FFW. Her approach is seemingly at variance with that of Ms Guthrie. On 15 December 2016 the Claimant was issued with an FFW. Mr Williams appealed the decision and on 26 January 2017 Mr Jennings, following a meeting on 18 January 2017, wrote to the Claimant to say that his appeal was dismissed.

16. On 9 February 2017 Mr Williams was told that he had failed to complete the FPP satisfactorily. There was no alternative role available and he was invited to a meeting on 3 March 2017 with Mr Jennings to consider whether he should be dismissed. Mr Williams attended the meeting with his union representative. Mr Williams' main argument seemed to be that the performance figures were incorrect and should not be relied on.

17. Mr Jennings did not agree that the figures were incorrect. Although he accepted that there were some minor discrepancies he felt that these had no material impact and the effect on the Claimant's figures was 'negligible'. Mr Jennings says even allowing for the error the Claimant would still be "substantially below the required standard". On 9 March 2017 Mr Jennings wrote to the Claimant to inform him that he was to be dismissed with 12 weeks' notice with the last day of employment being 31 May 2017.

18. Mr Williams appealed. The appeal was dealt with by Mr Jason Stanton who at the time was employed as a General Manager within BT Consumer. He held a meeting with the Claimant and his union representative on 27 March 2017. Mr Stanton concluded that the Claimant had received coaching for some time yet had not seemingly progressed. He regarded Ms Wilkinson as one of "top performing leaders in the centre and the support the Claimant was being given could not be sustained indefinitely. In a letter of 18 April 2017 he wrote to say the appeal was dismissed.

19. On 8 May 2017 Mr Williams submitted his claim to the Employment Tribunal claiming unfair dismissal.

THE LAW

20. The relevant law is not in dispute. Section 98 of the Employment Rights Act 1996 ('ERA 1996') so far as it is relevant 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,

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(4) In any other case 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.”

21. In **Alidair v Taylor Limited** [1978] ICR 445 the Court of Appeal (Lord Denning MR) said the following in relation to determining the fairness of capability dismissals:

“Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.”

22. In the same case, Geoffrey Lane LJ identified a two stage test namely:-

(1) does the employer honestly believe the employee to be incompetent or unsuitable for the job?

(2) are the grounds for that belief reasonable?

23. In determining the question of reasonableness I have borne in mind that it is important that the Tribunal does not substitute its view for that of the employer. I have been careful not to do so. The Tribunal must consider the *reasonableness* of the employer’s decision and not whether it would have done the same thing. So long as dismissal is within a band of reasonable responses open to a reasonable employer, the dismissal is fair.

CONCLUSIONS

24. I am satisfied that the Respondent has correctly followed its own internal procedures and also that it followed a fair procedure in dismissing the Claimant. There is no basis for finding that the dismissal was procedurally unfair or in breach of the ACAS Code.

25. In relation to possible alternative employment in place of dismissal, I did initially have some concerns as to whether reasonable efforts had been made by the Respondent (not least because the Respondent's own procedures appear to require it) and moreover because there did not appear to be any effort on the part of Mr Stanton in making any such enquiry. Mr Jennings appears to have left the task wholly to Ms Wilkinson. On balance I conclude that there were reasonable efforts made to find Mr Williams alternative employment within BT as an alternative to dismissal. It is clear that Ms Wilkinson was making genuine efforts and the fact that she did so instead of Mr Jennings makes no real difference. Mr Williams continued to look for alternative employment internally right up to the time he left. I am also satisfied that there were no suitable jobs from mid-February onwards that could potentially have been offered. Mr Williams limited his search to BT roles within Leicestershire. The only potential job, which the Claimant rightly rejected, was in Warehouse Operations working via an agency which would not even be as a BT employee. This would be a manual job and clearly unsuitable given that the Claimant had undertaken a clerical role throughout his time with BT. The Claimant did make one other job application very late in the day which was unsuccessful on its merits.

26. I now turn to the rationale for dismissal for poor performance. The Claimant's failings as to performance are set out in the FPP and summarised at paragraph 22 of Mr Jennings's statement. They are as follows:-

26.1 that the Claimant was told that he should only call suppliers when necessary and where the information was not already available. This appears to be an allegation of making unnecessary 'touches';

26.2 that when calling suppliers the Claimant should only have asked specific and relevant questions in order to get only the information needed and not to spend too much time receiving irrelevant information;

26.3 that the Claimant should have listened to customer(s) to ensure that he understood and identified the relevant issues;

26.4 To have set clear expectations with customers;

26.5 to have ensured that calls to customers were necessary and only made when there was an update for the customer.

27. The Claimant argues that the statistics produced by the Respondent which led to his dismissal are either wrong or unreliable and in any event that he did not have sufficient feedback to be able to improve his performance.

28. There is some dispute as to the part statistics play in the decision-making process. I understand the Respondent's case to be that while statistics are useful guidelines they are not ultimately the basis for the decision. The crucial failure, and hence the reason for dismissal, was the Claimant's perceived "behaviours" and a perceived inability to change. That is clear from the evidence of both Mr Jennings and Ms Wilkinson. At paragraph 41 of his statement Mr Jennings says:

"During the appeal [against the formal final warning] I noted that the Claimant seemed to be very concerned with his adherence and cancel/keep score measures as opposed to his customer effort measures. Although these are important measures in themselves, the performance plan coaching was focussed on reducing the Claimant's effort measure and working effectively with customers and suppliers, in particular by adapting his behaviours to drive the required

performance increases..... The Claimant did not seem to have taken away from coaching that his effort measures and the behaviours that drive these were the most important aspect of the coaching being provided.”

29. At paragraph 3 of her witness statement, Ms Wilkinson says:

“The coaching sessions were in relation to the Claimant’s call handling and the length of time which the Claimant spent on calls. They were in relation to the way he handled calls with customers, not as a result of failing to meet specific targets. The issue was in relation to how he was handling customers.”

30. The statistics are therefore used to measure levels of ‘effort’. Here, effort is undesirable because the greater the effort, the greater the staff involvement. BT’s policy, for these purposes, is that the least amount of effort is most desirable as it leads to a saving in costs.

31. Therein however lies an inherent contradiction in the Respondent’s case. Absent the Claimant’s performance as set out in his figures then it is almost certainly the case that he would not have been either placed into the MUP or that he would have been recommended for a decision meeting. In his witness statement Mr Jennings accepts that there were some minor discrepancies in the figures produced which the Claimant had highlighted at the 3 March meeting but that the impact of the error on the Claimant’s performance figures was “negligible” and the Claimant was still “substantially below the required standard”. It is difficult to see why that should be relevant if statistics have no bearing on the ultimate decision. Either the figures were relevant, in which case the discrepancy rightly made no difference to the decision, or they were not relevant in which case it did not matter if they were correct or not.

32. In the 9th February 2017 assessment undertaken by Ms Wilkinson, and the one that leads her to send the Claimant to a termination meeting, Ms Wilkinson sets out the figures in some detail. Her e-mail contains the following table:-

<u>Mark</u>	<u>Team Average</u>
Eclipse Usage = 100%	85.71%
ABS usage = 50%	22.77%
Next day diary = 17.65%	17.95%
Ownership = 54.55%	20.34%
Touch effort = 21.93%	20.56%
Closure rate = 25.93%	40.89%
Easy Query Usage = Not populated	Not populated
AWA adherence = 84.3%	93.7%

33. Some of the above terms require explanation:

“Eclipse” refers to the flow of updates on processes. The higher the figure the better in terms of employee performance.

“ABS usage” refers to diarising matters and the use of the system. Here the higher the percentage the better.

With “ownership” the higher the percentage points the better.

“Touch effort” refers to the amount of effort using the system. Whilst generally effort is a good thing, for these purposes the lower the effort the better. Reducing effort means less time spent on a matter and ultimately at a lower cost to BT.

“Closure rate” refers to closing cases. Naturally the higher the percentage of closing cases the better.

“AWA” stands for automated work allocation being the software system used in allocating work in relation his colleagues. For AWA the higher the figure the better. The expected minimum is 85%.

“Next Day Diary” deals with setting realistic timescales when diarising for next customers and contacts. This had fluctuated but at this point in time the Claimant’s figure was 17.65% compared to the team’s figure of 17.95%.

34. It will therefore be seen that at this critical juncture, in terms of figures, the Claimant was ahead on Eclipse Usage, he was significantly higher on ABS Usage, his Next Day Diary figures were only marginally below average compared to his colleagues (less than 1%) and his Touch Effort was similarly only slightly below average (less than 2%). However, his closure rate in relation to his colleagues was significantly lower and his AWA Adherence was a little shy of the required 85% minimum but less than 10% of the team average. There is no suggestion that his Closure Rate or AWA Adherence was deemed sufficient on their own to merit dismissal.

35. I appreciate that the Respondent’s primary case is ultimately that what was important was how the Claimant was seen to deal with ‘expected behaviours’ rather than the figures alone but if that is the case then it is difficult to see why it the figures trigger the termination decision meeting or why so much reliance is placed upon them in the reviews. On these figures the Claimant could not reasonably be said to be incapable. There were aspects of his role that his manager felt could have been done better or differently but he was not, nor could he be reasonably viewed as, being incapable. He was below average on some aspects but being below average is not the same thing as being incapable, even if indeed he was factually below average.

36. Clearly, the Claimant was capable of doing his job. If he was not doing the job in the manner in which BT wanted him to then that was a conduct issue, not capability. This case has not been argued as a conduct case. I am not invited to consider it in the alternative and there is no application to amend.

37. Ms Wilkinson’s assessment of the Claimant’s performance, and her assessment is paramount because neither Mr Jennings nor Mr Stanton had first-hand knowledge of the Claimant’s day to day work, is entirely subjective and without the relevant evidence to support her assessment. Her evidence fails to

give specific examples of where time was being wasted or spent. Ms Wilkinson fails to give, on the somewhat serious charge of calling customers unnecessarily, any recent examples. On the contrary Ms Wilkinson records in one instance that “you [the Claimant] took all relevant actions on the system and the case was dealt with and resolved within 24 minutes which is great”. In relation to setting realistic timescales, Ms Wilkinson fails to give any specific example but instead sets out how the Claimant’s performance figures fluctuated between weeks 2 - 5. She refers to ‘effort measures’ but there is nothing which is identified as significantly wrong in effort levels or which can reasonably be lead to the process of dismissal.

38. During the course of this hearing, I made it clear that I expected to see examples of the failings alleged where the Claimant had undertaken (or failed to undertake) matters for which he was ultimately dismissed. For example, one expects to see examples where Mr Williams had “set unclear expectations”. The only example cited is from January 2016 which is not only historical but also before the formal performance improvement plan started. The evidence of the Respondent’s witnesses fails to give examples of unnecessary calls, unrealistic timescales, a failure to listen or follow instructions or any failure to identify the appropriate issues. In short, the Respondent’s case lacks credible evidence linking the perceived failures to specific examples.

39. The Claimant was criticised for using jargon. Clearly jargon should be avoided but the jargon that the Claimant was criticised for was using terms such as “expedite orders” and “provisional dates”. Such terms are not identified as jargon in BT’s own documentation. They are words used in ordinary everyday language. No reasonable employer would consider them as jargon. It is not surprising that in those circumstances Mr Williams chose not to sign the coaching document which criticised him for using jargon.

40. Ms Hirsch submits that the Respondent’s improvement plan provides the most objective and measurable manner of assessing the Claimant’s capability and that the Tribunal is not in a position to second guess the Respondent’s assessment of the Claimant’s capability. Whilst I agree that it is not for the Tribunal to substitute its view for the Respondent, there is no objective assessment which is ultimately capable of being tested. The dismissal did not depend upon any objective method of assessing performance but rather the subjective view of Ms Wilkinson which was neither rigorously tested nor independently considered by either the dismissing or appeal officers. Both of them appear to have accepted at face value what they were told by Ms Wilkinson and what they read in the documentation rather than independently considering the matter as they are obliged to do. Mr Jennings appears to have focussed largely on the Claimant’s assertion about the inaccuracy of the figures but that was not the only or indeed the primary issue. He appears to have treated Mr Williams’ 30 years service as a disadvantage as he thought that someone with that length of service ought to do better (see his paragraph 55 of his witness statement). Length of service should be a factor against dismissal, not in support of it. Mr Stanton regarded Ms Wilkinson as a “top performer” and appears to have been overtly influenced by the fact that other colleagues were improving under her management but the Claimant was not. That was not only a wholly irrelevant consideration but also unreasonable. The issue before him was whether the Claimant was capable, not how others were doing.

41. I should deal with the Claimant's contention that the figures relied on by the Respondent were wholly unreliable and should be disregarded in totality. In support, Mr Williams refers to an instance where he was alleged to have spent 480 minutes (approximately 8 hours) in one day on one customer's account only. The Respondent accepts that was an error and Mr Williams could not have spent a whole day on one customer alone. I am prepared to accept that was an isolated glitch and that the conclusion which Mr Williams invites me to draw, which is tantamount to throwing the baby out with the bathwater, is not warranted. Clearly there was an error but it affected everyone else too.

42. The Claimant accepts, and I am therefore bound by his concession, that the Respondent held an honest and genuine belief in his incapability. However, it is difficult to see how the belief was or could be based on reasonable grounds. I do not accept that the Respondent has provided any material evidence that Mr Williams was routinely calling customers and/or suppliers unnecessarily but if he did it was disproportionate to dismiss for that reason. There is no evidence that the Claimant was routinely asking irrelevant questions of customers and suppliers. There is no independent objective evidence that calls by the Claimant took any significantly longer than his colleagues other than perhaps the statistical evidence as to 'effort' which includes matters other than calls. There is no evidence of any external complaint that Mr Williams did not understand what an issue with a customer was or failed to provide appropriate support. If Mr Williams was doing the job but not the way BT wanted him to, that was an issue of conduct not capability.

43. It is pointed out that Mr Williams accepted much of the criticism and was keen to improve which suggests he acknowledged his failings. The Claimant might not have made too much of the criticism during internal performance procedures but I do not place too much store by that. Many employees do not argue their corner during employment. Their priority then is principally to remain in employment and debating issues does not necessarily help. It does not always mean that the criticism is well-founded or accepted as justified. It is clear from the Claimant's evidence, in relation to the issue of jargon for instance, that he did not agree with all of the criticism. It is also clear from his evidence at this hearing that he did not agree that the criticism was justified.

44. In summary, whilst the Respondent held an honest and genuine belief as to incapability, I do not accept that the belief was based on reasonable grounds. The dismissal was therefore unfair.

45. There is one aspect where matters were within the Claimant's control and where he could possibly have done more. That related to the diarising of calls. Mr Williams was told to diarise matters in a certain manner. There is evidence that he did not always follow those instructions. There were occasions when he applied his own diarising process.

46. That criticism alone would not however have justified dismissal nor does the Respondent's case rest upon that in the alternative. I have considered whether it ultimately caused or contributed to his dismissal. I conclude that it did not. I do not therefore make any reduction for contributory conduct.

47. As the unfairness is not concerned with any procedural issue no question a **Polkey** based reduction (see **Polkey v Dayton Services Limited** [1988] AC 344) is applicable.

48. The issue of remedy will be listed for hearing in due course.

Employment Judge Ahmed

Date: 16 August 2018

JUDGMENT SENT TO THE PARTIES ON

21 August 2018

FOR THE TRIBUNAL OFFICE