EMPLOYMENT TRIBUNALS

Claimant: Miss S Alves

Respondent: British Gas Services Limited

Heard at: Manchester **On:** 28 and 29 August 2019

Before: Employment Judge Ross

REPRESENTATION:

Claimant: In person
Respondent: Ms A Smith, Counsel

JUDGMENT having been sent to the parties on 5 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant worked in the respondent's Revenue Management Team and her job title there was Customer Services Adviser, although she was also referred to as a Customer Services Executive. She had a contract of employment that confirmed that position, and she had lengthy service because she had started working for the business in March 2002.

2. In 2016 the company restructured in an operation called Operation Line, and there was collective consultation with the trade union about that restructure.

3. At that time the claimant worked in a small niche team in an administrative financial role and her small team was originally told that there may be a risk of redundancy. The documentation in the bundle shows that employees were warned

there may be a reduction in some roles (page 87). I find that there was a strategy agreed collectively with the trade union to reduce redundancy wherever possible, and I find that although the claimant's team had been told they were initially at risk of redundancy, by 1 December 2016 they had been specifically informed that they would not be made redundant, and that they would be moved into a front facing role at the same level, which was level 8, in the same building. Insofar as it is relevant, the claimant's original contract refers to her being in a job role at G2, and I accept the evidence of the respondent's witness (which was not challenged) that in or around 2004 that level (G2) became known as level 8.

4. The claimant was unhappy about the proposed move to a different role and she objected. She filed a grievance in December 2016, and her primary objection to the new role was that it was on the telephone and that it involved shift working, and it was very different to the role she had previously done within the business.

5. I reminded myself that there was a generic job description of the level 8 CSA role which was prepared in October 2016. I did not see any earlier generic job description. There was no dispute that the specific tasks the claimant was engaged in when she worked in an administrative financial role were included in those described in the generic job description.

6. By March 2017 the claimant had appealed her grievance outcome, unsuccessfully. It is not at all relevant to the legal issues that I have to find but I do find it was deeply unhelpful that when the claimant went through a grievance process about the redundancy situation and her role, the respondent used the terminology of "mapping" to the claimant but when giving evidence at Tribunal their witnesses conceded that actually that terminology was not quite right and they meant to refer to "realignment". The change in use of language was confusing for the claimant. I find it surprising that a major business like British Gas Services Limited with the benefit of senior people in HR should make such a mistake, but it is not directly relevant to the legal issues I have to find so that is just an aside.

7. By August 2017 the claimant's team were due to start in their new role which was I find in the same office, on the same pay, at the same grade and it was only a few desks away from where the claimant had previously been working in Stockport.

8. The claimant went off work sick with anxiety and depression. She informed the respondent she was not willing to do the new job or even to try it, even with training, or even whilst they looked for something else, or even with a buddy, and in fact she never returned to work. She was dismissed for capability on 15 March 2018, which was confirmed in writing on 17 March 2018, and she did not appeal that decision.

9. I turn now to the legal questions that I have to answer, and I have turned first on my issues document in relation to the unfair dismissal claim.

10. The first question I have to ask is what was the reason for dismissal at the time the claimant was dismissed by letter dated 21 March 2018. That is the relevant date. I entirely accept the evidence of Ms Gribbon that the reason for the claimant's dismissal was capability. By the time the claimant was dismissed she had been

absent from work on sick leave since 20 July 2017, so that is a period of eight months. The Occupational Health report indicated that there was no reasonable prospect of a return to work because of how the claimant felt about the new role. The Occupational Health report indicated that she felt dissatisfaction at starting the new role.

11. The claimant considered the reason for dismissal was redundancy, and I can understand on a human level why the claimant thought that. In her mind she believed the reason she was absent from work was because she felt unwell at the prospect of returning to work in a new role which was offered to her in the restructure even though it was at the same grade, and so she considered the real reason for her dismissal was redundancy.

12. However, the law is very precise. The relevant law is s95 and s98 Employment Rights Act 1996. It requires me to consider whether the respondent can show me the reason for dismissal at the point the claimant was dismissed in March 2018. I find that the respondent has shown me that the reason she was dismissed in March 2018 was because she had been absent from work for a very extensive period and there was no prospect of her returning, so capability is the reason for dismissal and that is a potentially fair reason. The reason for dismissal is not redundancy.

13. I then have to consider the next issue which is the fairness of that dismissal: was it fair or unfair within the meaning of the Employment Rights Act 1996 to dismiss the claimant in March 2018 for capability? Certain steps are expected of an employer in a capability dismissal. Employers are expected to consult with employees, they are expected to consider whether they need medical evidence and if so how it affects their decision, they are expected to consider alternative work, and also there is a question about how much longer can an employer be expected to wait for someone to return to work. In this particular case the claimant's suggested the decision was procedurally unfair because the case proceeded straight to stage 4, the last stage of the respondent's procedure, so I will deal with that first of all.

14. I am satisfied on the facts of this case that the respondent was entitled to do that. Their own procedure states, and the claimant was taken to it in the bundle, that if Occupational Health or the medical evidence suggests there is no reasonable prospect of a return to work it is permissible to go straight to stage 4 of the procedure. That was exactly the situation the respondent was in. The Occupational Health advice was that there was no reasonable prospect of a return to work, so it was a reasonable in those circumstances for the employer to proceed to stage 4 of their procedure.

15. What about the other steps an employer is supposed to take? Consultation: the respondent did consult with the claimant. The claimant, who is a convincing and fair witness, who gave concessions where necessary, agreed that Nicola Davies had remained in regular contact with her as set out in the timeline document in the bundle. I also find there was further opportunity for consultation at the first attendance meeting which the claimant attended on 23 February 2018 and then again at the last attendance meeting on 15 March 2018. I find the respondent was

not simply jumping through hoops: the consultation was meaningful. Ms Gribbon obtained up-to-date Occupational Health evidence once she realised at the first meeting with the claimant that it had not been provided. I find both Ms Davies and Ms Gribbon did try to actively engage with the claimant in their consultation and made positive suggestions.

16. What about medical evidence? The respondent did obtain medical evidence because they obtained advice from their Occupational Health provider. That evidence was crucial because it stated essentially that the claimant was fit to work but there was no prospect of a return to work because of her perception of the new role.

17. What about the issue of the GP notes? In some cases the fact an employer has not contacted the GP might be very significant, but was not in this case. The claimant's own evidence to the respondent was that she was not waiting for any treatment, she was not waiting for a referral or an operation, she was not under a course of treatment or receiving medication, so there was not going to be any information in the GP notes that would help the respondent make their decision: that would have been the purpose of the respondent contacting the GP – if there was likely to be some new information there to assist them or to help the claimant in relation to her absence and possible return to work. I find there was no requirement for a reasonable employer in these circumstances to contact the GP and obtain the claimant's GP notes.

18. Alternative work: an employer is expected to consider alternative work for an employee who is at risk of being dismissed for capability, and both Ms Davies and Ms Gribbon actively looked for other level 8 roles for the claimant, but I accept their evidence there were none available. It is unfortunate that we do not have documents in the bundle of what they actually looked at, but I accept their evidence and I find they are telling the truth to me: that they looked for other level 8 roles for the claimant and there was not anything available

19. The last matter is: could the respondent have been reasonably expected to wait any longer, in other words to allow the claimant to remain on sick leave any longer, before they terminated her employment? I find at the point they dismissed they could not reasonably be expected to wait any longer. The claimant had been absent for almost eight months at the date of the final hearing. The Occupational Health report makes it clear there was no prospect of any change, there was no prospect of a return to work, and as Ms Davies identified, someone who is absent on sick leave inevitably has an impact on the respondent's operational ability. Even though the claimant had never taken up her role in that team, the team was one person down or the respondent had to "backfill" that role from somewhere else in the business. So, given the Occupational Health report and the claimant's unwillingness to trial the customer facing role, there was no prospect of any change in the near future, and in those circumstances it was reasonable for the respondent to dismiss at that point and so the unfair dismissal claim fails.

20. I turn back now to the redundancy payment. I turn to issue 2: was the claimant dismissed for redundancy? The answer to that question is clearly "no" for

the reasons given above. The claimant was not dismissed for redundancy, she was dismissed for capability in March 2018, and if an employee is dismissed for capability she cannot be entitled to a redundancy payment because that is a sum of money payable to an employee where the reason for dismissal at the relevant time(March 2018) was redundancy. In case I am wrong about that, I am not satisfied in any event that there was a redundancy situation.

21. The definition of redundancy at s139(1)(b) Employment Rights Act refers to *"the fact that the requirements of the business are for (i) employees to carry out work of a particular kind or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer have cease or diminished or are likely to cease or diminish*"

22. The case law reminds us that I am not to look at the very detailed particulars of the job that the claimant did, but instead to look at the overall requirements of the business in Stockport. The evidence in this case is actually by December 2016 there was no overall need for a reduction in staff because the employer had restructured in such a way that it could move the level 8 employees such as the claimant into to other level 8 roles, and crucially the claimant had a flexibility clause in her contract which meant the employer was allowed to do just that.

23. So although the claimant may feel personally that there was a redundancy because her niche role had gone in the reorganisation, it is not the same as the legal definition of redundancy. In other words, was there a general redundancy situation for level 8 employees such as the claimant in Stockport office at that time? No there was not, because there was no need for a reduction in level 8 staff, so the claim fails there.

24. Even if I am wrong about that and there was a redundancy situation, there was an offer of potentially suitable alternative employment to the claimant. I understand it was not a role the claimant wanted to do, that she was not keen to make telephone calls and be "front facing", but it was at the same grade, it was in the same place, she agreed it had the same level of status, and so I find it was suitable alternative employment. The claimant did not even want to trial it and so any refusal was unreasonable. However, all of that is irrelevant because the claimant was not dismissed for redundancy she was dismissed for capability.

25. I do not need to deal with the issue of time limits because the redundancy payment claim fails.

26. Lastly, the claim for unlawful deduction from wages. As the claimant herself said, I think there might have been some misunderstanding here.

27. There is no claim in relation to sick pay. The claimant was paid properly, under the terms of her contract in terms of sick pay.

28. In terms of bonus, was the claimant paid less than the sums properly payable? There is a lack of clarity about what is being claimed and why. I do not have either the documentation in terms of how the bonus scheme operated and neither do I the key performance indicators(KPIs).

29. The claimant agreed that she was not eligible for accrual of bonus during the period when she was absent from work on sick leave.

30. All we are left with is the claimant is not sure whether the sum of money she received in November of £75.60 is correct or not. I am not satisfied that is sufficient to show that the respondent has paid her less than the sum that is properly payable: there has to be some reasoning as to why the claimant says the sum is not sufficient, and the burden is on the claimant to do that. In the absence of that documentation or anything verbally from the claimant about why the amount she received is insufficient, that claim must also fail.

Employment Judge Ross

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Date 9 December 2019

REASONS SENT TO THE PARTIES ON

12 December 2019

FOR THE TRIBUNAL OFFICE