EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106806/2017

Held in Glasgow on 9, 10 and 11 October, 13 November and 19 December 2018

Employment Judge: F Jane Garvie

X	**Claimant** **Represented by:** **Mr R Brown – Solicitor**
South Lanarkshire Council	**Respondents** **Represented by:** **Mr S O'Neill - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed in terms of section 98 of the Employment Rights Act 1996 and a remedy hearing will be fixed and if the representatives consider that it would be helpful a preliminary hearing by way of case management can be arranged in advance of that remedy hearing.

REASONS

1. In her claim, (the ET1) presented on 1 December 2017 the claimant alleges that she was unfairly dismissed. She gave the start date of employment as 17 August 1998 and the termination of employment as 4 July 2017. The ACAS Early Conciliation notification and receipt was sent on 2 October 2017 and the date of issue was 2 November 2018. In the response, (the ET3) the respondent explained that the claimant was dismissed on "the grounds of incapability due to illness". They also assert that the claimant's dismissal

was fair in the circumstances of her case and further information was set out in a Paper Apart to the ET3.

2. Evidence was given on behalf of the respondent by Ms Carole McKenzie who is the Head of Education for one of the areas for which the respondent has responsibility. She was the claimant's Line Manager from October 2015. Mr Tony McDade who is the respondent's Executive Director for Education also gave evidence on their behalf as did Mrs Rosemary McStay who is a personnel officer.

3. The claimant gave evidence on her own behalf. No evidence was led by other witnesses for the claimant.

4. The parties had agreed a joint bundle and subsequently, further documents were provided for the claimant.

5. The representatives agreed following the Final Hearing that it would be appropriate for the Tribunal to issue an anonymisation order in terms of rule 50(3)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Accordingly, an order to that effect has been issued.

Findings of Fact

6. The Tribunal found the following essential facts to have been established or agreed.

7. As indicated above, the claimant commenced employment with the respondent on 17 August 1998. As at the date of termination of her employment, she held two roles, one being as part time Depute Head and the other as Head of Provision in the Early Years sector of the respondent's education department. She was based at an Early Years Centre but had responsibility for three physical locations.

8. By way of background, it appears that from 13 April until 15 October 2015, a fact-finding investigation was being carried out by the respondent into allegations that the claimant failed to support staff within the Centre where

she was based. There were also allegations of failure to follow appropriate policies and procedures and a failure to maintain records.

9. Ms McKenzie issued a report on 22 December 2015 recommending that the matter should proceed to a disciplinary hearing which was held on 22 March and 29 April 2016. The claimant attended these hearings with her union representative.

10. The outcome of the disciplinary hearing was notified to the claimant by letter of 5 May 2016, (pages 192 – 193). The result was that she was issued with a final warning and a demotion from the head post to a depute head post.

11. The claimant appealed against that decision and an appeal was heard on 17 August 2016.

12. Following that appeal, the claimant was informed that her appeal was upheld to the extent that the demotion was removed and the sanction imposed with a final written warning remaining on the claimant's record as set out in a letter to her of 18 August 2016, (page 206). The panel also wanted the claimant to undertake further training.

13. The claimant was absent from work due to ill health from 31 August 2015 until the date of her dismissal on 4 July 2017. She was signed off as unfit to work throughout this time by General Practitioner.

14. While the claimant was absent from work, she was invited by Ms McKenzie as her Line Manager to attend an attendance support meeting to discuss her absence and to enable the respondent to ensure that any support and assistance that was required could be provided to her by them.

15. The respondent has a policy called "Maximising Attendance Policy and Procedures". It is dated February 2011, (pages 5-36) and is referred to as MAPP. They also have a further document again dated from February 2011 entitled, "Managing Stress at Work Policy" (pages 37-48). This is referred to as MSWP.

16. In terms of MAPP, support meetings are held regularly. The relevant clauses are set out below and reads as follows:

"**2.6 Attendance Support Meetings**

These are normally held where a more formal discussion about an absence or attendance level needs to take place. These meetings take place on the third and subsequent absences within a 12 month rolling period. An attendance support meeting can also be arranged to discuss a pattern of absence identified which may not necessarily fall within the rolling year period and/or during a period of long term continuous absence. The employee has the right to be accompanied by a companion to this meeting. A companion is an accredited trade union or a work colleague (in addition he may also be accompanied by a friend/relative, however they cannot participate in the meeting). These meetings should be used to consider:

- reasons for absence(s) and how improvement can be facilitated
- discuss any patterns of absence and the reasons for this
- ensure all relevant supports/adjustments have been discussed and offered to the employee
- how a successful return to work could be facilitated such as return to a different job or working pattern/phased return etc.
- improvements required and a review period
- the next steps e.g. medical referral, incapability or conduct considerations

2.7 Medical Referral

The Council has an Occupational Health Adviser who is available to provide occupational health advice and, where appropriate, will medically examine employees. Managers should only refer employees for medical examination where appropriate e.g.:

- the manager wants to ask the Occupational Health Adviser if the employee is fit to undertake a specific range of duties; this

may be if the employee has been absent or while the employer remains at work

- the employee has requested ill health retirement
- the manager is considering disciplinary action and the employee reports continuing underlying health problems.

Please note: It would not be appropriate in all the circumstances to refer an employee for a medical examination, for example if an employee has a broken leg, there would be little more information that the Occupational Health adviser could provide. Managers should carefully consider whether there is anything to be gained by carrying out a medical examination and could refer details of any case to the Occupational Health Adviser and ask that the case be reviewed to determine whether a medical examination will add any information.

If a medical examination is required the manager should inform the employee and of the reasons for the decision. The employee is contractually required to attend the medical examination and refusal to attend may be considered a conduct issue.

To process a request for a medical examination the Medical Referral Form along with all relevant Medical Consent Form(s) should be completed. When the manager is completing the Request for a medical examination form, the following information should be included in the referral form:;

- the exact medical condition and/or any background information.
- date of future specialist/doctor/hospital appointments.
- details of current/proposed treatment programme.
- details of advice the manager is seeking from the Occupational Health Adviser."

17. There is then reference to the requirements in terms of the Access to Medical Reports Act 1988.

18. Clause 2.8 Redeployment reads as follows:

"If there are no reasonable adjustments identified to enable the employee to carry out their role, then redeployment should be considered. An employee may be redeployed on a temporary or permanent basis. Redeployment may be used, for example, to accommodate a change in the employee's medical condition or to give the employee time while adaptations are put in place in the work location (also refer to 9.1.1)"

19. Clause 9.1 deals with incapability procedures. Clause 9.3 deals with termination on the grounds of incapability and reads as follows:

"**9.3.1 Consideration of termination (incapability)**

As explained above, during the course of an employee's absence, and as part of the regular personal contact between the manager and employee, discussion will have taken place regarding the employee's return to work to their original job or to another post. It is important that employees are given appropriate time to recover from undergoing treatment and/or their illness. Where however, through the process of consultation, it is identified that there is no foreseeable return to work date or that no return to work date can be established, the manager and employee must look at the options of ill health retirement as outlined above and termination due to incapability. There will be some cases where ill health retirement cannot be pursued e.g. the employee is not permanently unfit or the employee is not a member of an occupational pension scheme.

Termination on the grounds of incapability should only be considered where:

- an employee is no longer capable of undertaking their duties and this has been confirmed by the Occupational Health Adviser
- their job/work location cannot be 'reasonably adjusted' to accommodate their situation
- the offers of redeployment to alternative duties have been made and rejected by the employee – or have been accepted and implemented but unsuccessful

- the redeployment process has been exhausted
- ill health retirement is not appropriate.
- all other reasonable adjustments have been exhausted by the DLO who must be consulted on all cases of incapability.

20. Clause 9.3.2 deals with the termination process, setting out eight points for consideration, one of which (vi) states that before a meeting takes place the employee will be advised of the purpose of the meeting in writing and will have the right to be accompanied by a companion (an accredited trade union representative or a colleague). At the meeting the employee will have an opportunity to explain their views on the case being presented by management.

21. In addition to the attendance support meeting held on 16 November 2015, the claimant attended further such meetings on 18 December 2015, 25 February 2016, 4 October 2016, 6 December 2016 and 10 February 2017.

22. The claimant agreed to attend a medical assessment with a Dr Herbert on 10 November 2016 (pages 252 – 254). His view was that the claimant was "currently unfit for work" – please see comments below".

23. He then set out detailed comments, (pages 253 – 254).

24. He noted the claimant was receiving medication from her GP and that she was unfit for work. He also referred to the fact that the claimant described "this depressed mood" as being "due to the uncertainty of the process in which she is involved. She feels entirely in the dark and is uncertain of what is going to happen next."

25. He indicated that, in his view and in the absence of things moving on, "we were looking at a 6-9 month period of treatment to try and bring her mood up to a more normal level. You will see then that the medical issue is tied in with the organisational issue in which she (the claimant) finds herself."

26. He indicated that ultimately the claimant ought to be able to recover completely and be able to undertake the normal duties of work in the long term.

27. As indicated, there was then a further attendance support meeting review held on 22 February 2016, (page 255). A letter was issued following that meeting dated 1 March 2016, (pages 263 – 264).

28. A further meeting was arranged for 4 October 2016 following which a letter was issued by Ms McKenzie on that date, (pages 266 – 267). The claimant had explained that she had a further appointment with her GP on 5 October 2016. At that meeting there had been discussion about the annual leave the claimant had accrued and that if she were signed back to work she could take that leave immediately.

29. The claimant had explained that she had been attending CBT sessions through her own GP. She was advised that if she required this for counselling through the respondent then this would be provided to her.

30. It was also explained that there would be a further referral to Dr Herbert.

31. The claimant attended a further meeting with Dr Herbert and he assessed her on 10 November 2016, (pages 269-271).

32. Under the question, "1A Current state of fitness for work?" he marked with an X the box marked, "Fit" but below this he added the following:

"She is fit to discuss a return to work programme but there are concerns about the nature. Please see my comments below."

33. Further on in his report he referred to seeing the claimant in January 2016 and he referred back to that earlier report. He pointed out that, at that time, there were two issues: one was of a physical nature which was "complete and unlikely to cause further difficulty" and the second arising from the fact findings since August 2015."

34. He noted that the fact finding was ultimately concluded in May 2016 but the claimant appealed this and the outcome was partially changed on appeal in August 2016.

35. His report continued as follows:

"I said in my earlier report what was required was resolution and a conclusion of the situation in which she (the claimant) found herself, but she remained unhappy with the way she feels she has been treated throughout this. This is now subject of a complaint she is progressing through her union rep about the way she feels she has been treated.

I note from your referral that you are trying to find a way of getting her back into the workplace and this includes moving her from her substantive post (place name redacted by the Tribunal) and you ask whether I think she is fit to resume duties.

With a long discussion about this, she remains distressed with difficulty with her emotion, she exhibits symptoms of depression but this is being treated with medication. I do think that being able to achieve rhythm and regularity through being at work would be helpful for her and I think she needs to move towards a return to work in order to establish this. Indeed, I think progress here is going to be re-engaging with work but as before the difficulty is in the way that she perceives she has been treated over the last couple of years. She feels concerned that people will talk about her when she moves to a new post and I have given her some strategies to think about in order to deal with this.

The bottom line is that I think she is capable to engage in the kind of work she is normally employed to do but she will require a phase to return to work in a location that is suitably supportive. I think this must commence in a planned fashion but she is able in my view to discuss what a phased return would look like and agree a return to work plan.

I think that ultimately her psychology will only move on when there is a full resolution and conclusion of everything that has arisen from the procedures initiated in August 2015.

I trust this information is clear but if you require further clarification please let me know."

36. The claimant was then invited to attend a meeting on 30 November 2016, (page 268) with Ms MacKenzie but then rescheduled to 6 December 2016, (page 272).

37. Following that meeting Ms MacKenzie wrote to the claimant on 13 January 2017, (pages 273 – 274). She referred to a discussion about the Occupational Health Report and Dr Herbert's suggestion that a phased return to work would be required in a location that was "suitably supportive and we confirm that we would support this".

38. She also referred to Counselling Services that had been provided to the claimant through her GP. She reminded the claimant that the Fit for Work Scheme in which she had been involved had now come to an end. She also noted that the claimant thought CBT might be helpful and had agreed to make a referral for the claimant.

39. Her letter concluded as follows:

"As previously discussed, I again stressed that we cannot sustain your absence indefinitely and that we are looking for a commitment from you to return to work. Should this not be possible, then I will have no option than to consider your case in terms of the incapability procedures."

40. Her letter confirmed that a further meeting was scheduled for 10 February 2017.

41. A letter was then sent to the claimant on 18 January 2017, (page 275) confirming this meeting. It advised that the reason for the meeting was to "discuss your continuing absence from work and to ensure you receive any support and assistance available should you require it".

42. This further meeting duly took place on 10 February 2017 after which a letter was sent to the claimant dated 24 February 2017, (pages 276 – 278).

43. At that meeting the claimant indicated that she had discounted accepting the role of a full time depute head post at one of the nurseries. The letter confirmed that, "You advised that you do not feel that you can return to the Early Years Sector within Education Resources and you asked if you could be redeployed outwith Early Years. We explained that you are not eligible for SWITCH2 and it is believed that the options are reasonable offers."

44. Ms McKenzie's letter also indicted that she had confirmed that she asked the claimant if there was anything that the respondent could do to assist the claimant with returning to work and the claimant had confirmed she could not think of anything further and she understood "these options were reasonable".

45. The claimant had been asked if she could confirm a date of return to work but was unable to do this and stated that she remained unfit for work. The letter confirmed that the claimant was asked to continue to consider the options available and to let Ms MacKenzie know if she wished to accept any of the offers, (page 277).

46. The claimant responded by an email dated 30 March 2017, (page 278) explaining that she did not wish to be considered for a full time depute post as an option but that she wished to be placed in a depute post on her current terms and conditions until a head post 0.5 FTE was identified.

47. The claimant attended a further occupational health meeting with Dr Herbert on 21 April 2017, (pages 280 – 281).

48. In his report, under the section, "1A Current state of fitness for work?", he ticked the box marked, "*Fit with restrictions/adjustments". Below that he wrote, "***Currently fit for altered duties from those she undertakes at present***", (Tribunal's emphasis).

49. Under the Comments section, he noted that:

"I think you have stated the situation very clearly and she gives exactly the same account herself about where she feels she is at with regards to her mood.

In summary, she has been absent since August 2015, has been the subject of a disciplinary process which resulted in a final written warning and initially demotion although the demotion was later repealed on appeal but the full process has left her feeling very isolated, victimised and criticised and in her own words she has lost all confidence both in the system and in her employers.

I note that reasonable offers that you have given her for returning to work in her stated role in [place names redacted by the Tribunal] but she has informed you that she could not see herself engaging with any of these because the work remains in the Early Years sector. Again in her own account she feels that she could not attend meetings where she would see people that she felt had "betrayed her". This is a real issue for her and is a very fixed idea. In her own mind she cannot see herself returning there for Early Years work with South Lanarkshire Council.

I note that she has received CPT and this is the exactly kind of treatment and resource that can help this kind of fixed idea. However it has not to date done so and I have to say that I think it is unlikely to do so in the near future.

Essentially she is quite determined in her own mind that she could not take up the kind of post that you offered to her and she seeks a transfer therefore to other work and she sees this as the only way out of the predicament in which she finds herself. She is realistic enough to know that may or may not be possible within the constraints of the Council's employment sphere.

I can confirm that she is of sound mind and clearly able to discuss all of the above issues logically and with insight and therefore I think she is capable of engaging with any further discussion with you about a role, redeployment or capability."

50. Ms MacKenzie decided to refer the case to Mr McDaid as the Executive Director in order that an incapability hearing could be held. This took place on 4 July 2017, (pages 282 – 284).

51. A very detailed set of documents was provided by Miss McKenzie by way of a summary for that meeting. This included her fact finding report and notes from the various meetings that had taken place with the claimant and her representative. The claimant provided a prepared statement, (pages 286 – 287) as well as a chronology, (page 285).

52. At the hearing, Mr McDaid advised that he had decided that the claimant should be dismissed on the grounds of incapability and that the decision would be set out in writing with a right of appeal, (page 284).

53. A letter was sent to the claimant dated 4 July 2017, (page 289) confirming her employment had been terminated on the grounds of incapability with effect from 4 July 2017 and that the claimant would receive a payment of 12 weeks' pay in lieu of notice and 40 days annual leave balance. As indicated above, she was given the right of appeal against his decision.

54. The claimant decided that she could not face proceeding to an appeal against her dismissal.

55. Separately, as explained above she had instituted a grievance against the respondent and the grievance appeal hearing was held on 17 August 2017, (pages 292 – 296). A report was provided for that appeal hearing which was stage III of their grievance process. The earlier two stage grievance process was heard at meetings on 26 January and 7 February 2017.

56. This grievance appeal was, of course, held after the claimant's employment with the respondent had been terminated with effect from the decision being intimated on 4 July and 12 weeks' pay in lieu of notice and outstanding accrued holiday entitlement having been paid to her.

57. It appears that the outcome of that grievance appeal held on 17 August 2017 was intimated by letter of 21 August 2017, (page 306) and this was that the grievance disputes panel was not in a position to offer the posts requested by the claimant since, in their view, she was not eligible to be considered for posts in accordance with the respondent's SWITCH2 policy.

58. The panel concluded that the facts in respect of the issues presented relating to the fact finding and discipline process had been dealt with by the appeal panel on 17 August 2016. The letter of 21 August 2017 continued as follows:

59. "Your appeal in this regard was upheld in part. It is not for the Grievance and Disputes Panel to reassess or further determine the issues that were presented in this regard. The panel noted and accepted the written response provided at stage 2 by Morag McDonald acknowledging that the timescales in this case were not as normally expected and apologised for any undue stress that this may have caused you;

and the panel agreed with the decision that was reached at stage 2 by Morag McDonald that the maximising attendance policy was followed in your case." The letter concluded by confirming that there was no further right of appeal.

60. As mentioned above, the respondent has a policy called Switch2, (pages 393 – 402).

61. Section 1 reads:

"1. Policy aims

1.1 The aim and process of this policy is to clearly state the guiding principles and associated processes for circumstances where employees become displaced, through redundancy or medical incapability and an alternative post is required."

62. The claimant had sought to be moved from the Education Sector to an alternative post elsewhere within the respondent's organisation i.e. outwith that Sector not just the Early Years part of that Sector.

63. As indicated above, it had been agreed that this Hearing would proceed on the basis of liability only and, if the claim were successful, then there would be a separate hearing on remedy at a later date.

64. The Tribunal heard evidence from the claimant about various internal advertisements within the respondent's organisation which she obtained following a Freedom of Information Request. The claimant's view was that

she would have been eligible to be considered for many of these internal vacancies albeit she accepted she did not hold a social work degree or qualification but she did have a degree which she believed was of similar or equivalent status. For the avoidance of doubt, these roles were not considered by the respondent when looking at alternative roles for the claimant prior to the incapability hearing held on 4 July 2017.

65. The claimant was told that the respondent had investigated the redeployment of her through Switch2, (page 2354 as set out in the conclusions from Ms MacKenzie in her report of 8 May 2017, (pages 231 – 235 at page 235).

66. This was set out as conclusion 5.3 and reads as follows:

"Redeployment through Switch2 has been investigated however there are no other Grade 3 vacancies, other than the three Early Years Heads of Centre vacancies which (the claimant) did not wish to consider. The redeployment process has therefore been exhausted and (the claimant) did not accept the reasonable adjustments in terms of the positions offered to her."

67. Her conclusion also indicated under clause 5.5, (again 0age 235) that ill health and retirement was not appropriate as with "the level of capability (that the claimant) has she would certainly not be considered for ill health retirement."

68. It was agreed that the parties would provide written submissions which they did by 28 November 2018.

Respondent's submissions

69. This is a claim of unfair dismissal which the Respondent denies. The Claimant was dismissed for reason of her capability to perform work of the kind she was employed to do in consequence of her ill health.

70. Section 94(1) ERA 1996 provides employees have the right not to be unfairly dismissed by their employers. Section 95(1)(a) provides an employee is dismissed by his employer where the contract under which he is employed is terminated by the employer. As regards the fairness of the dismissal, s.98(1) provides that it is for the employer to the reason for dismissal and that it is a

reason falling under s.98(2). Section 98(2)(a) provides for where the dismissal relates to the capability or qualification of the employee in performing the work of the kind they are employed to do. Section 98(3) provides that "capability" means the employee's capability assessed by reference to skills, aptitude, health or any other physical or mental quality. Section 98(4) provides that the employer in showing the dismissal was for reason of capability to undertake the work, in this case due to the Claimants Health, then the question of whether dismissal is fair or unfair (having regard to the reasons shown by the employer), depends on whether in the circumstances (including the size and administrative resources of the employer) they acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

71. The tribunal heard that a Fact Finding investigation was undertaken from April 2015 into concerns raised by nursery staff concerning the nursery the Claimant managed. The Fact Finding concluded on 15th October 2015, due to illness of fact finder. In accordance with disciplinary policy, the Claimant as redeployed to another location during Fact Finding process.

72. After the Fact Finding investigation, disciplinary procedures were initiated in December 2015. A disciplinary hearing was then held on 22nd March and 29th April 2016. After appealing the decision to demote and issue a FWW, the demotion is withdrawn on 17th August 2016. Training recommended for the Claimant. She was then absent from work from 31st August 2015.

73. The Claimant thereafter raised a grievance due to the timescales and handling of the Fact Finding and disciplinary processes. The Claimant and her representative met with Morag McDonald, Early years Manager on two occasions and a letter apologising for the delay and unnecessary stress caused her. The rest of her grievance concerning a lack of Support and a Failure to provide alternative work after the Disciplinary were rejected. This decision was appealed by the Claimant.

74. Incapability Hearing – from August 2015 to July 2017, the Claimant remained signed off from work due to stress. No foreseeable return to work date was provided at the hearing and the Claimant was dismissed on grounds of ill health.

75. The Issues for the tribunal is whether in all the circumstances the respondent could be expected to have waited longer for the claimant to return to work, and if so, how much longer. **[*Spencer v Paragon Wallpaper 1976]***

76. The Claimant argues that her illness was caused by the Respondents not adhering to their own procedural timeframes, that the fact Finding Process was protracted and as a consequence she became absent from work due to ill health caused by stress. She claims she was very concerned about returning to early years and facing colleagues who instigated the Fact Finding. She was also fearful of "further repercussions". She states in her claim and in evidence that *these* were the reasons she requested a move from Early Years. She states the Respondent has a policy which allows staff to transfer to another department and that this was denied to her. In her amended ET1 she claims that Respondent's failed to apply their own Policies where an ill-health issue arose.

77. The Respondent refers to the ET3 response and the grounds for defending the claim stated therein. The Respondent could not be expected to have waited longer at the time of dismissal. There was no return to work date on the horizon and no likely date of return offered by the Claimant. By this point in time she was absent from work for 23 months. The tribunal heard that the Claimant had accrued over 50 days of leave by end of December 2017. She was advised that if she gave a return to work date after her "Fit Note" expired that she could still remain off work on leave for up to 3 months afterwards. A transitional phased return could then have been attempted.

78. The tribunal heard that DR Herbert stated in his initial Occupational Health report that the Claimant could not see herself return before the disciplinary process had concluded. In around November 2015, after the Fact Finding process concluded, the Claimant was contacted by Carole McKenzie, Head

of Education, arranging to meet her at an Attendance Support Meeting under the council's Maximising Attendance Policy. Attendance Support Meetings were held on 18th December 2015 and on several dates as were Attendance Review Meetings at which the Claimant was accompanied by her union representative. Letter of 5/1/16 [p.A244], confirms.

79. The first Attendance Review Meeting agreed an OH assessment and report by Dr Herbert which is dated 19/1/16 [pA252]. Dr Herbert states she is unfit for work on account of low mood which he reports in the Claimant's own view as being due to uncertainly of the fact finding process. He states the most important thing to progress her return to work would be a resolution of the investigation to allow her to draw a line under the matter. Absent any resolution to the process however, he indicates a period of 6-9 months for her recovery – so by around October 2016. However he reiterates her recovery could be much quicker if it is resolved by then. His prognosis was a complete recovery and a return to duties.

80. The Attendance Support Meeting on 25/2/16, the Claimant states she could not contemplate a return to work until after the conclusion of the disciplinary process that was now ongoing following the recommendations of the Fact finding investigation. The OH report was discussed and it was noted by Carole McKenzie that the Claimant was unhappy with her experience at the early learning unit but that an alternative location could be arranged to assist her return to work. This was refused as the Claimant as she did not feel it would help.

81. On 28/09/16, after the conclusion of the disciplinary process, Ms McKenzie again wrote to the Claimant to attend an Attendance Review Meeting on to discuss her absence and support her return to work [P.265]. At this meeting on 4/10/208, which was also attended by the Claimant's union representative, it was noted that the outcome of the disciplinary hearing was to return the Claimant to her substantive role once posts became available. The Claimant stated that she had two CBT sessions remaining and she believed they had made a difference. She said she would discuss with her GP whether she was ready to return. She was advised that further CBT could be made available if

she required it. She was told that the Early Years Manager would be made aware of her anxiety over returning to work and need for assurance that she would be supported back to work in early years.

82. On 27th October 2016, the Claimant and her union representative met Jennifer McCormack, her new line manager. By Letter of 2nd November 2016 [pA213], MS McCormack summarised the meeting, stating the Claimant was advised that she was to attend at Hollandbush Nursery until new posts were identified as becoming available for her, until which time the training recommended by the disciplining offer and appeals panel could be progressed. The Claimant responded by letter on 6/12/16, [pA217], stating that Ms McCormack was mistaken as to her understanding of the training requirement and also that she was daunted by the aspect of being placed at Hollandbush Nursery in advance of then moving to two other nurseries to cover her substantive posts. She complained that she had not yet been given specific timescales for placing her in a permanent post. At the same time, the Claimant states in her same letter that she was in any event unfit to return to her substantive posts, and she was not encouraged that her health would be protected upon her return. She states that as a result, at her Attendance Support Meeting that day [being on 6/12/16], she sought a move to another resource out with Early Years. Ms McCormack then responded to the Claimant stating that the delay in offering a permanent location was due to there being no vacancies, as was discussed at their meeting and that meantime pending posts becoming available Hollandbush Nursery was identified in order to support her return to work meantime.

83. Ms McKenzie's outcome letter of the ASM on 6/12/16 [pA273] states that Dr Herbert's report three weeks earlier [pA269] had stated that the Claimant was in fact fit to return to her role in a phased return to a supportive location. The Respondent would submit that returning to a single location such as Hollandbush Nursery under a phased return is exactly what was recommended by Dr Herbert. When offered this option and asked if she was fit to return to work however the Claimant found fault stating that as permanent posts had not been identified she could not focus on returning as a result. Two

things are mistaken here. First there requires to be a return to available posts, and also that returning to two permanent posts is not what Dr Herbert was recommending, but a return to a supportive location under a phased return. This is what Ms McKenzie stated in her letter, that she was supporting the Claimant by way of Hollandbush Nursery to allow the Claimant the supportive environment to build her confidence and find the rhythm and purpose of being back at work as recommended by Dr Herbert. The priority for the Respondent was to return the Claimant's return to work and Hollandbush Nursery was appropriate for her to return to while awaiting vacant posts at her substantive level. The Respondent submits it would not have been reasonable to prolong her absence unnecessarily waiting for vacant posts to become available, that she may or may not accept. That was not what Dr Herbert advised, but for her to return to work as soon as possible.

84. Prior to the capability hearing, Mr McDaid was provided with a report from Carole Mckenzie, providing a detailed account of the support provided to the Claimant throughout her absence in the attempt to return her to work. The report was supported by copies of various letters and reports concerning the Claimant's health including the Claimant's own views on her health and prospects of a return to work. Mr McDaid stated he read it thoroughly and was aware of the circumstances prior to the hearing. He advised he had not been provided with any prior written report from the Claimant's union.

85. The report contained three OH reports – the latest being on 24/4/17 in which Dr Herbert states she is fit to return with altered duties. He states that the offers made to the Claimant at this time, including Hollandbush Nursery, were reasonable offers for her to return to her role, however the Claimant's own account was that she could not return to Early Years as she would be attending meetings with people she felt had betrayed her. He states that she had received CBT which was exactly the kind of treatment that can help with such fixed ideas, but that it has not done so with the Claimant and was unlikely to do so in the near future. This would appear to be what the Claimant said to Dr Herbert at the time of that OH referral, and which he has repeated, however we know that it did work to some extent from the Claimant's own comments

to Ms McKenzie in a Attendance review Meeting in October 2016, that she felt it had made a difference to her [p266].

86. Mr McDaid stated that he was supported by Sheila Davidson, Personnel Officer. He said he was satisfied that all reasonable efforts had been taken to help the Claimant return to work and that redeployment options had been exhausted. He advised that he had taken advice from Personnel and his own understanding of the maximising attendance and Switch 2 policies.

87. The case of **East Lindsey District Council v Daubney 1977** is authority for the principle that the employer should consult the employee for her own views on her health and foreseeable return to work**.** Mr McDaid said he was aware of the nature of the Claimant's illness and discussed this with her at the hearing. The claimant stated in answer to Mr McDaid that she could not see herself returning to her position in Early years and did not anticipate a change in that perception. When asked by Mr McDaid if there was anything that could done to change that perception, the Claimant responded that anything that anything that could have been done had been done. The recent Inner House decision in **BS v Dundee City Council [2013],** is authority that it is not necessary for the employer to seek a detailed medical examination, because the decision to dismiss is not a medical question, but a management decision to be taken in light of available medical advice. The Respondent in the present case ascertained the true medical position from Dr Herbert, the claimant's Fit Notes and consulted the employee herself before taking the decision to dismiss her. The Claimant stated at the capability hearing that she could not see herself returning to her post within early years.

88. Mr McDaid also said he took account of the length of the Claimant's absence from work, which at that stage had lasted around 23 months. He was aware that she had exhausted her right to sick pay. He said the length of the absence was only one of the issues for consideration including the nature of illness and the support put in place. He advised also that account was given of the impact upon the services and that the claimant's 0.5 f/t posts were difficult to recruit for, with F/t posts being much more attractive to potential applicants. He said that at the time of the capability hearing that there was no foreseeable return

to work suggested by the Claimant or her representative. Mr McDaid said that there was also no mention from either the Claimant or her representative that consideration should be given to the claimant being considered for any other particular vacant posts within the council. The Respondent submits that the Claimant's representative would have a good practical understanding or policies applying.

89. Mr McDaid said that at the hearing the personnel officer present stated that the decision to dismiss could be appealed and this was also confirmed in writing. Mr McDaid said he also took account of the Claimant's assertion that the reason for her absence was the effect on her of the protracted procedure and perceived lack of support during her absence. However Mr McDaid stated that what he what he was more concerned with at the incapability hearing was the likelihood of getting her back into the workplace and what efforts and support had been taken to that end. He was satisfied that all avenues were considered and reflected upon in the support meetings**.**

90. It has been accepted by the Respondent that the Fact Finding process was protracted and the Claimant received an apology for this at stage 2 of her grievance. However it has not been accepted by the Respondent that it was responsible for her illness or long absence. The purpose of the fact finding was into allegations made against the claimant for which she ultimately received a Final Written Warning. However if the respondent was responsible in part for the Claimant's illness due to protracted procedures, the Respondent would refer to the case of ***McAdie v Royal bank of Scotland 2007 - here*** the English Court of Appeal held that the Employment Appeal Tribunal had been right to hold that an employer was not precluded from fairly dismissing an employee on the grounds of ill health by reason of the fact that its conduct was at least partly responsible for that employee's inability to work.

91. The Respondent relies on the case of **Spencer v Paragon Wallpaper 1976** which states the fundamental question is whether in all the circumstances the employer could be expected to have waited any longer, and if so, how much longer. It was clear to the Respondents that after consultation with the Claimant and her union representative that she was not likely to return to her

job within a reasonable time and that no other alternative available jobs could be offered to her. In the circumstances it was reasonable for the Respondent's to dismiss the claimant.

92. The length of absence and its likely duration were considered by Mr McDaid who enquired from the Claimant whether a return date was foreseeable. There had been no rigid timeframe set for her return, however there was no foreseeable end in sight, no return to work date even suggested by the Claimant. The Claimant was advised in Ms McKenzie's letter to her 9 months before the capability hearing of 4/10/16 that failure to return could result in a capability hearing [p266].

93. The claimant argues that she ought to have been afforded the opportunity of being redeployed to another department under Switch 2 policy. As regards Switch 2 policy [p.A393], no argument was put forward from the claimant or her union rep at the incapability hearing that Respondent was applying S2 wrongly. Rosemary McStay stated that Personnel officers, including more senior personnel officers than her, were satisfied that the S2 policy did not apply to the Claimant's circumstances. She had not been displaced from her job through either redundancy or medical incapability resulting in an alternative post being required.

94. The problem for the Claimant was not the inability to do the job itself due to ill-health, but that due to her perceived environment of Early Years in its entirety she suspected people would gossip about her and treat her poorly. This is not a case of the Claimant being unable to undertake the duties of the post itself due to the effect of ill-health, but that it was anxiety at the thoughts of returning to her workplace and the wider resource itself in order to perform the job she was employed to, and how she thought she would be received by her colleagues, which caused her to remain signed off work due to ill health through the stress such thoughts caused her. The Claimant states in the ET1 that this was the reason she did not wish to return to her job. At the point of her dismissal she had ruled herself out of returning to work to perform any job in Early Years, not just her substantive posts.

95. The Claimant's absence was managed under the Maximising Attendance Policy and this was made clear to her at various points across her absence. She had been made aware at least 9 months before she was dismissed that unless a return to work date was provided by her that a capability hearing would likely follow. Dr Herbert was satisfied in November 2016 that she was fit to return to work and that a return to work itself could help her recovery.

96. The Claimants Personnel officer took advice and was advised that when Swich2 did not apply, before dismissal was decided upon, there should still be a look across the Council to see whether there were any other suitable posts. Ms Rosemary McStay stated that she was advised that the posts available to the Claimant were within Early Years.

97. Ms McKenzie and Mr McDaid were satisfied that every practical support had been investigated and offered to her and that reasonable offers had been made to her to return to work and that redeployment considerations had been exhausted.

98. The Claimant states her FOI request produced posts which she thinks she could have been considered for and spoke to several Job Adverts and Job Profiles outside the Education resource, specifically within the Social Work resource. The majority of these required a degree in Social Work (or equivalent). One such vacancy was withdrawn several months prior to her dismissal and others were restricted to the Social Work resource only. It is submitted that the Scottish Social Services Council website identifies that "equivalent" refers to qualification the SSSC accept as being an equivalent to a Social Work degree. The Respondent lodged a screen print of the relevant pages from the SSSC website and submits the Claimant is mistaken in believing that the word "equivalent" alongside the posts qualification requirement refers to the academic level of the degree rather than the equivalent of a degree in Social Work. The Claimant was also mistaken therefore that the Respondent could train her to perform such posts. The respondent's position is that it is for the SSSC to decide what qualification is accepted as equivalent to a degree in Social Work in order to be registered by them to practice as a social worker in the Respondent's employment. This

would have been made clear to the Claimant had she contacted Personnel to enquire as to what "equivalent" amounted to. Another post the Claimant referred to as possibly being suitable required a "RMA" also known as a Registered Manager Award, which the Claimant did not hold.

99. Prior to her dismissal, the Respondent considered posts the Claimant may have been considered for under the Maximising Attendance Policy and three posts in Early Years were identified. These were refused by her. In any event however the posts would not have remained available indefinitely, and further, she had not provided a return to work date, or forecast a likely return to work date in the near future at her capability hearing to allow redeployment to be considered.

100. The Claimant's circumstances did not qualify her to be redeployed under Switch 2. Even if they did, which is denied, the Claimant was not capable of being redeployed as she was absent due to ill health and provided no realistic prospect of her return to work in the near future. Argument by the Claimant to the alternative is based entirely in hypothesis.

101. The Respondent submits that the Claimant was dismissed fairly in all the circumstances. It was not reasonable for the Respondent to be expected to delay dismissal further when after almost two years the Claimant could still not provide a foreseeable date for her to work from ill health absence.

Remedy

102. The Claimants schedule of loss is disputed. The sums claimed appear not to have taken account of the statutory limit for a week's pay as regards the Basic Award or for the time limits in the calculation of the Compensatory Award.

103. She has clearly failed to mitigate her losses. There is no evidence produced of applications for jobs at a similar level of position or pay and no medical evidence to support her not having done so. She could have applied for a similar job in another authority. Any claim that the SSSC investigation was a barrier to this was not evidenced and in any event the SSSC investigation was not in the control of the Respondents and no evidence was produced to

support the claim that the Respondents actions hampered the SSSC investigations.

104. There is little evidence of pay received from Sainsbury's or Motherwell FC and copy contracts with either have not been produced to evidence her salary claim in their regard.

Claimant's submissions

105. The Claimant argues that she has been unfairly dismissed on the following grounds:-

106. The Respondents were precipitous in dismissing the Claimant given that she had raised with them redeployment issues which ought to have been investigated and had they been investigated, it is more probable than not that an alternative role could have been found to redeploy the Claimant.

107. Section 98 of the Employment Rights Act (as amended) 1996 provides:-

> **"98 General**
>
> (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,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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."

108. It would appear the Respondents have dismissed the Claimant for reasons falling within Section 98(2)(a) (Capability). It is submitted that in all the circumstances of this case, having regard to equity and the substantial merits

of the case, the employer did not act reasonably in treating this as a sufficient reason for dismissing the Claimant.

109. Whilst the reason is one of capability, it is argued that no such "incapability" arose given the Claimant's ability to have been redeployed in terms of the Respondents' own policies, the Claimant's terms and conditions of employment and the Respondents ability to have her redeployed in other posts.

110. If it is accepted that she was not capable of carrying out work of the kind for which she was employed to do then for the same reasons set out above the dismissal was unfair as the employer has not acted reasonably in treating it as a sufficient reason for dismissing the Claimant taking into account equity and the substantial merits of the case. In particular the question of reasonableness arises in that the Respondents ought to have redeployed the Claimant either through the Switch2 policy or under the general ability to redeploy in other posts. The primary submission by the Claimant is that the Switch 2 policy clearly applied to her and was not considered appropriately.

111. The question of redeployment falls into two areas:-

(a) Whether the Respondents ought to have had regard to the Switch2 Policy which would involve a separate process in itself; and/or

(b) Whether the Respondents ought to have redeployed in relation to alternative Grade 3 posts that may have been available to her.

(i) In dealing with (a) above it is submitted that the evidence is clear that the policy applied to the Claimant. The policy is reasonably clear in its terms. Reference is made to page A393 "Switch2 Policy".

"**Policy Aims"**

"1.1 The aim and purpose of this policy is to clearly state the guiding principles and associated processes for circumstances where employees become displaced,

through redundancy or medical incapability and an alternative post is required."

Further -

"2.2 Vacancies will be considered for employees who require alternative employment as a result of ill health or disability, once all resource specific options have been exhausted.

3.2 Switch2 is the process by which the Council manages displaced employees in appropriate alternative vacancies and by which it assesses what it constitutes a reasonable alternative offer."

112. The policy aims refer to "medical incapability". It is submitted the evidence lead before the Tribunal would reasonably suggest that the Claimant would satisfy the criteria to be included in that policy.

113. The Investigating Officer, Carole McKenzie, accepted what she was told by "Personnel" as to whether the Claimant was eligible. Mr McDaid in deciding whether the Claimant was eligible appeared simply to accept the advice from "Personnel". The only Personnel Officer who could speak to this advice was Ms Rosemary McStay. Ms McStay was unable to give cogent or clear evidence as to the reasons why the Claimant did not qualify to be considered under the Switch2 Policy. Her reasons in the first instance indicated that she had taken advice from a Ms Doyle. Ms Doyle responded to her query concerning Switch2 replying in the negative that the policy applied. There was no further explanation for that opinion. Ms Doyle did not give evidence. Ms McStay clarified during the course of her evidence that she also considered the application of the Switch 2 Policy and appeared to indicate that her view in considering it did not apply related to;

(a) the fact that Dr Herbert in the Occupational Health Report of 24 April 2017 (A280-281) had indicated in a tick box that the Claimant was fit to return to work with adjustments;

(b) that she did not satisfy as being defined as disabled in terms of the Equality Act 2010; and

(c) that she was of sound mind.

114. This rationale has no foundation in terms of the Switch2 Policy or with any other documentation presented by the Respondents. It is submitted that Ms McStay's reasoning is fundamentally flawed.

115. It is submitted that on a fair reading of Dr Herbert's most up-to-date report (A280-281) (and taking into account that the Claimant's GP confirmed she was unfit for work – such evidence being spoken to by the Claimant herself) that she would have satisfied the definition of "medical incapability" in terms of paragraph 1.1 of the Switch2 Policy. It is irrelevant as regards the causation for any ill health resulting in an inability to return to the Early Years sector. It is submitted that a reasonable employer would have concluded that Dr Herbert confirmed that the Claimant was not able to return to the Early Years sector due to ill health (a mental health issue). This view is corroborated by the Claimant's GP and by the Claimant. It is submitted that a reasonable employer, taking all the evidence available to it at the date of dismissal would conclude that the Claimant was unable to return to her post in the Early Years Sector due to ill health. That, it is submitted, amounts to "medical incapability" in terms of Clause 1.1 of the policy aims in the Switch2 policy hereinbefore referred to. Throughout the evidence from the Respondents there was references to the Appellant's "perception" of her health. This phrase was repeated in cross examination to the Claimant. The impression one gains from this is that the employer did not truly consider that she was unfit to return to her employment in "Early Years". It is submitted that any such suggestion should be rejected for the lack of foundation given the full context of the OH report from Dr Herbert on 24 April 2017, the evidence from the Claimant and the opinion of her GP as at the date of dismissal.

116. It is the Claimant's submission that the Claimant was eligible for admission to this procedure and that the Respondents failed to apply that policy and procedure when they ought to have done so. Had they applied the policy then

the matter would have been taken further to a full consideration as to re-training and a potential suitable post available. Reference is made to pages 389 to 390 in respect of Conditions of Service for Local Government employees and how vacancies are filled. In particular, reference is made to paragraph 1.4, 1.5 (first bullet point) and paragraphs 1.6 to 1.9.

117. It is submitted the Respondents, in failing to properly consider that the Switch2 Policy applied, have not acted reasonably in all the circumstances in dismissing the Claimant. Whilst it is difficult to assess what would have happened had the Claimant been considered for the Switch2 Policy, it is submitted the Switch2 Policy is an inclusive policy to attempt to allow an employee to be redeployed in alternative posts and will be afforded a significant degree of support to do so.

118. Given the Claimant's evidence and given her general skills base and experience, it is submitted that it is more probable than not that a post could have been found to allow her to be redeployed under the Switch2 Policy.

119. At the very least, the Claimant has been denied that opportunity due to the Respondents' failure to properly consider their own policy, its application to the Claimant and the Claimant's own terms and conditions. (A389)

120. In dealing with (b) even if the Switch2 Policy is not found to apply, the Respondents obliged themselves to consider whether there were any posts that the Claimant could fulfil. The assertion from the Respondents is that there were no such posts. There was no-one from the Respondents to speak directly to any searches that were carried out in this regard. There is evidence from the Claimant that she had obtained a Freedom of Information Request which produced documentation to confirm that Grade 3 posts were available.

121. The Claimant gave evidence clearly and comprehensively as to why she felt that her present skills were transferrable skills and as to why she may have been able to carry out the posts referred to under the Freedom of Information Request. She also spoke as to why her BA Degree in Childhood Practice may be considered as an equivalent Degree given her involvement with other partners within the Council including the Social Work Department and in

dealing with vulnerable children and families. She confirmed that she was registered with the Scottish Social Services Council.

122. There was no evidence spoken to by the Respondents to confirm what an "equivalent" Degree may mean. The document from the SSSC produced on the final day of evidence is of little assistance in assessing what that phrase means. It is not a document emanating from the Respondent. It is does not refer to equivalence of degrees. It was suggested during cross examination of the Claimant that she could have ascertained what "equivalent" meant from Personnel. That may or may not be the case but it is a matter for the Respondents to confirm by evidence what "equivalent" may mean. It is submitted the normal meaning of the word equivalent be taken as equal in value, amount, function or meaning. The Claimant gave evidence as to why she considered her own degree qualification may be equivalent. There was no evidence to refute the Claimant's evidence in this regard.

123. The only evidence as regards job searches that had been carried out came from Ms McStay and Mr McDaid. Ms McStay indicated that she believed a search had been done by Ms Doyle. Mr McDaid was not clear who carried out the search but believed one had been carried out. There was no evidence from Ms Doyle.

124. It is not clear exactly when any searches were carried out. Given the evidence of Carole McKenzie, there appeared to be two searches carried out as far as she was aware, the last search being carried out immediately prior to the date of her report of 8 May 2017. She was informed of this by Rosemary McStay. It would appear from the evidence of the Respondents that there was no up-to-date search carried out to on or around the date of dismissal. Ms McStay spoke of carrying out such searches and used the term "at a moment in time" but conceded she could not confirm when searches were carried out and whether any updated searches were carried out after 8 May 2017 to the date of termination of employment. It does not appear in dispute that as a result of Freedom of Information Request there were posts available under Grade 3 as set out in the Third Inventory of Productions now lodged by the Respondents.

125. Had such posts been put to the Claimant, it is submitted on the balance of probabilities, given the Claimant's evidence that she would have been able to have competitively applied for such posts. That opportunity was not afforded to her.

126. In summary the Claimant contends that the Respondents have failed to follow a fair procedure in their failure to properly consider their own policy, the terms and conditions of the Claimant and their failure to consider alternative employment. It is submitted that the decision to dismiss did not fall within the band of reasonable responses open to the employer in all the circumstances. The question of reasonableness has to be considered taking into account the size and administrative resources of the employer. This is a substantial local authority with policies designed to assist individuals who have difficulties in attending work due to ill health.

127. This is not a case where it is argued by the Claimant the Respondents ought to have delayed a decision (see Spencer v Paragon Wallpaper referred to in the Respondents submission) – nor is it a case where the Claimant argues that she ought to have been given time to return to the Early Years sector. Her position is very clear for a significant period leading up to the date of dismissal; that is that she was not able to return to the Early Years sector and this was due to ill health. It ought to have been clear to the Respondent that this was her position and therefore it would be clear unless redeployment was available it was inevitable she would be dismissed on the grounds of capability. Taking that very clear picture, the Respondents acting reasonably, ought to have considered carefully whether redeployment was open to the Claimant. It is the Claimant's position that no such careful consideration was made and that the consideration as to whether the Switch2 policy applied to the Claimant was entirely misconceived.

128. There is an implied criticism against the Claimant that the Switch2 policy was not raised at the incapability hearing on 4th July 2017. Clearly it had been raised by the Claimant previously and she had been informed it did not apply. Her evidence in this matter was that by the time the meeting on 4th July 2017 had taken place the Respondents view on this was clear. It is noted at page

A282 in the last sentence of the third paragraph under the subheading "Management"; "redeployment options had been exhausted".

129. The Claimant confirmed that the statement at A286-7 was read out and within that document she confirms she had requested to work outwith the Early Years sector for the reasons contained therein. Whilst there may be some criticism that the Switch2 issue was not focused in detail, it has to be looked at in the context of the whole procedure including the report from Carol McKenzie, the request from the Claimant which was not considered and the clear conclusion from the Respondent that the policy did not apply. It is of course a matter for the employer to act reasonably in dismissing the Claimant. Notwithstanding the apparent lack of focus on the Switch2 policy at the meeting on 4th July 2017 there was no significant investigation by the Respondent as to whether and why the Switch2 policy did not apply.

Observations on the witnesses

130. The respondent's witnesses all gave their evidence clearly with reference to the documentation but they did not give the impression to the Tribunal of having fully understood the points that the claimant was making, in particular, in relation to why she was not able to return to the Education Sector. She set her position out very clearly in her grievance statement (page 286 – 287) and to the Tribunal when giving evidence.

131. It remained unclear to the Tribunal on what basis the respondent took the view that the claimant should be dismissed on the ground of capability (or as their documents and policies and procedures put it "incapability" standing the terms of Dr Herbert's final assessment of the claimant,(page280) as being "fit to return to work but with altered duties from those she undertakes at present". In his comments, (see above at page 281) he went on to explain why he had reached this view.

132. Whilst the Tribunal noted all that was said by the respondent's witnesses about finding suitable alternative employment this all focused on the Education Sector, despite the fact that Dr Herbert was very specific that fitness to work would be to altered duties to those undertaken by the claimant

in the past. It seemed that the respondent did not take sufficient notice of this when looking at whether the claimant could be found another role outside the Education Sector which was very clearly what the claimant was asking them to consider.

The Law

133. Section 98 of the Employment Rights Act 1996 states:

"98 General

(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 the subsection if it -

(a) relates to the capability or qualification of the employee for performing work of the kind which she 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 other physical or mental quality, and

(b) "qualifications", in relation to an employee means, any degree, diploma or other academic, technical or professional qualification relevant to the position he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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."

Deliberation and Determination

134. The tribunal was grateful to the representatives for providing such detailed submissions.

135. As Mr O'Neill pointed out section 98 (3) of the 1996 A provides potentially fair reasons for dismissing an employee. Capability is one of the reasons provided under that section. The respondent, of course, relies on the use of the term, "incapability" whereas the statutory reference is to "capability".

136. Section 98(4) has also to be considered by the tribunal. Where an employer has shown that the reason for dismissal was capability or, as in this case as the respondent would have it "incapability", the tribunal then has to consider whether that dismissal was fair or unfair having regard to the reason shown by the employer and this depends on whether in the circumstances, including the size and administrative resources of the employer, they acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and it is to be determined in accordance with equity and the substantial merits of the case.

137. The tribunal noted all that is said in support of the reason why the respondent came to the conclusion that the claimant's employment with them should be terminated and, in particular, that it was pointed out that she had been absent from work for 23 months. There was also considerable reference made to the

attendance review meetings held in the occupational health reports from Dr Herbert.

138. In relation to the respondent's Switch2 policy their position was that this was not discussed at the date that the disciplinary hearing and that their staff were satisfied that the claimant's position did not fit with that policy.

139. The respondent's position was that they did look at alternative posts and three posts in the same sector (i.e.) Education were identified but these were all refused by the claimant. It was also their considered view that Switch2 did not apply and could not apply in the claimant's particular circumstances.

140. Against this, Mr Brown was adamant that the respondent had been precipitate in reaching the decision to dismiss the claimant given she had raised the issue of redeployment and this could and should have been investigated and, had this happened, then, in his submission, it was more probable than not that that an alternative rule could have been found.

141. He too made reference to the detailed provisions of section 98 of the 1996 Act.

142. Against the argument that the reason for dismissal was capability, he submitted that there was no such incapability on the claimant's part given she could have been redeployed in terms of the respondent's own policies, her terms and conditions of employment and the respondent could have a route redeployed to other posts.

143. He went on to submit that, if it was accepted that she was not capable of carrying out the work of the kind for which she was employed to do, then the dismissal was unfair and the employer acted unreasonably in treating it as a sufficient reason to dismiss the claimant, taking into account equity and the substantial merits of the case.

144. He pointed out that the issue of reasonableness arises in that the respondent could have redeployed the claimant either through the Switch2 policy or by using its general ability to redeploy staff to other posts.

145. Redeployment also arose as to whether the respondent ought to have had regard to that policy which would have involved a separate process of whether they could have redeployed in relation to other posts at the same grade as the claimant. Mr Brown drew support from the policy aims specifically at paragraph 1.1, 2.2 and 3.2.

146. It was his submission that Mrs McStay was the only person who seemed to be in a position to give evidence as to whether the claimant was eligible given Mrs McKenzie accepted what she was told by personnel and Mr McDaid took advice from personnel. However, Mrs McStay did not seem to be able to respond as to the position regarding the Switch2 policy. She explained that she took advice from a Mrs Doyle who said that the policy did not apply. Ms Doyle did not give evidence.

147. It was pointed out that in Mrs McStay's evidence she said that she had considered the policy and she did not think it applied.

148. Considerable attention appeared to have been given to the fact that Dr Herbert in the Occupational Health Report of 21 April 2017 had put in a tick in a box, indicating the claimant was fit to return with adjustments.

149. Consideration also seemed to have been given to the fact that the claimant was not stated to be disabled in terms of the Equality Act 2010 and that Mr Herbert had said the claimant was "of sound mind".

150. Mr Brown submitted that Mrs McStay's reasoning was fundamentally flawed. He submitted that, on a fair reading of the most up-to-date report from Dr Herbert, and taking account the claimant's GP having confirmed that she was unfit for the work was spoken to by the claimant she would have satisfied the definition of "medical incapability" in terms of paragraph 11 the policy.

151. He submitted that the position for any ill-health was irrelevant.

152. He submitted that a reasonable employer, acting reasonably in all the circumstances would have accepted Dr Herbert's view that the claimant was not able to return to the Early Years Sector due to a health issue which was said to be a mental health one.

153. That view was corroborated by both the claimant's GP and the claimant herself.

154. Mr Brown submitted that a reasonable employer taking all the evidence at the date of dismissal would have concluded that the claimant was unable to return to her post in the Early Years Sector because of ill health. He submitted that this would amount to medical incapability in terms of clause 1.1 of the policy.

155. He made the point that there was considerable reference to the claimant's perception of health and this was repeatedly put to the claimant in cross-examination.

156. Mr Brown submitted that it seemed to be suggested by the employer that it did not truly consider that the claimant was unfit to return to the Early Years Sector. That, however, does not sit comfortably with Dr Herbert's report of 24 April 2 017, the claimant's own evidence and the opinion offered by the GP.

157. Accordingly, the claimant's submission was that she was eligible for admission to the procedure but the respondent failed to apply that policy and procedure and this should have done. Had they applied it, then the matter could have been taken to a full reconsideration about retraining and finding a potentially suitable role for the claimant.

158. Mr Brown made reference to pages 38, 93 and 90 of the Conditions of Service for local government employees and how vacancies are filled. He also made specific reference to paragraph 1.4, 1.5, the first bullet point in paragraphs 1.6 to 1.9.

159. He submitted that the respondent had failed to give proper consideration to that policy and, in doing so, had not acted reasonably in dismissing the claimant.

160. He accepted that it would be difficult to assess what would have happened had she be considered for that policy but, this policy was one which could have been used to allow an employee such the claimant to have been redeployed into an alternative post and to have been given a sufficient degree of support to do so.

161. In his submission, given the claimant's evidence and her general skills base and experience it was more probable than not that a post could have been found to allow her to continue in the respondent's employment.

162. The claimant had been denied the opportunity to do so.

163. Even if the tribunal considered that the Switch2 policy did not apply, the respondent was obliged to consider if there were other posts that the claimant could have fulfilled. The respondent's view was that were no such posts and no one could speak to any searches that were carried out to check this.

164. It was pointed out that the claimant had obtained a Freedom of Information Request and, as a result, the work which, in her view, she could have taken up, having a BA degree in childhood practice was, she suggested was equivalent to a degree which others in, for example, social work would have required to hold where they are dealing with vulnerable children and families. The claimant was registered with the Scottish Social Services Council.

165. No evidence was provided as to what would be an equivalent degree but Mr Brown submitted that this would be equal in value, amount, function or meaning.

166. Evidence about job searches came from Mr McStay and Mrs McDaid. Mrs McStay thought there had been a search done by Ms Doyle and Mr McDaid was not clear who had carried out a search. No evidence was given by Ms Doyle.

167. There was no clear evidence of when such searches were carried out but the position seemed to be that, had posts been offered to the claimant even on a competitive basis, it was, on the balance of probability, likely that she would have been eligible to obtain one of the posts.

168. The claimant's position was that the respondents failed to follow a fair process and failed to consider properly their own policy, the claimant's terms and conditions and they failed to consider alternative employment for her. They were aware that the claimant had indicated she could not return to the

Education Department but she might well have been able to return to employment elsewhere within the respondent's organisation.

169. The Tribunal considered whether the respondent has established in this case the reason for the claimant's employment having been terminated on the ground of capability. It concluded that, in all the circumstances, the respondent had failed to establish that the claimant was dismissed for a potentially fair reason, namely capability or as they put it, "incapability" standing the very clear terms of Dr Herbert's final report as set out above and referred to in the closing submissions. It was not clear to the Tribunal on what basis the respondent considered that they have shown that the reason for dismissal was capability since the medical view was that the claimant was "Currently fit for altered duties from those she undertakes at present". Since the Tribunal was not satisfied that the reason for the dismissal has been established by the respondent, it follows that the claimant was unfairly dismissed in terms of section 98 of the 1996 Act.

170. However, in the event the Tribunal was wrong in this assessment and the respondent has established the reason for the claimant's dismissal as being capability/incapability then the Tribunal would have required to consider the terms of section 98(4) of the 1996 Act. Had it done so, it would have concluded that the submission by Mr Brown was well made in that the respondent failed to look sufficiently at alternative roles outside the Early Years and indeed the Education Sector to see if a suitable role could have been found for the claimant outside that Section but within the respondent's organisation. In doing so, the Tribunal noted that the respondent is a large employer with presumably other areas where people carry out similar roles to the ones previously undertaken by the claimant. The Tribunal was not satisfied that sufficient efforts were made by the respondent to look into this for the claimant.

171. The Tribunal is aware that it is not for it to substitute its view for that of the respondent but it has to look at what a reasonable employer, acting reasonably in the circumstances would have done. In this case the Tribunal

was not satisfied that a reasonable employer, acting reasonably in all the circumstances would have dismissed the claimant from their

172. The tribunal must be careful not to assume that if it would have acted in a different way to the employer that the employer has therefore acted unreasonably, (see Iceland Frozen Foods Ltd v Jones [1983] ICR 17) which makes it clear that there may be a "band of reasonable responses" to a given situation.

173. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The tribunal's task is to determine whether the respondent's conduct in breaching the contract, including any procedure adopted leading up to the breach, falls within that band of reasonable responses. If so, the dismissal is fair. If not the dismissal is unfair.

174. In this case the Tribunal concluded that it could not be satisfied that a reasonable employer, acting reasonably in the circumstances would have dismissed the claimant by reason of capability.

175. It is also important to emphasise again, as indicated above, that the Tribunal was not satisfied that the respondent has shown the reason for dismissal in this case but, in the event it was wrong in that conclusion, the Tribunal would have considered the terms of section 98(4) and it would have concluded that the respondent, failed to satisfy the requirements of that subsection.

176. In all the circumstances of this case, the Tribunal concluded that the claimant was unfairly dismissed when applying the law to the above findings of fact. As explained, the hearing did not deal with remedy but only the determination of liability.

177. Since the Tribunal's conclusion is that the claimant was unfairly dismissed, arrangements will now be made for a Preliminary Hearing (by way of Case Management Discussion to be held either by telephone conference call or in person) to discuss preparation for that remedy hearing.

178. Date Listing Letters will be issued for that case management discussion separately from this judgment. It would be helpful if, in advance of that preliminary hearing, the representatives can provide an Agenda of issues for discussion.

Employment Judge: F Jane Garvie

Date of Judgement: 07 January 2019

Entered in Register,

Copied to Parties: 08 January 2019