EMPLOYMENT TRIBUNALS

Claimant: Siohbán O'Neill Worth

Respondent: Thames Water Utilities Ltd

Heard at: **Watford** **On:** **05-08 July 2021**

Before: **Employment Judge Housego**

Representation

Claimant: Suhayla Bewley, of Counsel, instructed by Leathes Prior, solicitors

Respondent: Iris Ferber, of Counsel, instructed by Eversheds Sutherland (International) LLP

JUDGMENT

1. The Claimant was constructively unfairly dismissed by the Respondent, by reason of redundancy.

2. The Claimant was entitled to a notice period of 12 weeks.

3. The claim will be relisted for a remedy hearing.

REASONS

Summary

1. The Respondent had a reorganisation which removed the Claimant's post. They say that she was *"job matched"* to another role, and so there was no redundancy situation. The Claimant says that she was redundant from her post and that this was unsuitable alternative employment, and so her resignation was a rejection of it. She claims notice pay, the enhanced redundancy payment (of 27 weeks' pay, uncapped) she would have received had she been dismissed by reason of redundancy, and loss of income after dismissal. She says that she had no written contract of employment and so should receive 2 or 4 weeks' pay[1]. There may be a

[1] S38 Employment Act 2002

further issue about enhanced pension entitlement.

Evidence

2. The Claimant gave oral evidence. For the Respondent I heard oral evidence from:

- Kyle Robins: the Claimant's manager before and after the reorganisation;
- Ritu Pathak: manager of the team to which the Claimant was transferred;
- Richard Fitzjohn: who took the appeal against the move to the new post;
- Andrew Popple: who took the Claimant's grievance hearing; and from
- Andrew Rimmer of human resources, who was involved in the grievance appeal.
- There was an agreed bundle of documents of 762 pages.

The hearing

3. The hearing was conducted by cvp without issue. Both Counsel provided helpful opening statements, and written submissions, to which they spoke. I made a full typed record of proceedings. It was unfortunate that there had been no case management in a case such as this, but the issues that needed resolution were largely agreed in the hearing. I deal with those that were not below, so far as is necessary.

Law

4. The Respondent says that the Claimant resigned, and so must show that there was a fundamental breach of contract, which was the reason she resigned (without delay or affirming the contract) in order to amount to an unfair dismissal[2]. They say there was none.

5. Claimant says the reason was redundancy, which is a potentially fair reason for dismissal[3]. She must show that the situation was within the statutory definition of redundancy[4]. She also says that it was unfair constructive dismissal, for the reasons which are set out below.

6. If the reason was a constructive dismissal, there will remain an issue is whether it was fair, or not. The starting point for the issue of fairness is the

[2] S95(1)(c) of the Employment Rights Act for unfair dismissal, and for redundancy S136(1)(c).
[3] S98(2) of the Employment Rights Act
[4] S139 of the Employment Rights Act 1996:
(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
(a) the fact that his employer has ceased or intends to cease—
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business—
(i) for 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 ceased or diminished or are expected to cease or diminish.

words of Section 98 (4) of the Employment Rights Act 1996 ("the Act")[5].

7. So far as a redundancy situation is concerned:

   7.1. Was there adequate consultation?
   7.2. Were there alternatives to dismissal (such as voluntary redundancy by others, part time working, alternative employment)?
   7.3. Was the choice of a pool for selection reasonable?
   7.4. What were the criteria for selection, and were they fair?
   7.5. Was the Claimant properly assessed against those criteria?

8. If the Claimant succeeds in showing that this was a redundancy situation the issue is also, and primarily, whether or not the post to which she was transferred was suitable alternative employment[6]. If the Claimant succeeds to this point there is also an issue about whether she rejected the new post within required 4 weeks (the Claimant's response being that she was not offered a trial period at all, and that it was a fundamental breach of contract not to do so.) The Respondent says that she was outwith the statutory trial period provisions because she was never given notice, and that is the legislative gateway to such a trial. They say that in any event the Claimant worked for the four weeks of September 2019 after being transferred, and did not resign until March 2020, after working four more weeks and so could not be within the position of rejecting unsuitable alternative employment because she did not take action for eight weeks' work, and for six months.

9. Alternatively, the Claimant says that the way she was not offered a statutory trial period was a fundamental breach of contract, as was, she says, the way the process was handled from start to finish.

10. She further says that if none of the above, then the Respondent unilaterally changed her terms and conditions of employment in such a substantial way that to impose this on her was a fundamental breach of contract.

11. The burden of proving the facts lies on the Claimant, given the Respondent's denial of dismissal. There is no burden of proof in deciding the issue of fairness, for it is an assessment of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer.

12. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act.

13. The compensatory award is dealt with in Section 123 of the Act[7].

14. There is also section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS

---

[5] *"…. 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"*

[6] S138 Employment Rights Act 1996

[7] S123(1) "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

Code of Practice 1 on Disciplinary and Grievance Procedures ("the ACAS Code"). There is provision for increase in compensation of up to 25% if the Acas Code is not followed by an employer which unfairly dismisses an employee. These are matters which may be relevant in the remedy hearing.

15. S38 of the Employment Act 2002 provides for 2 or 4 weeks' pay for those who do not have a contract of employment. This was not pleaded, but was raised in the hearing. The Claimant points out that it does not need to be pleaded, and arose when there was no contract disclosed in the bundle of documents. The Respondent says that this is no more than the loss of a contract entered into nearly 20 years ago, much altered over time by agreement, and that they have not been able, in these circumstances, to seek any evidence about it.

16. There is a breach of contract claim. If there was an unfair constructive dismissal the Claimant would not be obliged to work a notice period. If she simply resigned, there would not be a notice pay entitlement as the Claimant did not wish to work her notice period. If she was redundant then there would be notice entitlement, but as she chose not to work it, entitlement to compensation would depend on that dismissal being unfair constructive dismissal.

The Parties' positions

17. These are complex, and the documents presented by Counsel set them out fully, and they diverge totally. The following is merely an overview, and I have spent considerable time considering the competing arguments. I have not always used the terminology or length of their arguments, and the exact meaning is to be derived from their written submissions.

Claimant

18. Counsel for the Claimant says that the Claimant's job was removed, as was her whole department. So, her post was redundant and the issue was what was to happen to her. It was a redundancy exercise that was being conducted, and she was in a pool for selection. That pool was artificially restricted to the new IBP department through the *"lift and shift"* exercise for the whole of Kyle Robins' team. That was not fair, but it remained a pool none the less.

19. It was irrelevant that the Claimant had never been given formal notice of being *"at risk"* or notice of termination by reason of redundancy, because this was part of the redundancy process, merely being part of the obligation to seek to avoid dismissal by reason of the loss of the post. It could not be other than a redundancy situation, as defined in the Employment Rights Act 1996, because 350 people left the Respondent and another 300 temporary or agency staff and external consultants, and her post was abolished.

20. Therefore, the new post could be no other than an offer of suitable alternative employment, as defined in the Employment Rights Act 1996. The Claimant had worked such a period (and she had been offered it in December 2019 until Stuart Rimmer of human resources took that away and on his own changed it to a *"settling in"* period). The purported change was ineffective –

the trial period (which could only mean a statutory trial period) had been offered by Richard Fitzjohn, and Andrew Popple, and recommended by Aimee Cain of occupational health, herself very senior in the organisation, and it was not possible for someone in human resources to simply take it away. As a matter of law that was what it always was, and remained.

21. Alternatively, there was always a common law trial period in such cases, as the case law, albeit old, made clear. It was not open to an employer to abolish an employee's position and transfer her to a new post, to which she objected and as a result resigned from employment, and then defeat her claim for redundancy by saying that the new post continued. No amendment was required, because the facts alleged were that this was precisely what had occurred here. This was merely giving the Tribunal the legal basis for the facts alleged (and in the absence of a list of issues agreed by the parties given the lack of case management by the Tribunal, this was, while perhaps unfortunate, no prejudice to the Respondent). Both parties had needed to prepare the case on multiple alternative bases as both written submissions made clear.

22. Further, separately, and in addition to this, the way the matter had been conducted was unfair and demeaning to the extent that it was itself a fundamental breach of contract and so matter of constructive dismissal, and an unfair dismissal.

23. The new job was not suitable alternative employment for the reasons advanced by the Claimant, and so she was entitled to say that she was dismissed by reason of redundancy. The fact of redundancy from her old post was not in dispute, and so her refusal of the post offered meant that she should have been given notice of dismissal and placed in the redeployment pool. It was doubly unfair, first because if she had been placed in that pool she might have retained employment, and secondly because by resigning rather than being dismissed she was deprived of the substantial redundancy payment that would follow such dismissal.

24. The only other option for the Respondent was that it had changed the Claimant's terms and conditions unilaterally and without the consent of the Claimant, who had positively objected to the change. This was fundamental change, and the Claimant was entitled to view this as a breach of contract sufficient to mean that it was a constructive dismissal within the Employment Rights Act 1996.

25. It was not open to an employer to evade a statutory trial period by dressing a redundancy up as a job change: this whole process was, as the documents made clear, a redundancy process, in which the Claimant's post was removed, so that it was impermissible to say that a new post was not within the statutory scheme by the device of calling her a *"person affected"* by the reorganisation, but not *"at risk"* of redundancy. How could she be otherwise when in the reorganisation her post and her whole department was removed from the organisational structure?

26. Counsel also referred me to the relevant section in Harvey:

> "Secondly, if there is no termination of the original contract, just an attempt to unilaterally vary it, the employee may pragmatically accept the change, creating a bilateral variation of contract with the consequence that there has been no dismissal, no trial period, and no entitlement to a redundancy payment. However, where an employee is, in effect, faced with the choice of agreeing the proffered variation or losing their employment, the tribunal may be able to say that the employee did not genuinely consent to the variation; that the apparent variation was in truth a repudiatory *breach* of contract on the part of the employer, and that, by quitting the trial, the employee was merely exercising their common law right to treat themself as discharged by that breach. Thus the later (constructive) dismissal can be connected to the earlier redundancy situation (*Marriott v Oxford and District Co-operative Society Ltd (No 2)* [1970] 1 QB 186, [1969] 3 All ER 1126, *CA*; *Shields Furniture Ltd v Goff* [1973] 2 All ER 653, [1973] ICR 187, *NIRC*; *Sheet Metal Components Ltd v Plumridge* [1974] IRLR 86, [1974] ICR 373, *NIRC*). But the argument does not always work (*Optical Express Ltd v Williams* [2007] IRLR 936, [2008] ICR 1, *EAT*)."

The Respondent's case

27. There simply was no redundancy for the Claimant. Her department was *"lifted and shifted"* into the new IBP department and then reorganised. The Claimant was *"job matched"* and so isolated from redundancy. Those in the team who were not *"job matched"* were put into a process involving redeployment or dismissal. Therefore, she was ineligible for a redundancy payment, because she had never been at risk of being dismissed by reason of redundancy.

28. As a matter of simple statutory construction (and the Employment Tribunal is a creature of statute) there can only be a trial period within the Employment Rights Act 1996 once notice of dismissal has been given, and none had, in this case. (O'Connor v East London NHS Foundation Trust [2020] IRLR 16 made this clear.)

29. Therefore there was no *"trial period"* in the sense of the Employment Rights Act 1996, and Andrew Popple was unaware of the legal sense of such a term. Beverley Keogh had likewise wanted details of a trial period agreed by Kyle Robins, so was also not using the phrase in a technical, legal, way. Aimee Cain was a professional occupational health specialist, and it was not her remit to deal with matters of redundancy procedure, had it been such. Richard Fitzjohn had used the phrase, but it was in the sense of getting her to try the role, particularly as he had referred to the period to be agreed and to be concluded by 31 December 2019, being far more than 4 weeks (this is developed at paragraph 24 onwards of the submission).

30. The job itself (contact with OFWAT) remained to be done, and while parts of it had gone to other sections of the Respondent the Claimant was to have been a key person in the IBP team. The whole purpose of that team was to plan for the whole business, and to meet the requirements of OFWAT and to plan for future AMP cycles. Instead of doing this as a five year process, the aim was to build year by year for the next decision point. All jobs evolved and this was no more than that. A generic job description was now the norm in the Respondent, and there was nothing in that change: indeed the role of the Claimant had changed greatly over time. This was nothing more than a further

evolution.

31. The Claimant had transferred on 01 September 2019, and been absent through illness after 30 September 2019. Even if the Claimant was right, she had the four week trial period in September 2019, so in any event could not say there was another in February / March 2020.

32. By working in September 2019 and in February / March 2021 and not resigning in between the Claimant had affirmed the contract, as if the change was a breach of contract, that was concluded by 01 September 2019.

33. The pleadings had not referred to a *"common law trial period"* and there had been no application to amend. This had no part in the decision of the Tribunal. It had never been referred to before the hearing started. In any event she had such a period for the whole of September 2019. In so far as argument was required, the EAT case of East Suffolk NHS Trust v Palmer [1997] ICR 425 set out that the right to a common law trial period can arise only in constructive dismissal cases, where an employer imposes new terms and conditions on an employee in fundamental breach of the employment contract, because they are faced with a redundancy situation. There had been, it was submitted, no such breach. It could not be said that there was a period to try out the role at the end of which (in March 2020) she could claim a redundancy payment.

34. Overall, there was a reorganisation, and the need for it was not challenged. The Claimant was not dismissed, but resigned. She had to show a fundamental breach of contract – the word *"fundamental"* was critical. Not every change was a breach of contract, and even there was a breach it was not fundamental. The Claimant was highly regarded, and the absence of her expertise had been problematic for the Respondent, and particularly difficult for Kyle Robins who had to cope without her expertise and deep knowledge of the OFWAT process at a critical time. Given the period September to December was when the five year AMP process ended (with the acceptance in December by the Respondent of the OFWAT proposed outcome) the work of the Claimant in February was bound to change its focus.

35. Counsel did not argue, but it was implicit, that at worst for the Respondent there was a *"some other substantial reason"* justification for a dismissal, which would be fair irrespective of any breach of contract in the process.

36. (The submission also dealt with the allegations of failing appropriately or fairly to deal with the grievance, alleged demotion, alleged failure to give notice of redundancy, and alleged belittling or humiliating her.)

37. On 08 March 2020 the Claimant resigned from the IBP role which she had held since 01 September 2019, which role continued. That meant there was no possible claim for redundancy.

38. As to constructive dismissal the Claimant should be restricted to the professionally pleaded particulars of claim in the ET1:

    38.1. The grievance was in effect that the Claimant wanted to be dismissed as redundant – she was not redundant so this cannot succeed.

38.2. The IBP role was on precisely the same terms and conditions, and in reality had the same day to day tasks.

38.3. She was helped to find other roles, but refused the help of both Kyle Robins and of Rithu Pathak. She had not indicated any preference. She did not apply for any other jobs within the Respondent, but plainly she could have done, as Simon Pratt did precisely that.

38.4. Not giving the Claimant notice of dismissal after a four week trial period: there had been no such period, so this was not possible.

38.5. Belittling and humiliating her, and demoting her: this was no more than a repeat of the 2nd allegation.

39. The resignation was because she did not want the IBP role, and did want a redundancy payment.

Findings of fact

40. The Respondent is a water utility company. The Claimant has a doctorate in technical matters to do with that industry. She worked for the Respondent from 13 November 2000 until 12 March 2020. At the relevant times she was a senior analyst on grade ML5 (the ML grades being the senior ones, from ML1 at the top to ML5). She was one of 10 analysts reporting to Kyle Robins, at grade ML4. Her job title was Wholesale Outcomes & Measures Manager (555) and her job description (272) was that it was a

"Specialist role to own and develop best practice outcomes and quantative approaches measure sustainable business performance across the wholesale plan."

The summary of her activities was to:

"Lead TW staff, managing virtual teams, external suppliers and external contracts to deliver benefits to the business through effective application of technical knowledge and business awareness to position wider TW business activity appropriately to ensure the best outcomes for TW shareholders, stakeholders and customers.

Develop Outcomes which are genuinely supported by customers, which provide glide path from AMP 6[8] and beyond and can be valued. Develop long term metrics to replace asset health. Test and implement ensure compatibility across water and waste as appropriate.

Develop consistent business process for Supply Demand forecasts, including revenue and Tariffs and ensure that these are utilised in AMP 6 and 7 planning.

Develop Common approach to WLC, as applied to in period and future periods based on appropriate deterioration modelling and use to support

[8] AMP is the 5 yearly review with OFWAT, they being numbered sequentially

metrics.

Define investment groupings for Capex[9] and Opex[10], and audit trails for future work – based on outcomes and customer service objectives.

Present a glide path for the improvement of metrics through AMP6 into AMP7 and beyond. Include data and systems improvements.

Engage cross sector and with leading experts to ensure TW have leading approach to measurement of asset performance, service and value."

41. The role had no direct reports, but the Claimant had significant collaboration with external experts. She worked with OFWAT. She had a significant profile within the Respondent as the expert in work with OFWAT, and externally, by reason of that work. The significance of her work is that performance targets, such as for leaks, have very significant penalties if not met. The Claimant's work was therefore of considerable importance to the Respondent.

42. The Respondent decided that its expenditure had grown significantly and in May 2019 decided that reorganisation was required to curtail the salary bill and make savings of some £120m. About 350 salaried staff were to go, and with a reduction of about 300 short term, agency or external consultants in addition.

43. Ritu Pathak started with the Respondent in September 2018. Her job title is Head of Strategy and Integrated Business Planning ("IBP"). The aim was to unify planning across the Respondent rather than divide it between the two main activities of the Respondent – supply of water, and dealing with waste water.

44. Kyle Robins' team of 10 was removed in the new structure.

45. In May 2019 there was to be a new Strategy and IBP team headed by Ritu Pathak, with 8 reports.

46. It was decided to *"lift and shift"* all of Kyle Robins' team to the new team headed by Ritu Pathak. There were more people in that team than were needed in Ritu Pathak's team.

47. Kyle Robins was IBP manager water (555) in Ritu Pathak's IBP team. He was to have one analyst reporting to him. The 10 analysts he used to have were pooled, and from them four would be chosen to support four of the managers, including him. The other four had analysts from other parts of the business.

48. All but one of the six of Kyle Robins' team who were not allocated a role found roles elsewhere in the Respondent. The remaining one was made redundant, compulsorily. The Claimant was allocated to be Kyle Robins' analyst (as second choice for that role, Simon Pratt who was allocated it,

[9] Capital expenditure
[10] Operating expenditure

having found a role elsewhere in the organisation).

49. Because the whole of Kyle Robins' department was to be disbanded, there was a redundancy consultation. The Redundancy Q&A (57) states that *"If your role is affected you will be invited to a 1:2:1 meeting with your manager where they will explain how your role is affected"* and *"Your manager will also explain the process used for selecting employees for redundancy…"*

50. Employees were scored against a series of criteria. The Claimant's score was high, 30 (309). (There was reference to 48 in the hearing but it is unclear where that figure comes from, but the actual figure is not relevant: the point being that it was agreed to be a high mark.) This form was not completed until 06 September 2019, by Kyle Robins, whose job title on that document remained *"Head of Wholesale Strategic Investment"* and not his new title of *"IBP Manager Water".*

51. On 10 July 2019 Ritu Pathak sent a draft email to human resources and to Kyle Robins for approval (243). It starts *"Below is the note I am about to send to the 9 folks who are in my impacted pool."* (It appears that by this time one person, Simon Pratt, who accompanied the Claimant to meetings, had secured another role within the Respondent. He was first choice to be Kyle Robins' analyst, but moved to another role and so was not part of the pool.)

52. Ritu Pathak refers to the matching process in her email (243) (the date it was actually sent is not clear) stating that there would be *"matching sessions"* during the week starting 29 July 2019. These did not involve the Claimant. It also contained details of the jobs that were available. It said that *"as discussed last week you are in the impacted pool in the IBP team".*

53. The Claimant was asked to, and did, fill in a redundancy questionnaire online (305). She indicated that none of the roles stated to be available attracted her, and that she had not indicated any preferences as she thought none were suitable alternative employment.

54. On 16 July 2019 (260) after their 1:2:1, the report was logged online. Its first question is *"Do you fully understand the impact of the reorganisation on your role (i.e. additional responsibilities, changing in reporting line, risk of redundancy etc)"*. Kyle Robins comment is that *"Siobhan has stated that she has not seen a suitable role of equivalent standing in the structure and therefore believes her role is redundant."* He recorded that her answer to the question *"Do you have an interest in redundancy?"* was *"Strong interest".*

55. The Claimant was allocated the role of ML5 analyst reporting to Kyle Robins. Her new job description (251) has a position title of Business Planning Lead, and job title of Integrated Business Planning Lead. It was an ML4 role on exactly the same financial terms. It had no reports, internal or external (external consultants were being reduced). The descriptions of job role are generic, and were the same for all the 8 analysts in the IBP team.

56. On 28 August 2019 the Claimant met Kyle Robins who told her she was *"job matched"* to the job as his analyst (307). On the same day the Claimant received a letter from human resources headed *"Confirmation of Job Match"* (282). This document is riddled with error. The copy provided is dated 15

January 2020, which appears to be an auto update to the day it was printed. It states that the Claimant had been matched to the role of *"Outcomes and Metrics Lead"* when this was not the case (see above). It states that she would be based at Iver, Berkshire, when her place of work was not to change.

57. There was no evidence about the process by which any *"Job Match"* was arrived at, and no detail of what happened so far as the Claimant was concerned. It appears that if the job match is 70% or over it is said to be certain to be a good match. If over 40% then it may be. No evidence was provided as to that process, or how it was evaluated. Whatever the process was, or is, it was not applied to the Claimant (or the others in that team). There was said to have been a meeting involving human resources Ritu Pathak and Kyle Robins, but if there was it was not minuted (or if it was minuted those minutes were not provided to me).

58. The Q&A document supplied by the Respondent to those affected covered the Claimant's situation:

> *"Q What if you find a job for me in Thames but it is not a job I want?"*

The answer is *"Discuss with your line manager, and if there is no agreement then appeal using the Redundancy Appeal Form on the Respondent's HR portal".* (63).

59. The Claimant submitted such a *"Redundancy Appeal Form"* online. This was within the process set up by the Respondent (91). The appeals process document stated that there were 3 reasons that could lead to an appeal:

- That the role was not redundant;
- That the person should not have been selected for redundancy; and
- That the new role was not suitable alternative employment.

The appeal form (287) is an online form. There were 3 bullet points, as above, asking what was the appellant was *"challenging"* and the Claimant clicked on the button *"suitable alternative employment offered".*

The appeal would be heard by an appeals panel. The document does not say how that panel is to be made up. It was just Richard Fitzjohn.

60. The policy also says that those selected for redundancy will go into a redeployment pool and the persons manager will help the person manage redeployment. It was accepted by the Respondent (Stuart Rimmer's oral evidence) that those in that pool get preferential treatment for any vacancy.

61. People could opt for voluntary redundancy, and the Respondent might or might not agree. Those made redundant compulsorily who were over 50 could opt for a pension payable immediately, and not actuarially reduced for early payment before normal retirement age (but not those who volunteered). The Claimant always stated that she did not accept the new post, she wanted to go into the redeployment pool, and that while she was far from averse, in these circumstances, to compulsory redundancy she was not going to volunteer for it. She did not so much refuse to do so, but state that she should be put into the redeployment pool and then either she would have a suitable

job, or she would be made redundant compulsorily.

62. The Claimant's view has always been that the role was much reduced, in inputting data to a program (widely used across the world) called Anaplan, and was internal facing only, and with no team to work with externally or internally, and was intrinsically much less interesting and rewarding, and a very significant loss of status.

63. The Respondent's view was that the Claimant had a unique understanding of the OFWAT process, that work would change in December 2019 in any event once the five year plan was accepted by them (that was when it was accepted), that she was highly skilled and her expertise of great value to the organisation, and that while all the roles were generic, each post holder could make of it what they wished, and that they wanted her to build the new role based on her previous work. Everyone was moving to generic job descriptions, everyone had to change what they did as the organisation changed, and that this was not of lesser status.

64. On 30 August 2019 the Claimant emailed those running the process to say that she was appealing and would work under protest, and that by doing so she was not accepting the new role. Her email is very detailed (541 - 548).

65. The new role was imposed on 01 September 2019. The Claimant worked as before. There was no change at this point (Claimant's evidence, and as is clear from Richard Fitzjohn's outcome letter. It was also Kyle Robins' evidence (referred to at paragraph 43(e) of Counsel's written submission) that *"nothing moved overnight to Economic Regulation"*). I note also that Kyle Robins was still using his pre 01 September 2019 title on an email of 06 September 2019. I do not find that there was a change other than a nominal one at this point. I reject the Respondent's evidence and submission that the Claimant carried out the new role post 01 September 2019 and it was the same as the old (so it was suitable alternative employment): it was merely that there had been no change yet. The new role started on 07 February when the Claimant returned to work after sickness absence starting on 30 September 2019.

66. On 03 September 2019 Ritu Pathak met the Claimant, and the Claimant recorded this covertly. The transcript (293 *et seq*) was not challenged as to accuracy, and was not said to be inadmissible. In it the Claimant objects that the role is mainly internal, and had a significant loss of standing. Ritu Pathak stated that *"we were told that you match"* (297) indicating that someone else had made that decision. The Claimant said *"I was doing very very discretely different role*." Ritu Pathak replied *"Unfortunately that role doesn't exist".* It was clear (and the Respondent accepts) that the work the Claimant used to do had been fragmented and sent to different places. Ritu Pathak also said that it was clear that the Claimant wanted a broader wider role, or nothing at all (299). She also said (300) that the Claimant had been placed in *"a closed pool for these jobs"*. That has always been the Respondent's position.

67. Ritu Pathak said that while *"from a titles standpoint people might think that the role is a downgrade"* but also that it was *"responsible for pulling together the plan for a huge part of the business",* to which the Claimant responded that *"That is not the same as leading the business in areas, which is what I*

was doing." Ritu Pathak said *"The new job is very generic, it is what you make of it. We haven't specifically said what it is."* The Claimant responded that having no mandate was a huge problem in the business, and Ritu Pathak said *"It is, I completely agree"* (302).

68. On 10 September 2019 there was a meeting chaired by Victoria Graham of human resources. Victoria Graham said there was a 75% match (Claimant's account in appeal, at 333). There is no indication of how this figure was arrived at. It appears, from the absence of any evidence, to be a figure made up on the spot, or Victoria Graham's own estimate. It was not a good meeting: the Claimant was told to listen and not speak, and became upset. This was in part because she had tended to speak more than listen at earlier meetings, and to become upset, and the Respondent wanted to try to explain to her what they had to say, but it was not appropriate, as the Respondent later accepted (Stuart Rimmer's oral evidence).

69. On 12 September 2019 Kyle Robins prepared a job match document (309) which was provided to the Claimant (see 411, 428 and 501) on 23 September 2019 (after several requests). It is the only document about the job match. It was referred to in the meeting on 16 September 2019, but the Claimant was not given a copy or allowed to see it.

70. On 16 September 2019 Richard Fitzjohn heard the Claimant's appeal against her allocation to the position in IBP. On 26 September 2019 he sent her (375) the outcome letter (322 *et seq*). He concluded:

- The new role was on the same terms.
- There was a total divergence of view as to its suitability.
- Even the prospect of a trial period filled her with anxiety.
- The Claimant did not want voluntary redundancy.
- The Claimant had not shown that it was not suitable alternative employment.
- The way to see whether or not it was suitable was a trial period. That was the point of a trial period. It would provide information on which to base a final decision.
- Therefore, she should meet her line manager to discuss the trial period and agree a clear review process to allow a clear decision on suitability no later than 31 December 2019.

71. Richard Fitzjohn was (until 31 March 2021) Director of Reward, Pensions and Industrial Relations. In the context of this appeal it was absolutely clear to me that he understood exactly what was meant by *"trial period"* and he accepted as such in answer to questions asked of him in the hearing. In so far as the later part of his evidence, in re-examination, was that in some way a 3 month *"settling in period"* was the same, I reject it as implausible and logically unsustainable.

72. Richard Fitzjohn was clear that he had made notes, as had the person there from human resources. It was his practice to upload his minutes of meetings to the human resources portal. No notes of this meeting were provided by the Respondent. There is no explanation for their absence. Stuart Rimmer's evidence, which I do not doubt on this point, is that he made enquiry of the human resources department for relevant documents, and forwarded what he received, without checking them, to the Respondent's solicitors.

73. In between 01 and 30 September 2019 Ritu Pathak did not give the Claimant any specific task or have any individual meeting with her. She regarded it as the role of Kyle Robins to manage the Claimant.

74. On 23 September 2019 Kyle Robins sent the Claimant the document he had sent to Victoria Graham and to Richard Fitzjohn for the meeting of 16 September 2019 with Richard Fitzjohn (321).

75. On 30 September 2019 the Claimant was signed off work with stress and anxiety, and did not return until 12 February 2020.

76. On 01 October 2019 the Claimant raised a grievance about the way the job matching exercise appeal process and outcome of that process (322). She complained that:

- She was ring fenced into the IBP role;

- The job matching process was flawed, and had only one document of 12/13 September;

- The appeal process was flawed – no full disclosure of documents, no justification of job match, and not an independent panel (as Kyle Robins was involved);

- The work, taking a template to system strategy teams, getting them to fill it out, and bringing it back for someone else to enter into Anaplan during the trial period was menial demeaning and embarrassing (336).

77. Andrew Popple does not have a human resources or employment law background. He met Kyle Robins on 14 October 2019, Ritu Pathak on 16 October 2019, the Claimant on 18 October 2019, and Richard Fitzjohn on 21 October 2019 (notes at 390) . He declined to talk to Simon Pratt, who had been in the department, which the Claimant has asked him to do. He reported that his meeting with the Claimant had been professional and polite. Having observed Andrew Popple give evidence it is easy to see why this was so.

78. He did not uphold the grievance. His outcome letter was dated 24 October 2019 (394). He felt it was a suitable alternative role. While he says that he made his own decision on that, the basis for it was that Ritu Pathak and the others told him so. He did not avail himself of the opportunity of hearing from Simon Pratt to support the Claimant's views. He thought it significant that the Claimant was unwilling to undertake a trial period. He thought that it was not unfair to decline to put her in the redeployment pool, because she was not at risk of redundancy. He thought that if she was put in that pool she would

make little effort to find a role. He did not deal with any other aspect of the grievance. He had asked what the Claimant wanted out of the grievance, and it was a trial period, which so far had not materialised. He thought a trial period of a duration to be agreed would enable her to assess the suitability of the role and provide evidence on which to base any final decision.

79. The Respondent produced, again without explaining their absence, no notes of this hearing, although Andrew Popple provided the notes of his discussions with others.

80. Andrew Popple was right to say that a trial period was a necessary precursor to being placed in the redeployment pool. I attach no legal significance to his use of the phrase "*trial period"*, because he did not appreciate that it has a technical meaning. He was clear as to the effect, though, as in an email of 01 February 2020 to the Claimant he wrote *"I agreed the role was not a direct match, however I do believe it is a suitable alternative, which is why I supported the idea of a trial period."* To the lay person, such a trial period cannot have only one outcome. At the end of the trial, it is either suitable or not suitable. He was not suggesting that the Claimant have time to adjust to an unwelcome change, but an opportunity to try it and either accept or reject it.

81. On 29 October 2019 the Claimant appealed that grievance outcome, to Beverley Keogh (*408 et seq*). She has since left the Respondent. Stuart Rimmer was involved in the grievance appeal throughout, and so he gave evidence about it.

82. On 11 December 2019 Aimee Cain, head of occupational health provided a report on the Claimant (468) having seen her on 05 December 2019 (468). It said that she was confident that if *"agreement can be made for Siobhan to trial the new matched role for four weeks as per the OD process she would feel able to return to work".* It also said that the Claimant would benefit from a clear description of the trial period and what *"the next steps would be in relation to a successful and unsuccessful trial period".*

83. This was initially scheduled for 11 November 2019 (430) and 03 December 2019 (451). Beverley Keogh took the appeal on 12 December 2019 (455). The minutes are at 482 *et seq* and a transcript is at 471 *et seq*. The Claimant provided observations on these (490 on). At that meeting Stuart Rimmer stated that the trial was not as to suitability, for that had already been decided, and the Claimant's appeal to Richard Fizjohn had not succeeded on the point, and what was proposed was to support her transition into the role (490).

84. After the meeting Beverley Keogh discussed with others such as Ritu Pathak, Kyle Robins and Stuart Rimmer, before a further meeting on 17 December 2019 (513). On 20 December 2019 the Claimant provided to Beverley Keogh by email (550) the outcome letter from Richard Fitzjohn. Beverley Keogh forwarded the email (with others from the Claimant) to Stuart Rimmer.

85. The hearing was on 17 December 2019 (513 *et seq*). The outcome letter was 03 February 2020. Stuart Rimmer said that the delay was because he

had some 30 matters to deal with, there was the Christmas break and he needed to take advice, from solicitors. The outcome letter dismissed the grievances.

86. During the hearing Beverley Keogh discussed with Kyle Robins, at some length, the question of a trial period:

> *"BK: Right ok, because obviously from Siobhan's perspective, in relation to the trial period she's interested in understanding what the trial period is and what would deem a successful trial period, who decides as to whether it was successful, what's the success criteria etc?*
>
> *KR: But we never got as far as that because she just said no…*
>
> *BK: and then what would deem it not successful…who decides its unsuccessful, does she have a say in that decision as well and what would happen next if the trial was deemed as unsuccessful. So, she's open to understanding more information about the trial? And I don't know if you've seen the occupational health letter that's come back?*
>
> *KR: Yes*
>
> *BK: that talks about a 4-week trial and so I'm making a request of you, that we need to work out what this trial period is."*

Kyle Robins said he would work on that but that there were legal letters which might get in the way.

> *"BK: So, I'm going need you to help to pull together what a trial period will look like and take into consideration the Occupational Health report that mentions 4 weeks.*
>
> *KR: Yes*
>
> *BK, so is that something that you can do?*
>
> *KR: I can try and do that…"*

87. On 30 December 2019 the Claimant emailed Stuart Rimmer (560) and Beverley Keogh (584), having received the minutes of the meeting:

> *"To be clear the outcomes I want in writing are, the trial period, what constitutes a successful or unsuccessful trial period, who determines that, and will I have a say in that. I felt the company have disregarded me completely,*
>
> *I said I would enter into the statutory trial period for the role of four weeks, In line with the OD process*
>
> *However prior to doing this I wanted in writing.*
> *Confirmation of the four week trial period,*
> *Confirmation of what constitutes a successful or unsuccessful trial period, who determines that, and will I have a say in that.*

I also said that I wanted in writing what would happen at the end of a trial period if that was successful or unsuccessful.

The head of Occupational Health said that the normal process is that the employee has a four week trial period then has a say in whether the role is working or not.

In the context of my comments on redundancy.
I said that my role has been made redundant.
The other comments I made were in the context that if I were to leave the business I wanted that to be done in a way that would support not damage the business."

88. On 13 January 2020 Beverley Keogh sent a draft outcome letter (595) to Stuart Rimmer. He amended it (598) and sent it back on 14 January 2020 (597). On 15 January 2020 Stuart Rimmer sent a draft return to work programme to Kyle Robins (601 *et seq*).

89. On 20 January 2020 Stuart Rimmer responded (610) to the Claimant's emails to him (she having been unable to contact him on the telephone (611) of 30 December 2019 and 17 January 2020 saying that he would reply to it *"as soon as possible"*.

90. On 27 January 2020 at 11:45 (am) the Claimant emailed Kyle Robins (613) asking for an update on the trial and said it was now the 7th week since it was agreed. She also emailed Beverley Keogh and Stuart Rimmer at 11:39 saying that it was apparent to her that the trial was a sham (612).

91. On or about 30 January 2020 Stuart Rimmer wrote to the Claimant (621):

"As mentioned, I have been looking into your query below. Apologies for the delay, I wanted to ensure I was clear on the position before coming back to you with a full response.

To be clear, statutory trial periods are only applicable for people whose role was identified as 'at risk of redundancy' and who have therefore gone through redeployment to find an alternative role. In those circumstances the whole premise of a trial period is for individuals to settle into their new role and ensure that it is an appropriate fit for knowledge, skills and experience. It was also explained in the "Reorganisations An employee's guide" that trial periods are for individuals who have gone through redeployment, which I have attached for you.

The statutory trial period concept does not apply to you. You have not been placed at risk of redundancy. You have not been offered alternative employment by virtue of a redundancy situation. You have not been through the redeployment process. Instead, in the early stages of the re-organisation process your previous role was assessed as being a sufficient match to the Business Planning Leave (BPL) role, such that we are entitled to transfer you directly into that role in accordance with our usual redundancy process.

We understand that you disagree that the new role is a sufficient match to

your previous role and that you dispute its suitability for you, but your appeal in that respect was unsuccessful. As part of the appeal outcome, the term "trial period" was proposed to you to help ease your concerns on the role. I appreciate the term trial period may have caused some confusion, and I apologise for this. What is proposed is intended to be more akin to a settling in period to support your return to work and help you adjust to the new role taking into account both your recent period of absence, your concerns about the role and the OH advice. Kyle has worked on how to help you settle in while also taking into consideration the advice he has received from OH that states you are due a 2 week phased return to work, which is usual for the length of time you have been absent. We are obliged to include a phased return to work as part of the settling in period to ensure we comply with that specialist advice.

His plan is to help ease you back into the workplace and your new team. Once you are back at work and have completed your phased return, Kyle will continue to help you to settle into your new role and will bring you up to speed on the parts of your old role that you will still have responsibility for while also providing the basic training required on end user for Anaplan and other elements of your role. Furthermore, it will be to update you on what has happened both within your team and the wider business during your absence.

You ask for confirmation about what constitutes a successful or unsuccessful trial period and what happens at the end of the trial period. However, as I have explained, this is not a statutory trial period in the way you envisage. I apologise if there has been confusion in that respect. As the company believe your new role is a match, we do not believe there will be any issue in your success in the role. If you do not wish to continue in the role during or after a settling in period, then we will discuss that with you at the time and the reasons why you continue to be unhappy.

To be clear however we do not propose to make you redundant in those circumstances, or to pay you a redundancy payment. You have a continuing role in the organisation and there is no redundancy situation."

92. Stuart Rimmer made the decision that it was not to be a trial period, but a *"settling in"* period, the difference being that the Claimant was being told that she had been *"job matched"* and had appealed unsuccessfully, and so that was her job. He said that she was not *"at risk"* at any point, as she had never moved past the *"affected person"* category, which was resolved by her job match. No one else was involved in that change, which Stuart Rimmer has always described as *"clarification"*. Whether it was within policy or not, I find that a statutory trial period was offered, and that offer was withdrawn by Stuart Rimmer telling Beverley Keogh it was not going to happen, and telling the Claimant himself.

93. On 03 February 2020 Beverley Keogh's grievance appeal outcome letter (633 *et seq*) was emailed to the Claimant.

94. On 07 February 2020 the Claimant emailed Stuart Rimmer in reply (642) and said that she was due to return to work on 12 February 2019, saying that it was a trial period and if it was not successful she would resign at its end.

Stuart Rimmer reiterated the position on 10 February 2019 (645), and 11 February 2019 (650), and there were further exchanges.

95. The Claimant did return to work. She did not have any substantial contact with Ritu Pathak, who regarded it as the responsibility of Kyle Robins to manage the Claimant and her evidence was that she did not want to micromanage him.

96. The Claimant did not take to the new role and by email of 06 March 2020 she resigned (682 *et seq*). She indicated that she would leave on 12 March 2020, after the 4 week trial period. She gave detailed reasons why she considered that the role was not suitable:

> *"My redundant role of Wholesale Outcomes and Metric Lead is an externally facing role which requires setting up and writing the fundamental relationship framework for service and performance between the company the customer and the regulator. It requires significant industry, external and stakeholder relationship development and management to ensure the company approach, the company outcomes and the company external facing performance and service measures are the best in the industry, are valued by customers and endorsed by customers and accepted by the regulator. This requires setting up the financial incentives for out and underperformance which have a material financial impact on the company and shareholders +£100m to - £800m.*
>
> *This results in an agreed regulatory rule book, which states financial penalties for levels of performance which materially affect the companies financial viability year on year going forward.*
>
> *The second core part of my role is to develop real time reporting and big data anaytic tools to help deliver that performance or provide insight into Asset and Service Performance, Risk and Resilience regionally, and locally.*
>
> *The third part is to drive Asset Management Asset Health Policy, Strategy and Best Practise and capability improvement to ensure the business has best in class Asset Management and Asset Health Practises.*
>
> *My role and these functions have been removed from the organisational structure. This has been acknowledged by Thames Water.*
>
> *In contrast the role of Business Planning Lead is an inwardly facing role, supporting the Water IBP Manager. That manager only has responsibility for the Water Plan. So I have no requirement to use the extensive skills I have developed within 30 years in the water industry, namely my extensive Regulatory experience, Water Design experience, Service Reservoir Design and optimisation experience, Wholesale Asset Health Strategy, Maintenance Strategy, Customer and Stakeholder Engagement and Big Data Analytics and real time risk and resilience reporting and capability for Wholesale Water and Wastewater Treatment and Networks.*
>
> *In sharp contrast in the IBP Team the role of IBP Lead in Water, is supporting the Water IBP Lead I have not been asked to undertake or*

review any work in other areas, either Wastewater or Customer or Retail, therefore I have concluded that my knowledge in these areas will not be used. The role is classed and described internally as an Analyst role which is what it is titled on the Thames Water system. The role has no individual areas or even single duties where I have responsibility or accountability. It has no external, customer, or stakeholder responsibilities or duties.

I have now only two working days of this trial left. I have conducted a journal every day of what I have been asked to do and the tasks I have been asked to perform.

The team operates by a series of tasks being given to people on a daily basis at this 9.30 team huddle. These are set to be delivered by a certain time each day. To date all these tasks have been about discussions with various parts of the business on budget plans, these are incorporated into a software programme Anaplan, to reconcile that day and produce output slide packs. Each days meeting has been the same in terms of finance and budget discussions being updated in a spreadsheet by others.

I have no prior experience of budgeting, finance or Anaplan, so therefore do not take part in these discussions, nor have I been asked to provide any advice, help, or given any duties or tasks in this regard. I could not complete any of the tasks required with my existing knowledge, as they require specific knowledge of the budgeting tool, finance and individual conversations that have taken place.

I have had frequent, internal training and familiarisation sessions on Anaplan, the platform that is used. With these I have been able to gain access, log on and find already existing presentational dashboards on the system. This is not an intuitive system however and even simple relationship easily done in excel seem extremely complex to set up. I have discussed at length that this is not an area where my core skills lie and even with extensive prolonged training this is an area where I would expect my skills to remain nothing more than basic, if I progress to that level of attainment.

It is extremely demoralising after 30 years experience to be placed in a role where your core skills at which you excel at an Industry level are not utilised at all. Where you are expected to undertake substantial training to be a poor performer."

97. This critique is not dealt with by the Respondent, other than to say that the generic role was what she made of it, that she was highly esteemed and valuable to the business, and that she was not expected to have any great involvement in Anaplan, which was a tool she could utilise with others knowing how it worked in terms of input etc. Ritu Pathak wanted an overall plan for the Respondent without 5,000 spreadsheets, and said that the expertise of the Claimant would have been helpful in building such a plan. There was no evidence of any action to make any of that happen in September 2019 or February 2020. (I take full note of the submissions of Counsel for the Respondent on the point at paragraph 43 onwards.) It is apparent that Ritu Pathak took no step to reassure the Claimant about this, and nor did Kyle Robins, and Ritu Pathak accepted that she had no meetings

with the Claimant, nor gave her any specific project after 01 September 2019 (the date when the Claimant came under her line management, with Kyle Robins in between).

Conclusions

98. My conclusions are these:

98.1. There was a redundancy situation at the Respondent.

98.2. The Claimant's role was removed from the organisation as part of a large scale reorganisation. She was told she would have a new role with effect from 01 September 2019.

98.3. The whole process, so far as she was concerned, and in reality, was a redundancy process.

98.4. There was no proper *"job match"* process, for want of any documentation about it, or evidence as to what it consisted of. Plainly there was some sort of discussion about it, but unminuted and not by reference to any form of procedure.

98.5. Victoria Graham simply made up the figure of a 75% match. On 12/13 September 2019 Kyle Robins did a post event justification for it, not supplied to the Claimant until 23 September 2019, even though it was relied upon in the redundancy appeal held by Richard Fitzjohn on 16 September 2019. The roles were not, in fact, matched.

98.6. Ritu Pathak was clear to Andrew Popple that in the initial job match exercise the Claimant was not matched to anyone (384) and so would have fallen into the redeployment pool, as did the others not matched. The Claimant was allocated to the role with Kyle Robins only after Simon Pratt got another role in the Respondent. It follows that the role was considered by the Respondent to be less suitable for her than for him. This weakens the Respondent's assertion that there was a strong similarity between old and new roles (it is, of course possible that one was exceptionally suited and one highly suited, but nevertheless she was less suitable than another, and the absence of any objective data is entirely the responsibility of the Respondent).

98.7. All 10 of Kyle Robins' team were (correctly) categorised as a pool (necessarily for redundancy purposes, as their roles had been removed). The four who were not *"job matched"* went into the redeployment pool. It is logically impossible (in my judgment) to say that those who were *"job matched"* were retrospectively removed from the pool for selection and so not at risk of redundancy. The *only* reason they were *"job matched"* was because they were in a pool for selection for redundancy. It necessarily follows that they were offered what was considered by the Respondent to be suitable alternative employment, as an alternative to being given notice of dismissal by reason of redundancy, and then placed in the redeployment pool.

98.8. The Claimant's new role had no reports, and the old role had many

internal contacts and external teams who, in practice, reported in to her.

98.9. Ritu Pathak accepted that the title could be seen as less prestigious. It was, for the reasons adumbrated by the Claimant at length.

98.10. The Respondent has not dealt with the Claimant's objections to the role allocated to her, other than as indicated above: that she could make of it what she might, and her talents were considered of great value. Unfortunately, the Claimant was not encouraged in this direction in any tangible way.

98.11. In September 2019 there was in fact no change in practice. This month cannot be seen as a trial period, because nothing had changed, and the whole point of a trial period is to try out the new role. There cannot be a trial period while carrying on in the old role, whatever date is given to the change of role by management. The Respondent's closing submissions support this, *"… it was clear from her reaction to cross examination of R's witnesses that she had not realised that she was working in the new role after 1 September 2019."* That was precisely because nothing had changed, and she was not working a new role. That, it was clear, started only in February 2020.

98.12. The Claimant had a right of appeal against being allocated a new role, as part of the redundancy process, and exercised that right. It is logically impossible to say that the allocation of the new role, a result of the removal of her post, and against which she had an appeal as part of the redundancy process, was other than a part of the redundancy process. It follows that she should have been accorded a statutory trial period for the new role allocated to her on the basis that it was suitable for her. This obligation cannot be sidestepped by omitting the giving of notice, or if it is, then the provisions of S136(1) mean that the fundamental breach of contract in not offering suitable alternative employment entitles the employee to claim that she has been unfairly constructively dismissed.

98.13. I accept that it would have been better for the Claimant to have taken at face value the offers of Kyle Robins and Ritu Pathak (both of whom I judge to have been genuine in that regard) to help the Claimant find other roles, but there was no human resources involvement in suggesting any avenue the Claimant might follow. After 20 years in her role the Claimant may well have had good cause for thinking that she knew who to approach, even though there could have been (as Ritu Pathak observed in oral evidence) a better chance if she approached her peers, rather than the Claimant being in the position of supplicant.

98.14. I do not accept that Stuart Rimmer's email of 30 January 2020 was as Counsel put in paragraph 40 of closing submissions. It did not leave all options open. It meant she had to accept the new role and then either leave or find herself another role in the organisation. If given notice and put in the redeployment pool, she would have got preferential treatment.

98.15. I do not agree that the Claimant was angling for compulsory redundancy. The terms of compulsory redundancy are much more

generous for those over 50 as a pension (valuable for someone with 20 years' service) can be drawn immediately with no actuarial reduction. The Claimant was very interested in this, and who can blame her? I take full note of the career break or sabbatical of three months not long before, but is clear to me that the Claimant's approach was that she would not go for voluntary redundancy, even with the enhanced redundancy payment, and that she wanted an alternative role with the Respondent (it is absolutely clear that she has found the loss of her job devastating). If that were not possible, then she would be prepared to start anew with the benefit of the large lump sum and the pension. The one thing she was not going to do was ask to go.

98.16. As a result of her redundancy appeal the Claimant was promised a trial period.

98.17. As that proposal was made by Richard Fitzjohn who knew exactly what that phrase meant, a statutory trial period was offered, and this offer was repeated by Andrew Poppel, and Aimee Cain.

98.18. The Claimant initially refused this, but eventually (in early December 2019) agreed to it.

98.19. Stuart Rimmer took it on himself, unusually as a human resources adviser, unilaterally to change that, and override what had transpired between Richard Fitzjohn's decision on 25 September 2019 (322) and the grievance appeal. It is absolutely clear from the documentary and oral evidence that Stuart Rimmer decided that a statutory trial period was not going to take place, whatever had been said before. I reject his evidence that this was *"clarification"* It was not. It was a policy reversal.

98.20. A *"settling in period"* of 3 months was disingenuously described (by Stuart Rimmer in an email (427) to the Claimant of 06 November 2019) as to the Claimant's advantage, when plainly it was not: if accepted it amounted to an affirmation of the contractual change. There was no option but to carry on or leave the job by resigning with no possibility of remedy. The phrase is referred to by Aimee Cain on 06 December 2019 (462) and so was mooted before the grievance appeal hearing (12 December 2019).

98.21. Beverley Keogh was told that there was to be no statutory trial period. It was plainly not her decision to alter this to a *"settling in period"*.

98.22. During her month the Claimant was not shown how the role might grow and adapt to be what she wanted. The *"daily huddles"* were about things she was not involved in. Her critique of what was lacking in her work in this period is not undermined by any evidence.

99. From these conclusions I decide that the parties' contentions in these ways.

99.1. The Claimant was redundant from her post with the Respondent.

99.2. The Respondent is correct in saying that there can only be a

statutory period if there is notice of termination given – S138 is clear on this, and it is a statutory period, and so its parameters are set by the statute. It can be longer than four weeks if longer is needed for training (S138(3)(b)(ii)), and training was needed here (on Anaplan) so there is no magic in the period.

99.3. The Respondent accepts that it was a change to the Claimant's contract. That does not require a common law statutory period. The Claimant is entitled to say *"I'll work it under protest to see if I will accept it, even though you are wrong to make me change"* and then resign, provided she did not delay or otherwise affirm the contract, and I find she did neither.

99.4. The issue is in effect the same (or not markedly different) whether the new job was said to be suitable alternative employment within S138, or a change imposed which was not a fundamental breach of contract.

99.5. In the circumstances of this case the Claimant was entitled not to accept the change made to her contract (for the reasons given by her and by me above).

99.6. There was a fundamental breach of contract by the Respondent in:

99.6.1. Failing to offer a statutory trial period;

99.6.2. Taking 8 months to resolve the issues raised by the Claimant.

99.6.3. Resiling from the (accepted) offer of a trial period.

99.7. The Claimant resigned in consequence of (and by reason of) those fundamental breaches of contract, in good time and without affirming the contract.

99.8. It follows that the Claimant was constructively unfairly dismissed under S136(3)(c) (to which I referred the parties in the hearing), which applies to dismissals under Part XI of the Employment Rights Act 1996, about redundancy, because of the failure to offer the required statutory trial period. Accordingly it was an unfair constructive redundancy dismissal. (I discount the logically possible finding of a fair constructive dismissal in these circumstances.)

99.9. The other breaches, of delay and of resiling from the outcomes of Richard Fitzjohn and Andrew Popple, were also a fundamental breach of contract in response to which again the Claimant resigned (without affirming and in good time) and so there would also be, had I not found a constructive and unfair redundancy dismissal, an unfair constructive dismissal within S95(1)(c) of the Employment Rights Act 1996. It was all redundancy connected, which is why I determine it to have been a redundancy dismissal even though some of the breaches would on their own have resulted in a finding of ordinary unfair constructive dismissal.

99.10. I do not agree with Counsel for the Respondent that there is no

entitlement to a statutory redundancy payment, because there was not a redundancy dismissal. There was a redundancy dismissal by operation of S136(1)(c): a constructive dismissal for the purposes of Part XI of the Employment Rights Act 1996, which is redundancy. There was a constructively unfair redundancy dismissal, and so the reason for dismissal is redundancy.

99.11. In any event, from my subsidiary finding it follows that the Claimant is entitled to a basic award, equal to the statutory redundancy payment applicable to her.

99.12. While I was not addressed on a *Polkey*[11] reduction, it was indicated that on receipt of this judgment the parties would, if it was in favour of the Claimant, have discussions. Without at this stage coming to any conclusion, my initial observation is that I cannot readily detect that, had a fair procedure been followed there would have been a fair dismissal, as my findings of fact are that a statutory or other trial period should have been offered, and the new job found not suitable.

99.13. (For the avoidance of doubt there is no question of contributory conduct in this case.)

99.14. It follows from the fact that I have found this to be a constructive dismissal that the Claimant was not required to give notice, but is entitled to notice pay (of 12 weeks' pay given her 20 years' service).

99.15. There is no pleaded claim under S38 of the Employment Act 2002 for want of a contract of employment. As Counsel for the Claimant pointed out there does not need to be one. However, given that the Claimant started work for the Respondent 20 years ago, it is not unlikely that the contract has been lost or mislaid in the meantime. It is not shown on the balance of probabilities that no such contract was issued.

99.16. The other case law cited is not of assistance, given my conclusions. Counsel for the Claimant referred me to Turvey v C.W.Cheney & Con Ltd (about common law trial periods if the employee worked longer than four weeks after a change). But I found that there was no trial period in September 2019 and the Claimant limited her work to four weeks in February / March 2020. More fundamentally that case involved a trail period, and this case is about refusal to give one).

100. The case will now be relisted for a remedy hearing.

Employment Judge

_____

Date 12 July 2021

[11] Polkey v AE Dayton Services Ltd [1987] UKHL 8

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....

.....
.....
FOR THE TRIBUNAL OFFICE