EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102326/2020 (V) Hearing by Cloud Video Platform (CVP) on 19, 20 and 21 January 2021

Employment Judge: M A Macleod

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Fiona McAulay — Claimant
Represented by
Mr G Bathgate
Solicitor

Chivas Brothers Limited — Respondent
Represented by
Mr M McLaughlin
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims fail, and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 28 April 2020 in which she complained that she had been unfairly dismissed by the respondent from her employment with them; and that she had been unlawfully deprived of a redundancy payment.

2. The respondent submitted an ET3 in which they resisted the claimant's claim of unfair dismissal, while admitting that she had been dismissed on the grounds of redundancy.

3. A hearing was listed to take place on 19 to 21 January 2021. Owing to the ongoing restrictions imposed as a result of the coronavirus pandemic, the hearing was conducted by CVP. The parties were each able to hear and see each other, as was the Tribunal, and accordingly the Tribunal was satisfied that the hearing was conducted in a manner which was fair and consistent with the overriding objective set out in Rule 2 of the Employment Tribunals Rules of Procedure 2013.

4. The claimant was represented by Mr Bathgate, and the respondent by Mr McLaughlin.

5. Witness statements were presented to the Tribunal to stand as the evidence in chief of the witnesses called by each party.

6. The respondent called as witnesses Anne Campbell, Senior HR Business Partner (though at the material time in this case she was Head of HR - Support Functions and HR Service), and Robert Muir, HR Manager for Manufacturing and Production. A witness statement was also presented on behalf of Scott Livingstone, at the material time the respondent's HR Director. Mr Livingstone, I was informed, was unavailable to attend as a witness in this hearing as he was suffering from serious ill health. His witness statement was tendered for whatever weight might be attributed to it, and the claimant confirmed that there were aspects of his statement which she was prepared to agree.

7. The claimant gave evidence on her own behalf.

8. The parties presented a Joint Bundle of Productions, in electronic form, to which reference was made by both in the course of the hearing.

9. The issues in this case were narrowed down, helpfully, in an Agreed Statement of Issues Between Parties presented to the Tribunal at the outset of the hearing.

10. For the purposes of this Judgment, it is helpful to set out what was said in that Agreed Statement, for clarity as the scope of the dispute now remaining between the parties:

> **1. "The Claimants only challenge to the fairness of the dismissal arises out of the fact that the Respondent confirmed to her that she would be based full time at Kilmalid once the Paisley Depot closed when, in fact, it had been decided that she would be based in Glasgow. The Claimant takes no Issue with the consultation nor does she assert that the failure on the part of the Respondent to identify alternative employment at Kilmalid renders her dismissal unfair.**
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> **2. In relation to the Claimant's claim for a statutory redundancy payment, she accepts that the HR Administrator's role based in the new office in Glasgow City Centre was suitable alternative employment.**
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> **3. She maintains it was reasonable for her to refuse that offer because she had been told that she would be based in Kilmalid and the Respondent reneged on that undertaking. In terms of the reasonableness of her refusal of the role in Glasgow, she does not seek to rely upon the time or cost of travel to Glasgow as compared with Paisley or her responsibilities to her parents."**

11. Based on the evidence led and information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

12. The claimant, whose date of birth is 25 February 1977, commenced employment with the respondent on 2 August 2004 as an HR Administrator, initially based at the respondent's plant at Kilmalid, close to her home. At that time, the respondent was known as Allied Domecq. When the company merged with Chivas Brothers Limited, the claimant was moved to Paisley, with her main customer area being Manufacturing,

based at Paisley and Kilmalid. Prior to her employment coming to an end (on 31 January 2020), the claimant reported to her line manager, Lorna Milroy.

13. In or around November 2016, the respondent formulated a proposal to close its Paisley bottling plant and office facility, and move those aspects of its business to the facility at Kilmalid. It was proposed at that time to move the back office functions (Finance, Customer Services, IT, HR, Communications and Legal Services) to Kilmalid to a new purpose-built office to be sited adjacent to the bottling hall. Subsequently, the respondent decided to review that decision, and to explore the possibility of moving the back office functions (which included the claimant's role) to a corporate office in Glasgow city centre. In 2018, the respondent began to inform and consult all affected staff about this move.

14. The respondent established a Smart Working Policy to give employees flexibility in relation to hours of work, place of work and home working, with effect from 1 January 2018 (104ff).

15. The respondent dealt sympathetically with the claimant's need, from time to time, to have time off work, for example, to take one or other of her elderly parents to a medical appointment, or to attend to a personal matter relating to her own or her family's life. Both Ms Milroy and Ms Campbell gave the claimant time to listen to her personal concerns, and sought to be flexible in dealing with her when she was so affected. The claimant was a very experienced and highly-regarded professional whose services were valued by the respondent.

16. In November 2017, the respondent decided not to move the support staff to Kilmalid, and this was intimated to the affected staff at that time. Staff were advised that the respondent was considering property in Glasgow.

17. In August 2018, the respondent confirmed to employees that they were in negotiations to take over a lease in Glasgow city centre. The claimant was very unhappy about this announcement. It became known to the

respondent that the claimant was discussing her feelings about this move with other members of the team.

18. In November 2018 announced that the company had signed a lease on a property in Blythswood Square, Glasgow.

19. On or around 23 October 2018, the claimant attended one of the regular HR Administration Team meetings with Anne Campbell, Lorna Milroy and Lowri Deehan also in attendance.

20. Ms Campbell had become aware of, and concerned by, the claimant's negative demeanour in the office about the proposed move to Glasgow. At the meeting of 23 October, while one of the HR team provided an update to the team about the proposals, the claimant sat looking sullen with her arms folded. Ms Campbell did not wish her attitude to affect the remainder of the team nor the meeting. She said to the claimant that she knew that she was unhappy about this, but that "Chivas is not in the business of pissing anyone off', and that they would look for a way to have her based at Kilmalid so that she did not need to work in Glasgow 5 days a week. She explained that she would remain as part of the HR Administration team but could support Robert Muir and his team at Kilmalid. She went on to say that the claimant would require to attend the Glasgow office for one or two days per week, and could work at home on the remaining day. At that time, she was already working one day a week from home under the Smart Working Policy.

21. Ms Campbell had not intended to make any statement or undertaking to the claimant about her location following the closure of Paisley, but wanted to try to find a way to reassure her that a solution could be found for her unhappiness. She was aware that the decision would ultimately be taken by Scott Livingstone, the HR Director, though she did not say that to the claimant.

22. The claimant was cheered by this statement made by Ms Campbell. She interpreted what had been said as an undertaking by Ms Campbell on behalf of the business that she would be based at Kilmalid, and that she

would not require to work at all in the Glasgow office. She considered this to be an excellent outcome.

23. Ms Campbell did not have the authority to enter into any formal agreement with the claimant about the variation of her contract to locate her in Kilmalid rather than Glasgow. The claimant's position was that she was unaware that that was the case, and considered the conversation to amount to a binding agreement with her to move to Kilmalid.

24. There were no further formal conversations about the claimant's location following the closure of the Paisley plant until the HR Director met with the staff on 23 January 2019. However, the claimant told her colleagues that she was not moving to the Glasgow office, and would be relocating to Kilmalid to work with Robert Muir and others.

25. Ms Campbell was on holiday from 16 December 2018 until 3 January 2019, when she returned to work for one day. Tragically, her husband died suddenly on 6 January 2019. She did not return to work until May 2019. During the course of her absence, the claimant did not contact her nor have any discussion with her about her relocation.

26. On 23 January 2019, Mr Livingstone convened a meeting with the HR Team. During the course of that meeting, Mr Livingstone made clear to the claimant that she was moving to the Glasgow office, and that that had always been the intention of the respondent. Following that meeting, the claimant met with Mr Livingstone and Ms Milroy. Mr Livingstone explained to her that irrespective of what Ms Campbell may have said to her it was his decision that she should move, with the remainder of the HR Administration Team, to the Glasgow office. He said that this had been discussed at HR Management meetings over a period of months. The claimant raised concerns with him about the reliability of the train service from Balloch to Glasgow, and the caring responsibilities which she would have in light of her father's cancer diagnosis, both of which would mean that being based at Kilmalid would be much more convenient for her.

27. The claimant was very unhappy at this development. She was absent from work from 28 January 2019 until 21 March 2019 on the grounds of ill health, which she attributed to her shock and sadness at the respondent's change of position. She returned to work for two days in February 2019 but due to a viral infection was unable to sustain her attendance beyond that until she returned in March.

28. On 11 February 2019, Robert Muir wrote to the claimant (41) a letter in which he confirmed that as Mr Livingstone had outlined in the meeting of 23 January, the HR Administrator role would be based in Glasgow, although "there will be some flexibility through our SMART working arrangements."

29. When she returned to work, the claimant met with Robert Muir. Ms Campbell remained absent due to ill health. Mr Muir told the claimant that he was confident that a suitable role would come up for her in Kilmalid in the next three to six months, and before the HR team were to move to Glasgow. They had a number of informal conversations over the succeeding months owing to the proximity of their working spaces. By this point, it was clear that the claimant did not intend to move to Glasgow, and was seeking alternative jobs at Kilmalid. She advised Mr Muir that she was not prepared to work in a "unionised role" - understood to mean a role in the manufacturing or operations sections of the business - nor would she accept anything other than a management position.

30. In May 2019, a vacancy arose in the Material Requirement Planning department for an MRP Specialist. The role was a 12 month fixed term position, and if the claimant were appointed to it, she would be appointed on a secondment from her current contract, to which she would return (based in Glasgow) at its conclusion. The manager in charge of that area of the business was Geoff Soler Gomez. The claimant expressed an interest in the role (42ff) and then applied for it (45) on 13 May 2019.

31. As it turned out, the advertisement for that role was withdrawn as Mr Soler Gomez decided that it should be filled internally by a graduate or graduates from the graduate training scheme, owing to its temporary nature.

32. The claimant's evidence (paragraph 15 of her witness statement) was that she was very disappointed not to have the opportunity to take up this position, and that she came to understand that the reason was that if she were applying for the job to avoid going to Glasgow, she would not be appointed. She said this to Mr Muir, who responded that this was a misrepresentation of Mr Soler Gomez's position, which was that he would not be willing to see someone appointed as an alternative to going to Glasgow when they were not qualified for the position, as a number of people were doing. The claimant was not, he considered, in that category, as she had highly transferable skills into different parts of the business.

33. The claimant also became aware of a Freight Analyst position which became available, but which was never advertised, when, in her HR role, she was asked to draw up some paperwork. She met and emailed Mr Muir about this role and their exchange is produced at 75-78, in June 2019. This was a 6 months secondment to cover maternity leave, of which three months would be at Paisley and three months at Kilmalid. Mr Muir's position was that it needed to be filled urgently, and that this was done without an advertisement. Mr Muir did not regard this as a suitable opportunity for the claimant as it was so short and needed to be filled immediately. The claimant regarded this as an indication that the respondent was not taking seriously the need for her to be redeployed.

34. In June 2019, a vacancy arose for a Team Leader in the Bill of Materials section. Mr Muir considered that this would have been a good opportunity for the claimant, representing a promotion for her, and encouraged her to apply for it. This post was in the part of the business managed by Mr Soler Gomez. The claimant did not apply for this role. She was convinced, from discussions she had had with colleagues, that Mr Soler

Gomez would not assist her in finding alternative employment. She did not speak to Mr Soler Gomez directly at any stage.

35. The claimant submitted a formal grievance to the respondent on 1 July 2019 (55). Her grievance related to the "miscommunication" relating to her relocation to Kilmalid, and to the respondent's failure to take reasonable steps to secure her redeployment.

36. A grievance hearing was conducted on 7 August 2019, chaired by Leesa Henderson, Financial Manager, accompanied by Iona McDonald, Senior HR Business Partner, at which the claimant attended and was represented by Elaine Dougall. Notes of the meeting were taken (57-65).

37. Following the grievance, Ms Henderson wrote to the claimant confirming that her grievance was not upheld (66) by letter dated 22 August 2019. Ms Henderson advised the claimant that she considered that her refusal to undergo a trial period in Glasgow was unreasonable, and that her reasons for not wishing to move to Glasgow - her concerns about the reliability of transport and about her elderly parents' needs - were no different to concerns expressed by others involved. She went on to say that she believed that Ms Campbell was seeking to find a way to assist the claimant in the move, and encouraged the claimant to continue to look for alternative employment within the business.

38. She also notified the claimant of her right to appeal against the grievance outcome.

39. The claimant did appeal, by letter dated 28 August 2019 (72), highlighting what she considered to be discrepancies in the grievance outcome and her dissatisfaction with Ms Henderson's decision.

40. The appeal hearing was heard by Gordon Thomson, Customer Service Director, assisted by Ms McDonald on 2 October 2019. Notes of the appeal hearing were taken (79ff) and Mr Thomson wrote to the claimant on 9 October 2019 (85ff) to advise that he was not upholding her appeal.

41. The claimant remained absent due to ill health during the grievance process.

42. On 15 January 2020, Ms Campbell wrote to the claimant to advise that her application to the Income Protection Scheme had been refused (89). She went on to say that the HR team, of which she had been part, had been moved to the Glasgow office, and that the role she had been offered in Glasgow was identical to her role in Paisley. As a result, she said, the claimant had been offered suitable alternative employment. She went on to note that the reasons for the claimant's refusal to accept that alternative employment were that she was concerned about the reliability of transport to Glasgow from her home, and about the needs of her elderly parents. Ms Campbell confirmed that the respondent did not consider either of these reasons to amount to a reasonable basis to refuse an offer of suitable alternative employment. She stressed that the claimant had not provided any evidence in support of her assertions about the unreliability of transport to Glasgow from her home, and that the claimant had already had a degree of flexibility permitted to her in her work which would have continued and allowed her to attend medical appointments and other caring needs for her parents.

43. As a result, the respondent confirmed to the claimant that she would not be awarded a redundancy payment, having unreasonably declined an offer of suitable alternative employment from them, and that she would therefore be given 12 weeks' notice of termination of employment on the grounds of redundancy.

44. On 21 January 2020, the claimant submitted a formal grievance about the refusal to pay the claimant during her notice period of termination of her employment (95). That grievance was upheld by the respondent, and accordingly she was paid 12 weeks' pay in lieu of notice (96) on 27 January 2020.

45. On 3 February 2020, the respondent wrote to the claimant to confirm (102) that her termination date would be 31 January 2020, and that her

payment in lieu of notice and outstanding holiday pay would be paid to her at that point.

46. Following the termination of her employment the claimant sought to secure alternative employment, and presented evidence of her attempts to do so (135-139). Her efforts were frustrated by the onset of the restrictions imposed as a result of the coronavirus pandemic in the course of March 2020. However, on 22 September 2020, the claimant commenced new employment as an Administrator with Babcock International Group (129), at an annual salary of £21,412.

47. While employed by the respondent, her salary was £32,169 per annum, and in addition, she belonged to the company pension scheme into which she made contributions of 6% of her salary, and the respondent contributed £469.13 monthly.

Submissions

48. For the respondent, Mr McLaughlin presented a skeleton submission, to which he spoke. He submitted that the issue in the unfair dismissal claim is a narrow one: did Anne Campbell's words in the meeting in October 2018 and the subsequent correction of that position by Scott Livingstone in January 2019 render the dismissal unfair?

49. There are, he pointed out, two claims before the Tribunal: that the claimant was unfairly dismissed, and that she was unlawfully deprived of a redundancy payment.

50. With regard to the unfair dismissal claim, he described the claim as a "curious beast indeed". The claimant does not argue that redundancy was not the real reason for the dismissal, nor that the consultation was not reasonable; she raises no issues about the pool for selection, nor does she suggest that the respondent failed to make a suitable offer of alternative employment. He said that he had struggled to engage with the factual dispute as it was not identified as an issue of unfairness in relation to the dismissal.

51. Mr McLaughlin submitted that there has been no stateable challenge to the fairness of the dismissal. Mr Livingstone's decision that the HR Administration team should remain together and be moved to the Glasgow office is a business decision. It is not for the Tribunal to grapple with the rights and wrongs of that decision unless it can be said to be a bogus reason, which is not suggested in this case.

52. He described the claimant's claim as one in which she says that unfairness arises solely out of the fact that she was mistakenly led to believe for a period of three months that she would be based in Kilmalid and not Glasgow following the closure of the Paisley plant, though she expresses it differently. There are two slightly different versions of events before the Tribunal: the claimant says that she was to be based only in Kilmalid, with no flexibility around that, whereas the respondent says that the suggestion was more nuanced than that, in that she would be based at Kilmalid but would still need to work in Glasgow and with Glasgow colleagues. The respondent wanted to "make it work".

53. Mr McLaughlin argued that whichever version of the meeting of October 2018 is preferred, it cannot render the dismissal unfair. This is not the kind of factor which is taken into account under section 98 of the Employment Rights Act 1996. If there were some form of general unfairness in that change of position, the claimant knew by March 2019 that Glasgow was the likely destination and that she was not going to Kilmalid. The respondent was very clear about that. From an early stage, the claimant was also clear that she would not be moving to Glasgow.

54. He commended Ms Campbell's evidence to the Tribunal, to the effect that the claimant's "toys were out of the pram" after she became aware that the team would be moving to Glasgow, and that that was what caused her to say what she did in the October meeting. She did say that the respondent was "not in the business of pissing people off[1]. The claimant took no steps to have the matter put in writing. She complained in her grievance that Ms Campbell took no further steps to deal with this, but

Mr McLaughlin submitted that there was no need for her to do any more. Nobody told Scott Livingstone about this conversation.

55. After two or three months, events move on - Ms Campbell had to take time off due to personal tragedy, and when Mr Livingstone realised what the claimant was saying, he could not consult with Ms Campbell as to what had been said, but told the claimant clearly what his decision was. The claimant had her hopes dashed, which was unfortunate, but had no real impact on her because she was still 9 months away from the move at that point. When Ms Campbell returned to work, the claimant met with her but did not want to discuss the office move with her.

56. The claimant and Ms Campbell had worked together for 20 years or so, and had become friends, but the claimant was unable to identify precisely where Ms Campbell went wrong. This is not the factor which can give rise to a finding of unfair dismissal, but if it could, all that happened was that Ms Campbell raised her hopes of moving to Kilmalid, which were then dashed by Scott Livingstone some months before the move to Glasgow would actually happen.

57. He invited the Tribunal to find that there is no basis for finding that the claimant's dismissal was unfair. The claimant was not given an unequivocal undertaking, but was given reassurance in order to address her demeanour. Ms Campbell spoke spontaneously and in good faith.

58. If the dismissal is found to be unfair, he submitted, the Tribunal should not make any compensatory award but should make a 100% Polkey deduction. The claimant was aware from March 2019 that she was likely to be asked to move to Glasgow and decided she would not do so, despite conceding that the job in Glasgow amounted to an offer of suitable alternative employment. Had Ms Campbell said nothing in the meeting in October 2018, the claimant would still have been told that her role would move to Glasgow. She would have refused, and therefore, he argued, the dismissal would have been unfair. In any event, it would not be just and equitable to award either a compensatory award or a basic

award given that the claimant made little or no effort to engage with Robert Muir or the respondent more generally in relation to alternative roles at Kilmalid.

59. Mr McLaughlin then turned to the claim for a statutory redundancy payment. He submitted that the burden of proof is on the respondent to demonstrate that the claimant unreasonably refused an offer of suitable alternative employment. The claimant's behaviour around the issue of the refusal must be judged, looking at the matter from her point of view, on the basis of the facts as they appeared, or ought reasonably to have appeared, to her at the time when she made her decision.

60. The claimant accepts that the HR Administration role in Glasgow amounted to suitable alternative employment. The reason why she maintains that it was reasonable to reject the offer was not for any reason related to transport or the need to be closer to her parents, but because she was misled by Ms Campbell in October 2018 about where she would be relocated. He submitted that it was unreasonable for the claimant to have rejected the offer on the basis that she had been misled, for a period of three months, as to where she would be relocated. This is not the type of factor personal to the claimant which can render her refusal reasonable. The claimant had already decided from an early stage that she would not move to Glasgow and had been resigned either to leaving or finding a job outwith HR in Kilmalid.

61. It is also relevant, he submitted, that Ms Campbell's words were spontaneous and well-intentioned, in response to the claimant's demonstrable unhappiness at being moved to Glasgow. The claimant knew that the decision would ultimately be Scott Livingstone's, and not Anne Campbell's. She did not seek, nor was she given, written confirmation that she would be moved to Kilmalid. The claimant refused to talk about the matter with Ms Campbell, who apologised to her.

62. Mr McLaughlin submitted that the Tribunal should find that it was not reasonable for the claimant to have refused the offer of suitable

alternative employment, and therefore that she was not entitled to a redundancy payment.

63. For the claimant, Mr Bathgate said that this was a particularly sad case, in which a long working relationship had broken down, and that it was tragic that it had come to the point where the parties faced each other in a defended claim before the Tribunal. Both parties, he submitted, had conducted themselves with dignity before the Tribunal.

64. He accepted that this is a peculiar situation in which the claims arise.

65. He submitted that it is a matter for the Tribunal to determine whether the claimant's refusal of the offer of suitable alternative employment was a reasonable one, based on the claimant's own perspective and in her circumstances.

66. With regard to the unfair dismissal claim, Mr Bathgate said that this case gave rise to issues of behaviour, and that it is necessary to consider the terms of section 94 in determining whether the respondent acted reasonably in treating redundancy as a sufficient reason for the claimant's dismissal.

67. He submitted that the Tribunal needs to consider whether an undertaking or commitment was made to the claimant that she would be based at Kilmalid. If she was, the Tribunal requires then to assess, under the general test of reasonableness, whether the decision to renege on that commitment and insist that she move to Glasgow rendered the dismissal unfair. He argued that it did.

68. He asked the Tribunal to compare the evidence of Ms Campbell before the Tribunal with her evidence to the grievance. She said in the grievance response that her intention was, following the meeting in October 2018, "100%" to find a solution, but she did nothing after that meeting, as nothing could have realistically have been done.

69. He invited the Tribunal to make a finding that at the meeting in October 2018, Ms Campbell did make a commitment to the claimant that she

would be based at Kilmalid. There was no need, thereafter, for her to seek clarification or confirmation of the position since it was clearly given. She did not consider it appropriate to have a discussion with Ms Campbell on the day that she returned from bereavement leave in May 2019. The parties had taken up entrenched positions but that cannot all be laid at the door of the claimant. Despite the claimant talking widely within the department about the commitment made to her, no steps were taken to disabuse her of her understanding that she would be based at Kilmalid.

70. Mr Bathgate insisted that the evidence demonstrated that the claimant did take reasonable steps to seek alternative employment contrary to what was suggested by the respondent. It must be borne in mind that the claimant was aggrieved. It was an issue of trust and confidence that the claimant believed that her employer had reneged on a commitment made to her. That put barriers in the way of that employment relationship continuing. She went down a grievance route and effectively nobody believed her.

71. He submitted that the claimant did not unreasonably refuse the offer of suitable alternative employment in Glasgow. She was entitled to do so given that she was told she would be based in Kilmalid, and when that was taken away from her it was reasonable for her to have declined the offer of a role in Glasgow.

72. That withdrawal of the commitment to allow her to be based at Kilmalid rendered the dismissal unfair.

73. This is not a case for a Polkey deduction from compensation. The issue between the parties was a substantive, not a procedural, one. He invited the Tribunal to make an award based on the schedule of loss as a just and equitable assessment of compensation.

74. Mr Bathgate therefore invited the Tribunal to uphold both claims on behalf of the claimant and make the awards set out in the schedule of loss in full.

The Relevant Law

75. Redundancy is defined, in section 139(1) of ERA, as follows:

> Tor *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 -*
>
> *1. the fact that the employer has ceased or intends to cease -*
>
> *a. to carry on the business for the purposes of which the employee was employed by him, or,*
>
> *b. to carry on that business in the place where the employee was so employed.."*

76. Section 141(2) provides that "where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer." That offer, referred to in subsection (1), is an offer either to renew his contract of employment or to re-engage him under a new contract of employment.

77. Section 141(3) sets out the circumstances in which subsection (2) is satisfied, namely that the provisions of the new or renewed contract offer do not differ from the previous contract in relation to the capability and place in which the employee would be employed, and the other terms and conditions of his employment, or the contract offer is one containing different terms and conditions but which "constitutes an offer of suitable employment in relation to the employee."

78. The Tribunal also considered carefully the statutory provisions in relation to unfair dismissal. The respondents require to show that dismissal, where admitted, was for a reason potentially fair under section 98(1) of the Employment Rights Act 1996 (ERA). In this case, the reason was redundancy.

79. The Tribunal also had regard to section 98(4) of ERA, in which the Tribunal needs to be satisfied that in the circumstances the employer

acted reasonably in treating the reason relied upon as a sufficient reason for dismissing the employee.

80. The well known case of **Williams & Others v Compair Maxam Ltd [1982] ICR 156** sets out basic principles for employers to carry out a fair redundancy process. It is necessary for a Tribunal to take into account current standards of fair industrial practice, such as whether the employers had given the maximum warning of impending redundancies, whether they had consulted with the union as to the criteria to be applied when selecting employees for redundancy, whether those criteria were objective rather than subjective, and whether they could have offered employees alternative employment before dismissing them.

81. The Tribunal also had regard to the other authorities to which we were referred.

Discussion and Decision

82. In this case, it is necessary to address the issues, which have been agreed, and which have been set out above. I repeat them here for convenience:

> **"1. The Claimant's only challenge to the fairness of the dismissal arises out of the fact that the Respondent confirmed to her that she would be based full time at Kilmalid once the Paisley Depot closed when, in fact, it had been decided that she would be based in Glasgow. The Claimant takes no issue with the consultation nor does she assert that the failure on the part of the Respondent to identify alternative employment at Kilmalid renders her dismissal unfair.**
>
> **2. In relation to the Claimant's claim for a statutory redundancy payment, she accepts that the HR Administrator's role based in the new office in Glasgow City Centre was suitable alternative employment**

3. She maintains it was reasonable for her to refuse that offer because she had been told that she would be based in Kilmalid and the Respondent reneged on that undertaking. In terms of the reasonableness of her refusal of the role in Glasgow, she does not seek to rely upon the time or cost of travel to Glasgow as compared with Paisley or her responsibilities to her parents."

83. These issues are set out in a slightly unusual form, but essentially the issues in this case are:

1. Did the respondent dismiss the claimant unfairly?

2. Was the respondent entitled to withhold the claimants redundancy payment?

84. I take these issues in turn.

Did the respondent dismiss the claimant unfairly?

85. As both representatives have acknowledged, the basis of this claim is unusual. The claimant was dismissed on the grounds of redundancy. That was accepted by the claimant, and there is no dispute on this before me. The claimant also accepts that her role at Paisley was redundant, owing to the closure of the plant there. She does not challenge the decision itself as being unfair, nor does she argue that the respondent failed to follow a fair consultation process. She does not suggest that she should not have been included within the pool for selection for redundancy, given that she was employed at a plant which was closed.

86. The claimant's claim is that having been given a commitment, in October 2018, by Ms Campbell that she would be based at Kilmalid, and having had that commitment withdrawn by Mr Livingstone in January 2019, her dismissal on the grounds of redundancy was unfair.

87. It appeared to me that both parties were struggling to articulate precisely the basis upon which it was said that the claimant was unfairly dismissed by the respondent as a result of this sequence of events.

88. Mr Bathgate sought to rely upon the terms of section 94 of ERA, which provides, in subsection (1), that *"An employee has the right not to be unfairly dismissed by his employer",* and on section 98(4), which requires the Tribunal to consider the matter in light of equity and the substantial merits of the case. He sought to persuade the Tribunal to consider the "general unfairness" visited upon the claimant by the respondent's actions.

89. In analysing this matter, I considered that the claimant was endeavouring to show that her dismissal was unfair on the basis that a commitment was made to her to work at Kilmalid, which was then withdrawn (or reneged upon) by the respondent, in January 2019.

90. What was necessary for the claimant was to demonstrate the connection between that issue and the decision to dismiss her, with effect from 31 January 2020.

91. As I read it, what was being put forward on behalf of the claimant was that there was general unfairness to her in the withdrawal of the commitment made by Ms Campbell, which then tainted the dismissal. In effect, the respondent acted in such a way as to damage irrevocably the trust and confidence which she could have in them as her employer.

92. It is accepted by the claimant that the normal factors which would be raised in a claim of unfair dismissal where the reason for dismissal was redundancy, as set out in the case of **Williams & Others v Compair Maxam Ltd [1982] ICR 156,** do not form part of her claim. The respondent was entitled, therefore, to declare that the claimant was redundant, due to the closure of the plant where she was employed to work; they carried out the necessary consultation process, and indeed it was clear that well before the move took place the staff were being advised of the employer's intentions; they selected the claimant, fairly, to be included in the pool for selection for redundancy; and perhaps most importantly of all in this case, they offered her suitable alternative

employment, namely her own job but relocated to the Glasgow office in Blythswood Square.

93. Whether the claimant acted reasonably in rejecting that offer of suitable alternative employment has no bearing on the fairness of the dismissal (though it does arise in relation to the second issue under consideration).

94. The claimant does not dispute that she was redundant, nor that the process leading to her dismissal was fair.

95. So far as the discussion in October 2018 is concerned, it is plain that the claimant and Ms Campbell have different recollections of the precise words which were used, but each is convinced as to the effect of those words. In my judgment, the critical comment, accepted by Ms Campbell, was that the claimant could be "based at Kilmalid". The claimant discerned from that comment that she would be working at Kilmalid for her whole working hours, with no need to travel to Glasgow. She maintained that Ms Campbell actually said that to her. Ms Campbell denied that she said that, but accepts that she used the words "based at Kilmalid". What she says she meant by that was that the claimant could work several days per week from Kilmalid, one day at home and the remainder of the week in Glasgow, which she says she assured the claimant would still be her base.

96. Resolving the differences between the parties' recollections as to what was precisely said is extremely difficult. The matter may have been advanced had statements been taken in the grievance process from the two other individuals present at the meeting, or had they been called as witnesses to the Tribunal, but no such evidence was available other than Ms Milroy's confirmation that a statement had been made to the effect that the claimant could be based at Kilmalid.

97. Whatever was intended by Ms Campbell in saying what she said, (and she clearly meant to reassure the claimant, or at the very least try to cheer her up) the claimant plainly left that meeting with the clear

impression that she did not have to move to the Glasgow office when the Paisley plant closed.

98. That was not, however, the end of the matter, because in January 2019, Mr Livingstone made clear to the claimant that Glasgow was where she would be expected to move and work. At that point, the decision was clear. The respondent's position did not change thereafter.

99. The claimant seems to have suggested that this change of position meant that she lost all trust and confidence in the respondent's conduct towards her. This is not, however, a claim for constructive unfair dismissal, but for unfair dismissal on the grounds of redundancy.

100. Having considered the submissions made by both parties very carefully, I have come to the conclusion that there is no basis for the claimant's claim that she was unfairly dismissed. There is no basis for criticising the respondent for their decision to terminate the claimant's employment on the grounds of redundancy. She was redundant. She did not obtain any alternative employment within the respondent's business, and in particular she was offered what she accepts was suitable alternative employment but rejected that offer. A fair process was followed, and in light of the facts set out, it was inevitable that the claimant's employment would be terminated.

101. There is nothing unfair about the respondent's decision to dismiss her once it was clear that no alternative employment was acceptable to her or found for her. The claimant's appeal to "general unfairness" is entirely unclear to me in these circumstances. She may feel that it was unfair for the respondent to hold out to her the hope that she could move to Kilmalid full time, but when it was made clear to her that that would not be an option, there was still a considerable period of time within which to find alternative employment within the business. Given that she has not established a basis upon which it can be said that the dismissal was unfair because of the conversations about which she is particularly displeased, her claim to have been unfairly dismissed must fail. It is, on

the facts before me and as pled, impossible to discern a proper basis for that claim.

102. The claimant's claim of unfair dismissal must therefore fail, and it is dismissed.

Was the respondent entitled to withhold the claimant's redundancy payment?

103. The claimant accepts that the offer of her existing job, on the same terms and conditions as she had, but relocated to Glasgow, amounted to an offer of suitable alternative employment.

104. The question for the Tribunal, therefore, is whether the claimant unreasonably refused that offer.

105. It is important to establish the reason why the claimant says she rejected that offer. She does not rely upon the two reasons which she seems to have put forward at the time, namely that she was concerned about the reliability of the train service between Balloch and Glasgow, and that she wished to be available for her parents and therefore working closer to Dumbarton. Were these the reasons relied upon, it would be important to consider them carefully in order to establish their reasonableness.

106. However, the claimant relies solely upon the fact that she did not wish to move to Glasgow because she had been promised a move to Kilmalid, and the respondent reneged on that promise.

107. At best, it seems to me that the claimant's argument is that it was reasonable for her to refuse the offer of alternative employment because she no longer trusted her employer.

108. In my judgment, and in the circumstances of this case, that cannot amount to a reasonable basis upon which to refuse an offer of suitable alternative employment. The claimant seems to be suggesting that the respondent was guilty of a repudiatory breach of contract, which she was aware of in January 2019. However, she did not resign in response to

that alleged breach of contract, but remained in employment until the respondent dismissed her on the grounds that she was redundant.

109. There is an inconsistency in the claimant's position here. She says that the respondent is wrong when they say that she failed to take proper steps to identify suitable alternative jobs with the respondent, and that she did do so, making reference to a number of positions in which she was interested. If that is correct, then it cannot be found that the claimant could have no trust and confidence in her employer: she sought to continue her employment with them in the form of work at Kilmalid.

110. As a result, it is my judgment that the claimant cannot be said to have genuinely believed that her relationship with the respondent was irrevocably broken down. That cannot, therefore, be relied upon by her as a reason for her rejection of the offer of suitable alternative employment.

111. A clear theme which emerges from the evidence is that the claimant was, from the outset, resolved not to move to Glasgow, and deeply annoyed at the respondent for this suggestion. The respondent's position is essentially that the claimant rejected the offer because she was "in the huff', in other words that she was disaffected and disillusioned, and as a result decided not to engage with the process which might have led to her accepting the offer of the position in Glasgow. She was unwilling to discuss the matter, or any flexibility, with Ms Campbell upon her return from bereavement leave. Her explanation was that she did not think it appropriate to discuss such a matter with her at such a time, though she did not think it inappropriate to ask questions of Ms Campbell about the death of her husband. It seems to me that discussing a work situation with a work colleague at the point where that colleague has been certified as fit to return to work would be entirely appropriate, particularly when Ms Campbell brought the subject up.

112. Having considered all of these matters carefully, I have reached the conclusion that the claimant did not reasonably refuse the offer of suitable

alternative employment made to her by the respondent. She does not rely upon the two practical reasons which she relied upon at the time, and therefore there was no practical reason for her to refuse the offer. The only reason was, to put it crudely, her displeasure with the respondent at their actions of some 9 months before. That does not, in my judgment, form the basis for a reasonable refusal in these circumstances.

113. Accordingly, it is my judgment that the respondent was entitled to conclude that the claimant's refusal of the offer of suitable alternative employment was unreasonable, and thereby to withhold her redundancy payment.

114. This claim by the claimant therefore must fail.

Employment Judge: Murdo Macleod
Date of Judgment: 12 February 2021
Entered in register: 24 February 2021
and copied to parties