



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100115/2018 Held in Glasgow on 25, 29, 30 & 31 May 2018

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Employment Judge Shona MacLean

Mrs S Fallon

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Claimant
Represented by:
Mr LG Cunningham
Advocate

British Gas Services Limited

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Respondent
Represented by:
Ms V Kerr
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the applications should be dismissed.

REASONS

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Introduction

1. The claimant alleges that she was unfairly dismissed, the effective date of termination being 21 August 2017. The claimant also alleges that the respondent is in breach of contract failing to pay the contractual redundancy payment.

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2. The respondent's case is that the claimant was dismissed following extensive absence management from July 2016 until August 2017. After the absence management process the respondent says it had a genuine and reasonable belief that the claimant was not fit to carry out her role. There were no suitable adjustments or alternatives available. Accordingly, respondent's decision to

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dismiss the grounds of capability was reasonable. As regards the breach of contact claim the respondent says that the claimant has not dismissed by reason of redundancy (or placed at risk of redundancy). Therefore, the respondent submits that there was no right to the contractual or statutory redundancy payment. Alternatively, if the claimant was dismissed because of redundancy respondent says that the claimant declined suitable alternative position and therefore forfeited the right to a redundant.

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3. It was agreed that the hearing would be restricted to liability only. The issues to be determined by the Tribunal were:

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- a. What was the reason for the claimant's dismissal?
- b. Was the reason a potentially fair reason?
- c. If so was it reasonable in the circumstances for the respondent to dismiss the claimant for that reason?
- d. Was the respondent in breach of contract by failing to pay the claimant contractual redundancy pay?

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4. The Tribunal heard evidence from Nicole Donnelly, Area Customer Relations Manager (the claimant's line manager); Ann Hislop, Area Customer Relations Manager (the dismissing officer), James Stevenson, Area Customer Relations Manager; Eleanor Curran, Business Manager; and Suzanne Rourke, HR Manager. The claimant gave evidence on her own account.

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5. The Tribunal found the following essential facts to be established or agreed.

Findings in Fact

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6. The respondent employed the claimant from 3 April 2000. The respondent provided the claimant with a statement of terms and conditions of employment dated 22 March 2000 (production 139). It states that the claimant's job title is customer service adviser and her place of work is Uddingston. It also provides that collective agreements of the appropriate Services Joint Councils and Senior Officers will apply in respect of the claimant's employment.

7. The respondent has redundancy compensation for gas staff and senior officers (levels 7 and 8) who are made redundant because of circumstances covered by section 139 of the Employment Rights Act 1996 (the Contractual Redundancy Scheme) (production 152 and 152A). The respondent shall
5 decide in each case whether the circumstances under which an employee is made redundant are such that the scheme should operate and whether the provisions for redundancy compensation should be applicable. An employee who has been made redundant is eligible consideration under the Contractual Redundancy Scheme. There is no entitlement to a redundancy compensation
10 payment under the Contractual Redundancy Scheme if an employee refuses suitable alternative employment with the respondent not involving additional travelling and/ or change of residence.
8. In March 2016 the respondent proposed reorganising its activities by closing
15 its Oldbury office, creating Centres of Excellence in Uddingston, Stockport and Leicester and moving some back office processing to external partner arrangements. It was anticipated that this would improve efficiency within the respondent's business as well as improving consistency of service to customers.
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9. It was proposed that Stockport be the home of home installation and the Centre of Excellence for planning and dispatch. Uddingston was to be the Centre of Excellence for customer relations, retention and operational
25 process. Leicester was to be the Centre of Excellence for multi-product customer service and digital.
10. A collective consultation process was then carried out during which these proposals were agreed with the trade union representatives and employee
30 representatives.
11. One of the respondent's key objectives was to minimise the number of possible redundancies. In the new Centres for Excellence the respondent proposed a principle that the activities of all level 8 (L8) colleagues be aligned to an L8 position in the specialism for the centre that they worked within. The

requirement for customer service advisers at level 8 remained the same. There were alternative L8 roles for all the L8s. They were to be transitioned without the need of an interview process. The respondent proposed that full support and training be provided for L8 colleagues as the Centre of Excellence were established and the activities were aligned. The L8 colleagues were not at risk of redundancy. No notice of dismissal by reason of redundancy were issued to them and no statutory trial period was offered (production 90).

10 12. As part of the collective consultation meetings on 10, 18, 24, 31 May 2016 there was discussion around concerns about alignment and thinking regarding suitable alternative roles. The respondent considered that L8 colleagues were employed on generic terms, they had transferable skills which were appropriate to move to other departments.

15 13. The claimant worked in Uddingston as a customer service adviser. She was worked in planning and moved to dispatch three years previously. The claimant reported to Nicole Donnelly, Operation Service Manager. The claimant thought she was in a unique position being the only person in
20 dispatch who was hoping to have the option of redundancy. She sent an email to the respondent asking who chose to align dispatch to customer relations and why (production 157). Hayden Heaney, Head of HR replied to the claimant by email on 14 June 2016 which was copied to the Lindsay McNaught lead Unison National Representative (production 156):

25 *"Whilst there may be fewer similarities in the duties of the current Dispatch and OR roles, the skills required skills are interchangeable and we believe that the right training and support the transition will work for our people - and we are committed to ensuring that everyone has that support throughout the
30 transition phase and into the future."*

14. By 15 June 2017 the overall sentiment of people in Uddingston was that they were *"okay with the proposals with a handful of exceptions; keen to move to*

individual 121's and have clarity' (production 130). The final collective consultation meeting took place on 21 June 2016.

- 5 15. Individual consultation process also took place. The claimant's one to one meeting with Ms Donnelly took place on 6 July 2016. The claimant expressed concerns about moving to customer relations and retraining without any protection at her age. The claimant said that customer relations was not a job that she would choose to apply for. She did not think it was a job she could or wanted to do. The claimant said that she was going through the
10 menopause and was already struggling with his symptoms. She did not consider that she had the nature or capability to deal with the constant negativity. Also her daughter and sister-in-law both worked in the customer relations and that could cause pressure within the family. The claimant said that she was being mapped because she was a generic customer service
15 adviser. That was not what it said in her contract. The claimant was happy to leave the business through redundancy for someone else who was at risk to leave. She had concerns about performance management. She had been in dispatch for years and there were still things about which she was not confident. The claimant also that she had issues with her eyesight (production
20 426).
16. The claimant was signed off from work on 6 July 2016 due to broken ribs and a broken toe.
- 25 17. On 27 July 2016 Ms Donnelly wrote to the claimant about the points raised in the one-to-one meeting on 6 July 2016 (production 161). The claimant's existing terms and conditions of employment, including pay and benefits would remain unchanged. The claimant would be fully supported during the transition through appropriate training and coaching. The respondent
30 considered that it had a contractual right to vary the claimant's duties in accordance with the needs and requirements of the business. The unions had been consulted and the rationale behind the alignment exercise fully explained. Accordingly, the claimant's objections to the alignment were not

reasonable. The matter was concluded and that the claimant would commence customer relations duties with effect from August/September 2016.

5 18. At the first employee review meeting on 12 August 2016 the claimant said that as well as her broken ribs and toe she was feeling stressed (production 162). Work was a very big contribution to her personal stress along with various other factors. The claimant said that she was *"concerned about work for a while, then I broke my ribs, my dog died, my dad has not been well and*
10 *then the house move"*.

19. At the second employee health review meeting on 7 September 2016 the claimant said that her ribs were getting better but she was feeling anxious (production 165). The claimant referred to the same contributory factors
15 mentioned previously. When asked about her new role in customer relations the claimant said that she found the change in work time frustrating but had not thought about it as so many other things were going on. As the claimant is not fit to return to work the respondent discussed the medical support and what respondent could do to help. The claimant was also reassured that
20 although the rest of the team were in training for the new role of customer relations the claimant would receive the same training when she was fit to return to work.

20. The respondent's occupational health provider, MyHealth contacted the
25 claimant around 12 September 2016. The claimant remained absent. Ms Donnelly kept in regular telephone contact with her.

21. On 20 October 2016 the claimant attended a third employee health review
30 meeting (production 173). The claimant said that she was not yet fit to return to work. Her doctor had signed her off as unfit for work for a further four-weeks. Ms Donnelly offered to arrange counselling but the claimant did not feel this was necessary. The claimant was on new medication. Returning to work was not on her radar. It was agreed that the claimant would contact the respondent after her next doctor's appointment.

22. On 17 November 2016 the claimant informed the respondent that her doctor had signed her off work for further eight weeks (production 175). The claimant still had worries about returning to work and wanted redundancy (production 175).

23. On 25 November 2016 Gemma Cotterel of MyHealth spoke to the claimant following which she prepared a report (the November report) (production 176). It stated:

In my opinion Ms Fallon is fit for work in some capacity; with sufficient motivation and a more positive view of her capabilities she should be able to return to work with an appropriate support in place i.e. a supportive phased return to work plan; however a return to her new role is unlikely to be successful due to her residual psychological symptoms and her perceptions about the role."

24. On 1 December 2016 the claimant attended a fourth employee health review meeting with Ms Donnelly (production 178). Kevin Donnelly, HR Manager was present. The claimant was accompanied by Donna Marie Lyons, Trade Union Representative. The claimant said that she was feeling better. The claimant asked for clarification why she was declined redundancy when her role changed. She spoke about her perceptions of the customer relations role. Mr Donnelly asked the claimant if she would be willing to test her perception of the role in a controlled and supportive environment. Starting by returning to work, going through the required training and starting the role. The claimant said that the role was not her and asked if there were any roles which will not customer facing.

25. A follow-up meeting took place on 14 December 2016 (production 179). The claimant was advised that her role was not redundant and save for a change to her duties her terms and conditions remained unchanged. The claimant was also told that the only roles available at that time were in customer relations and customer service. The first, the claimant said that she would not

choose and the second she said that she did not want. The claimant was asked to speak to her manager about what a phased return to work, when she was fit to return, would look like.

5 26. The respondent concluded another collective consultation in Project Lime about 15 December 2016 which resulted in 14 people in the Marcomms Administration Team being put at risk of redundancy. There were no roles available in which these employees could be aligned. Individual consultation followed.

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27. The claimant and Ms Donnelly agreed a phased return to work at a meeting on 6 January 2017 (production 181). The claimant said that she felt she would be fit to return following the expiry of her current sicknote on 18 January 2017. She would return to work on significantly reduced hours. The hours were then to increase gradually each week until she was working full-time starting from 15 27 February 2017. It was agreed that the claimant would spend the first three days at work settling back in clearing her emails. She would then begin one-to-one training the following week. The claimant still had reservations about the customer relations role. She intended to raise a grievance as she did not 20 feel that the matters have been resolved informally. Ms Donnelly provided the claimant with a copy of the grievance process.

28. On 9 January 2017 the claimant contacted Ms Donnelly about proposed annual leave (production 188). Ms Donnelly informed the claimant that she 25 was unable to grant some of the claimant's annual leave request. Ms Donnelly explained that there were rules and what percentage of annual leave in any given dates and those states had already been booked. Ms Donnelly offered to find out if anyone would be willing to swap the claimant shifts on the dates. The claimant declined this offer.

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29. On 12 January 2017 the claimant raised a grievance regarding the dispatch role being transferred to the customer relations role in August 2016 (the first grievance) (production 187). The claimant felt that the customer relations role was not similar to the dispatch role nor was not suitable alternative

employment. She was 54 years old she did not wish to undergo training for another role at this stage in her working life. The claimant said that there was nothing in her contract entitling the respondent to vary her duties.

5 30. On 17 January 2017 the claimant telephoned to say that she had been signed off as unfit to work for a further four weeks (production 190). She would not be starting the agreed phased return on 18 January 2017. The claimant said that by not granting her holiday request she felt that a block was being put in front of her. Ms Donnelly told the claimant to let her know if she could to help.
10 Ms Donnelly would arrange for MyHealth to contact the claimant.

31. The claimant attended a grievance hearing on 1 February 2017 (production 201). It was conducted by Graeme Butchart. The claimant was accompanied by Ms Lyons. The claimant expanded upon her first written grievance. She
15 described her role in dispatch. The claimant said that it was different from the customer relations role. The claimant felt that she could not deal with the negativity. She felt that regardless of who she spoke to she received the same answers. She had also spoke to the union but had the "same line from everyone". The claimant offered to show Mr Butchart her contract. He said
20 that he would obtain a copy. Mr Butchart investigated the grievance and made enquiries.

32. The claimant attended the fifth employee health review meeting on 7 February 2017 (production 210). Ms Donnelly was not involved in the
25 grievance process. The claimant said that her absence was due to work related stress. She was continuing with her mediation. She had started back at the gym. She was having trouble with her gallstones. The claimant did not consider that she would benefit from further support from MyHealth. The claimant said that refusing her holidays was a barrier to her returning to work
30 but could not say if they had been approved she would have returned. The claimant said that she did not feel she could discuss return to work until she received her grievance outcome. It was agreed that a further employee health review meeting would be carried out once the grievance outcome was issued.

33. MyHealth issued a case management report on 2 March 2017 (the March report) after receipt of a report from the claimant's doctor and a review with the claimant (production 219).
- 5 34. The March report stated that the claimant has been absent from work for eight months. My Health was unable to foresee a timescale for this changing. This was also the view of the claimant's doctor. The recommendation was that the claimant should run to work as soon as possible to avoid making it more difficult to return. This would depend on the outcome of the grievance and her acceptance of it.
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35. Mr Butchard investigated the claimant's first grievance. He concluded that her contractual role was a L8 customer service adviser. In consultation with the union it was agreed that that activities of all L8 colleagues would be aligned to the specialism in for the centre in which they were located. The claimant's role had never been placed at risk of redundancy. The claimant was aligned to a similar role with broadly comparable skills. With the relevant training, coaching and support the claimant should successfully transition into the customer relations role. The claimant's role as customer relations adviser required a very similar core skills and similar work to be carried out. Mr Butchart did not uphold the first grievance. This was confirmed in a letter to the claimant dated 13 March 2017 (production 221)
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36. The claimant appealed the first grievance outcome on 27 March 2017. The claimant said that she was being bullied into a role that was neither similar or suitable (production 235). She also considered that Mr Butchart failed to undertake a detailed analysis of the roles.
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37. On 31 March 2017 Ms Donnelly prepared an attendance report reviewing and considering the claimant's absence (production 242) She noted that since 6 July 2016 the claimant had been absent for 185 days. Ms Donnelly believed that the appropriate adjustments and support had been offered to the claimant. She concluded that as claimant was unable to provide a realistic return to work date; she did not utilised the support avenues available to her
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and the detrimental effect of the claimant's absence on the business the claimant should be invited to attend an absent management meeting to review the situation and establish if there were any alternative supports that may be a better support to the claimant. The claimant's work was being covered by colleagues.

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38. On 12 April 2017 the claimant attended a grievance appeal hearing with Lorraine McCluskey Hall who had investigated the points that had been raised. The claimant was accompanied by Ms Lyons. Ms McCluskey Hall wrote to the claimant on 28 April 2017 dealing with each ground of appeal, setting out her findings and conclusions. Ms

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39. In April 2017 vacancies became available in customer services. These were not new roles but they had become available due to attrition. The Marcomms Administration Team who had been placed at risk of redundancy in December 2016 had been confirmed as redundant and had the right of appeal. These vacancies were a redeployment opportunity. There were insufficient vacancies for the entire Marcomms of all the Administration Team.

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20 40. By letter dated 27 April 2017 the claimant was invited to a stage 4 attendance hearing under respondent's attendance management policy and procedure (production 27). The claimant was warned that the possible outcome of the hearing was the termination of employment (production 272).

25 41. Ann Hislop was the lead for the stage 4 attendance hearings. James Stevenson was present to ensure that nothing was missed and to assist with any investigation.

30 42. Ms Hislop was not involved in the grievance procedure but knew that the attendance hearing had been delayed until the grievance was concluded. She was experienced in attendance management. Ms Hislop was had no previous involvement with the claimant. It was her decision as to the claimant's continued employment. Ms Hislop read the attendance report but had no preconceived view. She wanted to discuss it with the claimant.

43. The attendance hearing took place on 4 May 2017. Ms Lyons accompanied the claimant (production 278 to 293). The claimant's absence was discussed in detail. The claimant said that the customer relations role was not suitable and that redundancy should be an option. The claimant could not give a definitive date for her return to work. The claimant raised the possibility of medical retirement as an option. She also mentioned accessing her pension at 55. The attendance hearing was adjourned to allow Ms Hislop to investigate this.

44. The attendance hearing reconvened on 15 May 2017. Ms Hislop said that it was possible to get notification of vacancies on the claimant's personal email address and offered to help the claimant. Ill health retirement was discussed. It was explained that ill-health retirement only came into play when the employee is not able to carry out any role or in the foreseeable future. The claimant referred to menopause being a contributory factor to her stress and anxiety. This had not been considered by MyHealth. The attendance hearing was again adjourned for MyHealth to consider this.

45. The claimant raised a second grievance on 23 June 2017 about the respondent's decision to make the Marcomms Sales Administration Team redundant rather than use the business principles set out during Project Stone (the second grievance) (production 326).

46. Ms Cotterell of MyHealth had requested a medical report from the claimant's doctor around 24 May 2017. When this was obtained Ms Cotterell issued a case management report on 28 June 2017 (the June report) which stated:

"Based on the available information Ms Fallon is currently unfit for work in any capacity and I am unable to foresee when this may change" "There has been little progress with this situation almost 12 months and therefore it is reasonable to suggest that this is unlikely to change or in the foreseeable future". It continues "It is likely that Ms Fallon will fit to work in an administrative role which does not involve the claimant demands associated

*with her new role, but timescales for this indeterminate. Ms Fallon has been clear that she cannot envisage a return to work in the near future and she wishes to explore what alternative options remain open to her**. It also notes *I am unable to suggest any modifications that are likely to facilitate a return to this type of role*" (production 320).

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47. Alyson Aird met the claimant on 7 July 2017 to discuss the second grievance. The claimant was accompanied by Lindsey McNaught Trade Union Representative (production 338).

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48. Following investigation Ms Aird wrote to the claimant on 12 July 2017 advising that the second grievance had not been upheld (production 347). It was explained that under Project Lime the Marcomms Sales Administration Team of 14 people were involved in collective consultation in December 2016 when they were placed at risk of redundancy and through individual consultation were confirmed as redundant with the right of appeal. Within customer relations vacancies became available in April 2017 due to back fill for leavers following natural attrition. This presented redeployment opportunity not mapping opportunities as the Marcomms Sales Administration roles had been confirmed as redundant. The principle of mapping L8 to L8 roles in Project Stone was based on their being enough roles for everyone with no one being at risk of redundancy.

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49. On 20 July 2017 the claimant appealed against the second grievance outcome on the grounds of failing to investigate and consider comparable justice (production 353).

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50. The attendance hearing reconvened on 27 July 2017 (production 354). The claimant was accompanied by Ms Lyons. The June report was discussed. The claimant did not say anything to Ms Hislop that was contrary to the June report. It was explained to the claimant that because of the change in prognosis, medical redeployment was an option. Ill-health retirement and medical redeployment dominated the discussion.

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51. David Rigby conducted the second grievance appeal hearing on 14 August 2017 (production 363). Ms Lyons accompanied the claimant.
52. The attendance hearing reconvened on 15 August 2017 (production 368). Ms Lyons accompanied the claimant. It was explained to the claimant that it was her choice whether she wished to pursue ill health retirement. The claimant did not wish to pursue this. Medical development was also discussed at length. The claimant did not wish to pursue medical redeployment. The attendance hearing was adjourned for Ms Hislop to consider the matter.
53. On 16 August 2017 Mr Rigby wrote to the claimant advising that her second grievance appeal was unsuccessful (production 379). Mr Rigby said that the decision to map the L8 roles in Project Stone was reached without the need to perform any formal evaluation and overriding that the L8 contract of employment generically covered both roles. In Project Lime the roles were already put at risk of redundancy before the vacancies became available and the number of vacancies were less than the number of people within the Marcomms Administration Team.
54. The attendance hearing reconvened on 21 August 2017 (production 383). The claimant's absence was summarised. Ms Hislop offered to look at ill health retirement but the claimant was not interested. The claimant had nothing further to add.
55. Ms Hislop considered that there was no foreseeable return to work for the claimant. The claimant did not wish to pursue ill health retirement or medical redeployment. As Ms Hislop could not manage the claimant's return to work she concluded that the claimant's employment should be terminated on the ground of capability. This decision was confirmed to the claimant in a letter dated 25 August 2017 which also set out Ms Hislop's reasoning (production 386).
56. The claimant appealed the decision to terminate her employment by email sent on 6 September 2017 (production 393). The main grounds were that the

claimant said that the respondent had caused her ill health by not keeping promises to ensure that everything would be done to help her return to work in January 2017; the absence management and the second grievance should be one process; and she did not refuse medical redeployment or ill health retirement.

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57. The claimant was invited to an appeal hearing conducted by Eleanor Curran, Business Manager on 21 September 2017. Paul Verrichia, Trade Union Representative accompanied the claimant. Ms Curran considered the grounds of appeal and made findings on them. The claimant did not allege that she was fit for work during the appeal process. Ms Curran concluded that the dismissal was fair and reasonable in the circumstances.

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58. Ms Curran advised the claimant of the decision in a letter dated 5 October 2017 (production 417). Ms Curran considered that the assurances about a phased return to work and additional training could not be fulfilled as the claimant did not return to work. She also considered that the absence management and grievance processes were separate. Also that the decision to proceed to a stage 4 attendance hearing was taken after the grievance had been heard and answered. The meeting notes showed that the claimant refused medical redeployment saying that she did not feel she would be able to return to work in the near future and that they also showed that she refused ill-health retirement on learning that her pension would not be topped up. No new evidence was presented that had not been considered as part of the original decision.

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Observations on witnesses and conflict of evidence

59. Ms Donnelly, the claimant's line manager was in the Tribunal's view a credible and reliable witness. Ms Donnelly was personally involved in Project Stone and was at one point at risk of redundancy. She did not appear to have any animosity toward the claimant. Indeed, she was in the Tribunal's view supportive of the claimant's return to work and was well placed to comment on the similarity of the dispatch and customer service manager roles given that she managed the team before and after the alignment.

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5 60. The Tribunal also considered that Ms Hislop was a credible and reliable witness who gave her evidence in a candid manner. The Tribunal had no hesitation in accepting her evidence which was supported by Mr Stevenson's evidence.

61. Ms Rourke's evidence was given honestly based on her understanding of events. The Tribunal was mindful that she was not directly involved in Project Stone.

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62. Ms Curran's evidence was given honestly in straightforward manner and was not challenged in any material way. The Tribunal considered that she dealt with the appeal hearing in a reasonable and proper manner.

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63. The Tribunal had no doubt that the claimant gave her evidence honestly based on her recollection and perception of events. The Tribunal considered that in the summer of 2016 the claimant's personal and work life was going through significant change. Her role was changing, her dog died, her father was unwell, her daughter was getting married and the claimant was moving to a new house. Each of these events was stressful. To compound matters the claimant was going through the menopause, she had a sports injury and was unable to destress through exercise. She also had childcare responsibilities for her granddaughter. From July 2016 the claimant was on long term sick absence during which she raised two grievances and was being managed under the absence management procedures, in addition to her stress and anxiety the claimant also had issues with her gall bladder and her mother was unwell and passed away.

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64. The Tribunal's impression was that the claimant viewed everything through the prism of her health and perspective of events. She stated that it was all about her. The claimant seemed oblivious or not interested that her most of her colleagues were also facing uncertainty and change. She appeared to have little regard to how her absence and behaviour impacted on the team and that others may have a different perception.

5 65. As example of this was in relation to holidays. The claimant said that Mr Donnelly assured her at the meeting on 1 December 2016 that the phased return would be tailored to support her. The claimant considered that Ms Donnelly acted unreasonably when she told the claimant in January 2017 that she could not approve all the claimant's annual leave.

10 66. The Tribunal considered that likely that Mr Donnelly would have known that the claimant was accruing annual leave although she was on sick leave. There was reference to the claimant being in Dubai in November 2016 but it was not suggested that it was taken as annual leave. In any event the Tribunal considered that it was unlikely that Mr Donnelly would have been able to guarantee that the claimant could take annual leave whenever she wanted unless it had been previously authorised. No dates were discussed and he would have been unaware when others were on leave.

15 67. On being becoming aware of the claimant's annual leave request Ms Donnelly was unable to authorise all the annual leave as some dates were fully booked and other employees had already had their request for that period refused. She spoke to her manager to see if an exception could be made for the claimant but was considered unfair to other employees if the claimant's request was granted after their request had been refused. The Tribunal considered that this was reasonable as other employees who had transferred to the customer relations manager role and had been working throughout had previously requested leave and had been declined. Ms Donnelly endeavoured to facilitate the claimant absence by arranged for it by means other than annual leave but the claimant was unwilling to explore this.

25 68. Ms Donnelly spoke about the similarity of the work undertaken by her team and skills required before and after the transfer. The claimant's evidence was that the roles were different. The claimant did not work in the customer relations role. Her perception was based on her daughter's experience who was not in the role at that time. While the Tribunal did not doubt that the claimant believed that the roles were different it preferred Ms Donnelly's

evidence which was more consistent and was based on actual knowledge from supervising the team.

5 69. There was a dispute about ill health retirement and medical redeployment. Ms Hislop and Mr Stevenson said that the claimant said that she did not wish to pursue these options. The claimant said that she did not refuse, instead she said that she felt the policies contradicted each other. The claimant agreed that the minutes of the attendance hearings were a fairly accurate record. They supported Ms Hislop's recollection of events. The Tribunal
10 preferred the evidence of the respondent's witnesses as it was supported by contemporaneous documents.

Submissions

15 70. Ms Kerr and Mr Cunningham helpfully provided written submissions which are summarised below.

20 71. In summary Ms Kerr said that the reason for dismissal was capability. She referred the Tribunal to section 98 of the Employment Rights Act 1996 (ERA) and the following cases: *East Lindsey District Council v Daubney* [1977] ICE 566; *Lyncock v Cereal Packaging Ltd* [1988] ICR 670; *D B Schenker Rail (UK) Ltd v Doolan* UKEATS/0053/09/BI; *Hart v A R Marshall & Sons (Bulwell Ltd)* [1977] IRLR 51; *Daubney and Spencer, (K) v Paragon Wallpapers* [1976] IRLR 373 EAT; *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439; *HSBC v Madden* [2000] ICR 1283; *Holmes v Qinetiq Ltd* UKEAT/0206/15; and *London Borough of Brent v Finch* EAT 0418/1 1.

25 72. The respondent does not accept that the claimant was ever at risk of redundancy. If she was under the terms of the enhanced redundancy payment scheme, she would still not have been entitled to an enhanced redundancy payment.

30 73. In relation to the claim for a statutory redundancy payment the Tribunal was referred to section 135(1) of the ERA. The right to a statutory redundancy payment only arises if and when the employee is dismissed by reason of

redundancy. If an employee *should have* been dismissed by reason of redundancy, but was not, the employee still therefore has no entitlement to a statutory redundancy payment.

5 74. In the alternative, if the Tribunal finds that the claimant was dismissed by redundancy, the role in customer relations constituted an offer of suitable alternative employment for the claimant which she unreasonably refused. The tribunal was referred to section 138(1), 138(2) and 138(3) of the ERA. If the claimant was dismissed by reason of redundancy, she was re-engaged within
10 the customer relations team with immediate effect. The claimant has given evidence that her salary, location and "grade" did not change. There was no change to her contractual terms. The claimant was employed as a customer services adviser. Dispatch and customer relations are divisions of customer services. The claimant therefore continued to be a customer services adviser,
15 whichever of these two departments that she worked in. Further, the skills required in both teams are very similar.

75. In summary Mr Cunningham said that the starting point was the issue of redundancy. He referred to section 139(1)(b) of the ERA. He said that the role
20 of customer services adviser in dispatch in Uddingston was work of a particular kind for the purposes of the ERA. Dispatch work and the complaints handling work were "different jobs" that constitutes a cessation or diminution in the requirements of the respondent's business for employees to carry out dispatch work in Uddingston.

25 76. The Tribunal was referred to *Murray v Foyle Meats Ltd [1999] ICR 827*. A redundancy situation did exist.

77. The respondent refused to acknowledge that the transfer of the dispatch work
30 from Uddingston to Stockport created a redundancy situation among dispatch workers, such as the claimant. The respondent "mapped" the two different jobs because they were both L8 jobs. L8 is a pay grade only.

78. The claimant was entitled to at least a four-week trial period before deciding whether to accept or reject that offer of employment. In the circumstances, the refusal to offer the claimant a trial period (something that she requested from the earliest stages and repeated thereafter) was unreasonable
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79. In any event any refusal of the customer relations role work was not unreasonable: That is a subjective.
80. The causation test is whether the dismissal was "attributable" to the redundancy. It is submitted that it is.
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81. The claimant's capability was not assessed by reference to the work "that she was employed to do". That is a fundamental error. It renders the dismissal unfair. The claimant was assessed by reference to the new job. She was in protest about that change from the outset and that continued until the dismissal: *Abrahall v Nottingham City Council [2018] EWCA Civ 796*.
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82. The respondent failed to carry out a reasonable investigation. There is no evidence that the putative occupational health reviews were carried out by a person with appropriate qualifications. Ms Hislop did not know what qualifications Ms Cotterrell held. There is nothing on the face of Ms Cotterrell's reports to identify any qualifications that she might have. Before dismissing on health capability grounds. Steps must be taken to discover the true medical position. The employer must usually take medical advice: *East Lindsey District Council (above)* and *BS (above)*. That would require to be a person who is qualified to provide expert evidence: *Kennedy v Cordia (Services) LLP [2016] ICR 325*.
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83. The respondent failed to have regard to the issues in the grievance and the way in which the grievance process was impacting on the claimant's health. The policies had sufficient flexibility to allow for that.
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Discussion and Deliberations

84. Section 98(1) of the ERA provides that the respondent must show the reason for the dismissal and that it was for a potentially fair reason as set out in section 98(2). At this stage the Tribunal noted that it was not considering the question of reasonableness.

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85. The Tribunal then asked whether the respondent had shown the reason for the claimant's dismissal. The respondent said that the reason for dismissal was the claimant's capability - a potentially fair reason under section 98(2)(a). The claimant said that her dismissal was attributable to redundancy.

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86. The Tribunal considered its findings. The claimant did not challenge that Ms Hislop took the decision to dismiss on 21 August 2017.

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87. The claimant argued that the starting point was the issue of redundancy and referred the Tribunal to the statutory definition of redundancy in section 139(1)(b) of the ERA: *"for the purposes of this Act an employee who is dismissed shall be taken to have been dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (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 had ceased or diminished or were expected to cease or diminish"*.

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88. The Tribunal found that the claimant was employed as a customer services adviser. In March 2016 the respondent proposed to reorganise its business which involved redistributing work between offices. In Uddingston where the claimant worked the requirement of customer service advisers at the claimant's level remained the same. The duties of the customer service advisers role changed from dispatch to customer relations. There was collective and individual consultation. The roles were similar and the skills were interchangeable. The claimant's terms and conditions remained unchanged. She was not told that her job was at risk of redundancy. The Tribunal considered that roles often change over time and employees require to be flexible. The claimant's duties had already changed during her

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employment with the respondent as she had worked in planning before dispatch.

5 89. The claimant agreed to returning to work on a phased basis in January 2017. This did not happen. Ms Hislop was not involved with the claimant until the 4 May attendance hearing at which point the claimant had been absent from work since 6 July 2016. The March report said that the claimant should be fit for a gradual return to work with support in place. At the 4 May attendance hearing the claimant did not indicate that she would be returning to work in 10 the foreseeable future. Further investigation was made which resulted in the June report that concluded that the claimant was unfit to return to work and "*this was unlikely to change in the foreseeable future*". The claimant did not dispute this. Ms Hislop then explored with the claimant on several occasions ill health retirement and medical redeployment neither of which the claimant 15 wanted to pursue.

20 90. There was no evidence to suggest that Ms Hislop's decision to terminate the claimant's employment on 21 August 2017 was for any reason other than the claimant's capability. The Tribunal was not satisfied that the termination of the claimant' employment was mainly attributable to the fact that the respondent's requirements for employees to carry out work of a particular kind in Uddingston had ceased or diminished or were expected to cease or diminish.

25 91. The Tribunal was satisfied that the respondent had shown that the reason for dismissal was capability. The Tribunal therefore concluded that the respondent was successful in establishing the dismissal was for a potentially fair reason.

30 92. The Tribunal then referred to section 98(4) of the ERA. It noted that it had to determine whether the dismissal was fair or unfair having regard to the reasons shown by the employer and the answer to that question depended on whether in the circumstances (including the size and the administrative resources of the employer's undertaking) the employer acted reasonably in treating the reason, the sufficient reason for dismissing the employee; and

that this should be determined in accordance with the equity and the substantial merits of the case.

5 93. In applying section 98(4) the Tribunal must consider the reasonableness of the respondent's conduct, not simply whether the Tribunal considered the dismissal to be fair. In judging the reasonableness of the respondent's conduct the Tribunal must not substitute its own view as to what the right course to adopt for that of the respondent. In many (although not all) cases there is a band of reasonable responses to the employee's capability within
10 which one employer might reasonably take one view and others quite reasonably take another. The function of the Tribunal is to determine whether in the particular circumstances of this case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band, the
15 dismissal is fair if it falls outwith the band the dismissal is unfair. A failure to carry out a reasonable procedure at each stage the dismissal process is relevant to the reasonableness of the dismissal.

20 94. The Tribunal turned to consider what steps the respondent took to establish the claimant's true medical position.

25 95. Dealing first with occupational health, the Tribunal found that the respondent involved MyHealth from September 2016. The November report said that the claimant was fit for work in some capacity and recommended that a meeting be arranged to discuss the claimant's concerns. The March report said that
30 the claimant had been absent from work for eight months and was unable to foresee a timescale for this changing. The recommendation was that the claimant should run to work as soon as possible to avoid making it more difficult to return. This would depend on the outcome of the grievance and her acceptance of it. It was not until the June report that MyHealth's advice was that the claimant was unlikely to be fit to return to work in the foreseeable future.

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96. The respondent did not re-refer the claimant to MyHealth before she was dismissed in August 2017. The respondent was however aware that the claimant's doctor had provided reports to MyHealth to which reference was made in the March report and June report. The June report stated that the claimant would not be returning to work in the foreseeable future.
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97. In addition to the MyHealth reports to discover the true medical position the Tribunal found that the respondent also consulted with the claimant. There were numerous employee health reviews up to 24 March 2017 followed by five attendance hearings.
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98. While at the final hearing the claimant questioned Ms Cotterell's qualifications this was not raised by the claimant during her employment. To the contrary the claimant took no issue with MyHealth's recommendations. In January 2017 the claimant agreed a return to work plan. In March 2017 the claimant did not see herself returning to work before June 2017. In July 2017 the claimant had not returned and did not take issue with the June report that she would not be returning to work in the foreseeable future. In August 2017 the claimant said that she was not fit to work and did not wish to be consider for
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- medical redeployment or ill health retirement.
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99. The Tribunal considered that having consulted with the claimant it was reasonable without a further MyHealth referral for the respondent to accept that the claimant was not fit to return to work in August 2017 as that was her position and she remained on sick leave.
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100. Before taking the decision to dismiss the claimant the Tribunal found that the respondent meet her the claimant in August 2017 to discuss her absence and clarify her position. The claimant's position was that:
- a. She was not fit to return to work in the foreseeable future.
 - b. She did not feel capable of doing the role of customer manager role of even with training and support.

- c. She did not want to be considered for medical redeployment as even if a suitable role became available she would not be fit enough to return to work.
- d. She did not want to pursue ill health retirement as she felt that there was not benefit in doing so if her pension was not topped up.

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101 . Although she had not been involved in the process Ms Hislop knew that the issues raised by the claimant about the customer service adviser role had been considered and dealt with as part of grievance and grievance appeal processes. The Tribunal considered that from July 2017 Ms Hislop had identified from the June report and consultation with the claimant that the claimant would not return to work in the role of customer service adviser in the foreseeable future. Ms Hislop offered to explore medical redeployment and discussed ill health retirement but the claimants did not want to pursue these options.

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102. The Tribunal appreciated that the claimant's position was that the respondent caused her ill health. Ms Hislop knew that the claimant was aggrieved about the issues raised in the grievance and grievance appeal processes. These matters had been investigated and addressed by others. The absence management process was delayed to facilitate this. No other measures were proposed by the claimant, which Ms Hislop could have put in place to support her return to work. The Tribunal's impression was that Ms Hislop was keen to have assist the claimant returning to work in some capacity and reluctantly decided to terminate the claimant's employment.

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165. At the appeal stage Ms Curran considered and investigated the issues raised by the claimant. At this point the claimant did not allege that she was fit to return to work. She did not say that there were any issues regarding the fairness of the appeal. The Tribunal did not consider that Ms Curran's position was unreasonable. She considered all the grounds of appeal setting out her findings and reasoning. In the Tribunal's view Ms Curran was entitled to reach the conclusion that the dismissal was fair.

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166. The Tribunal was satisfied that Ms Hislop genuinely believed that the claimant was unable to work due to ill health and that was the reason for her dismissing the claimant. The Tribunal was also satisfied that Ms Hislop had reasonable
5 grounds for that belief having taken reasonable steps to ascertain the claimant's true medical position by obtaining MyHealth reports and consulting with the claimant. The Tribunal considered that Ms Hislop and Ms Curran acted reasonably taking account of what they knew about the circumstances of the claimant's case.

10 167. The Tribunal then turned to consider if the decision to dismiss the claimant was within the band of reasonable responses. The Tribunal again reminded itself that it should not substitute its own decision but rather consider whether objectively speaking the claimant was or was not capable of remaining in
15 employment.

168. The Tribunal found that the claimant had been absent since 6 July 2016. At the August attendance hearing the claimant's position which was in line with medical advice was that she was unable to return to work and could not
20 indicate when she might be fit enough to do so. She did not want to pursue medical redeployment or ill health retirement. The claimant had raised grievances and grievance appeals. The issues raised by her had been investigated and addressed. There was nothing else suggested to Ms Hislop to support the claimant back to work. The claimant's absence was being
25 covered by her colleagues. This could not continue indefinitely.

169. In considering the reasonableness of the decision to dismiss the Tribunal also had regard to the procedure adopted by the respondent. Ms Donnelly had personal contact with the claimant. Ms Donnelly sought to understand what
30 adjustments could be made to support the claimant back to work; she proposed a phased return plan with appropriate training. Ms Hislop also had personal contact with the claimant and considered MyHealth reports. The claimant was provided with the right to be accompanied and an opportunity to put forward representations at each stage and after being dismissed the

claimant was provided with the right of appeal which she exercised. The Tribunal considered that there was no fundamental flaw in the procedure followed by the respondent. The Tribunal considered that the respondent was entitled to treat the grievances separately and noted that the absence management procedure was delayed to allow the grievances considered.

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170. The Tribunal concluded that in the particular circumstances of the case dismissal fell within the range of reasonable responses, which a reasonable employer might have adopted. The Tribunal's reasoning was that the evidence available to Ms Hislop at the August attendance hearing was that the claimant was not likely to be able to return to work in the foreseeable future. The claimant and her doctor were unable to indicate when she would be able to return to work. The claimant did not want to engage in any redeployment options. The claimant had been absent for more than a year. In the Tribunal's view there was nothing else that the respondent could reasonably be expected to do to support the claimant back to work.

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171. The Tribunal concluded that in the circumstances of the case the decision to dismiss fell within the band of reasonable responses. Accordingly, the unfair dismissal claim was dismissed.

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172. The Tribunal then turned to consider the claimant's claim that the respondent was in breach of contract for failing to pay the contractual redundancy payment.

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173. The Tribunal referred to *Jenvey (above)* in which it was found that if the employer had resolved to dismiss his employee by reason of redundancy and had served notice of his dismissal that employer could not defeat that employee's entitlement to receive compensation by dismissing for some other unrelated reason unless the dismissal was for good cause.

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174. The Tribunal considered that in March/April 2016 the respondent did not propose to make the claimant redundant and did not serve her notice of dismissal by reason of redundancy. When she was dismissed in August 2017

the claimant had been unfit for work for over a year with no foreseeable return to work. Her absence had been managed under the absence management procedure and in the Tribunal's view the respondent had good cause for her dismissal.

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175. The Tribunal did not find that the claimant's dismissal was one in which an employee who was dismissed for a reason other than redundancy was entitled to a contractual redundancy payment.

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176. For the reasons set out above the Tribunal was not satisfied that the claimant was dismissed by reason of redundancy. The Tribunal accepted the respondent's evidence that while some of her duties changed the fundamental requirements and terms and conditions of her employment remained the same. Having concluded that the claimant was not dismissed by reason of redundancy the Tribunal did not consider that the claimant was

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entitled to a statutory redundancy payment under section 135(1) of the ERA.

177. The Tribunal therefore dismissed the claimant's applications.

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Employment Judge:	S Maclean
Date of Judgment:	6 July 2018
Entered in register:	12 July 2018
and copied to parties	

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