

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4104893/17**

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**Held in Glasgow on 1, 2 & 5 February 2018**

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**Employment Judge: Robert Gall**  
**Members: Robert McPherson**  
**Jim Burnett**

**Mrs Susan Gillan**

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**Claimant**  
**Represented by:**  
**Mr L Anderson -**  
**Solicitor**

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**Scottish Canals**

**Respondent**  
**Represented by:**  
**Ms L Davis -**  
**Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The unanimous Judgment of the Tribunal is that the claim as brought is unsuccessful on all grounds.

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**REASONS**

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As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the Hearing itself or by written request presented by any party within 14 days of the sending of the written record of the decision. No request for written reasons was made at the Hearing. The

**E.T. Z4 (WR)**

following sets out what was said, after adjournment, at the conclusion of the Hearing. It is provided for the convenience of parties.

1. This claim arose from the dismissal of the claimant by the respondents. It was not, however, a case of unfair dismissal brought in terms of the Employment Rights Act 1996 as the claimant did not have qualifying service to bring such a claim.
2. The claimant said that dismissal was a discriminatory act. The protected characteristics involved were disability and age. She also brought a claim of associative discrimination related to the health of her mother.
3. There were some other elements of claim initially brought.
4. Firstly, the claimant said that the payment in lieu of notice had been paid net when it should have been paid gross. She accepted, however, prior to the Hearing that in fact the payment had been made gross. This element of claim was not therefore insisted upon.
5. The claimant also accepted that a claim brought under Section 15 of the Equality Act 2010 of discrimination arising from disability and said to be founded upon the health of the claimant's mother could not proceed. That was therefore not insisted upon.
6. There were other elements which were insisted upon at the Hearing.
7. Firstly, the claimant said that there was a payment due to her under the respondents' Stability Policy. Her position was that the policy applied in times of change. It therefore applied, she said, in her situation where she had been dismissed.
8. The Tribunal was satisfied, however, that the Stability Policy applied if there was a redundancy situation and not otherwise.

9. There was no redundancy situation here in relation to the claimant's employment. Her post remained. No payment under the Stability Policy was therefore due to her.
- 5 10. The claimant pointed to others who she said had received some enhanced payment on departing the respondents' organisation. It was entirely unclear, however, what was the basis and amount of any such additional payment. There was no evidence that any such payment had been made under the Stability Policy.
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11. In reality the Stability Policy provided for an additional enhanced payment in the event of redundancy. This element of claim is therefore unsuccessful.
12. The claimant had been paid in lieu of notice. Her employment ended on 17  
15 July 2017 without her working notice.
13. The claimant's position was that she would have accrued six days holiday leave if she had worked her notice period. She said that she was in those circumstances due to be paid in respect of those days of holiday which would  
20 have accrued had she worked her notice period.
14. The Working Time Regulations 1998 are clear in relation to payment in respect of leave accrued. Accrued holidays which are untaken at the time of termination of employment, being the date upon which termination takes  
25 effect, are to be compensated. This is in terms of Regulation 14. There were no such days accrued but untaken at time of the claimant's employment ending with the respondents. There was therefore no claim under the Working Time Regulations in this regard.
- 30 15. No basis was advanced on which there was a contractual claim in respect of this payment. It would be somewhat unusual for there to be such a provision. It would be likely that any holiday entitlement relative to the notice period would see holidays being taken in that time.

16. The position, however, is that there was no basis of claim under the Working Time Regulations in respect of this element of claim. There was no basis under contract on which the claim could be advanced. This element of claim is therefore also unsuccessful.

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17. The claimant said that she had accrued 2 days of flexi time which she had not used at time of termination of her employment. She sought payment in respect of that. She did not, however, point to any statutory or contractual basis for that claim.

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18. The Tribunal did not see that financial recompense was appropriate or something which could be awarded in that situation. This element of claim is therefore also unsuccessful.

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19. Turning to the claims of discrimination made, there were certain key elements to the factual background in the case.

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20. The claimant had been appointed and promoted when 48 years old. Her date of birth was known to the respondents. It was unlikely therefore given those events that she would have been dismissed because of age on reaching 49. Further, the age of Mr Dunlop and Mrs Lithgow militated against the respondents having an issue with age in general and with either of those two individuals having an issue with age.

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21. As to the background remarks, on the claimant's own evidence, Mr Dunlop had said that he was "*delighted we do have a young vibrant team*". He denied the use of the word "*young*".

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22. On the claimant's own evidence therefore Mr Dunlop had been referring to the team as being young and vibrant, the team including the claimant. There had been no exception made for her. It was impossible in the view of the Tribunal to see this as a remark supporting an inference of age discrimination.

23. A further comment alleged was that Mrs Lithgow had said to the claimant that she was "*falling apart*" and that if she was a horse, Mrs Lithgow would "*take you round the back and shoot you*". That was, if said, said in the context of the claimant's return to work after a particularly serious road traffic accident. If it was made, it was an unfortunate comment. It was not one, however, related to age.
24. The respondents were accepted by the claimant as being largely supportive in her time of illness following the road traffic accident. They had sent flowers to her. They had visited her. They had sent her texts.
25. In respect of the claimant's disability, there was no issue looming and no absence looming. Very unfortunately, the claimant had been affected by cancer. Thankfully, this had reached the point where an annual check up was involved to monitor the situation. The claimant inserted eye drops which involved a minor amount of time and no disruption to her employment. There had never been any difficulty or issue raised by the respondents with her in this regard.
26. The claimant's mother was unfortunately affected by health issues. Again the respondents were supportive. They had been aware of an issue in this regard when they employed the claimant. She was permitted to work one day from home to assist with her mother's illness and with travel. There was never any adverse reaction or comment raised in relation to that situation.
27. The respondents therefore were generally supportive of the claimant in relation to her health. A further instance of that was when Mrs Lithgow suggested that the claimant obtain a line for a further fortnight when she was due to return from her road traffic accident. They agreed with the claimant a phased return at that time.
28. The Tribunal came to the conclusion on the evidence that the claim had been brought due to the fact that the respondents had been enthusiastic about the

claimant returning to work in June as it approached. The claimant had, however, been back for two days and had then gone on holiday for a fortnight, that being pre-arranged. She had then been dismissed on her return from holidays. The dismissal had therefore come "out of the blue". She had  
5 concluded that the dismissal was a discriminatory act.

29. There were, however, no facts in the view of the Tribunal which supported that as being the ground for dismissal on the evidence which the Tribunal  
10 heard.

30. It was very unhelpful that dismissal was out of the blue. What happened was a far from ideal way of operating. If this had been an unfair dismissal claim then clearly there would have been issues about the absence of procedure and the way in which this was tackled had events taken place as they did.  
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31. On the evidence the Tribunal heard, the respondents had had concerns as to the claimant's way of working and her approach. They had unfortunately, however, not raised those with her. On her return to work she had worked from home on the first day. There had been a five hour handover call. The  
20 way in which that was tackled by the claimant and the reaction to it of the Acting Head of HR & Organisational Development led to real concerns on the part of the respondents. A different employee in the team had then spoken to the respondents as to issues in relation to the claimant. These events led to the decision which the respondents took.

25 32. The respondents had not explained their decision to the claimant other than saying that she was "not a fit".

30 33. The Tribunal understood the claimant's surprise and that she was stunned on being told that she was dismissed. It understood her conclusion that there must be something sinister behind the decision given that nothing had been said to her prior to it as to there being any issue. On an explanation for the decision being given by the respondents during the course of the Tribunal

process, the claimant asked why she had not been placed on a personal improvement plan. The respondents answer to that was that it was not something generally done for senior management and that in any event what was involved was not a performance issue but rather a behavioural issue.

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34. Whether the respondents were right or not, the Tribunal was satisfied that they dismissed for the reasons advanced in evidence at Tribunal. The Tribunal's unanimous view was that there was no basis on which there were facts from which the Tribunal could conclude that there had been discriminatory actings. There was no evidence to support there having been discrimination.

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35. The treatment of the claimant as an employee was not satisfactory or perhaps particularly humane. There was, however, no basis to support a claim of discrimination.

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36. For these reasons therefore the unanimous conclusion of the Tribunal was that the claim was unsuccessful.

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Employment Judge: Robert Gall  
Date of Judgment: 08 February 2018  
Entered in register: 09 February 2018  
and copied to parties

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