



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4110206/2021 (V)

**Final Hearing
Held on the Cloud Video Platform
on 3 and 4 May 2022**

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Employment Judge Jones

Ms J Kerr

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**Claimant
In person**

British Gas Services Ltd

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**Respondent
Represented by
Ms Stobart, counsel
Instructed by
Pinsent Masons**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was not unfairly dismissed and the respondent did not breach her contract of employment. Her claims are therefore dismissed.

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Introduction

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1. The claimant presented a claim on 25 June 2021 that she had been unfairly dismissed and that the respondent was in breach of her contract of employment by failing to pay her the full amount of pay in lieu of notice to which she said she was entitled. The respondent's position was that the claimant had been dismissed for a potentially fair reason, being redundancy and that the respondent had acted reasonably in all the circumstances. The respondent also said that the claimant had worked part of her notice period and been paid in lieu of the remaining period of her notice, that the

respondent was contractually entitled to require the claimant to work part of her notice and that there was therefore no breach of contract.

2. Parties produced a joint bundle of documents for use at the hearing. The Tribunal heard evidence on behalf of the respondent from Mr Gavin Murray who had been involved in the process of selection of the claimant for redundancy and Mr Steve Coulthard who had conducted the third consultation meeting with the claimant and had latterly been her line manager. The claimant gave evidence on her own behalf. Both parties made brief oral submissions at the conclusion of the evidence.

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Facts

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3. Having listened to the evidence, and considered the documents to which reference was made together with submissions by both parties, the Tribunal found the following facts to have been established.

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4. The claimant was employed as a Level 6 Customer Service Manager based at the respondent's operations in Uddingston.

5. The claimant signed a contract of employment on 13 March 2014 which provided that the claimant's employment could be terminated by either party by giving not less than three months' written notice to the other and that 'the Company may at its sole and absolute discretion pay basic salary alone in lieu of any unexpired period of notice'.

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6. In 2020 in response to a disappointing financial performance, the respondent undertook a reorganisation of its functions with a view to simplifying its structure and reducing the number of managers in post.

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7. The claimant was placed in a pool with six other managers with the intention that the number of managers be reduced from seven to five. The claimant's scoring was such that she was sixth in rank and therefore at risk of redundancy.

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8. The respondent engaged in collective consultation with relevant unions and elected representatives. Relevant documents were uploaded to Sharepoint to which all staff had access. Proposals could be put forward by staff in order to avoid redundancy.

9. The claimant and a colleague put forward a proposal that six Customer Resolution Managers be retained rather than five. The proposal was partially accepted in that it was agreed that an additional role be created on a temporary basis.
- 5 10. A consultation meeting took place between the claimant and her then manager Mr O'Neil on 26 October 2020. The claimant confirmed at that meeting that she wished to be considered for the temporary role. She also put forward information in support of a review of her scoring.
- 10 11. A second consultation meeting took place between the claimant and Mr O'Neil on 3 November. At that meeting the claimant was advised that while the information provided by her in relation to scoring had been considered, her score would not be amended. She was also advised that she would be offered the interim role until the end of February 2021. The claimant was advised that the consultation process would therefore be put on hold. Mr O'Neil informed the claimant that as he was leaving the business that week, Mr Coulthard would pick up the next consultation meeting which would take place nearer the claimant's exit date.
- 15 12. At the second consultation meeting, illustrative redundancy calculation figures of the sums which would be paid to the claimant on termination of her employment were also discussed. Mr O'Neil advised that claimant that she would still receive pay in lieu of notice at the end of the interim role she was to undertake.
- 20 13. A final consultation meeting took place between the claimant and Mr Coulthard on 28 January 2021. A revised breakdown of the claimant's entitlement on termination of her employment was provided to her. The claimant raised a query regarding a difference in the amounts between the illustrative figures provided at the November meeting and the new figures which had been provided. Mr Coulthard undertook to look into this and revert to the claimant. The claimant was also provided with letter terminating her employment on 28 February with one month's notice.
- 25 30 14. Following an exchange of emails with the Employee Transformation Team, it was explained that the difference was because the first illustration was based on the claimant leaving employment immediately and therefore being entitled to be paid entirely in lieu of notice and the final figures were based

on the claimant being given notice of termination of employment on 28 January and leaving employment on 28 February, which would involve her working four weeks' notice and being paid in lieu of the remaining notice period.

5 15. Mr Coulthard responded by email to the Employee Transformation Team on 1 February indicating 'we haven't notified JK of a reduction in PILON and should still be entitled to the full 13 weeks. Can we please amend this to reflect the full window and update CPS elements. In short we simply asked JK to stay and help us until the end of Feb - and then overlay all the same financial summary (with a slight increase to cover a 1 year employment increase)'.
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16. Mr Coulthard was subsequently provided with final figures for the claimant to which she would be entitled on termination of her employment and was advised that as the first breakdowns were always illustrative figures and the claimant had not at that time been issued with a final confirmation of redundancy, the revised calculations were correct. Mr Coulthard was also advised that it was a business decision not to pay full PILON to redundancy leavers.
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17. Mr Coulthard informed the claimant of the decision initially in an email and then on a telephone call. He advised the claimant that she could raise a grievance if she was dissatisfied.
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18. The claimant did not wish to raise a grievance but sent an email on 11 February to Mr Brass, who was the Customer Contact Director raising her concerns. Mr Brass then asked Ms O'Neill from HR to look into the issue.
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19. Ms O'Neill emailed the claimant on 26 February indicating that the decision in relation to the claimant's entitlement to pay in lieu of notice would not be changed.

20. The claimant's employment terminated on 28 February 2021.
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Observations on the evidence

21. The Tribunal found all witnesses to be both credible and reliable. The only issue in dispute was whether the claimant had been given an undertaking

by Mr O'Neil that in taking up a temporary role she would still receive her entire notice pay in lieu. The Tribunal accepted the claimant's evidence in this regard. Mr O'Neil was no longer employed by the respondent and he and the claimant were the only individuals present at the meeting. The claimant's evidence was consistent with what she subsequently informed Mr Coulthard and while no contemporaneous written record of the discussion was made, the Tribunal accepted that the claimant had been told that she would be paid in lieu of her notice if she took up a temporary role.

10 **Issues to be determined**

22. The Tribunal was required to determine two matters

- 15 a. whether the respondent had established a potentially fair reason for the claimant's dismissal and if so whether it had acted reasonably in all the circumstances, and
- b. whether the respondent had been in breach of the claimant's contract of employment by paying her 8.57 weeks' notice pay rather than 12 weeks' pay in lieu of notice.

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Unfair dismissal

23. It is for an employer to establish a potentially fair reason for dismissal. Section 98(1)(c) Employment Rights Act 1996 ('ERA') provides that redundancy is a potentially fair reason for dismissal.

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24. Section 98(4) provides that

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Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

25. In the present circumstances, the claimant questioned the requirement for her post to have been made redundant in that she was of the view that there was no diminution of work as complaint levels remained as high if not higher than they had been in previous years. The claimant however accepted that this had been a business decision taken by the respondent and it had been made in good faith. There was also no dispute that the number of managers was reduced from seven to five albeit that a temporary role was created to deal with the likely increase in requirements over the winter period.

26. The Tribunal had no hesitation in concluding that the respondent had established that the claimant was dismissed because her role was redundant. The respondent had decided to reduce the number of managers across the business in general and specifically in the area in which the claimant worked. Responsibility for the team leaders who had previously been allocated to the claimant was redistributed across the remaining managers. While this was a business decision with which the claimant disagreed, she did not challenge that it was a genuine business decision.

27. The Tribunal then went on to consider whether the respondent had acted reasonably in dismissing the claimant.

28. The claimant sought to challenge the fairness of her dismissal for a number of reasons.

29. She said that Mr Coulthard ought to have known at the time of her dismissal that a secondment would likely be required to cover for one of her colleagues who was taking on a project role. Mr Rigby, one of the claimant's colleagues had been asked to take on a project role in addition to his normal duties around the time of the claimant's dismissal. However by mid to late March, Mr Rigby told Mr Coulthard that he was struggling to carry out both roles. As a result of this it was agreed that he would carry out the project duties full time and someone else would be seconded to his substantive role for a period. The advert for the secondment was issued around mid April, around 6 weeks after the termination of the claimant's employment.

30. The Tribunal accepted Mr Coulthard's evidence that if he had been aware of the secondment at the time of the claimant's dismissal that he would have offered to it her. Mr Coulthard was of the view that the claimant was a good performer and there was no dispute that he and the claimant had a very good working relationship.

31. The Tribunal did not accept that any unfairness arose in relation to the claimant's dismissal as a result of this secondment. Mr Coulthard could not have foreseen the need for the secondment at the time of the claimant's dismissal.

32. The claimant also suggested that if the respondent had properly assessed the need for her role prior to her dismissal she would not have been dismissed. The Tribunal could not accept that the respondent's approach in identifying the claimant's role as redundant and then dismissing her as a result was either procedurally or substantively unfair.

33. There was no dispute from the claimant that she had been assessed in the correct pool or that her scoring was inaccurate. She also accepted that there had been consultation both collectively and individually and that she had access to all documentation regarding the redundancy process.

34. In all these circumstances, the Tribunal was satisfied that the respondent had established a potentially fair reason for dismissal, and that it had acted reasonably in all the circumstances. The claimant's claim of unfair dismissal therefore fails.

Breach of contract

35. In terms of the claimant's claim of breach of contract, the starting point is the terms of the claimant's contract of employment itself. That contract makes clear that the employer retains the discretion to pay the claimant in lieu of any unexpired period of notice to which she is entitled. There is therefore no contractual right for the claimant to be paid in lieu of notice on termination of her employment.

36. The claimant was provided with a calculation of the sums to be paid to her if she were made redundant at the meeting with her line manager Mr O'Neil. That calculation makes clear that it is 'for illustrative purposes only.' The

Tribunal accepted that the calculation was based on the fact that the claimant would leave her employment on 27 November and that she would be paid in lieu of the notice to which she was entitled at that time.

5 37. It is accepted that Mr O'Neil in response to a question from the claimant, informed her that she would still be paid in lieu of notice if she took on the temporary role she had suggested. The question for the Tribunal to determine is whether this had the effect of giving the claimant a contractual right to be paid in lieu of her notice on termination of her employment.

10 38. While the Tribunal accepts that Mr O'Neil did not seek to mislead the claimant by informing her of this, it is necessary to determine whether he had authority to confer a contractual right such as this on the claimant. The Tribunal considered the case of *Puntis v Governing Body of Isambard Brunei Junior School EAT 1001/95* where P, a teacher, was given a temporary promotion. At an appraisal meeting the deputy head teacher told
15 her that her position would be made permanent. When P's application for a permanent promotion was turned down, she applied to a tribunal under S.11 of the Employment Rights Act 1996 for a declaration that her terms and conditions should reflect the fact that she was entitled to the promotion. The tribunal found that the deputy head teacher had no authority to enter into a
20 contract which would bind the school governors, and the EAT upheld that decision. In the EAT's view, the discussion between P and the deputy head teacher bore none of the features that would be expected of a contractual agreement. The EAT rejected the argument that the deputy head had apparent (or 'ostensible') authority to contract on the governors' behalf as
25 there was no suggestion that any of P's temporary promotions in the past had been awarded by the deputy head.

30 39. In the present circumstances, the Tribunal is satisfied that Mr O'Neil did not have authority to agree that the claimant would be entitled to be paid in lieu of notice in all circumstances. At the point at which he gave the claimant this assurance, her redundancy had not been confirmed. While it had been agreed that she would carry out an interim role for a few months, the process of consultation with her had not concluded. The calculation which was provided to the claimant was illustrative only. The information on the frequently asked questions which was available to the claimant (at p1 15 of

the bundle) states 'The business has discretion as to whether to PILON or to ask you to work your notice period and will make this decision based on operational requirements.' Mr O'Neil was leaving the employment of the respondent and was not in a position to say what the operational requirements of the business were at the time at which the claimant was dismissed.

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40. While the Tribunal had considerable sympathy with the claimant in that she had relied on something told to her in good faith by her manager when considering what her entitlements would be on termination of her employment, this did not mean that she had a contractual right to be paid in lieu of notice.

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41. Further, while Mr Coulthard made every effort to persuade management to make the payment to the claimant which she had expected to be made, this did not confer a contractual right on the claimant.

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42. Finally the Tribunal noted and accepted the claimant's evidence that when she raised the issue with HR no investigation was carried out into the particular circumstances of the claimant's case. The claimant did not wish to raise a grievance as she did not wish to end her employment with the respondent on bad terms and it may be that further investigation would have been carried out had a grievance been raised. However, even if the claimant felt that she had, with some justification, been unfairly treated and that the respondent had failed to take her individual circumstances into account, again that did not confer a contractual right on her.

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43. In all these circumstances, the claimant did not have a contractual right to be paid in lieu of notice and her claim fails.

Employment Judge: Amanda Jones
Date of Judgment: 10 May 2022
Entered in register: 11 May 2022
and copied to parties

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