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# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Coleen Phillips  
**Respondent:** American Express Services Europe Limited  
**Heard at:** East London Hearing Centre  
**On:** 3 November 2017 and (In Chambers) 17 November 2017  
**Before:** Employment Judge Hallen

## **Representation:**

**Claimant:** In person  
**Respondent:** Mr T Hadden (Solicitor)

# RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for unfair dismissal is unfounded and is dismissed.

# REASONS

## Background

1 The Claimant in her Claim Form submitted to the Tribunal on 6 January 2017 made a claim for unfair dismissal. The Respondent in its Response Form disputed that the Claimant was unfairly dismissed stating that the reason for dismissal was incapability which was a potentially fair reason for dismissal and that the Respondent followed a fair procedure in dismissing for that reason.

2 At the hearing, the Respondent accepted that the Claimant was dismissed and submitted that the Claimant was fairly dismissed by reason of capability in respect of Section 98(2)(a) of the Employment Rights Act 1996 ("ERA"). As a consequence, the Tribunal had to determine whether the dismissal fair and specifically whether the

Respondent could show that:-

- 2.1 It had a genuine belief that ill health capability was the reason for dismissal
- 2.2 It had reasonable grounds for its belief;
- 2.3 It had carried out a reasonable investigation;
- 2.4 It could not have been expected to wait longer for the Claimant to return.

3 In addition, the Tribunal had to determine whether the dismissal was procedurally fair.

4 At the Tribunal hearing, the Claimant appeared in person and produced a witness statement. The Respondent called two witnesses, Miss Stephanie Mistry, Dismissing Officer and Ms Nathalie Stephenson, Appeal Officer. Both witnesses produced written witness statements. The witnesses were subject to cross-examination and questions from the Tribunal. The Tribunal had in front of it an agreed bundle of documents as well as written submissions from the Respondent.

### **Facts**

5 The Claimant commenced employment with the Respondent as a Project Leader on 4 June 1979. On 8 March 1999, the Claimant began a period of sickness absence on grounds of ill health due to a back condition. The Claimant received company sick pay until 7 June 1999. She then received statutory sick pay for 28 weeks.

6 The Respondent operated a discretionary Permanent Incapacity Plan (PIP). A copy of the rules relating to the PIP was at pages 33 – 35 of the bundle of documents. The PIP rules specifically indicated that if an employee ceased to qualify for benefits under the scheme because they were no longer permanently incapacitated, they would be offered redeployment support but if no position was available, employment may be terminated. In order to receive payments under the PIP, the Respondent's employees were assessed by the Respondent's occupational health provider. If they were considered unfit to work in any capacity, for any employer, up to the age of 65, they would have been eligible for payments under the PIP. Entry into the PIP was determined by the Respondent's occupational health provider and the human resources department. There was a period between 1999 and the Claimant's acceptance onto to the PIP when the Claimant was not eligible for PIP benefit because of the medical advice received by the Respondent to the effect that she did not meet the incapacity definition. Relevant documents were referred to the Tribunal in the bundle at pages 54 – 64. In 2001, the Claimant was accepted onto the PIP scheme by the Respondent. The Claimant's annual payment under the PIP in 2016 was £18,932.57.

7 Once in the PIP, the Claimant's condition was reviewed by an occupational health physician on a number of occasions during her lengthy sickness absence. These reviews occurred in August and November 2002 when the occupational health adviser indicated that she did not consider that the Claimant's condition met the definition of permanent incapacity and the PIP (pages 70 – 72). In addition in February 2004 the occupational

health adviser indicated that the Claimant should be entered onto a phased return to work (page 73). In March 2004 the Claimant's GP report also supported a phased return to work (page 75). In June 2005 a further report from the Claimant's GP and the Respondent's occupational health adviser was that the Claimant's condition met the PIP criteria. In July 2007 a further GP report was received indicating that the Claimant was "unsuitable at present for any gainful employment" (page 80). In June 2011, the Respondent's Employee Relations Team wrote to the Claimant explaining that the company wanted to undertake a more detailed medical review of her condition (pages 82 – 89). This communication resulted in an assessment by the Respondent's occupational health team in June 2013 when the Respondent's occupational health adviser concluded that the Claimant may be capable of some sedentary work (page 92). On 1 August 2013 the Claimant attended a face to face review with the Respondent's occupational health adviser who concluded that the Claimant was likely to be able to return to do some work (page 97). On 16 November 2013 the Claimant wrote to indicate that she disagreed that she was capable of work (pages 103 & 104). On 24 September 2013 the Respondent's occupational health team wrote to the Claimant's GP asking for more information. A review was carried out by the Respondent's occupational health team on 5 March 2015. This was summarised in a report dated 9 March 2015 (page 124 & 125) in which they concluded that the Claimant was fit for some work. On 16 October 2015 the Respondent's occupational health team confirmed that they considered the Claimant was fit for work (page 157). On 17 May 2016 a further review of the Claimant was undertaken. This was summarised in a report dated 20 May 2016 (page 199) in which the occupational health adviser concluded that the Claimant "can do some work".

8 The Claimant attended a telephone meeting with the Respondent's first witness Stephanie Mistry, Employee Relations Specialist, on 12 August 2015 to discuss the occupational health report dated 9 March 2015 (page 124) and the Claimant's return to work. At the meeting, the Respondent's redeployment process was discussed. The option of early retirement was also considered and on 3 September 2015, the Respondent wrote to the Claimant enclosing an early retirement statement (page 150). By telephone on 16 September 2015, the Claimant informed the Respondent that she did not consider that she could afford to take early retirement.

9 The Respondent wrote to the Claimant on 6 November 2016 outlining the redeployment programme available from its external redeployment provider, Lee Hecht Harrison (LHH) (page 162). The Claimant participated in the redeployment programme which included sessions on CV preparation and interview technique skills, career coaching and mentoring of meetings. The Claimant completed the redeployment programme by 3 March 2016. The Claimant continued to receive payments under the PIP during this period.

10 On 23 March 2016, the Respondent invited the Claimant to a meeting with Ms Mistry. The meeting was to discuss redeployment. The Claimant attended the meeting on 14 April 2016 by telephone. During the meeting, Ms Mistry discussed the formal redeployment period, which would last four weeks. Ms Mistry explained that she would support the Claimant during the redeployment period and that she would be sent weekly listing of job vacancies. The Claimant expressed concern that four weeks was a short period of time within which to find a new role. On 21 April 2016, the Respondent wrote to the Claimant enclosing notes of the 14 April meeting, advising that the Respondent would extend the redeployment period to five weeks and confirming that the Claimant would be

sent weekly listings of job vacancies (page 170). The Respondent advised the Claimant, that, if a suitable role could not be found in the redeployment period, her employment could be terminated. The Claimant continued to receive payments under the PIP during this period.

11 During the redeployment period, the Respondent sent the Claimant weekly listings of job vacancies. On 17 May 2016, the Claimant attended a further occupational health assessment. In the subsequent report, dated 20 May 2016 (page 186) the occupational health adviser for the Respondent advised that the Claimant was “fit for part-time sedentary work”. On 15 July 2016, the Respondent invited the Claimant to a formal meeting as the redeployment period had ended (page 204). The Respondent informed the Claimant that the potential outcome of the meeting could be the termination of her employment. Ms Mistry acted as the Respondent’s decision maker. The Claimant attended the meeting on 28 July 2016 by telephone. During the meeting the Claimant and Ms Mistry discussed the occupational health physician’s findings that the Claimant was fit for work, a vacancy list that had been sent to the Claimant every week and that while the Claimant had been in the redeployment period she had not identified any roles that she was interested in.

12 On 5 August 2016, the Respondent wrote to the Claimant advising her that as a suitable job not been identified during the redeployment period, her employment would be terminated (page 216). The Respondent advised the Claimant that she was entitled to 12 weeks notice and that she could continue to seek redeployment during that period. She was advised that, unless she found another role, her employment would be terminated on 28 October 2016. Again during this period the Claimant continued to receive PIP payments.

13 The Claimant appealed the decision to dismiss on 16 August 2016, (page 222). The Claimant attended the appeal meeting on 22 September 2016 by telephone. The Respondent’s appeal hearing was conducted by Nathalie Stephenson, Director of Employee Relations for the UK and Ireland. The Claimant was advised of her right to be accompanied but chose not to be accompanied. On 6 October 2016 the Respondent wrote to the Claimant and confirmed that it had decided to uphold her dismissal (page 248) and that her appeal was dismissed.

## **Law**

14 The Tribunal had to ascertain whether the reason for dismissal fell within Section 98(1) of the ERA and whether the Respondent had shown the dismissal was by reason of the Claimant’s capability.

15 If the Respondent could show that the reason for dismissal was capability and a potentially fair reason for dismissal, the Tribunal had to decide if the employer acted reasonably or not in dismissing for that reason. The statutory test for fairness is set out in Section 98(4) of the ERA:-

“the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer 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

sufficient reason for dismissing the employee, and ... shall be determined in accordance with equity and the substantial merits of the case.”

16 In *DP Schenker Rail (UK) Ltd v Doolan [2010] UKEAT/0053/09*, the EAT observed that in respect of ill health capability dismissals the Respondent must show:-

- 16.1 It had a genuine belief that ill health capability was the reason for dismissal;
- 16.2 It had reasonable grounds for its belief; and
- 16.3 It carried out a reasonable investigation.

17 Where an employee has been absent long term, the Tribunal must also consider whether the employer can be expected to wait longer for the employee to return (*Spencer v Paragon Wall Papers Ltd [1977] ICR 301*).

18 In addition, in the case of *BS v Dundee City Council [2013] CSIH 91* as applied in *Monmouthshire County Council v Harris [2015] UKEAT/0010/15* indicated that the following factors may be relevant to how long an employer may be expected to wait:-

- 18.1 The likely length of absence;
- 18.2 The fact that the employee has exhausted sick pay;
- 18.3 The cost of continuing to employ the employee; and
- 18.4 The size of the employing organisation.

### **Tribunal's Conclusion**

19 In this case, the Tribunal finds that the Claimant's dismissal was by reason of her capability. The Tribunal came to this conclusion based upon evidence contained in the following documentation which was not disputed:-

- 19.1 The minutes of the meetings on 12 August 2015, 14 April 2016 and 28 July 2016 (page 128, 168 and 208);
- 19.2 The dismissal letter dated 5 August 2016 (page 260);
- 19.3 The appeal outcome letter dated 6 October 2016 (page 248).

20 In addition, the evidence of Ms Mistry, (dismissing officer) and the appeal officer, Ms Stephenson, was clear that the reason for dismissal was capability. The evidence of these two witnesses on this point was not challenged.

21 The Tribunal noted the sad and lengthy sickness absence of the Claimant from 8

March 1999 due to her back condition which continued until the dismissal date on 28 October 2016, a period of 17 years. During this period of time, the Claimant received state sickness benefits and then from 2001, the Claimant was accepted on to the Respondent's discretionary Permanent Incapacity Plan (PIP).

22 In respect to the fairness of the dismissal, the Tribunal noted that on multiple occasions, the Claimant was assessed by occupational health advisers for the Respondent as fit to return to work with reasonable adjustments. Following the receipt of an occupational health report dated 9 March 2015 (page 124), a telephone meeting was held to discuss the Claimant's return to work. The Claimant was referred to the Respondent's redeployment programme and received details of job vacancies within the Respondent's organisation on a weekly basis. The Claimant was on the redeployment register from 14 April 2016 and remained on it until her employment terminated on 28 October 2016. Throughout the redeployment period, the Claimant continued to question the finding that she was fit to work. There was no legitimate reason for her doing so as the Respondent's occupational health adviser had confirmed that she was fit to undertake some kind of work and therefore was not eligible for the Respondent's PIP. In addition, there remained no indication when the Claimant would return to work despite the Respondent's attempts to support the Claimant in her attempts to find suitable alternative employment. In the circumstances, the Tribunal's view was that it was reasonable for the Respondent to conclude that the Claimant no longer met the criteria for payment of the PIP benefit. It was also reasonable for the Respondent to conclude that it could not be expected to wait longer for the Claimant to return given that the Claimant was indicating that she was not fit for work and gave no indication that she would consider herself fit for work in the near future. The Respondent had offered the Claimant support with redeployment for a considerable period of time (throughout which period the Claimant was paid under the PIP) and, in the circumstances, it was the Tribunal's view that it was reasonable to dismiss the Claimant.

23 For the sake of completeness, the Tribunal finds that the dismissal of the Claimant was procedurally fair. The Respondent's decision maker and appeal officer carried out the following actions during the redeployment period, dismissal and appeal process:-

- 23.1 Reviewed the PIP;
- 23.2 Held a meeting to discuss the Claimant's occupational health report dated 9 March 2015;
- 23.3 Discussed the redeployment support and the option of early ill health retirement with the Claimant;
- 23.4 Enrolled the Claimant on to the Respondent's redeployment programme;
- 23.5 Held a formal meeting with the Claimant to discuss redeployment;
- 23.6 Gave the Claimant the opportunity to explore the possibility of an alternative role within the Respondent with the benefit of adjustments and provided the Claimant with weekly job listings of job vacancies.

- 23.7 Obtained a further occupational health report dated 20 May 2016 (page 186);
- 23.8 Held a further formal meeting with the Claimant at the end of the redeployment period;
- 23.9 Considered all the evidence before making a decision;
- 23.10 Held an appeal meeting, during which the Claimant was given the opportunity to explain her appeal points; and
- 23.11 Considered all of the evidence before making a decision.

Employment Judge Hallen

12 December 2017