



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr N Karavias

AND

Northumberland Tyne & Wear
NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 24 & 27 March 2017

Before: Employment Judge Hargrove

Appearances

For the Claimant: In person

For the Respondent: Ms K Jeram of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:-

- 1 The claimant's claim of unfair dismissal is not well-founded.
- 2 The claimant is entitled to a redundancy payment pursuant to section 163 of the Employment Rights Act 1996.

REASONS

- 1 On 2 December 2016 the claimant presented to the Employment Tribunal complaints of unfair dismissal, and of a failure to pay him an enhanced redundancy payment against his former employers, Northumberland Tyne and Wear NHS Foundation Trust. In a response received on 30 December 2016 the respondent claimed that the claimant had been fairly dismissed for redundancy.

As far as the claim for an enhanced redundancy payment is concerned, the respondent asserted that he was not entitled to a redundancy payment because he reasonably refused an offer of alternative employment which it asserted was suitable for him.

- 2 The Tribunal starts by setting out a chronology of main events based on the evidence given first by the respondent, on whom the burden of proof lay to prove a reason for dismissal, from Anna Foster (AF), Deputy Director of Commissioning and Quality Assurance, Lynne Shaw (LS), Deputy Director of Workforce and Organisational Development, who dismissed the claimant at the first stage and made the decision to refuse the redundancy payment, and finally, Russell Patton (RP), Group Director of In-patient Care, who considered his appeal and rejected it. The respondent also gave evidence. All witnesses gave evidence by reference to witness statements which had been exchanged for the hearing and were taken as read. There was reference to a bundle containing 451 pages of documents to which additions were made during the hearing:
 - 2.1 The claimant had been employed by the respondent from **April 2009**, at first as an Information Officer on Band 4. He had previous employment with the NHS at another Trust. There had been a previous restructure of staff at the respondent in about 2011 and from **23 August 2011** the claimant worked as an Information Analyst on Band 5 under Agenda for Change.
 - 2.2 In **September 2015** Phase 1 of a further restructure of senior posts the Trust entitled Transforming Corporate Services (TCS). Phase 1 concerned jobs at Band 8A and above. It was considered appropriate to complete that restructure before moving to Phase 2. Following some initial meetings with affected employees in **January 2016** Phase 2, dealing with jobs at Band 7 and below commenced on **1 February 2016**. There was a proposal in particular for a reorganisation of the structure of the Information Department in which the claimant worked. On **15 January 2016** Anna Foster notified members of the team of a joint meeting to take place on **Monday, 18 January** to provide “an early opportunity to consider and to influence the proposed model that will be put forward for consultation and to raise any immediate queries/concerns ...”. Prior to that meeting, Anna Foster had a short meeting with the claimant alone on the same day. There is a note of that meeting made by AF at page 72 where it was noted that the claimant was “very agitated”; that he took it personally and that he was claiming that the proposal was “unethical, unprofessional and disrespectful”. The claimant did not attend the joint meeting which followed on 18 January.
 - 2.3 He did however, on **21 January**, submit anonymously comments on the proposed new structure which are to be found at pages 67-68. It became apparent during the consultation process that these comments had been sent by the claimant. In addition, there were elective comments criticising the proposals from the team which are to be found at pages 78-79. Prior to submitting his anonymous comments the claimant had e-mailed AF on **20 January** requesting a short meeting, which was offered to take place

on **21 January**. AF, apparently concerned about the claimant's demeanour at the first meeting, proposed that a senior colleague should also be present. She also said that the claimant could submit his comments in writing. This probably led to the claimant's anonymous comments being sent as above. The claimant however cancelled the meeting at short notice.

2.4 Changes to the structure

Prior to 1 July 2016 the structure of the Information Department, as shown in an organogram marked A and added to the bundle at the request of the Employment Tribunal showed the following personnel:-

- (a) An Information Manager, Alison Paxton (AP) on Band 7 reporting, as from 1 January 2016 to AF;
- (b) Two Senior Information Analysts on Band 6, one being Liam Quinn (LQ) who left the post in October 2015 and was then replaced by Neil Thompson (NL), who had previously worked in the department as an agency worker; he was made up following interview; and secondly, Mark Ellis (ME);
- (c) The claimant, a Band 5 Information Analyst.

The task of the Department was essentially to collate data and information and to provide to the Trust internally, and externally, analysis of such data in the form of reports of varying complexity.

- 2.5 The consultation period ran from **1 February 2016** for 45 days to **16 March 2016**. The claimant was on annual leave from the commencement of Phase 2 on **1 February until 8 February 2016**. In his absence, on **4 February 2016**, AF invited him to attend a meeting on his return to go through the consultation information (see page 115). There are no notes of that meeting but on **17 February 2016** AF e-mailed the claimant the response to a specific query that he had raised. The specific query which the claimant had raised was:-

“One of the Senior Information Analysts posts Band 6 became vacant on 1 October 2015. How is it possible to make a decision to fill that vacant post while the restructuring process started at an earlier date (and is still ongoing) and potentially having to displace either the successful candidate or any of the existing members of staff?”

AF responded:-

“The transforming corporate services Phase 1 consultation affecting those members of staff at Bands 8A and above only was launched in September 2015 and was ongoing when the above Band 6 post became vacant. At this stage it was known that there would be a

Phase 2 consultation affecting Bands 7 and below posts. However no further details were known as they were dependent upon the outcome of Phase 1. Due to the need to maintain the information analysis function, a recruitment process took place to replace the vacant Band 6 and the successful candidate was made aware of the forthcoming Phase 2 consultation at appointment”.

2.6 The claimant did not apply for that post in September 2015. He says that he was told at that stage by his Line Manager AP that he did not believe anyone possessed the skills and experience for the vacant post and therefore it would be externally advertised. He says he felt discouraged to apply. In any event he did not. Lynne Shaw also accompanied AF at the meeting with the claimant on 8 February. At the meeting the claimant was handed a copy of the consultation pack and there was a discussion about the proposed restructure. The nature of the proposed restructure with effect from 1 July 2016 is shown in organogram B as follows:-

- (a) AP (the former Information Manager) who also managed a separate information team of seven and did not do any analytical work herself, was redeployed to another Band 7 management role;
- (b) One of the other two Band 6 Senior Analyst roles was enhanced to Band 7; and responsibility for the management of the team was also added to the role. Neil Thompson was appointed to that post. The other Band 6 Senior Analyst role was retained with Mark Ellis in post;
- (c) The claimant’s Band 5 post as an Information Analyst was deleted and a new Band 4 post of Information Technician was introduced.

2.7 During the consultation process the claimant was offered the Band 4 post, his and five posts being set for deletion. The offer was on the basis that the claimant would receive pay protection for five years with the difference being made up to the claimant’s previous pay at the top increment which he held in Band 5. The final consultation feedback report had been distributed to the affected employees by an e-mail from AF on **24 March**. The document is at pages 121-136. At page 125 of that document referring to the Information Analysis Team it was noted that:-

“There were a significant number of queries and comments in relation to the resourcing of the information analysis function, prioritisation of workload and also the proposed future use of business intelligence tools. These have been carefully considered however there is no change to the structure”.

The process for dealing with staff subject to organisational change who were offered a post at a lower grade was set out in the HR process for CST in particular at 66AA staff “may be eligible for protection of earnings. Careful consideration will be given to the level of protection and whether the new post is suitable and will be discussed on an individual basis.

However, in the first instance like for like bandings or pay ranges will be sought for displaced staff". As stated, the claimant was offered pay protection for five years. It is to be noted that the claimant was at this time 48 years of age and had at least 12 years to go until his retirement.

- 2.8 On **14 April 2016** the claimant commenced sick leave. AF claims that he cleared his desk at that time. When asked whether this was true during his evidence to the Tribunal, the claimant did not give a clear answer, and I accept that little if any personal property was left behind by him. The claimant was referred to occupational health on **21 April**. It was noted that he was temporarily unfit for work. A GP's fit note had identified anxiety as the cause and that it was due to expire on **9 June 2016**. In answer to the question "How can we assist Nick through the process?", the Occupational Health Doctor replied that there was "Nothing else that can be done. He is receiving the e-mails regarding vacancies and this appears to be the only practical help that he needs at present". The Occupational Health Doctor gave the opinion that he was currently not fit for work, "however I believe the solution for this lies with management and not occupational health. If a new suitable post could be found for him I am of the opinion that his health would improve to allow him to return to work", (see pages 140-142). The eight week sick note was extended by a further GP sick note for a further eight weeks as from **9 June**.
- 2.9 In the meantime, on **28 April** AP notified the claimant by e-mail of information that she had received from Ben Scorer that there was a vacancy for a Band 5 Information Analyst at the nearby Northumbria Healthcare Trust, which the claimant did not apply for. He says that the post was different and was not suitable for him. Also, he regards the sending of that letter by AP as being significant as being an attempt to get rid of him.
- 2.10 On **6 May** a list of Band 5 vacancies within the Trust was circulated to the claimant. There was only one post which the claimant was interested in and applied for, that of Data Warehouse Officer. The claimant's application for that post is at pages 216-229 and the claimant provided some supporting information at page 228. However, on **11 May** he received notification of rejection for interview from Mr Scorer (see page 235):-

"I feel you do not have the knowledge or experience required in the key areas of data warehouse, national data sets and ASB scripting/webpage development. You also confirmed that you felt these were areas where you did not have the required knowledge and experience".

At the Tribunal hearing the claimant accepted that he did not have experience of webpage development but claimed that he might have been able to do the job with a trial period and some training.

- 2.11 Next, the Band 4 vacancies were released including the Band 4 Information Technician role in the team. There was an application deadline of **24 May 2016** (see page 240). The initial job description for that post is at pages 261-271. The claimant did not apply by that date.
- 2.12 Lynne Shaw invited the claimant to attend a meeting with her on **6 June 2016**. There are no notes of that meeting but immediately after it LS wrote to the claimant detailing the history (see pages 398-400, see especially page 399 where the Band 4 post vacancies notified to the claimant were identified). The letter continues:-

“I did not receive a response from you at the time but when we met today you confirmed that you had received the e-mail but stated that you would not apply for any Band 4 posts across the Trust and that you would only consider Band 5 or Band 6 posts. We discussed the above posts and I subsequently offered you the Information Technician post which remains unfilled. As you are aware, from my perspective and that of your Deputy Director Anna Foster we feel that you have the skills to undertake this post and hence remain a valued member of staff in the new directorate. I therefore consider the role to be a suitable alternative, mitigating against a redundancy, retaining you in broadly the same area of work, in the same location”.

There was then a note of the offer of pay protection “five years at approximately £5.500 a year based on your current salary. During the period of your protection we would aim to secure a role at a higher Band in order to return you to your substantive post, ie Band 5”. The letter went on to state that the claimant’s current post in the structure would not exist after **30 June**, that there would be no opportunity to remain in post after that date. The claimant was given until **15 June** to confirm acceptance of the band 4 post.

The only dispute about the account of the conversation is that the claimant denies that he stated that he would not apply for any Band 4 post, but only the Band 4 post in the new structure. I conclude that Lynne Shaw’s account is correct as to that dispute because it is entirely consistent with the letter that the claimant wrote by way of reply to Lynne Shaw on **June 15** (pages 401-402). In the fourth paragraph of that letter he stated:-

“As far as my statement where I confirmed that I would not be interested in any Band 4 posts is concerned, this stems from my experience to date of all available Band 4 posts which appeared either in the Trust’s vacancies section since end of January 2016 ... or the Band 4 vacancies within the new structure contained within your letter under the Band 4 posts within the weekly TED telegrams.

Effectively there is no comparison between these vacancies and my current post as an Information Analyst. The varied and

interesting workload, the challenging and mental stimulating tasks, the sense of achievement and contribution, the autonomy/independence and job satisfaction and motivation enjoyed are at the top end of the spectrum when it comes to evaluating my current job and any available Band 4 posts within the Trust.

It is all these factors that primarily matter to me which collectively define the 'status' and content of a job. Therefore it is more than obvious that all these Band 4 posts are at a much lower status than my current post. The financial remuneration element is important too, but only as a secondary consideration after judging the status of a job. I should also highlight that any pay protection would be a rather weak/temporary measure since I need another 20 years to reach the statutory pension age which coincides with the NHS current normal pension age".

He went on to describe "an overwhelming feeling of demotion of being undervalued and a sign of unappreciation on behalf of the management if I was to accept this offer". He disputed that the Band 4 post was suitable alternative employment. However he stated that he hoped that "a suitable alternative job in his current substantive banding might emerge within the coming months".

That representation of his views remained his position up to and including the Tribunal hearing.

- 2.13 On **24 June 2016** LS wrote to the claimant (see pages 403-404) urging him to reconsider his decision to turn down the post warning that if he unreasonably decided not to accept the offer he "may lose the right to a redundancy payment". He was asked to confirm his decision by 30 June. On **30 June** he did respond but maintained his position. He referred to differences in the job descriptions for the post at Band 4 and his current post at Band 5, and in particular referring to the fact that the Band 5 post required education to degree level or similar professional qualification in an IT related subject as opposed to "educated to A level in an information related subject."
- 2.14 In these circumstances, on **16 July** LS wrote to the claimant giving eleven weeks of termination of his employment on the grounds of redundancy, with effect from **30 September** and also notifying the claimant that he would not receive a redundancy payment since he had not accepted the post which in the Tribunal's view was suitable alternative employment.
- 2.15 The claimant's employment expired on **30 September 2016**. No other posts were offered to him in the interim period. In the interim however he had instituted an appeal against the decision in writing on **26 July** (see page 389). He stated his belief that the Trust should postpone the decision since only one post was offered to him and his substantiated reasons for refusal had not been seriously considered. In addition, the

Trust's view on suitable or alternative employment had been misjudged. He asked for reconsideration of their refusal to offer him a contractual redundancy payment. At the appeal hearing on **26 September** LS presented the management case as set out in a document at pages 394-397 with Appendices including the job description for the previous Band 5 Information Analyst post and the proposed job description for the Information Technician. Russell Patton chaired the appeal hearing and there are detailed notes which are at pages 438-447. The respondent has picked up on a particular answer which the claimant gave to questions at page 444 where it is asserted that the claimant had changed his position from a denial that any Band 4 post was suitable to be those available to him at the time. The respondent's argument is that that is an indication that loss of status was not a significant element in the claimant's decision not to apply. It is to be noted that on the basis of the timing in the notes, Mr Patton only adjourned for four minutes between 5:07pm and 5:11pm before notifying his rejection of the claimant's appeal. However, Mr Patton says, and I accept, that he had read all of the documents with care before the meeting, and in the outcome letter of **3 October** he gave detailed reasons for upholding the original decision (see in particular page 449). This ends the chronology of events.

6 The issues and the relevant statutory provisions

- 6.1 Did the respondent prove on the balance of probabilities that the reason or principal reason for the claimant's dismissal was redundancy?

Redundancy is defined in section 139 of the Employment Rights Act 1996. That provision applies if the following conditions are satisfied:-

"An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

- (a) the fact that his employer has ceased to or intends to cease –
 - (i) to carry on the business for the purposes of which the employee was employed by him, or
 - (ii) to carry on that business in the place where the employee was so employed; or
- (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 ceased or

diminished or were expected to cease or diminish”.

- 6.2 If the respondent satisfied the Tribunal that the dismissal was for that reason the Tribunal has then to decide whether the dismissal was fair or unfair applying section 98(4) of the Act:-

“... The determination of the question whether the dismissal was 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”.

- 6.3 If the dismissal for that reason is found to be fair, did the claimant lose the right to a redundancy payment by reason of an offer of suitable and alternative employment which the claimant unreasonably refused? In that respect section 141 provides as follows:-

“(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment –

- (a) to renew his contract of employment; or
- (b) to re-engage him under a new contract of employment, with renewal or re-engagement to take effect either immediately, or after an interval of not more than four weeks after the end of his employment.

(2) Where subsection (3) is satisfied the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.

(3) This subsection is satisfied where –

- (a) the provisions of the contract is renewed or if a new as to –
 - (i) the capacity and place in which the employee would be employed; and
 - (ii) the other terms and conditions of his employment would not differ from the

corresponding provisions of the previous contract; or

- (b) those provisions of the contract is renewed, or of the new contract, would differ from the corresponding provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee.
- (4) If the dismissal was unfair, to what compensation is the claimant entitled by way of a basic and compensatory award including the **Polkey** test what are the chances that the claimant would have been fairly dismissed in any event at some later stage and if so when?"

7 The reason for dismissal

The respondent submits that redundancy as defined in section 139(2)(b) was the reason for the dismissal. There was a reduction in the requirements of the business for a Band 5 Analyst because it proposed that the more complex analytical work could be done by the two former Band 6 Senior Analysts who had previously shared out the work to the claimant, but that it included the collection of basic data and information which was the subject of analysis. The collection of the basic data and some simple analysis could be assigned to a new Band 4 post. The Band 5 post could be disposed of.

The claimant's principal argument was that there was no reduction in the requirements for a Band 5 analyst and that that work was still required. It was not in dispute that the workload of the section had not diminished at all. The headcount of the team actually performing the work had not reduced. All that had occurred was that the Band 5 job had been downgraded from Band 5 to Band 4 to pay for the increased salary of the Band 6 Senior Analyst's post which had been upgraded to Band 7 to take into account extra managerial duties.

It is to be noted that the claimant has not asserted that the supposed redundancy was a mere sham to provide a cloak for a dismissal of the claimant for some other unconnected reason. Thus the test to be applied is that laid down in **Sainsbury's Supermarkets Plc v Burrell [1997] ICR page 523**, were approved by the House of Lords in **Murray v Foyle Meats**:-

"Free of authority we understand the statutory framework ... involves a three stage process:-

- (1) Was the employee dismissed? If so;
- (2) Had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so;

- (3) Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2 above ... There may be a number of underlying causes leading to a true redundancy situation; are stage 2. There may be a need for economy; a reorganisation in the interests of efficiency; a reduction in production requirements; unilateral changes in the employee's terms and conditions of employment. None of these factors are themselves determinative of the stage 2 question. The only question to be asked is was there a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind or an expectation of such cessation/diminution in the future?"

I have accepted that there was a genuine redundancy situation here. The two former Band 6 Senior Analysts could be freed up to perform only the more complex analytical work if the basic duty of data and information collection were assigned to an employee at Band 4. In those circumstances there was no longer any need for a Band 5 Analyst. It is to be noted that the Tribunal is not entitled to assess the employer's business reasons for reaching a decision or declaring a redundancy or redundancies provided there is no allegation that the reason is being used to mask what is in effect a sham. The claimant's criticism of the filling of the vacant Band 6 post in October 2015 is in my view not relevant to the issue whether the claimant's post was redundant in 2016. I accept that the respondent was still undertaking Phase 1 of the reorganisation at that stage and the restructure of the higher bands would have had an influence on how the lower bands in Phase 2 were restructured. At that stage there was clearly a business need to fill the Band 6 vacancy. For whatever reason, the claimant did not apply.

8 **The fairness of the process**

In relation to the application of the fairness test in section 98(4) to a redundancy dismissal, the starting point is the well known passage in Lord Bridges' judgment in **Polkey v AE Dayton Services**:-

"In a case of redundancy, the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."

The claimant was consulted prior to the decision being made to make his post redundant. He had the opportunity to and did make representations. Clearly he disapproved of the proposal. The respondent was entitled, having considered his objections, to confirm their original plan. The claimant originally asked for a second meeting but then cancelled it. Clearly the claimant was consulted about redeployment to alternative posts in particular the Band 5 post at which, however, he was unsuccessful. There is no basis for a conclusion that the reason for him not being shortlisted for interview was in any way improper or unfair. This is not a case for bumping, which commonly occurs where a more senior employee is redeployed into another more junior role as a consequence of his position being

made redundant and the more junior occupant is dismissed in his place. In the present case the Band 5 post in question was vacant and the respondent was entitled to take the view that the claimant did not have the necessary qualifications or experience to fill the role. In any event the role was not a more junior role. It was a role at the same band. It is not disputed that the other band five roles of which the claimant was notified were unsuitable for him. The claimant was then given the opportunity of applying for Band 4 roles but declined one for which he was clearly suitable if overqualified. There was adequate consultation with the claimant and he was given the opportunity of appealing. There is no valid criticism of the fairness of the procedure which was followed. For these reasons I find that the claimant's dismissal was fair.

- 9 **Was/is the claimant entitled to a redundancy payment**, in this case enhanced under the elective agreement to provide in effect a calendar month's pay for each year of employment, as opposed to one or one and a half week's pay under the statutory scheme contained in section 162 of the Employment Rights Act (see page 53 of the bundle)? The scheme also provided, however, that the right to a redundancy payment could be lost if the employer offered suitable alternative employment "regard should be had to the personal circumstances of the employee. The employee will however be expected to show some flexibility;". The offer was made before the date of termination, to be available not later than four weeks from that date – see paragraph 16.22 on page 64, and the employee loses the right if he fails to apply for it. These paragraphs expressly refer to the provisions in sections 138-141 of the Act. Section 141, it is agreed, contains the provisions material to the issue whether the claimant is entitled to the enhanced redundancy payment:-

- “(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment –
 - (a) to renew his contract of employment; or
 - (b) to engage him under a new contract of employment with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.
- (2) Where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he reasonably refuses the offer.
- (3) This section is satisfied where –
 - (a) the provision of the contract as renewed, or of the new contract, as to –
 - (i) the capacity and place in which the employee would be employed, and
 - (ii) the other terms and conditions of his employment,

would not differ from the corresponding provisions of the previous contract; or

- (b) whose provisions of the contract as renewed, or of the new contract would differ from the corresponding provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee”.

Thus the issues in the present case are as follows:-

- 9.1 Did the offer of the new contract, the provisions of which differed from the corresponding provisions of the previous contract, constitute an offer of suitable employment in relation to the employee?
- 9.2 Did the claimant unreasonably refuse the offer?

In her written submissions to the Tribunal counsel for the respondent submitted that some of the factors to be considered by the Tribunal would be relevant to both limbs of the test but the Tribunal had to consider the issues separately noting that the suitability test was an objective test as to whether the employment was suitable for the claimant, whereas the unreasonable refusal test contained elements of objectivity and of subjectivity. We were referred in particular to a passage in **Bird v Stoke on Trent PCT [2011] UKEAT/0074/11 paragraph 19**:-

“The question is not whether a reasonable employer would have accepted the employer’s offer, but whether that particular employee, taking into account his personal circumstances, was being reasonable in refusing the offer:- did he have sound and justifiable reasons for turning down the offer?”.

In **Devon Primary Care Trust v Readman [2013] IRLR page 878 paragraph 21** in the judgment of Lord Justice Pill the Court of Appeal said:-

“The tribunal applied the correct test in my judgment at paragraph 22 when it stated:

‘The reasonableness or otherwise of the refusal depends on factors personal to the employee and is assessed subjectively from the employee’s point of view at the time of the refusal’.”

Another passage from that judgment is contained at paragraph 31:-

“In unfair dismissal cases the Tribunal has to make a judgment on the evidence as to whether a decision to dismiss fell within the reasonable band of responses which a reasonable employer might have adopted. That is different from the test under section 141 which ... involves a judgment as to whether an employee has unreasonably refused an offer, looking at it from her point of view on the basis of the facts as they appeared or ought reasonably to have appeared to her at the time the decision had to be made. A specific judgment needs to be made, not a

judgment on whether the decision fell within a reasonable band of responses which a reasonable employee might have made ... the task under section 141(2)(b) is whether this particular employee in this particular situation acted reasonably in refusing the offer of employment”.

The respondent contends that the post offered was suitable for the claimant because the terms were identical NHS terms, permanent, on the same hours and with the same benefits save as for pay. As to the pay, the claimant's pay was already at the top of Band 5 and was to be protected for five years; the location was, as before, within the central IT function of the Trust at the same place, the team was as before save that one of the three remaining members of the team had been promoted to a Band 7 managerial post. The second remained at Band 6 and, although the claimant's new post was to be as a Band 4 post rather than a Band 5 post, he was still the junior whereby he was still being supervised by the now Band 7, former Band 6 employee. It was envisaged that in the new Band 4 post he would do less and only simple analytical work, although when Mr Thompson was first appointed from an agency position to the vacant Band 6 post he, the claimant, had been performing more complex analytical work while Mr Thompson completed other work. The claimant was now proposed to work in a post two bands lower than the Band 6 post holders. That could be compensated for in financial terms giving pay protection for five years although, as I understand the evidence, pay protection would be eroded because he would not get pay increases in the protected pay in the meantime.

Ms Jeram accepts that even if a job is objectively suitable, a claimant may not be unreasonable in refusing the offer if he himself considers it to be unsuitable. She cites the authority of **Cambridge & District Cooperative Society v Ruse [1993] IRLR page 156**, where a former manager of a butcher's shop which was closed was offered a new job as a butchery department manager in a supermarket in which he was responsible to another manager, did not have his own key and no longer had responsibility for banking, and refused it. Notwithstanding that it was suitable alternative employment the employee's perceived loss of status made it reasonable for him to refuse the offer. The mere fact that pay protection is offered to compensate for any loss of status does not necessarily or of itself make it unreasonable for the employee to refuse it. In addition however the respondent points to the opportunity stated to the claimant during the process to reapply for any Band 5 jobs which arose in the five year period. In addition, the respondent points to the single response to a question at the appeal that the claimant would have accepted the alternative Band 4 jobs, having previously indicated that no Band 4 jobs would be suitable. It is argued that this demonstrates that the claimant was no longer concerned about loss of status. However, although the claimant did not always act reasonably or rationally throughout the respondent's consultation process, I accept that he particularly felt that the Band 4 post that he was offered did entail a significant loss of status to him. Furthermore there was another relevant consideration within his thinking. It is not a case where pay protection was being offered to protect him for only a short time until his employment would otherwise have been due to end such as was the case in **Wiseman v Central Lancashire Primary Care Trust ET Case No 2408405/2008**. Here the period of pay protection was substantial but the claimant was only 48 years of age and, if no alternative Band 5 posts became

available he would have suffered a substantial loss of pay and consequent loss of pension contributions. For these reasons, but not without some hesitation, I accept that the claimant acted reasonably in refusing the offer and is accordingly entitled to a redundancy payment.

EMPLOYMENT JUDGE HARGROVE

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
26 April 2017**

**JUDGMENT SENT TO THE PARTIES ON
2 May 2017**

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL