EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss Clare Jackson	v	**University Hospitals of North Midlands NHS Trust**

Heard at: **Birmingham** **On:** **5, 6, 7 and 8 October 2021**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **In Person**

Respondents: **Mr M Fodder, Counsel**

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal for the reason of redundancy is well founded and succeeds.

2. The claimant is awarded a statutory redundancy payment.

3. The claimant is awarded a compensatory award calculated from 25 January 2019 to 3 March 2019.

4. The claimant's claim of breach of contract (for an enhanced contractual redundancy payment) is not well founded and is dismissed.

5. The claim for notice pay is not well founded and is dismissed.

6. The parties are to notify the Tribunal by 3 December 2021 whether a remedy hearing is required and if so, dates of availability for a ½ day remedy hearing by CVP from 1 March 2022 to 30 June 2022.

REASONS

1. By claim form dated 14 April 2019, the claimant brought claims of unfair dismissal (both direct dismissal and constructive unfair dismissal); a claim for a redundancy payment/breach of contract (failure to pay enhanced redundancy payment) and a claim for notice pay.

2. The Tribunal paper bundle had been delivered to the Stoke Court Centre so that the Tribunal worked from an electronic bundle on day 1. By day 2 the paper bundle had arrived at the Tribunal. The respondent stated it had amended the bundle on the morning before the hearing unbeknown to the claimant. The claimant, as Litigant in Person, was informed she would be given time to consider the bundle if she required. The bundle ran to 862 pages. The claimant in fact did have the correct bundle. It was agreed that the claimant could add in a document "Annex 24 : Guidance on workforce reprofiling (England and Wales) at pages 863 to 866 and a document titled NHS Job Evaluation Handbook at pages 867 to 874. On day 2 it was agreed that the respondent could add in a chain of emails; pages 798a to 798c.

3. Both parties had submitted opening statements in respect of their cases but there was no agreed list of issues or agreed facts. The claimant had put together a draft list of issues. The respondent was invited to consider this and drafted an agreed list. On day 2 the Tribunal sought clarification from the claimant as to her case and the dates of the incidents she relied upon.

4. Prior to commencing cross examination of the claimant, Counsel for the respondent stated he was going to adopt a light touch approach to the claimant's case about unfair redundancy. The respondent conceded that by virtue of placing the claimant on band 5 (a demotion from band 6) on 3 December 2018 it was in repudiatory breach of contract. The Tribunal noted this but commented how the respondent wished to run its case was a matter for that party.

5. The claimant attended the Tribunal building on day 1 and day 2. The respondent and counsel connected to the hearing remotely. At the end of day 2 the claimant requested to conduct her cross examination from home. The Tribunal agreed and there was no objection by the respondent. The cross examination of the claimant finished at 3p.m. on day 2. The claimant requested time overnight before starting her cross examination of the respondent witnesses. There was no objection from the respondent and the claimant was given the requested time.

6. The evidence was completed by 3 pm on day 3. Counsel for the respondent requested time to amend his written submissions overnight and supplement these with oral submissions on day 4. The claimant agreed this course.

7. The claimant relied upon her own evidence. The respondent called 7 witnesses namely Professor Antony Fryer, Director of Research and Development; Jillian Stacey, Research Nurse & Professional Head, (the claimant chose not to cross examine Miss. Stacey); Dr. Adam Farmer, Deputy Director of Research and Development; Katrina Parkinson, Lead Research Practitioner, Dr. Oxtoby, Medical Director, Lisa Hughes, Deputy HR Business Partner and Barbara Butcher, Deputy HR Business Partner.

8. The case was timetabled in draft and the Tribunal read all the statements and documents referred to in the statements prior to hearing evidence.

9. Both parties provided written submissions to the Tribunal on the morning of day 4. Mr. Fodder provided the Tribunal with an extract from Chitty Chapter 24 "Discharge By Breach" and supplemented his written document with oral submissions. The claimant did not wish to add to her written document.

Agreed Issues

10. Prior to hearing the evidence, the list of issues to be determined by the Tribunal was agreed as follows :-

(1)1 Was the claimant dismissed ?

(a) By the contract under which she was employed being terminated by the respondent (section 96 (1)(a) of the ERA 1996) and section 136 (1)(a) of the ERA redundancy and if so

(i)when? The claimant contends that the respondent did so on 3 December 2018;

(ii)How? The claimant contends that it did so by unilaterally deleting the claimant's substantive post and implementing another contract without the claimant's agreement thereby effectively withdrawing the old contract

(b) By her terminating the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct (s.95(1)(c) ERA [and S 136 (1) (c) ERA (redundancy)] and if so when?

(i)The circumstances which the Claimant says she was entitled to rely upon were breach of the express terms of her contract of employment and the implied term of trust and confidence by the Respondent

(c) Unilaterally changing the claimant's contract on the 3rd December without the claimant's agreement and knowledge and despite the claimant's express written objection.

(b) On or about 3 December 2018 Changing her electronic Employee staff records which showed she was under a new contract at a band 5 level which would have pay implications for any new employment the Claimant may have secured.

(c) On 25.1.2019 unilaterally attempting to enforce a temporary contract on the Claimant to cover a notice period for the deletion of her substantive post which had been deleted two months prior and refusing the claimant PILON. The Claimant relies on the 'last straw' doctrine.

(d) On 3 December 2018 Deleting the Claimant's substantive post without contractual notice (despite the Respondent knowing that the Claimant expressly objected to a new contract).

(e) Treating the Claimant in a perfunctory and insensitive manner indicating the Claimant's demotion when she had expressly objected to the new lower band contract.

(f)Inviting the Claimant to a band 5 meeting on 12 December 2018

(g) On 4 December 2018 Attempting to give the Claimant lower band duties.

(h) Not informing the Claimant of a meeting with the Principal investigator, research manager and data administrator and where

previously the Claimant's presence would have been essential. (the Claimant was only made aware of the meeting when she accidently walked in on the meeting).

(i) During the same meeting, telephoning an ex-employee to ask advise on the Claimant's trial when the Claimant was available

(j) In December 2018 Attempt to remove the Claimant's specialty when asked her to attend a site initiation visit for a neurology study and contribute to a stroke study which she was not competent and objected to in her grievance letter.

(k) In December 2018 Removing the Claimant's duties from her by not involving her in new haematology trials site initiation meetings, removing data oversight and trial monitor communication.

(l) From 3 December 2018 Not Inviting her to the band 6 management meetings and daily departmental band 6 meetings.

(m)On 27 September 2018 Misleadingly and wrongly informing the Claimant that each of her cancer trials had been risk assessed to determine skills and time needed to provide patient safety, welfare and trial completion when a risk assessment had not been done. This would have revealed that the claimant's duties and responsibilities were very different from others in the selection process.

(n)Misled the claimant that her notice to end employment on 1 December 2019 had been agreed

(2) The Claimant contends that she terminated the contract by her email of 16.04 on 25.1.2019 to Professor Fryer.

Reason for Dismissal?

11. If the Claimant was dismissed by the Respondent then:-

a. What was the reason (or, if more than one, the principal reason) for the dismissal?

b. Was it a reason falling within S 98 (2) ERA 199or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held?

If the Tribunal concludes that the Claimant was dismissed then the Respondent will contend that the Claimant was dismissed for some other substantial reason, namely its belief that in making the proposal set out in Dr Oxtoby's letter of 18.1.2019 it was acting in accordance with the Claimant's wishes alternatively by reason of the Claimant's redundancy.

Fairness of Dismissal

12. The Claimant contends that the dismissal was unfair because she contends that the Respondent:-

a. Failed to conduct an open, transparent and fair redundancy consultation in thatthey omitted to inform the claimant the

consultation was a redundancy consultation and that she was at risk of redundancy. Instead informed it was 'downbanding'.

b. Failure to document in the consultation paper or correspondence (dated September/October 2018) that theclaimant and other employees were at risk of redundancy.

c. On 29 October 2018 Wrongly told the claimant that the possible outcome for her post was 'down banding', when in actual fact it was redundancy. The NHS agenda for change documentation informs that down banding is a different workforce change involving robust in-depth role and duties evaluation in which points areallocated to determine banding.

d. On 23 November 2018 Misled the union representatives that this was a down banding process and not redundancy

e. Used ambiguous and misleading communication in referring to staff in the consultation paper (6 September 2018) who were at risk of redundancy as 'list of affected staff inpost being consulted with'

f. On or about 13 November 2018 Failed to carry out a matching exercise to determine the claimant's duties to justify ringfencing to the new band 6 post, and slotting into the band 5 post. asper the respondent's organizational change policy as per the respondent's organizational change policy.

g. In the consultation paper (6 September 2018) wrongly altered the claimant's substantive job title and used this incorrect job title to ringfence to new post with a like job title but which had very different roles and duties to the claimant's substantive post.

h. Failure to allow their own organizational change policy when the deadline date for the new band 6 applications (25 September 2018) was before the end of the consultation period (6 October 2018).

i. Led the Claimant to believe that the consultation was to determine demotion (downbanding) by selection process, a unnatural workforce change when in actual fact it was to determine the posts that were redundant.

j. Warned the claimant and other employees (consultation meeting with Barbara Butcher) that if they did not engage with the selection process they will automatically be

downbanded. As in Hogg v Dover 'held a pistol to the head'

k. Omitted to inform during and following the consultation period that the band 5 post was deemed 'suitable alternative employment'. This term was not used during the consultation.

l. On 13 November 2018 Omitted to inform of entitlement to a four week trial.

m. Failed to put the claimant at risk of redundancy at the first opportunity, when the consultation ended 6th October 2018 and when she informed them on 19th November 2018 that she did not agree that it was a suitable alternative role and wished to be made redundant.

n. On the 11th December 2018 denied the claimant was at risk of redundancy even though her post had been deleted on the 3rd December 2018 (without the Claimant's knowledge and against the grievance policy) and knowing that the Claimant expressly objected and did not agree to a new post. Despite the Claimant's detailed letter expressly objecting to the band 5 post as 'suitable alternative employment' the Respondent held 'pistol to the head and told' (Hogg v Dover) your contract will change.

o. Misled the Claimant in a formal letter on 29th October 2018 that one of the two possible outcomes for her of the selection process was she would be downbanded. Omitted to advise of risk of redundancy, suitable alternative employment, for week trial and notice period.

p. Failure to dismiss the Claimant as per ACAS guidelines when the Claimant expressly objected (in her grievance dated 19 November 2018) and did not agree to a new contract comprising a different role.

q. Despite the Claimant sending her form for suitable alternative employment to Barbara Butcher on 22.11.2019 the Respondent recused to search for suitable alternative employment until 22.1.2019 (8.5 weeks later).

r. Denied the Claimant a statutory redundancy payment when they admitted her post was redundant and had been deleted on the 3rd December 2018.

s. Denied the Claimant and enhanced contractual redundancy payment.

t. Misled the Claimant that her notice to end employment on the 1st February 2019 had been agreed [p799] 22.1.2019.

Remedies

13. If the Claimant was dismissed then is she entitled to receive:-

    a. A basic award? If so how much?
    b. A compensatory award? If so how much?
    c. A statutory redundancy payment? If so how much?
    d. Damages (limited to £25,000) for breach of contract by the Respondent not paying the Claimant
    (i)a contractual redundancy payment pursuant to and calculated in accordance with the provisions contained in S.16 of Agenda for Change
    (ii)notice pay

Facts

14. There was a significant amount of material in the bundle of documents and evidence provided in witness statements. The Tribunal has determined the facts proportionate to the relevant issues to be determined in the case.

15. The claimant was employed by the respondent from 23 March 2010 as an Acute Care Research Nurse band 6. The terms and conditions of her employment are set out in the document at pages 124 to 128. Pursuant to her contract, the claimant was required to give 4 weeks' notice to terminate her employment (paragraph 16). The claimant's contract was also subject to the NHS Terms and Conditions which defined a dismissal by reason redundancy at page 155 as including *"the fact that the requirements of the business for employees to carry out work of a particular kind in the place where they were so employed, have ceased or diminished or are expected to cease or diminish."*

16. A redundancy payment under the NHS terms is calculated on the basis of one month's pay for each complete year of reckonable service subject to a minimum of two years' continuous service and a maximum of 24 years reckonable service (page 156). Section 16.20 of the NHS Terms and conditions of service that provides under Exclusion from Eligibility that "*Employees shall not be entitled to redundancy payments or early retirement on grounds of redundancy if they: unreasonably refuse to accept to apply for suitable alternative employment with the same or another NHS employer; or leave their employment before expiry of notice."*

17. Suitable alternative employment is set out in the NHS terms at paragraphs 16.21 to 16.23. It states

    "16.22 Suitable alternative employment for the purposes of paragraph 16.20 should be determined by reference to sections 138 and 141 of the Employment Rights Act 1996. In considering whether a post is suitable alternative employment regard should be had to the personal circumstances of the employee. Employees will be expected to show some flexibility.
    16.23 For the purposes of this scheme any suitable alternative employment must be brought to the employee's notice in writing or by electronic means

agree with the employee before the date of termination of contract and with reasonable time for the employee to consider it. The employment should be available not later than four weeks from that date. Where this is done, but the employee fails to make any necessary application the employee shall be deemed to have refused suitable alternative employment. Where an employee accepts suitable alternative employment the "trial period" provisions in section 138 (3) of the Employment Rights Act 1996 will apply."

18. It is agreed by the respondent that the claimant was passionate about her work. The claimant was a conscientious professional who sincerely cared about the welfare of the patients in her unit. Historically she had raised formal concerns when she considered there was a failure to monitor patients appropriately on a clinical trial.

19. The claimant was a credible witness. The claimant's evidence was straightforward and balanced and she made concessions where she considered appropriate. This contrasted with the evidence given by some of the respondent's witnesses which the Tribunal found evasive (failing to answer questions despite being asked on a number of occasions) and very defensive in particular Ms. Butcher and Ms. Parkinson, who the Tribunal found struggled to directly answer a direct question. Where there is a dispute of fact between the claimant and the respondent's witnesses, the Tribunal in the main preferred the claimant's evidence.

20. The claimant's case is that she believed that the respondent had not simply made mistakes by treating her unfairly but had done so deliberately and she had been deliberately misled. Although a number of clinical staff had been involved in the process, she stated they had been advised and guided by H.R because clinicians are not experts in redundancy. She felt that the H.R. team should have recognised the obvious point that as her band 6 role no longer existed and she was not selected for a new band 6 role that she was redundant. From her limited research with no legal experience on google the conclusion she had reached is that she was redundant. She stated HR should have informed her along with colleagues that this was a redundancy situation but they failed to do so. She expected H.R. to be truthful. She was a nurse and she looked after vulnerable patients and her expectation is that H.R. would look after her and her colleagues.

21. The claimant was taken in cross examination to a number of matters she relied upon as part of the unfairness of her dismissal. The omission to inform her about a four week trial of the new band 5 post she stated was a deliberate omission by H.R.; the failure by Miss. Butcher not to place the claimant on the alternative work register was deliberate because the claimant refused to tick the box on the form that she was downbanded (she disagreed she was); the claimant believed that she was redundant; she said the respondent was not listening to her and stated "you are downbanded." She believes H.R. should have known better. The claimant stated that she did not understand the reasoning behind the decision to re-organise.

22. From hearing all the evidence, it became clear that the clinicians involved in the process were experts in their clinical field with no employment law

expertise and relied heavily on the guidance and advice provided by Human Resources. The Tribunal having heard all the evidence found it incredible to consider that H.R. professionals such as Ms. Butcher who had nearly 20 years of experience in H.R. could have made the mistake of failing to recognise that the claimant and colleagues not placed in the new band 6 posts were actually redundant; and the HR team had failed to advise band 6 employees of this or even inform them the band 5 roles were for a four week trial; the Tribunal concluded that these flaws were beyond mere mistakes committed by the H.R. team and were deliberate and the claimant was misled.

23. Acute care covered patients admitted for an acute episode of illness or disease and this would cover departments in the Emergency department, the Acute admissions ward and the critical care department. All research nurses worked at AFC band 6 level. Her specialty was haematology.

24. Professor Fryer commissioned an external review by Paul Cross Consulting who reviewed the Trust's General Clinical Practice (GCP) compliance in December 2017. The report concluded "the current staffing structure in the R & D office is inadequate." An action plan was put into place from January 2018 to address the findings of the report. The financial imperative resulted in a decision in January 2018 to implement the restructure in 2 phases, the delivery team first (phase 1) and then the support team (phase 2) with four main drivers (i)financial deficit (ii)the mis-alignment with skill mix elsewhere in the Trust (iii)the need to address the external review and ensure GCP compliance so that the Trust could sponsor clinical trials of an investigational medicinal product and (iv) partnership with its academic partner Keele University. Points (i) and (ii) were the drivers key to the delivery of the delivery team restructure. Jill Stacey, Research Nurse Professional Head and Adam Farmer Deputy Director of R & D started to develop a new model for the R & D Delivery Team for phase 1 of the restructure from January 2018. The Trust's view was that it could improve efficiency by incorporating 6 different delivery teams (neurology, oncology, women and children's medicine, acute and generic) into a single team supported by a single administrative support team. It anticipated this would general a saving of £600,000.

25. On 8 January 2018 Professor Fryer wrote to all staff (page 208) within the R & D Directorate to inform them about the outcome of the independent external review of the Trust's Good clinical practice compliance undertaken by Paul Cross Consulting in December 2017. At a staff meeting on 1 February 2018 all staff within the Research and Development Directorate were informed of the report findings, the Trust's action plan and that the R & D Directorate required and would be subject to a restructure (page 216-242). From February 2018 to September 2018 Adam Farmer, Deputy R & D Director and Professor Fryer wrote an Organisational Change Consultation paper (page 50-84) assisted by some members of the HR team and others.

26. On 26 July 2018 a briefing session for all staff took place to update them on progress and inform them that they were undertaking a two phase

restructure and that phase 1 would launch during the week commencing 3 September 2018 and the focus was the R & D Delivery Team (pages 253-9).

27. On 6 September 2018 Tony Fryer emailed all delivery staff the Management of Change Proposal paper (page 260-316) which envisaged a restructure across the Trust. The proposal paper recommended that there would no longer be specialised research nurses and instead it proposed a single delivery team that would cross over all disease specialties (page 275). It was proposed that staff shift patterns would change so there would be some unsocial hours and on call rota working to include out of hours and weekends. Staff would also be required to work across multiple sites. The largest group affected were AFC band nurses 6 (20 FTE to 8 FTE). A desk top selection assessment was to take place. The document stated that in respect of AFC band 6 the remaining staff would be inserted into the AFC band 5 posts and pay protected (page 278). The proposal document did not disclose the AFC band 6 staff were at risk of redundancy; nor did it refer to a trial period. Further the document stipulates that the formal consultation period for this proposal paper is 30 calendar days effective from the date of this letter and is due to close on 6 October 2018 by 5 p.m. and this will be then be followed by a process to implementation on 3 December 2018. It further sought applications for flexible working to be made by 25 September 2018 despite the fact that the formal consultation period did not end until 6 October 2018.

28. On 13 September 2018, 17 September 2018 and 19 September 2018 staff briefing/consultation meetings with staff took place about the proposed re-organisation of the structure and roles within R & D Directorate (p.317-322). Question and Answer papers were issued to address key questions received (pages 325-337, p.346-356 and page 545). Communication emails with information were sent out on 14 September 2018, 28 September 2018, 19 October 2019 and 26 October 2019 (p.323; p.344-345; p.524-5 and p.543-544). On 19 September 2018 (page 338) the claimant sent an email to Professor Fryer raising concerns that if the role of cancer research nurse was removed that it would give rise to patient safety issues. Further the claimant expressed there had been some misunderstanding about the role of the Cancer Research Nurse at Royal Stoke Hospital and she detailed the role performed by herself and her colleagues. Professor Fryer took into account her concerns as part of the consultation process along with a counter proposal from oncology clinical trials team on 5 October 2018 (page 357-363). The claimant had an individual consultation meeting on 27 September 2018 (page 342-3) with Adam Farmer and Rob Irving, Trade union representative.

29. The MOC final paper and implementation dated 29 October 2018 envisaged two possible outcomes for the claimant namely (a)that she would be selected for one of the posts in the new structure (and you would be issued with contract documentation or (b)that the claimant would not be selected for one of the posts in the new structure in which case the claimant would be down-banded to a band 5 research practitioner. At page 562 it states “the remaining people will be inserted into the proposed band 5 research practitioner roles and pay protected according to the Trust Policy for the

Protection of Pay and conditions of Service". The respondent accepts that it did not inform the claimant that her band 6 post was redundant or that the band 5 post could be carried out on a trial period for 4 weeks (as now conceded by the respondent). Professor Fryer did not consider it was a redundancy situation by reason of the information he received and relied upon from HR. There was no credible explanation from the respondent why this information had not been provided to the claimant and her band 6 colleagues.

30. Gillian Stacey (her evidence was unchallenged by the claimant) undertook an assessment of the band 6 staff separately from Adam Farmer. They later met to conduct a joint assessment by comparing their individual and joint assessment and scores to Helen Inwood, Deputy Chief Nurse as moderator.

31. On 13 November 2018 the claimant was informed by Professor Fryer about the outcome of the selection process (page 601-603). She was unsuccessful in the desk top assessment for the Band 6 role of Senior Research Practitioner. This new role involved a managerial position and conducting appraisals. Her previous band 6 role had been more patient care orientated. The claimant was informed that her *"current post is not required in the R and D Directorate new organisation structure from the effective date of change. However, as explained in the M of C consultation document there is an available suitable alternative post in the new structure that you will be slotted into."*

32. The claimant was informed that she would be slotted into the Band 5 role as a Research Practitioner with pay protection for 2 years. It was confirmed that the grade/band of the post is one band below that of her current post. He enclosed a copy of her new contract of employment (page 601-619) which provided for a minimum period of notice of 8 weeks. At the relevant time the claimant was at the top of band 6 and the consequence of this she would not have received any salary increase on this banding. The outcome letter said that the claimant had no right of appeal.

33. The letter attached a form to sign to accept the terms and conditions but the claimant did not sign it as she did not agree to it (page 619). The Tribunal finds that this evidenced the claimant's rejection of the proposed new terms and conditions.

34. Under cross examination Dr. Fryer candidly admitted he was not an employment expert and relied upon the H.R. advice he received. He was familiar generally with the term redundancy but was unaware of the statutory definition of redundancy. From the advice he received from H.R. he did not consider that the claimant's post was redundant. That opinion based on H.R. advice was wrong. Further he did not know that the suitable alternative employment started at the end of the previous contract. He was unaware of the trade union concern that the claimant and her colleagues posts were "at risk of redundancy but disguised as down banding" (page 658) which was raised with Ms. Butcher. Professor Fryer was unaware of the slotting in criteria set out in the Organisational Change Policy and Procedure document at page 66 namely *"there may be circumstances where certain*

roles and responsibilities of a post may alter. If a post remains substantially unchanged and the member of staff continues to undertake 70% or more of the same duties then the member of staff will be confirmed in post subject to personal circumstances." His evidence was that the band 5 job was suitable alternative employment because the claimant had the skill set to do the job. However, under the policy that was not the test. The claimant had sent an email to Professor Fryer and others on 19 September 2018 at page 338 stating what actual her role as a cancer research nurse was because she believed there was some misunderstanding. The claimant set out the details of her role and stated *"this is totally different to the role of the cancer research nurse at Royal Stoke Hospital".*

35. Professor Fryer accepted that the "suitable alternative employment" started when the previous contract ended. He did not accept that his letter dated 13 November 2018 gave notification to the claimant that her contract had ended and a start of a new contract on 3 December 2018 (the band 5 role). The Tribunal concluded the only sensible reading of the letter dated 13 November 2018 was to give notice to the claimant that her band 6 role was to end and she would be taking on a new contract with terms and conditions for the band 5 role on 3 December 2018. There was not an intention on the part of the respondent to terminate the employment of the claimant; it wished to continue to employ the claimant having down graded her (with two years pay protection). The respondent now accepts that this was in repudiatory breach of contract.

36. On 16 November 2018 (page 642-643) the claimant and three colleagues (all senior research nurses not selected for the new band 6 roles) raised a joint grievance. This again evidenced the claimant's protest against the imposition of changes to terms and conditions of her employment. This was heard by Professor Fryer on 28 November 2018. He did not uphold the grievance; and rejected the concern raised about patient safety and stated the necessary expertise would be available to support patients in existing studies; see the letter dated page 742-745.

37. On 19 November 2018 Michael Way, the claimant's trade union representative attached a second grievance in respect of the MOC process (page 645-649). The claimant stated *"The deletion of my specialty is of massive significance to me as my career in research is directed to cancer care and treatments..The change of terms and conditions and lack of specialist that will be forced on me with the change of contract to a band 5 generic research practitioner will halt my career pathway and aspirations abruptly as the chances of being shortlisted for these specialist posts from a band 5 generic research nurse position will be non-existent...Effectively there is no comparison between my current role as Haematology Research Nurse and the New Band 5 research practitioner. The job satisfaction I gain from my current role as a specialized Haematology Research nurse is immense"*. The claimant also stated that if no suitable alternative employment was found prior to her retirement she would suffer a substantial loss of pay and consequential loss of pension contributions. Any pay protection would be eroded in the coming few months as she would not be entitled to the pay increases secured recently by union bodies. She noted

the extended hours and on-call rota and consequent impact on work life balance.

38. The claimant described *"the unilateral change of terms and conditions could be a breach of contract. In this case the employer intends to terminate my current contract and offer a different contract. Even when a consultation has taken place, a change to the terms and conditions is a potential breach of contract and employees have the right to appeal albeit to an Industrial Tribunal."* The claimant complained that the AFC band 5 post was not suitable alternative employment and stated she wished to be made redundant but if this was not facilitated, she considered it a matter of constructive unfair dismissal.

39. Mr. Way, the claimant's trade union representative emailed Tony Fryer on 19 November 2018 stating
"I am representing Clare Jackson and am submitted the attached grievance on her behalf. She feels she has challenged the proposed MoC outcomes informally without satisfactory response; therefore please arrange a meeting to hear her grievance as per policy HR03. This will invoke a "Status Quo" and until the issue is resolved through the Trust processes current arrangements of contractual nature should continue without hindrance or change." This was with reference to the terms of Trust's Grievance & Disputes Policy & Procedure at paragraph 4.1 page *"All parties agree that where appropriate status quo may be maintained until the grievance is resolved."* The respondent's evidence is that Mr. Fryer did not accept this but it is equally accepted that his opinion was never communicated to the claimant or her trade union representative. The Tribunal finds that on this basis the status quo was maintained.

40. On 26 November 2018 (page 681) Miss. Jackson submitted a third grievance regarding the AER1 (alternative employment register) form being altered by Barbara Butcher without the claimant's agreement. Mrs. Butcher on 22 November 2018 informed the claimant that to be on the redeployment register the claimant needed to detail on the form the substantive B5 post not the B6 post. Further as the claimant had been down banded she was informed she would not be on the risk TWB register; she therefore removed the claimant's comments. The claimant responded to this by stating that the number for this role (band 6) had been reduced and therefore her role is not required in the new change. She stated this is not the same as down banding. The second and third grievances were considered by Professor Fryer at the grievance meeting on 29 November 2018.

41. At the grievance meeting on 29 November 2018 (page 691-695) chaired by Professor Fryer and supported by Gemma Grimes, Deputy ER Manager; and Bernie Grindley HR adviser. The claimant attended with her trade union representative Michael Way. Mr. Way stated that there should be a four week trial period. In the meeting the claimant stated that she didn't feel the band 5 was suitable for her because it was a demotion and it would not be unreasonable to decline it. She stated she wished to be put on the redundancy pathway, be put on the TWB redeployment so she had the opportunity of applying for jobs that were more suitable using her skills,

experience and knowledge. The claimant stated "Regarding my situation and being put on the redundancy pathway I would like that to be put first and get put on straight away. Professor Fryer responded that "I think that is probably something that we could pick off sooner with regard to a response." The claimant did not say anything in this meeting that she regarded herself as being dismissed on 3 December 2018. Further there were no relevant exchanges between the parties so to demonstrate the claimant expected the respondent to do anything in response to her grievance once it had considered it. The claimant did not write to the respondent on 3 December 2018 to state she has been dismissed.

42. In his grievance outcome letter dated 11 December 2018, Professor Fryer concluded that the band 5 job was suitable alternative employment for the claimant (page 713-715) because it was one band lower from the claimant's previous role; there was pay protection for 2 years; the job was on the same site and the same number of hours; the job was suitable for a nurse with research and development; the claimant had suitable skills as set out in the person specification and the respondent would support the claimant to find a suitable band 6 role and her details on the register would be checked against any available and suitable band 6 vacancies before being advertised for general recruitment.

43. Professor Fryer also stated that as the claimant was not being made compulsorily redundant she was not eligible to be referred to the Together We're Better redeployment service for individuals who work in health and social care provider organisations across Staffordshire and Stoke On Trent and who are at risk of redundancy. It was for this reason that Barbara Butcher asked the claimant to change the form but because the claimant refused Barbara Butcher changed the form to remove the TWB section from the form (page 673). He did not uphold the grievance and informed the claimant about a right of appeal.

44. The new structure was implemented on 3 December 2018 and the claimant was slotted into the Band 5 research practitioner role with pay protection at band 6. The respondent accepts that this was a repudiatory breach of contract. A research practitioners meeting was arranged for 12 December 2018. The claimant was invited to attend but chose not to attend (page 723-5). The Tribunal finds that the claimant maintained her protest to the imposition of new terms and conditions.

45. The claimant had oversight of the data concerning her clinical trials. In December 2018. The Tribunal finds that a meeting did take place between Dr. Kamaraj Karunanithi, Principle Investigator, Mrs. Katrina Parkinson and Emily Obhrai, Research Administrator. Since the claimant had oversight of the data for her trials, her attendance at this meeting was essential. The Tribunal rejected Mrs. Parkinson's evidence about this namely that this was an informal meeting; that she showed Emily the room of Dr. Karunanithi so to know where he sat and Emily had some difficulty in obtaining information from the claimant. The email correspondence between the claimant and Emily demonstrate that the claimant was very helpful to Emily (page 729) in contradiction to Ms. Parkinson's evidence. Further, this meeting took place

on a Friday afternoon and Dr. Karunanithi generally did not sit in clinic or do paperwork. The claimant was deliberately excluded by Ms. Parkinson.

46. In or about December 2018 the claimant was asked to attend a teleconference for a study that a band 3 had been scheduled to undertake. The claimant had spoken to Dr. Pilai Consultant Haematologist who said that a band 3 could undertake the work. The Tribunal did not accept Mrs. Parkinson's evidence that a qualified member of staff was required to provide oversight of the study. The only person who attended was Sharon Brookes who was not qualified and was a band 3. This was a deliberately demeaning act by Ms. Parkinson towards the claimant.

47. The claimant and other band 6 nurses usually had assistance from others collecting data, from Alan Hare (band 3) and, the administrative team generally copied consent forms for the nurses. On 4 December 2018 (page 705) Mrs. Parkinson emailed the claimant and other nurses placed on band 5 along with band 3 nurses and requested "please could you all input your own data following a patient visit onto the ECRF platforms and stated *"please place a copy of their consent form into the notes as soon as possible."* Again, the Tribunal finds that this was demeaning to the claimant and her colleagues at old band 6.

48. By letter dated 13 December 2018 (page 726) the claimant appealed the grievance; her trade union wrote on her behalf *"Clare is and myself unhappy with the outcome the details contained and therefore she feels this matter is not resolved to her satisfaction and wishes to escalate and appeal her grievance for this part to stage 2".* The claimant continued to work under protest of the imposition of new terms and conditions. She did not state she considered she had been dismissed.

49. The claimant brought to the Tribunal's attention a contradiction in evidence from a letter dated 20 December 2018 to the claimant's colleague from Professor Fryer that "We have performed a risk assessment associated with the wider MoC but this was not study specific" and the evidence now given by the respondent (there was a study specific). The Tribunal did not consider it had to resolve this conflict of evidence for the purposes of this case.

50. The claimant received her wage slip and it noted that she was on grade 5.

51. On 28 December 2018 (page 770-771), the claimant emailed Professor Fryer giving him written notice of her resignation. She stated she *"felt she had no choice but to resign because of her recent experiences regarding a fundamental breach of my employment contract and deem this constructive dismissal. On 19th November I wrote a letter of grievance disputing the unilateral and major change to my employment contract. This was followed up worth a meeting on 29 November 2018 with yourself and a HR representative where I explained that I would not be accepting the change to my contract on 3rd December 2018 without my agreement. Not only that you failed to carry out the trust grievance procedure in line with trust policy and my contract I consider this a fundamental breach of trust and confidence."*

The claimant at this point accepted the Respondent's repudiatory breach of contract. Her letter did not expressly state when her notice would end but the Tribunal finds (and the respondent accepts) that the claimant was giving four weeks' notice required under her contract of employment. The claimant's actions indicate that she regarded her contract as continuing up until 28 December 2018 when she invoked her right to terminate it. The respondent accepts that the claimant was entitled by reason of the respondent's change to her terms and conditions to treat herself as constructively dismissed on 28 December 2018.

52. On 31 December 2018 (page 774,776-7) Professor Fryer acknowledged the claimant's resignation but stated he knew the claimant's grievance appeal hearing was on 4 January 2019 so that the process was not yet exhausted. He requested the clamant to email him by no later than 4 January 2019 if she wanted to reconsider her resignation and said that if he did not hear from her, he would work on the basis of her resignation dated 28 December 2018.

53. Katrina Parkinson provided a reference stating that the claimant's reason for leaving is that she wishes to continue working with Haematology patients and the current role will be a generic position.

54. On 3 January 2019 (p.779-780) Mid Cheshire Trust confirmed an unconditional offer of employment to the claimant and sought confirmation from the claimant as to her start date. The claimant responded on 4 January 2019 to stated she had handed in her notice and was awaiting details of her leaving date from her manager but had been informed it was two months.

55. On 4 January 2019, John Oxtoby, Medical Director chaired the claimant's grievance appeal. He was supported by Lisa Hughes, H.R. Business Partner. The claimant was represented by Michael Way of Unison. The claimant accepted substantially the brief notes of the meeting at page 780 namely that she did not feel that the band 5 was a suitable alternative; the claimant wanted to go on a redundancy pathway; she was notified of a change on her pay slip which she was not happy about; she was placed on a band 5 without her agreement and she requested to be put on notice so she could be put on the redeployment process and the redeployment service. She confirmed she did not want to go on the redeployment register as a band 5. She wanted to be dismissed and given notice and wanted a fair process to be followed. Her grievance was that she believed that her band 6 role as research nurse was redundant and the band 5 role of research practitioner, she had been slotted into was not suitable alternative employment. The Tribunal finds that the claimant's request to be given notice of redundancy and placed on the TWB register was what she wanted and was prospective. Dr. Oxtoby told the claimant he needed to discuss the grievance with others including Ro Vaughan, HR Director and ask some questions before he reached a decision. The claimant told Dr. Oxotoby that she had resigned on 28 December 2018 and Professor Fryer had asked her to confirm whether she wished to procced with her resignation before the appeal was heard and she had to confirm by 4 January 2019 whether she wished to resign. Dr. Oxtoby advised the claimant to inform Professor Fryer

that she wished to extend the date of her resignation until she had received the outcome of the grievance appeal. He hoped to provide the claimant with an outcome within one week. The claimant did not raise any other complaints (namely the complaints in respect of the respondent's conduct towards her in relation to her continuing employment situation to which she now complains) set out in paragraphs 150 to 165 of her witness statement and the respondent was not required by the claimant to resolve these matters.

56. Under cross examination the claimant accepted that the band 5 role was a role she could perform with her skills. However, the role was a generic position and did not require the claimant specialist skills.

57. On 4 January 2019 the claimant sent an email to Professor Fryer stating *"on the advice of Dr. John Oxtoby and HR I would like to extend the date of reconsideration of resignation for one week.* Michael Way, the trade union representative sent an email to Miss. Jackson and copied to Professor Fryer and John Oxtoby *"I believe the request should be until there is an outcome to the stage 2 grievance which he thought would take about a week. He confirmed that she accepted this and not to act on her resignation until further communication* (p.781). Dr. Oxtoby confirmed that on his suggestion she should not resign until the Trust had arrived at the outcome. The significance of this is that the claimant's resignation was live but her contract of employment would end when the four week notice she had given expired. No steps would be taken by the respondent associated with her upcoming termination.

58. On 15 January 2019 the claimant felt unwell at work and went home. On 16 January 2019 p.788 the claimant confirmed with the Mid Cheshire Trust that she had to give the respondent two months' notice so she could start on 4 March.

59. On 18 January 2019 (p.790-2) Dr. Oxtoby wrote to the claimant to inform her he had upheld her grievance and accepted that the claimant did not consider the role of band 5 research practitioner with 2 year pay protection as suitable alternative employment. He confirmed that the claimant's band 6 post was redundant and that subject to Claire Jackson's confirmation that she has withdrawn her resignation which she will need to confirm in writing to him he confirmed that the Trust will serve the claimant with 8 weeks' notice of termination of her employment by reason of redundancy. He stated that during her period of notice the Trust would continue to look for alternative roles including but not limited to Band 6 roles. He stated he proposed to place the claimant onto the Trust's redeployment register and in this regard she was requested to complete the attached alternative *employment form and return to Lisa Hughes. He ended the letter stating "I look forward to hearing from you as outlined above and if you have any queries about the content of this letter please do not hesitate to contact me or Lisa Hughes Deputy HR Business Partner."* The claimant did not raise any queries. This decision gave the claimant what she had requested at the grievance appeal meeting and what she had requested at the meeting with

Professor Fryer namely to be given notice of redundancy and to be placed on the TWB register.

60. From 21 January 2019 the claimant was absent from work due to stress. (page 795).

61. On 21 January 2019 at 8.46 a.m. the claimant sent an email to Professor Fryer and Lisa Hughes stating *"As per grievance response received on 18 January 2019 I would like to withdraw my resignation* (page 798a). The claimant sent an email with the same wording to John Oxtoby on the same date at 10.31 a.m. (page 796). The Tribunal finds that the claimant's withdrawal of her resignation at this point was on the terms set out in Dr. Oxtoby's letter. The Tribunal rejects the claimant's current suggestion that Dr. Oxtoby's offer was to treat the claimant as having been given 8 weeks' notice on 3 December 2019. A person with the knowledge of all the circumstances could not have reasonably considered this to be the case; the only reasonable interpretation of the offer of Dr. Oxtoby was an offer to give 8 weeks' notice once the claimant had accepted his offer and withdrawn her resignation.

62. By accepting the offer of Dr. Oxtoby, the claimant affirmed the contract of employment; it was a clear express and irrevocable affirmation.

63. On 21 January 2019, the claimant engaged in further email correspondence with Lisa Hughes at 10.46 a.m. stating *"Please confirm whether notice of band 6 Haematology research nurse post redundancy started 13th November or 3rd December 2018. Letter received from Tony Fryer 13th November 2018 informing that my Band 6 post will not be required in new structure and will be terminated on 3rd December 2018 (on grounds of redundancy as per grievance outcome). Band 6 employment contract terminated 3rd December 2018 (as per ESR and December payslip). ACAS informs notice starts on the first full day after you've been given notice of redundancy. Therefore notice was given 13th November 2018. As my notice period is 8 weeks please arrange all necessary paperwork and redundancy payment calculation. To ensure safe handover of trial patients I would negotiate my notice period to finish 1 February 2019 if this is agreeable with yourselves."*

64. Lisa Hughes responded to the claimant stating *"As per the final paragraph in your email you are correct in that notice starts on the first day after you have been served notice. To date your notice has not yet been issued by the Trust. Tony Fryer will be responsible for issuing your notice. Just to remind you to complete and return your AER form to me by 5 p.m. tomorrow."* The Tribunal finds it was clear from this communication that the claimant had not been served with notice to terminate her contract of employment.

65. The claimant responded to this email stating *"To clarify the letter from Tony Fryer on the 13th November 2018 gave me notice of two pivotal points 1)informed me that my band 6 contract will be terminated on 3rd December 2018 2) that this was a result of my post being deleted/redundant in the MOC restructure.* The claimant stated *"I therefore consider myself serving*

notice from the time when my contract was terminated on 3 December 2018. Employment law advises that for a contract to be terminated notice must be given to not give notice would be a breach of contract." The claimant stated to move forward towards a resolution I am happy to negotiate that my notice will end on 1 February 2019.

66. Lisa Hughes responded "Tony Fryer will be writing to you to confirm the below." There is a dispute of evidence as to what this meant. Lisa Hughes stated that she meant that Tony Fryer would confirm the notice to be given to the claimant. The claimant says her interpretation since her email was below Lisa' response was that Tony Fryer was to confirm that her employment would end on 1 February 2019. The Tribunal rejects this. The Tribunal finds in all the circumstances it was reasonable to understand that Tony Fryer would confirm to the claimant directly when her contract would end. Lisa Hughes did not agree a termination date of 1 February 2019.

67. On 25 January 2019 (page 802-4) Professor Fryer emailed the claimant to confirm that following the outcome of the recent grievance appeal meeting he was attaching a notice of redundancy and thanked the claimant for withdrawing her resignation. He stated that in response to the queries raised with Lisa Hughes that the claimant's redundancy did not start on either 13 November 2018 or 3 December 2018 because the claimant has not been served with notice of dismissal by reason of redundancy and she was classified as being at risk of redundancy until notice of dismissal has been served. Professor Fryer stated that the decision had been made to terminate the claimant's employment by reason of redundancy and the letter formally terminated the claimant's employment by reason of redundancy. He stated that the period of notice of termination based on length of service is 8 weeks starting from the day after the date of this letter. "Therefore your employment with the Trust will end on Friday 22 March 2019 (the termination date)". The claimant was required to work her notice period; a payment in lieu would not be made because the respondent wanted to give the claimant as much time as possible to identify another role.

68. On 25 January 2019 the claimant responded that she had been informed that her employment contract would be terminated on 3 December 2018 as a result of her post no longer being required in the new structure. She said any reasonable person would concur that notice had been served when receiving the letter dated 13 November informing that your contract will be terminated on 3 December and this was a result of redundancy. The fact that this letter did not contain all of the information is an error of the trust and should have been rectified as soon as you received my complaint letter on 17 November 2018. She said most reasonable person would agree that notice of contract termination was definitely served when the employment contract physically ended on 3 December as evidenced by the deletion of the contract on ESR and on receipt of pay slip. As you have not acknowledged that my withdrawal of resignation has been agreed. I confirm my resignation still stands from 28 December 2018 deemed to be constructive dismissal. As of my contract 22 March 2010 which informs I am required to give one months' notice of my employment will end on 28 January 2018.

69. On 30 January 2019 (page 818) Professor Fryer acknowledged receipt of the claimant's resignation and employment terminating as from 28 January 2019. He stated that the Trust is obliged to give her notice of dismissal in accordance with her contractual rights and served with 8 weeks notice on 25 January 2019. He referred to section 16.20 of the NHS Terms and conditions of service that provides under Exclusion from Eligibility that "*Employees shall not be entitled to redundancy payments or early retirement on grounds of redundancy if they: unreasonably refuse to accept to apply for suitable alternative employment with the same or another NHS employer; or leave their employment before expiry of notice."* Given that the claimant left the Trust before expiry of her notice she was not eligible for a redundancy payment.

Submissions

70. Both parties provided detailed written submissions. The respondent also supplemented his document with oral submissions. Counsel for the respondent submitted that the Tribunal was left with three alternatives. First, if the Tribunal concluded that there was a dismissal on 3 December 2018 (a "Hogg" type dismissal, the dismissal was unfair by reason of redundancy. However, the respondent argues that the contract did not end at that stage.

71. Alternatively, if the Tribunal concludes that the claimant did not affirm the contract by accepting the offer of Dr. Oxstoby by 18 January 2019 she was dismissed by reason of redundancy dismissal and the dismissal was unfair. Further in the alternative if the Tribunal concludes that the claimant did affirm the contract by accepting to withdraw her resignation did the respondent do something else so that the claimant can claim she was constructively dismissed. The respondent would concede that the dismissal was unfair by reason of redundancy. The respondent submitted that in all cases the claimant would be entitled to unfair dismissal compensation; compensation to cover the period of 28 January 2019 to 1 February 2019 or until 3 March 2019 the day before she started her new job with the alternative Trust.

72. In respect of contractual damages these are limited to £25,000 pursuant to the 1994 Jurisdiction order. The claimant would be entitled to loss of earnings through unfair dismissal damages. The claimant was entitled to redundancy pay if the claimant had not been dismissed being paid that sum. The claimant is entitled to statutory redundancy pay; statutory right to statutory redundancy pay over and above that contractual jurisdiction of £25,000. Mr. Fodder also stated that employment law can be softened to the extent that employee might construe resignation and the employer realise that employee may not have intended to resign and in employment law there may be a softening approach to heat of the moment type cases but this was not the situation here.

73. The claimant deliberately accepted the offer of Dr. Oxtoby; this was not the heat of the moment. The respondent did not think that the claimant did not mean what she said. In contract law once a claimant has equivocally

accepted an offer she has affirmed the contract. In respect of the third possibility; did the respondent do anything more after 21 January 2019 so that the claimant can rely upon to claim constructive dismissal? The respondent submitted it did not.

74. The claimant had provided an opening statement and relied upon this for her submissions. The claimant submitted that termination of her role as senior haematology research nurse and replacing it with the band 5 research practitioner role was dismissal within the scope of section 95 (1) of the Employment Rights Act 1996. The claimant relied upon the case of **Hogg v Dover College 1990** namely where there is a change to an employee's contract of employment which involves his previous contract being wholly withdrawn from him or where an employer unilaterally imposes radically different terms of employment which involve a removal or withdrawal of the old contract that will amount to a dismissal; **Reilly v Trustees of the Royal Air Force Museum**. The claimant submitted that the band 5 and 6 roles were different. Her position as a senior haematology research nurse was a speciality post; only a qualified nurse could undertake this role. The new band 5 contract did not require experience of the speciality. There was a substantial difference in salary. The claimant submitted the date of dismissal was 3 December 2018 which was when the old contract was withdrawn and the date when the new contract was imposed. Alternatively the claimant submitted that her withdrawal of resignation on 21 January 2019 was on the confirmation that the respondent had finally acknowledged her post as redundant and her employment would end imminently. The respondent's letter of 25 January 2019 which sought to unilaterally enforce an extension to her notice period was the last straw; the claimant relies upon **Kaur v Leeds Teaching Hospitals NHS Trust (2018) EWCA Civ 978**; where the conduct of the employer is continued by a further series of acts in response to which the employee finally resigns then she should be entitled to rely on the totality of the conduct in order to establish a breach of the implied term. The claimant alleges that she was dismissed for redundancy and it was an unfair dismissal. She is entitled to a redundancy payment. The claimant was employed on Agenda for changer terms and condition. Section 16 of those conditions provide an entitlement to a contractual redundancy payment; the claimant seeks £36,644. Pursuant to **Ugradar v Lancashire Care NHS Foundation Trust** the claimant claims a statutory redundancy pay in addition to the contractual payment. The respondent is entitled to offset the statutory redundancy payment against the contractual payment but the offset is against the whole sum of what the claimant is due and not the capped sum of £25,000.

The Law

75. Pursuant to section 95 (1) (a) and (c) of Employment Rights Act 1996, (ERA) an employee is dismissed in circumstances where the contract is terminated by the employer or terminated by the employee in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. Whether a dismissal for a potentially admissible reason is fair depends upon 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 shall be determined in accordance with equity and the substantial merits of the case (see section 98 (4) of the ERA.

76. Redundancy is an admissible to dismiss an employee pursuant to section 98 of the Employment Rights Act 1996. Redundancy is defined pursuant to section 139 of the ERA as including circumstances where the requirements of the business for employees to carry out work of a particular kind in the place where the employee was employed have ceased or diminished.

77. Pursuant to **Hogg v Dover College (1990) ICR 39; Reilly v Trustees of the Royal Air Force Museum and Lees v Imperial College of Science Technology and Medicine (UKEAT/0288/15),** where there is a change to an employee's contract of employment which involves his previous contract being wholly withdrawn from him or where an employer unilaterally imposes radically different terms of employment which involve a removal or withdrawal of the old contract that will amount to a dismissal. In the **Reilly** case the date of the dismissal was said to be the date when the contract was to be imposed and the date when the claimant wrote to the respondent unequivocally indicating to the respondent that his employment with the museum ceased that day.

78. A notice of termination can not be unilaterally withdrawn (**Riordan v War Office) (1959) 1 WLR 1046.** It can be withdrawn by agreement.

79. An employee is entitled to resign her employment in circumstances where there is a repudiatory breach such as a breach of the implied term of trust and confidence. The implied term means, without reasonable and proper cause an employer conducts themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee (**Malik v BCCI SA 1998 AC 20 and Baldwin v Brighton and Hove City Council 2007 ICR 680**). The conduct of the employer must be such as to destroy or seriously damage the relationship (**Claridge v Daler Rowney Limited 2008 ICR 1267**) and there must be no reasonable and proper cause for the conduct. The employee must not delay too long before resigning nor should the employee affirm the contract if the employee is to establish constructive dismissal. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a last straw incident. The last straw incident by itself does not have to amount to a breach of contract nut it must contribute slightly to the breach of the implied term of trust and confidence; **Omilaju v Waltham Forest London Borough Council 2005 ICR 481.** In the case of **Kaur v Leeds Teaching Hospitals NHS Trust 2018 IRLR 833** the Court of Appeal proposed that in an ordinary case of constructive dismissal tribunals should ask themselves the following questions (a)what was the most recent act (or omission) on the part of the employer which the employee says caused or triggered her resignation (b)has she affirmed the contract since that sate? (c)If not was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach of the Malik term and (e)did the employee resign in response or partly in

response to that breach. Affirmation of the contract takes place where in all the circumstances the employee's conduct has shown an intention to continue in employment rather than resign.

Conclusions

80. Was the Claimant dismissed?

By the contract under which she was employed being terminated by the Respondent (S.95(1)(a) ERA) [and S 136 (1) (a) ERA (redundancy)] and if so:-

i. When? The Claimant contends that the Respondent did so on 3.12.2018
ii. How? The Claimant contends that it did so by unilaterally deleting the claimant's substantive post and implementing another contract without the Claimant's agreement thereby effectively withdrawing the old contract

81. The Tribunal concludes that the claimant's post of a band 6 no longer existed on 3 December 2018 by reason of the implementation of the restructure and the non-selection of the claimant into a new band 6 role. The claimant's post was redundant. The implementation of another contract namely the Band 5 with pay protection without the claimant's agreement was a repudiatory breach of contract. The claimant treated it as such by raising a grievance on 19 November 2018. Her significant concern was that she was to be placed into a band 5 generic role whereas she had performed a specialist role at band 6.

82. The respondent placed the claimant under protest into a band 5 role. The protestations of the claimant and her trade union representative were to retain the status quo pending the grievance she lodged complaining about the deletion of her role. The effect of this, was the continuance of the claimant's employment albeit under the protest that the claimant maintained that she was not a band 5 nurse and to be slotted in to such a role was not suitable alternative employment. The Tribunal does not find that it was a dismissal of the claimant because this was not a **Hogg v Dover** situation. There was no radical change such to entitle the claimant to regard herself as constructively dismissed; the role at band 5 with pay protection was generic and not specialist like her old band 6 role but the claimant had skills to do it and it did not meet the threshold of "radically different terms of employment." The claimant did not treat it as such and raised a grievance on 19 November.

83. By her terminating the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct (s.95(1)(c) ERA [and S 136 (1) (c) ERA (redundancy)] and if so when?

84. The claimant relies upon a number of matters which the Tribunal will deal with in turn.

The circumstances which the Claimant says she was entitled to rely upon were breach of the express terms of her contract of employment and the implied term of trust and confidence by the Respondent:-

a Unilaterally changing the claimant's contract on the 3rd December without the claimant's agreement and knowledge and despite the claimant's express written objection.

85. The respondent did unilaterally change the claimant's contract on 3 December without the claimant's agreement and knowledge and despite the claimant's express written objection. This is evidenced by the fact that the claimant's payslip dated 28 December 2018 stated she remained a band 5.

b. On or about 3 December 2018 Changing her electronic Employee staff records which showed she was under a new contract at a band 5 level which would have pay implications for any new employment the Claimant may have secured.

86. The claimant's pay slip indicates that her grade was changed from band 6 to band 5; a downgrade.

c. On 25.1.2019 unilaterally attempting to enforce a temporary contract on the Claimant to cover a notice period for the deletion of her substantive post which had been deleted two months prior and refusing the claimant PILON. The Claimant relies on the 'last straw' doctrine.

87. The claimant's grievance dated 19 November 2018 was that a demotion had been imposed upon her. She lodged her grievance to resolve this issue and to seek a determination that she was effectively redundant. Her actions were inconsistent with her employment ending on 3 December 2018. The claimant was stating that if the respondent did not either issue her with a notice of dismissal by reason of redundancy then she would treat herself as constructively dismissed; the claimant gave the Trust an opportunity to resolve the issue. Furthermore there was no intention by the respondent to dismiss the claimant; it sought to retain the claimant.

88. The claimant actually resigned on 28 December 2018 when she saw that the status quo had not been maintained as expected when her wage slip dated 28 December 2018 indicated she had been downgraded to grade 5. At that point (like the **Reilly** case) the claimant wrote to the respondent unequivocally indicating to the respondent that her employment with the Trust had ceased that day. However, the claimant decided to effectively "stay" her resignation awaiting the grievance appeal hearing. During the grievance appeal hearing, the claimant accepts she stated she wanted to be given notice and be considered for alternative roles. Following the grievance appeal hearing before Dr. Oxtoby, the respondent conceded that the claimant did not consider the band 5 post as being suitable alternative employment. On this basis Dr. Oxtoby stated that the claimant should withdraw her resignation. The conditions for the claimant to withdraw that resignation were clear. Dr. Oxtoby stated he confirmed that her Band 6 post of Research Nurse was redundant and that subject to her confirmation that she had withdrawn her resignation which the claimant needed to confirm in writing, the respondent would serve her with 8 weeks notice of termination of her employment by reason of redundancy. He further stated that during the claimant's notice period the respondent would look for alternative roles including band 6 roles; the claimant was required to engage fully with the redeployment process. Dr. Oxtoby also stated that in accordance with the terms and conditions of her employment under section 16.20 of agenda for change she would not be entitled to a redundancy payment on the grounds of redundancy if she unreasonably refused to accept or apply for suitable alternative employment with the Trust or another NHS employer. This was the proposed resolution of the claimant's grievance. On those terms the claimant did withdraw her resignation and she did so with the agreement of the respondent (**Riordan v War Office 1959 1 WLR 1046**). In the circumstances that the wording was clear as to the resolution of the claimant's grievance the Tribunal rejects the contention that on 25 January 2019 the respondent unilaterally attempted to enforce a temporary contract on the claimant to cover a notice period for the deletion of her substantive post; instead the Tribunal finds that the claimant accepted the proposals of Dr. Oxtoby which envisaged serving the claimant with notice and her full engagement with the redeployment process. In the circumstances the Tribunal rejects the contention that the respondent unilaterally attempted on 25 January 2019 to enforce a temporary contract on the Claimant to cover a notice period for the deletion of her substantive post which had been deleted two months prior and refusing the claimant PILON. The Claimant relies on the 'last straw' doctrine.

> On 3 December 2018 Deleting the Claimant's substantive post without contractual notice (despite the Respondent knowing that the Claimant expressly objected to a new contract)

89. The respondent did delete the claimant's substantive post without contractual notice despite knowing that the claimant had expressly objected to the new contract. There could be no just cause where the claimant maintained that she was dissatisfied with this.

> Treating the Claimant in a perfunctory and insensitive manner indicating the Claimant's demotion when she had expressly objected to the new lower band contract.

(a)On 12 December 2018 Inviting the Claimant to a band 5 meeting

90. The claimant was invited to a band 5 meeting because she had been slotted in to the band 5 role. Despite the fact that the claimant had expressly objected to the new lower band contract. (b)On 4 December 2018 Attempting to give the Claimant lower band duties.

91. The claimant was given lower band duties because she was "slotted in" to the band 5 roles.

(c)In December 2018 Not informing the Claimant of a meeting with the Principal investigator, research manager and data administrator and where previously the Claimant's presence would have been essential. (the Claimant was only made aware of the meeting when she accidently walked in on the meeting) .

92. The claimant had previously been in attendance at meetings with the principal investigator, research manager and date administrator. The claimant should have been involved but as she had been "slotted in" to band 5 she was deliberately excluded.

(d)During the same meeting, telephoning an ex-employee to ask advise on the Claimant's trial when the Claimant was available

93. There was no just cause to telephone an ex-employee to ask advise on the claimant's trial when the claimant was available.

(e)In December 2018 Attempt to remove the Claimant's specialty when asked her to attend a site initiation visit for a neurology study and contribute to a stroke study which she was not competent and objected to in her grievance letter.

94. This occurred because the claimant was slotted into band 5 but she was given a stroke study deliberately which a grade 3 could have done.

(f)In December 2018 Removing the Claimant's duties from her by not involving her in new haematology trials site initiation meetings, removing data oversight and trial monitor communication.

95. This represented a further demotion as the respondent believed unreasonably it had "slotted" her into a band 5 role.

(g)From 3 December 2018 Not Inviting her to the band 6 management meetings and daily departmental band 6 meetings.

96. This represented a further demotion as the claimant was considered to be on band 5 and had been slotted in.

(h)Misleadingly and wrongly informing the Claimant that each of her cancer trials had been risk assessed to determine skills and time needed to provide patient safety, welfare and trial completion when a risk assessment had not been done. This would have revealed that the claimant's duties and responsibilities were very different from others in the selection process.

The Tribunal finds that this did not form any reason of the claimant's resignation.

(i)Misled the claimant that her notice to end of her employment on 1 February 2019 had been agreed.

The Tribunal rejects this. The letter of Dr. Oxtoby is clear; in his letter dated 18 January 2019 if the claimant withdrew her resignation (in writing) the Trust will serve the claimant with 8 weeks' notice of termination of her employment by reason of redundancy. He stated that during her period of notice the Trust would continue to look for alternative roles including but not limited to Band 6 roles. Further the email of Lisa Hughes was not confirming as the claimant suggests that her employment ends on 1 February 2019; but rather that Tony Fryer would confirm to the claimant directly when her contract would end.

Reason for Dismissal?

97. If the Claimant was dismissed by the Respondent then-

a. What was the reason (or, if more than one, the principal reason) for the dismissal?

b. Was it a reason falling within S 98 (2) ERA 199or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held?

If the Tribunal concludes that the Claimant was dismissed then the Respondent will contend that the Claimant was dismissed for some other substantial reason, namely its belief that in making the proposal set out in Dr Oxtoby's letter of 18.1.2019 it was acting in accordance with the Claimant's wishes alternatively, by reason of the Claimant's redundancy.

The Tribunal finds that the principal reason for the claimant's dismissal was for redundancy. There was a reduced need for employees to carry out the old band 6 role and the claimant was not selected for one of the new band 6 roles. The claimant was unsatisfied with the proposed alternative employment of a band 5 role with protected pay for two years and rejected this as suitable alternative employment.

Fairness of Dismissal

98. The Claimant contends that the dismissal was unfair because she contends that the Respondent:-

u. Failed to conduct an open, transparent and fair redundancy consultation in that they omitted to inform the claimant the consultation was a redundancy consultation and that she was at risk of redundancy. Instead informed it was 'downbanding'.

v. Failure to document in the consultation paper or correspondence that theclaimant and other employees were at risk of redundancy.

w. Wrongly told the claimant that the possible outcome for her post was 'downbanding', when In actual fact it was redundancy. The NHS agenda for change documentation informs that downbanding is a different workforce change involving robust in-depth role and duties evaluation in which points areallocated to determine banding.

x. Misled the union representatives that this was a downbanding process and not redundancy

y. Used ambiguous and misleading communication in referring to staff in the consultation paper who were at risk of redundancy as 'list of affected staff inpost being consulted with'

z. Failed to carry out a matching exercise to determine the claimant's duties to justify ringfencing to the new band 6 post, and slotting in to the band 5 post. asper the respondent's organizational change policy as per the respondent's organizational change policy.

aa. In the consultation paper wrongly altered the claimant's substantive job title and used this incorrect job title to ringfence to new post with a like job title but which had very different roles and duties to the claimant's substantive post.

bb. Failure to allow their own organizational change policy when

the deadline date for the new band 6 applications was before the end of the consultation period.

cc. Led the Claimant to believe that the consultation was to determine demotion (downbanding) by selection process, a unnatural workforce change when in actual fact it was to determine the posts that were redundant.

dd. Warned the claimant and other employees that if they did not engage with the selection process they will automatically be downbanded. As in Hogg v Dover 'held a pistol to the head'

ee. Omitted to inform during and following the consultation period that the band 5 post was deemed 'suitable alternative employment'. This term was not used during the consultation.

ff. Omitted to inform of entitlement to a four week trial.

gg. Failed to put the claimant at risk of redundancy at the first opportunity, when the consultation ended 6th October 2018 and when she informed them on 19th November 2018 that she did not agree that it was a suitable alternative role and wished to be made redundant.

hh. On the 11th December 2018 denied the claimant was at risk of redundancy even though her post had been deleted on the 3rd December 2018 (without the Claimant's knowledge and against the grievance policy) and knowing that the Claimant expressly objected and did not agree to a new post. Despite the Claimant's detailed letter expressly objecting to the band 5 post as 'suitable alternative employment' the Respondent held 'pistol to the head and told' (Hogg v Dover) your contract will change.

ii. Misled the Claimant in a formal letter on 29th October 2018 that one of the two possible outcomes for her of the selection process was she would be downbanded. Omitted to advise of risk of redundancy, suitable alternative employment, for week trial and notice period.

jj. Failure to dismiss the Claimant as per ACAS guidelines when the Claimant expressly objected and did not agree to a a new contract comprising a different role.

kk. Despite the Claimant sending her form for suitable alternative employment to Barbara Butcher on 22.11.2019 the Respondent recused to search for suitable alternative employment until 22.1.2019 (8.5 weeks later).

ll. Denied the Claimant a statutory redundancy payment when they admitted her post was redundant and had been deleted on the 3rd December 2018.

mm. Denied the Claimant and enhanced contractual redundancy payment.

nn. Misled the Claimant that her notice to end employment on the 1st February 2019 had been agreed [p799] 22.1.2019.

The Tribunal deals with these issues proportionately. The respondent accepts that the claimant's dismissal was unfair. The Tribunal finds that the dismissal was unfair.

Remedies

99. If the Claimant was dismissed then is she entitled to receive:-

i. A basic award? If so how much?

ii. A compensatory award? If so how much?

iii. A statutory redundancy payment? If so how much?

iv. Damages (limited to £25,000) for breach of contract by the Respondent not paying the Claimant

v. a contractual redundancy payment pursuant to and calculated in accordance with the provisions contained in S.16 of Agenda for Change

vi. notice pay

100. The Tribunal concludes that the claimant is entitled to a statutory redundancy payment on the basis that she was dismissed by reason of redundancy. However, the claimant is not entitled to a contractual redundancy payment. A NHS contractual redundancy payment is an enhancement to an employee's statutory redundancy entitlement; the

statutory payment being offset against any contractual payment. An employee is not entitled to the contractual redundancy payment if an employee leaves before expiry of notice. The claimant was given notice on 25 January 2019 to expire on 22 March 2019. The claimant resigned on 25 January prior to the expiry of her notice. She is therefore not entitled to a contractual redundancy payment. However the claimant is entitled to a compensatory award; this is calculated from the 25 January 2019 (the date of her resignation) to the date before she started her new role at Mid Cheshire Trust namely 3 March 2019. The claimant resigned her employment and is not entitled to a notice award.

101. The parties are to inform the Tribunal by 3 December 2021 whether a remedy hearing is required and if so, dates of availability for a ½ day remedy hearing by CVP from 1 March 2022 to 30 June 2022.

Employment Judge Wedderspoon
22 November 2021

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