



# EMPLOYMENT TRIBUNALS

**Claimant** Ms Juliet Dines

**Respondent** Royal Devon & Exeter NHS Foundation Trust

**Heard at:** Exeter **On:** 2,3 & 4 November 2020  
(remotely by video hearing)

**Before:**  
**Employment Judge** Goraj

## Representation

**The claimant:** Mr C Canning, Counsel

**The respondent:** Mr D Leach, Counsel

## RESERVED JUDGMENT

### THE JUDGMENT OF THE TRIBUNAL IS that: -

1. The claimant was (constructively) unfairly dismissed by the respondent pursuant to sections 95 (1) (c) and 98 (4) of the Employment Rights Act 1996.
2. The claimant is not entitled to a statutory redundancy payment pursuant to sections 136 and 139 of the Employment Rights Act 1996.

## REASONS

### Conduct of the hearing

1. The hearing was conducted as a remote hearing to which the parties have consented. The form of remote hearing was a video conference

hearing. A face to face hearing was not held because of the Covid pandemic and because it is in the interests of justice and in accordance with the overriding objective to minimise expenditure on time and costs.

### **Introduction**

2. By a claim form which was presented to the Tribunals on 17 February 2020, the claimant, who was employed by the respondent between 25 April 2005 and 20 October 2019 (the effective date of termination), brought claims for :- (a) (constructive) unfair dismissal and /or (b) for a statutory redundancy payment pursuant to the Employment Rights Act 1996 ("the Act"). The claim is disputed by the respondent. The claimant expressly reserved in her claim form, the right to bring a claim in the civil courts for a contractual redundancy payment.
3. The claimant's ACAS Early Conciliation Certificate records that: - (a) the claimant's ACAS Early Conciliation Notification was received on 3 December 2019 and (b) that the ACAS Early Conciliation Certificate was issued on 17 January 2020.

### **Witnesses**

4. The Tribunal received a witness statement and heard oral evidence from the claimant.
5. The Tribunal also received witness statements/heard oral evidence from: - (a) Mrs Michaela Dicks, Clinical Matron, grievance officer (who was not cross examined by the claimant on the understanding that the claimant did not however accept the outcome of the grievance) (b) Mrs Sarah Hodder, Diagnostics Cluster Manager (c) Mrs Toni Hall, Radiology Services Manager and Miss Karen Scott, former HR Business Partner in Specialist Services.

### **Documents**

6. The Tribunal was provided with an agreed bundle of documents ("the bundle"). The Tribunal was also provided by the parties with an agreed chronology of events, written closing submissions and associated legal authorities. The legal authorities relied upon are listed on the attached sheet.

### **The Issues**

7. The Tribunal was provided with an agreed list of issues ("the List of Issues" which is also attached to the Judgment. During the course of the hearing, the claimant confirmed that she was no longer pursuing the allegations relating to TUPE (in respect of the claimant's alleged unfair dismissal at paragraphs 14- 17 of the List of Issues). The

claimant also confirmed that in the light of the nature of the claims she was not pursuing any claims pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

## **FINDINGS OF FACT**

### **Background**

8. The claimant was employed by the respondent/its predecessors in title from 25 April 2005 until her resignation by letter dated 18 October 2019 (which was accepted by the respondent on 20 October 2019). The claimant's date of birth is 17 November 1960.
9. The claimant was originally employed by East Devon Primary Care Trust as a locality business manager based at Sidmouth Hospital. The claimant's terms and conditions of employment which were issued on 30 March 2005 are at pages 64-65 of the bundle. The associated job description and job specification are at pages 57-63 of the bundle.
10. In 2011, following subsequent reorganisation/ mergers in the local health services, the claimant, who was then employed by the Northern Devon Healthcare Trust ("NDHT"), took on the role of Community Hospitals Radiology Business Manager. The claimant was not issued with any updated terms and conditions of employment and/or job description at that time (or at any time prior to the events in question). The claimant was banded as a grade 7 manager. At all material times, the claimant's line manager was Anne Cameron, Assistant Director of Community Hospitals, who had ultimate responsibility for the operational delivery/performance of the Community Radiography Service (also known as the Community Imaging Team) ("the Community Radiography Service").
11. The Community Radiography Service provides medical imaging services such as X rays to GP practices and community hospitals. The Community Radiography Service covers a large geographical area with sites ranging from Okehampton and Tiverton in the west and Axminster and Sidmouth in the east of the area. At all material times, the Community Radiology Service comprised of nine radiographers who worked across seven community sites. The radiographers included Mr Scott Burnett who was employed as a Band 7 Superintendent Radiographer. The radiographers (including Mr Burnett) were line managed by the claimant. Mr Burnett was however the clinical and professional lead for the remaining 8 Band 6 radiographers. The respondent's radiography service provided an ultrasound service to the community hospitals and there was an established working relationship between the sonography lead from the acute radiography service and

the Community Radiography Service, including in particular the claimant.

### **Transfer of community services to the respondent**

12. The respondent is a large Foundation NHS Trust serving the population of Exeter and surrounding areas. In October 2016, the respondent took over the running of NHS community services in East and mid Devon from NDHT including the Community Radiography Service. On 19 September 2016 the respondent wrote to the claimant confirming the position including that in accordance with the TUPE Regulations the claimant's employment would transfer from NDHT to the respondent with effect from 1 October 2016 with continuity of service and that her terms of service would remain unchanged (pages 66-67 the bundle). The respondent stated in the letter that the bringing together of the community and acute services was an important step towards building a truly integrated care system and that the claimant would be a valued member of the respondent's team.

### **The NDHT's Organisational Change Policy**

13. At the relevant times, the NDHT had an Organisation Change Policy ("the Policy") which it is agreed continued to apply to the Community Radiography Service following the transfer of the community services to the respondent. The Policy is at pages 427 – 420 of the bundle. The stated purpose of the Policy was to provide guidance to managers on what constituted organisational change (which is defined in the Policy as "Any change to the way in which a service or job role is delivered, which has an impact on the staff within that area") and how to handle such changes. The Policy recognised that organisational change often included redundancy and re- deployment situations and gave guidance on the definition of redundancy and the handling of redundancy situations.

### **The Service Restructure**

14. In April 2018, Mrs Sarah Hodder, the respondent's Diagnostics Cluster Manager, was asked to take forward a proposal to transfer the management of the Community Radiography Service to the Medical Imaging Team in the Acute Specialist Services Division ("the Medical Imaging Team") with the respondent. The objective of the proposed transfer was to achieve an integrated radiology service which it was anticipated would yield a number of benefits including the reduction of waiting lists at the respondent's main site, providing patients with the opportunity of accessing radiography services closer to home, the implementation of uniform imaging procedures across the respondent and associated governance benefits. Further, in the longer term, it would allow staff rotation between sites which would support increased

service cover and greater career progression. Mrs Hodder was asked at a meeting with senior managers on 24 April 2018 to take the proposal forward including to discuss the matter with Mrs Cameron. Mrs Hodder's manuscript notes of that meeting are at page 68 of the bundle. The notes record the possibility of the claimant moving to the respondent's main (acute) department in the next year.

### **The Initial discussions regarding the transfer**

15. There is a dispute between the parties regarding the extent of any initial discussions/ consultations with the claimant regarding the proposed transfer of the Community Radiography Service to the Medical Imaging Team. The respondent contended that Mrs Hodder and Mrs Toni Hall, Radiology Services Manager at the respondent, had a number of informal discussions with the claimant and Mrs Cameron about the proposed transfer prior to the commencement of the consultation process. The respondent also contended that the claimant was involved in providing information about the Community Radiology Service. The claimant accepted that she was asked to provide information on areas such as budgets and equipment which she supplied. The claimant also accepted that she was aware that there was a proposal for the transfer of line management but denied any involvement in any discussions regarding the nature of the proposed transfer of the Community Radiology Service.
16. Having considered in particular, the oral evidence, available documentary evidence, including the correspondence at pages 69 – 78 of the bundle, and the evidence of Mrs Cameron during the subsequent grievance process (page 333 – 334) the Tribunal is satisfied that the claimant's involvement at this time was largely limited to the provision of requested information and that there was minimal discussion with her (or Mrs Cameron) about the claimant's role or the nature of the combined radiology service going forward. When reaching this conclusion the Tribunal has also taken into account that :-  
(a) Mrs Hodder accepted that she was unaware at this time that the radiographers (including the Superintendent Radiographer Mr Burnett ) were line managed by the claimant) and (b) the proposed changes were at a formative stage prior to the meeting on 7 February 2019 and further (c) that the claimant was asked to leave the meeting on 7 February 2019 so that there could be a confidential management discussion about the proposed transfer including the nature of the claimant's future role.

### **The meeting on 7 February 2019**

17. Mrs Hodder prepared a document entitled "Change to Community Imaging Team Reporting Structure' ("the Consultation document") for

discussion as part of the proposed transfer process. The Consultation document, and its accompanying appendices, are at pages 79 – 82 of the bundle. Mrs Hodder stated in the Consultation document that there would be minimal change for most of the staff and that the main changes would be for the band seven managers namely, the superintendent radiographer (Mr Burnett) and the business manager (the claimant) as the process would affect their job titles and line management. Mrs Hodder also stated in the Consultation document that, “A number of informal discussions have been held with the Business Manager, culminating in this planned service change”. It was further stated that as the process was considered to be a minor change the consultation period was expected to be completed by the end of March 2019 with the new line management arrangements taking effect by no later than April 2019. A summary of the proposed line management changes is contained in Appendix A at page 81 of the bundle. Mrs Hodder did not have any discussions with Mrs Cameron to ascertain the existing management arrangements in the Community Radiology Service when preparing the Consultation document. Mrs Hodder was supported in the restructuring exercise by Karen Scott HR business partner who advised that the process should be dealt with in accordance with the NDHT’s organisational change policy.

### **The meeting on 7 February 2019**

18. In December 2018 Ms Adele Jones, the Integration Director at the respondent, invited a number of staff, including the claimant, to attend a meeting in the New Year to discuss the proposed service transfer. The meeting was arranged by Ms Jones’ PA for 7 February 2019. Mrs Hodder was unaware that the claimant had been invited to this meeting.
19. The meeting on 7 February 2019 was led by Ms Jones. Mrs Hodder, Mrs Hall, Ms Wickens (Divisional director, Specialist Services Division) and Ms Scott were also in attendance. Neither of the parties have produced any notes of the meeting. As a result of the initial discussions, the claimant became aware that it was proposed that responsibility for the line management of the radiographers would be transferred to Mr Burnett and further that it was proposed that she would be given responsibility for capital replacement. The claimant was asked by Ms Jones to withdraw from the meeting when it became apparent that the discussions would involve consideration of the claimant’s position as it was considered inappropriate by the respondent for the claimant to be party to discussions which involved her personally.

20. The claimant contended that she was advised during the meeting that she could be given further details of the proposals and made aware of the respondent's intentions more quickly if she agreed to the consultation process starting and that she therefore gave such consent. The respondent denied any such discussion. The Tribunal is not satisfied, on the balance of probabilities, that there was any such discussion /agreement. When reaching this conclusion the Tribunal has taken into account in particular this is denied by the respondent and also that any such discussion/ agreement would be inconsistent with the fact that the claimant was asked to withdraw from the meeting and also the subsequent course of the consultation process.
21. The Tribunal however accepts the claimant's evidence that she found the meeting on 7 February 2019 uncomfortable and of concern in the light of the nature of the initial discussions and her requested withdrawal from the meeting.

**Subsequent correspondence with staff side**

22. In the subsequent correspondence with the staff side concerning the Consultation document (page 91 of the bundle) Miss Scott advised the staff side that although the claimant's role was expected to remain at band seven there were proposed changes to the claimant's role which would be different to the way in which she currently worked. Miss Scott also advised the staff side that although it was their understanding that the Mr Burnett was the professional manager of the radiography team and that all of the line management responsibilities were undertaken by the claimant, it was proposed that such responsibilities would also transfer to Mr Burnett as part of the process. Miss Scott further advised staff side that the respondent would like to build on the claimant's existing skills to cover the wider radiography team such as capital programmes and that although the claimant would not be required to change work location she would be asked to attend management meetings at the respondent's headquarters.

**The email 25 February 2019**

23. On 25 February 2019 Mrs Hodder emailed the claimant with a copy of the Consultation document. Mrs Hodder advised the claimant that they would arrange to meet with her individually and with the team to discuss the changes in more detail during the consultation period. The email and accompanying documentation are at pages 95-107 of the bundle. The documentation included a copy of a job description for a Radiology Services Support manager (band 7) reporting to the radiology services manager. The stated job purpose was for the post holder to manage the provision of a full range of business support to the radiology services manager for hospital and community based

medical imaging services. The job description further stated that the role would be responsible for holding a lead role within medical imaging to provide business support and leadership to facilitate service initiatives which might vary and develop over time and that the postholder would also be responsible for the management of the capital programme for all equipment replacement across medical imaging. The principal duties and responsibilities were set out at paragraph 5 of the job description (page 101 of the bundle). The documentation confirmed (appendix A) that the line management of the radiographers would be undertaken by Mr Burnett.

24. The Consultation document was also issued to the radiographers immediately afterwards. The claimant became aware that the Consultation document had been issued to the team when a query was raised with her by one of the radiographers. The claimant felt undermined and distressed by the fact that the consultation document had been sent to her team without her prior knowledge and also because she believed that the reference in the Consultation document to the respondent having had informal discussions with her culminating in the planned service change was misleading.

#### **The meeting on 7 March 2019**

25. The respondent arranged a consultation meeting with the Community Radiographer Service team including the claimant and Mr Burnett on 7 March 2019. Following a request by staff side (page 110 of the bundle) the claimant and Mr Burnett were afforded brief individual pre meetings during which the claimant expressed her concerns regarding the content of the job description and that she considered that it had not been adequately thought through.
26. For operational reasons the radiographers were unable to attend the meeting and submitted instead questions which were collated and presented at the meeting by Mr Burnett at Mrs Hodder's request. The Tribunal has not been provided with any notes of the meeting. The discussions at the meeting focused on Mr Burnett's future role. The claimant expressed her concerns that the Consultation document referred to previous discussions with her regarding the proposed transfer which she considered to be misleading.
27. Mrs Hodder briefed Ms Wickins and Ms Jones on 7 March 2019 on the meeting and the proposed future process. Mrs Hodder advised them that whilst Mr Burnett was mostly happy about the proposed transfer of services he was anxious about taking on more line management responsibility and that they needed to ensure that he felt well supported and that they adopted a gradual process which would allow him time to learn the necessary skills. Mrs Hodder also stated that they had



explained to the claimant that the proposed job description was going to be rewritten and that she hoped that the claimant understood that the job description needed to be worked on together and that it would evolve as the claimant came into post. Mrs Hodder further advised them that there would be a delay in the proposed transfer to allow further consultation including 1 to 1s with the claimant and Mr Burnett and their respective trade union representatives.

### **The meeting on 14 March 2019**

28. The claimant and her trade union representative attended a 1 to 1 meeting with Mrs Hodder and Mrs Hall on 14 March 2019. The meeting was also attended by a representative of the respondent's employee relations team. The Tribunal has not been provided with any notes of this meeting.
29. Mrs Hodder sent a detailed letter to the claimant dated 15 March 2019 (which is at pages 120-122 of the bundle) setting out her understanding of the matters discussed at that meeting. In very brief summary:- (a) , Mrs Hodder advised the claimant that the job description which had previously been provided to the claimant was intended, in the absence of a current job description, as an initial framework for discussion and that she and Mrs Hall wished to work with her to agree a job description with which the claimant was comfortable (b) the claimant's representative expressed the view that the proposed job description was entirely different to the role currently undertaken by the claimant and that the claimant felt as though her role had become redundant as there was virtually nothing which the claimant recognised of her duties in the new job description (c) the claimant had described that 70 to 80% of the time was currently taken up with management duties including PDRs annual leave, absence management, rota production and management, dealing with operational problems and investigating datix incidents (d) Mrs Hodder informed the claimant that they did not consider the claimant's role to be redundant, that they wished to work with her to reach an agreement on her job description and, as they were not fully aware of all the duties which she undertook as part of her role, they wanted the claimant to inform them of her duties so that they could negotiate a job description with which they would all be happy (e) Mrs Hodder advised the claimant that they wished to align the reporting structures in accordance with the respondent's existing model including that Mr Burnett would undertake duties in accordance with the expectations of radiographers at the respondent which would free up time for the claimant to draw on her business and operational strengths such as capital projects, performance writing and training. The upshot of the meeting was that it was agreed that the claimant would provide an updated job description to reflect all the duties which

the claimant currently undertook as part of her role for further discussion.

30. The claimant wrote to Mrs Hodder by email dated 5 April 2019 responding to matters contained in Mrs Hodder's letter with which she disagreed (pages 125-126 of the bundle).

### **The meeting on 15 April 2019**

31. The respondent conducted a second group consultation meeting with the Community Radiology Service team, including the claimant and Mr Burnett, on 15 April 2019 which was led by Mrs Hodder and Mrs Hall. Ms Scott of HR and a member of staff side were also present. The claimant's notes, which include her observations of the meeting, are at pages 126 – 127 of the bundle. The claimant has recorded at the beginning of the notes her request to minute that the reference in the Consultation document to her having been involved in the planned service change was inaccurate and misleading.
32. The respondent confirmed during the meeting, in response to a question from the team, that the claimant would no longer be their line manager albeit that the current arrangements would continue in the short term with the duties gradually transitioning over to Mr Burnett. The respondent stated that annual leave requests and management support would be provided by Mr Burnett and they would work with Mr Burnett and the team in order to ensure a smooth handover. The respondent also informed the meeting the capital planning would start in October which would be led by Mrs Hall with assistance from the claimant. The respondent stated an intention to meet with Mr Burnett on an individual basis following the meeting.
33. Following the conclusion of the meeting with the team, there was an acrimonious discussion between the claimant and Mrs Hodder / Mrs Hall regarding responsibility for the preparation of the job description for the claimant and the accuracy of comments made by the claimant during the previous meeting. The respondent indicated that they proposed to record any future meeting with the claimant to avoid any future misunderstandings.
34. The Tribunal is satisfied that the meeting on 15 April 2019 was a very difficult meeting for the claimant which made her feel humiliated and undermined in the light in particular of the discussions with the team regarding the removal and transfer of her line management duties to Mr Burnett and the focus on his role going forward. When reaching this conclusion the Tribunal has had regard in particular to the claimant's

notes of the meeting and her associated oral evidence together with the subsequent correspondence (including in particular the claimant's email dated 17 April 2019 referred to below.) The Tribunal has also had regard to the notes of the subsequent grievance investigatory meeting with Mr Burnett (including in particular at page 389 of the bundle) in which he described how difficult the meeting was for the claimant.

**The claimant's letter of 17 April 2019 and subsequent correspondence**

35. The claimant wrote to Mrs Hodder by email dated 17 April 2019 (page 131 – 132 ) expressing her concerns in particular relating to :- (a) the preparation of her job description (b) that the confirmation of the removal of her line management of the radiographers at the meeting on 15 April 2019 as a fait accompli which she said had undermined her authority and made her feel extremely undervalued (c) that she felt excluded including in the light of in the respondent's statement at the end of the meeting that they wanted to meet with Mr Burnett alone following the meeting and (d) the she was beginning to lose trust and confidence in the process as a result of the way in which the proposed changes had been handled. The claimant's concerns were echoed in a letter to the respondent from the claimant's trade union representative.
36. Mrs Hodder responded by way of annotated comments on the above letters. In brief summary, Mrs Hodder confirmed in particular that :- (a) the proposal was that Mr Burnett would in time take over line management of the radiographers in line with the other superintendents in the service however this would be a gradual process which would allow Mr Burnett to settle into his role and support the claimant's transition into her role and (b) due to the concerns which had been raised by the claimant about the job description which had been distributed with the consultation paperwork and pending receipt of an up to date description of claimant's role the respondent was unable to confirm which of the tasks would remain with the claimant/ would be potentially be extended (pages 128 – 129 and 130 – 132 of the bundle ).
37. The respondent arranged a second 1 to 1 meeting with the claimant on 29 April 2019 however this was postponed as the claimant was absent due to ill health.

**The claimant's job description**

38. On 7 June 2019 the claimant sent to the respondent a job description and organisational chart setting out her current duties which she had prepared and agreed with her line manager Mrs Cameron. The job description and accompanying documentation are at pages 142 – 153 of the bundle. The purpose of the role was stated in particular to

include :- (a) the management of the community hospital radiology services including the provision of operational leadership for and line management of the radiographers including the Band 7 ( Mr Burnett) which involved the day to day management of the service as a whole and included the full range of management tasks (b) the monitoring of service performance (c) responsibility for budgetary and resource management (c) responsibility for the identification of community imaging requirements and managing the capital process for purchase (d) ensuring (together with the Superintendent Radiographer ) that quality and governance protocols were upheld (e) management of the community GPSI contract and (e) the representation of community hospitals at the Capital Programme Group (page 142 of the bundle).

### **The meeting on 11 June 2019**

39. The respondent conducted a second 1 to 1 meeting with the claimant and her trade union representative on 11 June 2019. The meeting was recorded. The notes of the meeting are at pages 154 – 167 of the bundle. The claimant confirmed that the job description was an accurate description of what she was doing on a daily basis and clarified certain aspects of her role including in particular with regard to the division of duties between her and Mr Burnett, the management of DATIX and the GPSI contracts. In brief summary, the upshot of the meeting was that :- (a) the respondent would review the job description which the claimant had provided and mark-up which duties it was proposed the claimant should retain, which should be extended and which would transfer elsewhere (b) the respondent would then go through the revised job description with the claimant on a line by line basis to try and agree a final form of the job description. There was also a discussion at the meeting about the claimant's future base. The claimant stated that it was her understanding that her base would remain out in the community hospitals. The respondent indicated that they were not adverse to the claimant's base remaining in the community however there was an expectation that there would be a greater need for the claimant to attend the respondent's main hospital base to support Mrs Hall with business matters or to attend meetings. The respondent also advised the claimant that any future requirement to work at the main hospital base would be subject to a consultation. The respondent wrote to the claimant by letter dated 24 June 2019 confirming what it considered to be the key elements of the meeting. (pages 191- 192 of the bundle).
40. The respondent subsequently sent a copy of the job description and organisational chart which had been prepared by the claimant to Mrs Cameron to confirm that it was an accurate reflection of the claimant's

current role. Mrs Cameron confirmed that it was an accurate reflection of the claimant's role subject to a couple of minor amendments (pages 167 and 168 of the bundle).

### **The revised job description**

41. Mrs Hodder and Mrs Hall marked up the job description which the claimant had provided with their proposed changes. The amended job description and associated documentation are at pages 174 – 188 of the bundle. The Job title was described as Radiology Services Support Manager. There were a significant number of amendments to the job description. In broad terms, the claimant's responsibility for direct/ day to day manage of the Community Radiology Service was replaced with operational leadership/ management.
42. The revised job description also stated that the claimant would be responsible for the development of the capital programme requests for the wider Medical Imaging service as part of the annual capital planning cycle working with the Radiology Services Manager Diagnostics Cluster Manager and the Divisional Business Manager (including that the claimant would take the lead role within Medical Imaging for the management of the capital programme and ensuring that appropriate funding requests were submitted). The Tribunal accepts the evidence of the respondent that this would have involved collating relevant information including obtaining quotes and working with procurement, estates and clinical teams to identify what was required. Mrs Hall however indicated in her evidence to the Tribunal that she was it not clear at the relevant time which projects the claimant would be required to undertake.
43. The job description further stated that whilst the Radiology Services Manager was expected primarily to be based within the community there was an expectation of onsite attendance at the respondent's main hospital for meetings and to meet the respondent 's operational needs as required.
44. The respondent sent a copy of the revised job description to the claimant on 24 June 2019. The respondent offered to work through the job description with the claimant on a line by line basis at the forthcoming meeting and to answer any questions regarding the changes.

### **The meeting on 2 July 2019**

45. The respondent held a meeting with the claimant on 2 July 2019. The meeting was led by Mrs Hodder and Mrs Hall who were supported by Ms Scott. The claimant was accompanied by her trade union

representative. The meeting was recorded and the notes of the meeting are at pages 201 – 222 of the bundle.

46. There was a detailed discussion at the meeting about the proposed revised job description and the extent to which the claimant would be required to undertake revised duties. The parties had fundamentally different positions regarding the nature/ extent of the changes.
47. In very brief summary, the claimant/ her representative contended that the respondent was taking away her responsibility for line management of the Community Radiology Service, which was 80 – 90% of her role together with her autonomy. They further contended that the respondent was replacing such duties with the development of the capital management programme for the community and the wider Imaging Service and in particular the development of capital management requests which currently represented around only 5% of the claimant's role.
48. In very brief summary, the respondent indicated that it struggled to understand how the management of the community radiographers occupied so much of the claimant's time. The respondent contended that although the management of the community radiographers would pass to Mr Burnett the claimant would retain operational leadership of the Community Radiology Service and would also provide business support to the Radiology Services Manager and the respondent's wider medical imaging service which it considered to be an extension of the claimant's existing role and utilisation of the claimant's highly regarded skills. The respondent confirmed that they believed that there was a need for 2 band 7 roles.

#### **The meeting on 6 August 2019**

49. The respondent held a final meeting with the claimant on 6 August 2019. The respondent's transcript of the notes of the meeting are at pages 225 – 240 of the bundle. The parties continued to have fundamentally different positions regarding the extent of any differences between the claimant's existing and future roles and the interpretation of the previous events. Both parties expressed difficulty in understanding the other's position. The claimant/ her representative continued to contend that the job description was very different to her current role and that the revised role would take away the claimant's management responsibilities and autonomy in the community and would require her to undertake capital programme work, which currently accounted for a small percentage of her time, for the respondent's wider Medical Imaging Team. The claimant's representative stated, in response to the respondent's stated intention to submit the claimant's revised job description for job matching that if

the respondent pursued the job description further they would take legal advice on the fact that the respondent was making the claimant's job redundant. The claimant also raised the possibility of raising a grievance. This was a difficult meeting and Mrs Hodder acknowledged during the subsequent grievance procedure that she was "quite open" in her views during the meeting and that she was not as gracious as she should have been (page 363 of the bundle).

50. The respondent stated at the meeting that, from its perspective, if the claimant was correct, and the claimant's job had changed as contended by her, it would, in any event, have followed a process whereby it would be looking to put the claimant on a redeployment register and offering her suitable alternative employment in order to avoid any redundancy. The respondent further stated that they considered that the proposed role would, in the circumstances, be a suitable alternative as it was at the same grade and because of the similarities with the claimant's existing role. The respondent disputed that it was a very different role as it contended as the claimant would retain operational delivery of the radiology team and further that it retained many of the claimant's existing skills but utilised them in a slightly different way and in particular that it expanded upon the skills which the claimant used in the community to support the respondent's wider Medical Imaging Team.
51. The respondent agreed to make amendments to the job description to confirm the claimant's continuing responsibilities for authorising travel claims and expenses and indicated its willingness to consider any further requested amendments. The respondent also confirmed however, that it otherwise proposed to proceed with the job description from November 2019, including submitting it for job matching. The respondent suggested that the claimant should trial the role for 3 – 6 months. The respondent offered however to refrain from proceeding with the implementation of the changes until mid-September 2019 to allow the claimant an opportunity to take legal advice and to hold a further consultation meeting if requested.

### **The correspondence dated 22 August 2019**

52. On 22 August 2019 Mrs Hodder sent to the claimant a copy of the job description which she had also sent for job matching (pages 192-200 and page 241 of the bundle) together with a letter summarising what the respondent understood had been agreed at the meeting (page 242 of the bundle). The respondent confirmed, subject to any further issues being raised on behalf of the claimant following receipt of advice, that the respondent would announce the transfer of services to the team in mid-September including that the transfer of the Community

Radiography Services to respondent's specialist services division would take place on 4 November 2019. The respondent further confirmed that from that date it was expected that the claimant would work under the terms of the revised job description which had been submitted for banding. The respondent stated in the letter that it recognised that it was a difficult time for the claimant and advised her of available support.

### **Subsequent correspondence**

53. Ms Scott followed the matter up with the claimant's trade union representative on 10 and 16 September 2019. The claimant's trade union representative responded on 20 September 2019 acknowledging the respondent's intention to send out communications regarding the proposed transfer of the Community Radiology Service. The claimant's trade union representative advised the respondent that once the consultation process was formalised it would be the claimant's decision as to whether she wished to take out a grievance against the respondent (page 246 of the bundle).

54. On 24 September 2019 Mrs Hodder emailed Mrs Cameron and the interim divisional director for community services informing them that she wished to send out communications that week to the Community Radiology Service confirming the transfer in early November 2019 and asked whether there were any issues or concerns relating to the release of the transfer date.

55. The interim divisional director indicated that she would leave the matter to Mrs Cameron as she had the most contact with the claimant. Mrs Hodder had further correspondence with Mrs Cameron at the beginning of October regarding transfer related issues. As part of the course of such correspondence Mrs Cameron informed Mrs Hodder in an email dated 2 October 2019 that she assumed that any outstanding issues regarding the claimant's transfer had been resolved (page 249 of the bundle).

56. The respondent did not correspond with the claimant further following the receipt by Mrs Hodder of the trade union's email dated 20 September 2019 (page 246 of the bundle) or following receipt of Mrs Cameron's email date 2 October 2019 referred to above.

### **The email dated 3 October 2019**

57. On 3 October 2019 Mrs Hodder sent an email to the members of the Community Radiology Service team (which was also copied to a number of managers within the respondent and the claimant's trade



union representative) informing them that the consultation process regarding the transfer of services to the respondent specialist division had concluded and that the transfer would take place from 4 November 2019. In summary, the email further advised that from 4 November 2019 Mr Burnett would line manage the community radiology team in accordance with the management structure in the respondent's hospital based radiology team and that the claimant would provide operational leadership and would continue to ensure appropriate levels of staffing across the community sites. The email further stated that the changes would be reviewed after three months (page 252 of the bundle).

58. The claimant did not have any prior notice of the above email which she considered to be insensitive and distressing.

**The claimant's resignation**

59. The claimant resigned her employment with the respondent by letter dated 18 October 2019 which letter is at pages 265- 266 of the bundle. The claimant also submitted a written grievance at the same time. In brief summary, the claimant advised Mrs Cameron in her letter of resignation that:- (a) she was resigning her employment with immediate effect as she felt that she had no choice but to resign in the light of her recent experiences regarding the fundamental breach of contract and complete loss of trust and confidence in the respondent (b) the majority of her position and associated responsibilities had been removed as a result of the alignment of the Community Radiology Service with the respondent's acute hospital service (c) her role had therefore been made redundant, removed from the structure and her duties allocated to her direct report (c) she did not consider that the job description which had been offered to her was suitable or reasonable as it was effectively a demotion which removed all her line management responsibilities for the community hospitals and confined her to an office based role completing forms for new equipment (d) the new job was not a substantial role/was not commensurate with her band seven status and she felt that she had been pushed out of the respondent without redundancy pay and (e) the last straw was when the notification email was issued on 3 October 2019 informing her direct reports that her duties were being transferred to Mr Burnett who she also managed, that she had felt unwell since that time and that the position had become completely untenable for her.

60. Mrs Cameron wrote to the claimant by email dated 20 October 2019 accepting her letter of resignation (page 269 bundle). The Tribunal is therefore satisfied that the effective date of termination/the relevant date for the purposes of the Act is 20 October 2019.

### **The claimant's grievance**

61. The claimant submitted a written grievance on 18 October 2019. This document is at pages 259 – 264 of the bundle. In very brief summary, the claimant stated that she had lost all trust and confidence in the respondent, that she did not believe that the respondent had followed due process including that it should have been dealt with as a redundancy consultation which the respondent had consistently failed to acknowledge and, that she had been subject to unreasonable treatment. The claimant set out in detail the alleged unreasonable treatment to which she alleged she had been subject since February 2019 culminating in the alleged final straw which she identified as the consultation update email dated 3 October 2019 in which the respondent informed her direct reports that her duties were being transferred to Mr Burnett who she also managed. In essence the claimant alleged that :- (a), the respondent's decision to align the Community Radiology Service with the respondent's Medical Imaging Team and the associated transfer of the management of the community radiographers to the superintendent radiographer, in line with the practice at the respondent, resulted in the removal of the majority of her role and responsibilities and that her job had therefore become redundant and (b) the position which she had been offered was fundamentally different to her existing role and was not suitable alternative employment and (c) the claimant set out in detail why she considered the associated process to be unfair. The claimant concluded her grievance by stating that she considered that her role was untenable, that her authority had been undermined and that she had lost all trust and confidence in the respondent such that she could see no other way forward other than separation and that redundancy was now the only solution.

### **The Grievance investigation and report**

62. Ms Michaela Dicks, Clinical matron in renal services at the respondent was appointed to determine the claimant's grievance. Ms Dicks had had no previous dealings with the claimant. As part of her investigation Ms Dicks reviewed the transcripts of the consultation meetings and met with the claimant and met /spoke to a number of staff including Mrs Hodder, Mrs Hall Mrs Cameron and Mr Burnett. The Tribunal has had regard to the notes of such meetings which are at pages 293 onwards in the bundle. The Tribunal has also had regard to the grievance statement which was submitted by the claimant as part of that process (page 319 – 327 of the bundle).

63. The Tribunal has noted in particular:- (a) the discussions with Mrs Cameron regarding the nature of the claimant's role including that the claimant spent at least 50 per cent of her time on operational management issues (including that the line management and operational aspects of her role were intrinsically linked) (page 332 of the bundle) (b) the discussions with Mrs Hodder including that Mrs Hodder had never perceived it as a redundancy situation but as a change in role utilising what the claimant did brilliantly for the benefit of the whole department/ the nature of the capital management work which the claimant would be required to undertake and Mrs Hodder's acknowledgement that some of the meetings were very challenging and that listening back to the transcripts she was probably not as gracious as she should have been (page 363 ) and (c) the discussions with Mr Burnett including that the consultation process was difficult for the claimant in particular because of the discussions regarding the transfer of the line management duties and the absence of any clear role for the claimant (page 389).
64. Ms Dicks completed her grievance investigation report around 10 February 2020 (pages 391-409 of the bundle). In brief summary, Ms Dicks concluded that :- (a) the correct process had been followed pursuant to the Policy and that a meaningful consultation process had been undertaken and (b) the claimant's role had not become redundant because the community work was continuing notwithstanding that there had been a reallocation of some of the community duties from the claimant to Mr Burnett including that the operational duties would continue for the vast majority of her role and (c) that if the claimant's role had become redundant the Radiology Services Support Manager role would in any event have been suitable alternative employment pursuant to the Policy as it was broadly similar to the previous post in terms of capability and terms and conditions of employment as confirmed during the investigatory meetings.
65. Ms Dicks wrote to the claimant by letter dated 15 February 2020 dismissing the claimant's grievance. This letter is at pages 410 – 414 of the bundle.

### **The Role of Radiology Services Support Manager**

- 66.** The job description for Radiology Services Support Manager was submitted to the job matching panel for banding in August 2019. The job description came back with a preliminary Band 6 banding in January 2020 (pages 419 – 420 of the bundle). Although it was originally the intention of the respondent to resubmit the job description to endeavour to obtain a band 7 grading the role was not, for reasons unrelated to this case, ultimately proceeded with and the

requirements of the service were covered by the recruitment of other manager roles.

## **CLOSING SUBMISSIONS**

67. The Tribunal has had regard to the written and oral submissions of the parties together with the authorities relied upon by them as listed in the attached sheet.

## **THE LAW**

68. The Tribunal has had regard in particular to the following statutory provisions namely: - (a) unfair dismissal – section 95 (1) ( c), 98, , 118 and 123 (1) of the Act (b) redundancy - sections 136, 139 and 141 of the Act.

69. The Tribunal has also had regard to legal authorities referred to in the attached sheet.

**70.** The Tribunal has reminded itself in particular of the following:-

### **Constructive dismissal**

71. As dismissal is not admitted, the burden of proof falls on the claimant to show, on the balance of probabilities, that she was entitled to terminate her contract of employment by reason of the conduct of the respondent for the purposes of section 95 (1) (c) of the Act.

72. For such purposes, It is necessary for the claimant to establish either: -

1. A fundamental breach of an express term of her contract of employment. The Tribunal has to consider for such purposes whether any changes to the claimant's contractual duties were sufficiently material to constitute a repudiatory breach namely, whether any such breach was wholly inconsistent with the respondent's obligations to the claimant. The claimant relies in this case on an anticipatory breach of the express terms.
2. Anticipatory breach arises when the employer intimates to the employee that it does not intend to honour a fundamental term of the contract and thereby repudiates the contract. The question of whether there has been a such a fundamental breach depends upon an objective assessment of the circumstances of the breach and is a question of fact and degree.

and/or

3. A breach of the an implied term of the contract of employment by the respondent namely, that it would not without reasonable and proper cause, conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.
4. That any such breach / breaches caused her to resign and further that she did not delay too long before resigning thereby affirming the contract and losing the right to pursue such a claim.
5. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract as the very essence of such a breach is that it is calculated or likely to destroy or seriously damage the relationship.
6. The test of whether there has been a breach of the implied term of trust and confidence is objective. In order to determine whether there has been a breach of the implied term of trust and confidence it is necessary to consider (a) the nature of the conduct complained of (b) whether the respondent had reasonable and proper cause for that conduct and (c) if not, was the conduct complained of calculated or likely to destroy or seriously damage the employer/employee relationship of trust and confidence.
7. Unreasonable conduct alone is not enough to amount to constructive dismissal. If an employee is relying on a series of acts the Tribunal must be satisfied that the series of acts taken together amounted to a breach of the implied term of trust and confidence.
8. A course of conduct may cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive unfair dismissal following a, "last straw" incident. The last straw need not of itself amount to a breach of contract, be of the same character as earlier acts or constitute unreasonable or blameworthy conduct. The last straw must however contribute to the breach. An innocuous act on the part of employer cannot be a final straw, even if the employee genuinely, but mistaken interprets the act as harmful and destructive of his or her confidence in the employer.

9. The Tribunal is required to consider whether any repudiatory breach played “a part in the dismissal” and was “an” effective cause of the resignation” rather than being “the” effective cause accordingly it need not be the predominant, principal, major or main cause for the resignation.

73. If the claimant is able to satisfy the Tribunal that she has been constructively dismissed for the purposes of section 95 (1) (c) of the Act, the respondent is required to establish the principal reason for dismissal for the purposes of section 98 (1) / (2) of the Act. If it is able to do so, the Tribunal has to consider whether the dismissal is, in all the circumstances of the case, fair for the purposes of section 98 (4) of the Act. As part of this process, the Tribunal has to consider whether the decision to dismiss the claimant and the process adopted was within the range of responses of a reasonable employer and is not allowed to substitute its own decision.

### **Redundancy**

74. The Tribunal has reminded itself in particular that the correct approach for determining whether a dismissal is by reason of redundancy (including for the purposes of any entitlement to a statutory redundancy payment for the purposes of section 139 of the Act) involves a three stage process in accordance with the guidance in **Safeway Stores plc v Burrell [1997 IRLR 200]** namely:- (a) was the claimant dismissed and if so, (b) had the requirements of the respondent’s business for employees (not the claimant) to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish and if so, (c) was the dismissal of the claimant caused wholly or mainly by that state of affairs?.

### **THE CONCLUSIONS OF THE TRIBUNAL**

75. The Tribunal has considered the claims in the order set out in the List of Issues attached to this Judgment unless otherwise indicated below.

#### **The claimant’s constructive dismissal claim (paragraph 2 of the List of Issues).**

**2. Did the respondent commit a repudiatory breach of the claimant’s contract of employment consisting of:-**

**(i) An anticipatory breach of an express term of the claimant’s contract relating to her duties.**

76. The Tribunal has considered first whether the respondent committed an anticipatory breach of an express term of the claimant’s contract of employment relating to her duties (paragraph 2 (i) of the List of Issues).

77. In brief summary, the claimant contended that the respondent committed a repudiatory breach of an express term of the claimant's contract of employment namely of the claimant's written contract of employment (pages 64 to 65 of the bundle) which, with effect from 2011, had been varied by agreement so that the claimant was employed as a Community Hospitals Radiology Business Manager with associated duties. The claimant further contended that claimant's contract of employment did not contain any flexibility clause permitting the respondent to impose a change to the claimant's job title or duties without her consent and in so doing, the respondent committed a fundamental anticipatory breach of contract.
78. In brief summary, the respondent disputed that the claimant was able to establish any breach/ any repudiatory breach of any express term including that the claimant was unable to do so in the absence of :- (a) any written express terms / specific oral express terms and (b) any evidence of any changes which were sufficiently material to constitute a repudiatory breach of contract (**Hutchings v Coinseed** and **Hilton v Shiner**). The respondent relied on its analysis of the claimant's duties/ proposed changes at paragraphs 11 – 28 of its written closing submissions. The respondent further contended that there was not, in any event, any anticipatory breach as a trial period had been offered and, as a matter of law, an anticipatory breach is not reached until an employer's position becomes entrenched. **Financial Techniques v Hughes**.

#### **The conclusions of the Tribunal on paragraph 2 (i) of the List of Issues**

79. Having given careful consideration to all of the above, the Tribunal is satisfied that the claimant's job title and contractual duties at the material time are as set out in :- (a) the claimant's terms and conditions of employment signed by the claimant on 11 April 2005 (pages 64 – 65 of the bundle ) (which do not contain any flexibility clause) and accompanying job description, as subsequently amended in 2011 when the claimant took up the position of Community Hospitals Radiology Business Manager and (b) as recorded in the job description which was prepared by the claimant in June 2019 (paragraph 38 above and pages 142 – 153 of the bundle) at the request of the respondent as approved by her line manager Mrs Cameron (paragraph 40 above) subject to minor amendments (page 168).
80. The Tribunal is further satisfied that:- (a) the key element of the claimant's role at the material time was the management of the Community Hospital Radiology Service which included the line management of the 9 radiographers (including the Superintendent Radiographer) (b) that such line management and associated duties occupied at least 50% of the claimant's time. When reaching this

- conclusion, the Tribunal had taken into account in particular its findings at paragraphs 38, 40 and 63 above (including Mrs Cameron's assessment of the position).
81. The Tribunal is further satisfied that the claimant's responsibility for the community capital programme was at the material time a subsidiary element of the claimant's role which constituted approximately 5% of the claimant's role (paragraph 47 above).
82. The Tribunal is also satisfied that, viewed objectively, the job description for the Radiology Support Manager (page 192 – 200) with which the claimant was issued on 22 August 2019 (page 242) contained significant changes including in particular the removal of the claimant's line management of the radiographers (including of the Superintendent Radiographer), which duties the respondent recognised were important to the claimant, and the requirement to take wider responsibility for the development of the capital programme for Medical Imaging including supporting the writing of CRIC's and associated sign off. Further when the job description for the Radiology Support Manager was submitted for banding (page 419 -420) it failed to achieve a grade 7 banding.
83. The Tribunal is further satisfied that above unilateral variations to the claimant's job title/ description / contractual duties were sufficiently significant to amount to an anticipatory breach of the above-mentioned express terms of the claimant's contract of employment including that the respondent's position had become sufficiently entrenched. When reaching such conclusions the Tribunal has taken into account in particular, that although there was discussion during the meeting of 6 August 2019 about the possibility of the job description being reviewed in 3 – 6 months (page 239) there is no reference to any such trial period in the subsequent letter dated 22 August 2019 (page 242) and moreover it is clearly stated in that letter that, " From this date (4 November 2019) it is expected that you will work under the revised job description being submitted for banding".
84. In all the circumstances the Tribunal is satisfied that the respondent acted in anticipatory repudiatory breach of the express terms of the claimant's contract of employment relating to the claimant's job title/ description and contractual duties in respect of the imposition of such revised duties as notified in the letter dated 22 August 2019 which were to take effect from 4 November 2019.

**Issue 2 (ii) of the List of Issues - Did the respondent commit a repudiatory breach of the claimant's contract of employment by, without reasonable cause, acting in a manner calculated or likely to destroy the relationship of trust and confidence between employer and employee (paragraphs 32 -33 of the claim form**

85. The Tribunal has considered first allegations (a) and (b) namely in summary, that the respondent acted in an inappropriate high handed



manner including in respect of the conduct of the meeting on 7 February 2019, misleading the claimant as to the extent to which her role would change, not telling the claimant's line managers about the changes and telling the claimant's team that she had been in discussion about the changes.

- 86.** In brief summary, the claimant contended that the way in which the respondent went about the consultation process, including its conduct of the meeting on 7 February 2019, contributed to the breach of contract. The claimant further contended that the respondent took virtually no steps to ascertain what the claimant actually did before proposing changes to her role, including to consult with her line manager, and when they did propose changes, the respondent refused to reconsider the position or look to replace the claimant in a properly comparable new job. Moreover, the claimant contended that the balance of the evidence indicated that Mrs Hodder told the claimant at the meeting on 7 February 2019 that the claimant's line management was being removed.
- 87.** In brief summary, the respondent contended that it had conducted extensive consultation with the claimant and denied any inappropriate conduct in respect of the conduct of such process including the meeting on 7 February 2019.

### **The conclusions of the Tribunal**

- 88.** Having given careful consideration to the above, Tribunal is satisfied that the difficulties which arose in respect of the meeting on 7 February 2019 (including the refusal to allow the claimant to see the Consultation document / to remain in attendance at the meeting ) arose as a result of a genuine misunderstanding regarding the claimant's invitation to such meeting (paragraphs 18-19 above) .
- 89.** The Tribunal is however satisfied, having considered the consultation process overall, that notwithstanding the number of meetings which the respondent conducted with the claimant between February and August 2019, the respondent :- (a) failed to take appropriate steps to ascertain the nature of the management structure in the Community Radiology Service at an early stage of the process including to take steps (such as consulting with Mrs Cameron) properly to understand the nature of the claimant's management role and responsibilities (including that she was Mr Burnett's line manager )/ the impact of the proposed changes. The Tribunal is further satisfied that such failures made the claimant feel excluded/undermined during consultation meetings such as those on 7 March and 15 April 2019 and led to a deteriorating relationship between the parties as evidenced by the recording of meetings from June 2019 (b) gave a misleading impression in the Consultation Document of the extent to which the claimant had been involved in the formulation of the proposals for the transfer of the Community Radiology Service (paragraph 16 above )

and (c) failed properly to acknowledge the claimant's legitimate concerns regarding the nature and extent of the proposed changes to her existing role including in particular the transfer / replacement of her management responsibilities for the Community Radiology Service with capital management work for the wider imaging team (paragraphs 47-49 above) and (d) acted on occasions in an insensitive manner including at the final meeting on 6 August 2019 in respect of which Mrs Hodder subsequently acknowledged that she had been "open" and not as gracious as she should have been (page 363) of the bundle. The Tribunal is further satisfied, in the light of the nature of the matters identified above that such conduct was without reasonable and proper cause.

**90. Paragraph 2 (c) taking away the alleged "core duty" of line management and leaving the claimant with residual duties of a "humdrum character" and (d) replacing hands on line management with purchasing forms".**

91. The Tribunal has considered these allegations together.

92. In summary the claimant contended that the extent of the change in the claimant's job namely, the removal of the core management duties was without reasonable and proper cause because whilst there were understandable reasons for wanting to bring the Community Radiology Service within the wider respondent Medical Imaging Team it did not warrant the dismantling of the claimant's job and in particular the removal of her line management responsibilities. The claimant further contended that:- (a) no protocol had been relied upon to support the respondent's contention that it was best practice for radiographers to be managed by a radiographer (Mr Burnett) (b) that there was no evidence that the lack of clinical management had been a problem during the previous eight years and that Mrs Hodder had given evidence that the Community Radiology Service was well-run and there was therefore no need to replace the claimant with an unproven manager and (d) the fact that the acute service radiographers were managed by a radiographer was not of itself a reason to enact change.

93. In summary, the respondent contended that the allegations were effectively a repetition of what had been relied upon in respect of the alleged breach the express terms of the claimant's contract and relied on its previous arguments regarding such claim. The respondent however further contended that there was, in any event, reasonable and proper cause for making the changes which amounted to some other substantial reason.

94. The Tribunal is satisfied for the reasons already explained at paragraphs 79-84 above, that the removal of the claimant's management responsibilities and the replacement and the requirement to take on wider responsibility for the development of the capital management programme for Medical Imaging constituted an

anticipatory breach of the claimant's contract of employment relating to the claimant's job description and contractual duties.

95. However, In so far as it is still therefore necessary for the Tribunal to determine paragraphs 2 (ii) (c) and (d) of the List of Issues in the light of the above, the Tribunal is not satisfied on the facts that the claimant's proposed responsibility for the development of the capital programme for Medical Imaging were duties of a humdrum nature or confined to the completion of purchase forms. The Tribunal is satisfied having regard to the job description and associated documentation for the Radiology Services Support Manager (pages 191- 200) and associated findings of fact (including paragraphs 29 and 42), that notwithstanding that the claimant would no longer sit on the Capital programme group meetings, this was nevertheless a substantial role that would have involved day to day responsibility for the management of capital programme across the wider Medical Imaging team.

96. Further, the Tribunal is not satisfied (for the purposes of the implied term of trust and confidence only) that the respondent acted without reasonable and proper cause in respect of the transfer of the claimant's management responsibilities to Mr Burnett. When reaching this conclusion the Tribunal is satisfied that the respondent was entitled to conclude that both (a) the transfer of the management of the Community Radiology Service to the Medical Imaging Team and also (b) the transfer of line management of the radiographers from the claimant to the Superintendent Radiographer was in the best interests in the service/ patients including for the purposes of clinical governance. When reaching such conclusions the Tribunal has had regard in particular to its findings at paragraph 14 above regarding the benefits to the service and further that the transfer of line management to Mr Burnett would align with his existing clinical management responsibilities for the radiographers.

**Issue 3 of the List of Issues- If proven did any of (ii) (a) – (d) above amount to a breach of the mutual trust and confidence (including was there a cumulative breach?)**

97. In brief summary the claimant relies, in addition to the submissions referred to above, to the alleged conduct of the respondent in respect of the issue of the email dated 3 October 2019 including that having regard to the correspondence around that time the respondent should not have made the announcement of the changes in the email dated 3 October 2019 would have taken the claimant by surprise and that it was "the the last straw" which contributed to the alleged breaches of trust and confidence.

98. In brief summary, the respondent contended that the issue of the announcement on 3 October 2019 was, having regard to the authorities of **Kaur and Omilaju**, innocuous and not capable of constituting a last straw including as (a) the way in which matters had been left on 6

August 2019 was that there was a consensus that the end of the road had been reached and that the final job description was to be the job description (subject to trial which had been offered)(b) the claimant's representative indicated that advice would be sought and that they would thereafter indicate if they were not happy for the announcement to be issued and (c) further the claimant's representative and her line manager were informed of the intention to send out the announcement and there was no indication of any objection from the claimant.

99. Having given the matter careful consideration, the Tribunal is satisfied (insofar as it is required to determine this issue given its previous findings above) that viewed objectively the respondent's email dated 3 October 2019 was not entirely innocuous and was capable of constituting a last straw in law.
100. When reaching this conclusion, the Tribunal has taken into account in particular that:- (a) whilst acknowledging the respondent's intention to send out communications regarding the proposed transfer of the Community Radiology Service the claimant's trade union representative advised the respondent in the email dated 20 September 2019 (page 246 of the bundle) that once the consultation process was formalised it would be for the claimant to decide whether she wished to take out a grievance against the respondent (b) On 2 October 2019, the claimant's line manager Mrs Cameron informed the respondent that she assumed that any outstanding issues regarding the claimant's transfer had been resolved and (c) notwithstanding such concerns the Tribunal took no steps to contact the claimant to ascertain whether she had any outstanding concerns/ wished to pursue a grievance and/or to alert her about the issue of the letter dated 3 October 2019. In the circumstances, the Tribunal is satisfied that the issue of the letter dated 3 October 2019 is capable of constituting a last straw in accordance with the guidance contained in **Omilaju**.

**Issue 4 of the List of Issues – In the event of a repudiatory breach being found, was the claimant's resignation dated 18 October 2019 at least in part in response to that breach.**

101. In brief summary, the claimant contended that she relied upon the reasons contained in her letter dated 18 October 2019 including in particular that she resigned because of the fundamental breach of contract and loss of trust and confidence in the respondent including as the majority of her position and associated responsibilities had been removed/ allocated to her direct report, that her role had therefore been made redundant and that the job description which had been offered to her was not suitable or reasonable. Further, the claimant denied that she had resigned because she was seeking a redundancy payment including as evidenced by the fact that the first time that she indicated an intention to claim a redundancy payment was in the grievance investigation.

102. In brief summary, the respondent contended that in the event that the claimant was able to establish any repudiatory breach ( which it denied) the claimant terminated her employment because she thought that she could use the occasion of the service change to assert that there was a redundancy situation which would have entitled her to a NHS redundancy payment which would have been broadly equivalent to the value of her earnings over the remaining 12 months of her employment and would taken her up to her intended retirement age of 60.

### **The conclusions of the Tribunal**

103. Having given the matter careful consideration, the Tribunal is satisfied that the reasons for the claimant's resignation are as set out in her letter to the respondent dated 18 October 2019 (pages 265-266 of the bundle) and in particular :- (a) because the claimant considered that in the light of her recent experiences there had been a fundamental breach of her contract and loss of trust and confidence in the respondent in respect of the alignment of the Community Radiology Service with the acute services in the respondent and the consequential removal of the majority of her role and responsibilities (b) that the new role offered was not substantial or commensurate with her status and (c) that the final straw had been the issue of the email dated 3 October 2019.

104. Further, the Tribunal is not satisfied that the real/ effective reason why the claimant resigned her employment was to procure a redundancy payment. When reaching this conclusion, the Tribunal has taken into account that the claimant stated in her letter of resignation dated 18 October 2019 that she felt that she was being pushed out of the respondent without redundancy pay. The Tribunal is however satisfied, having regard to its findings of fact concerning the contents of the various meetings with the claimant from 7 February 2019 onwards leading up to the claimant's resignation that the reasons for the claimant's resignation are as summarised in her letter dated 18 October 2019 as referred to above.

105. In all the circumstances the Tribunal is satisfied that the claimant resigned her employment by reason of the anticipatory breach of the express terms of her contract together with the breaches of the implied term of trust and confidence identified previously above.

### **Issue 5 - did the claimant delay too long before resigning so as to affirm the contract**

106. In brief summary, the claimant relies upon the email of 3 October 2019 as the final straw.

107. In brief summary, the respondent contended that many of the alleged breaches (which are denied) occurred early in the process and

cannot be relied upon including as the email dated 3 October 2019 cannot be regarded as a final straw for the reasons previously referred to above.

### **The conclusions of the Tribunal**

108. Having given the matter careful consideration, the Tribunal is not satisfied that the claimant has affirmed the breaches of the express and/or implied terms of the contract identified above. When reaching such conclusion the Tribunal has taken into account in particular that :-  
(a) in respect of the anticipatory breach of the express term relating to the claimant's job title/ job description/ contractual terms that respondent would have been fully aware at the meeting on 6 August 2019 of the claimant's position/ resistance to the proposed changes. Further, the claimant's trade union representative's letter dated 20 September 2019 (page 246 of the bundle) makes it clear that the claimant would be considering the possibility of taking out a formal grievance once the consultation process was formalised.  
(b) in respect of the breaches of the implied term of trust and confidence -although some of the established conduct occurred during the earlier stages of the process, the Tribunal has had regard in particular to its findings/ conclusions concerning the conduct of the meeting on 6 August 2019 (paragraph 49 above) and in respect of the email dated 3 October 2019(paragraphs 54 – 58 and 100 above).

109. Having regard to its findings and conclusions regarding the anticipatory breach of the express terms and the breaches of the implied term of trust and confidence of the claimant's contract of employment identified above, the Tribunal is satisfied that the claimant was constructively dismissed for the purposes of section 95 (1) (c) of the Act.

### **Fairness of the claimant's dismissal**

**Issue 6 of the List of Issues - if the claimant was dismissed in law was there a potentially fair reason for dismissal? The respondent denies redundancy and asserts some other substantial reason("SOSR")**

110. in brief summary, the claimant accepted that there was a potentially fair reason in law for the claimant's dismissal because she asserted redundancy. However, the claimant further contended that the dismissal was not fair in all the circumstances for the purposes of section 98 (4) of the Act for the reasons referred to below.

111. The claimant relied in support of the claimant's redundancy on section 139 of the Act and the legal authority of **Safeway** and in particular the following contentions (in respect of the second question in Safeway) :- (a) the requirements of the respondent for employees to carry out work of a particular kind had diminished (or were expected to

diminish ) as before the change the claimant did the majority of the line management of the radiographers in respect of which she spent approximately 24 hours a week were as Mr Burnett worked 25 or 26 hours clinically (of his 30 hours per week contract) which meant that there was about 28 hours per week of work to be done on line management (b) after the change the respondent's initial proposal was that Mr Burnett would take on these tasks however they would be combined with his clinical duties in accordance with the arrangement within the respondent (c) as Mr Burnett only worked 30 hours a week he could not have undertaken the same amount of line management as the claimant unless he did only two hours clinical work a week (d) it therefore follows that the line management of the community radiographers would have diminished following the change and (e) that it must have been the respondent's expectation that the requirement for employees to carry out this work would diminish. This was because it did not need as many employees to carry out the work because it was proposing that Mr Burnett did it rather than the claimant supported by Mr Burnett and as such the full-time equivalent headcount was being reduced and (f) the respondent failed to understand that organisational change could include redundancy for the purposes of the Policy (page 434 of the bundle).

112. As far as the third limb of Safeway was concerned, the claimant contended in summary that the claimant's resignation was (at least) mainly attributable to the redundancy as the claimant would otherwise have simply continued in her job as business manager of the community radiographers.

113. In brief summary, the respondent contended that there clearly was not a redundancy in this case. The respondent relied in particular upon **Safeway** and **Murray**. The respondent contended in particular that :- (a) the number of employees did not reduce (b) the amount of work did not reduce (c) the need of the respondent for employees to carry out line management of the radiographers did not reduce/ was not expected to reduce (d) all the work done by the claimant still needed to be done and there was to be the same number of employees (e ) the key issue is whether there was a reduction in the need for employees to do work of a particular kind, not a reduction in the need for a particular job and (f) the potentially fair reason was SOSR.

### **The conclusions of the Tribunal**

114. Having had regard to all of the above, including in particular sections 98 (1)/ (2), 136 and 139 of the Act and the guidance contained in **Safeway and Foyle** the Tribunal is satisfied as follows:-

- (1) The claimant was dismissed for the purposes of section 95(1) (c) and 98 (1) / (2) of the Act.

- (2) The respondent has established, on the balance of probabilities, a potentially fair reason for the claimant's dismissal namely, the transfer of the management of the Community Radiology Service to the Medical Imaging Team in the respondent's special services division and the associated reorganisation of the management of Community Radiology Service.
- (3) Further that the reason for such dismissal for such purposes was SOSR (rather than redundancy) for the purposes of section 98(1)/(2) of the Act.

115. When reaching the above conclusions, the Tribunal has taken into account in particular the following: -

- (1) **In respect of paragraph (1) above** – the findings at paragraphs 79-84 above regarding (a) the anticipatory breach of the express term of the claimant's contract of employment relating to her job title/ job description/ contractual duties and/or (b) the breach of the implied term of trust and confidence (paragraphs 89 and 97 -100 above) which entitled the claimant to terminate her contract of employment with the respondent for the purposes of section 95 (1) (c) of the Act which therefore constitutes a dismissal for the purposes of section 98 (1) (2) of the Act.
- (2) **In respect of paragraph (2) above** – the Tribunal is satisfied that, notwithstanding the repudiatory breaches of contract by the respondent, it has established, on a balance of probabilities, that the principal reason which entitled the claimant to terminate her contract namely, the unilateral variation of her contract relating to her job title/ job description and contractual duties (and in particular the removal of her line management duties and responsibilities and requirement to undertake wider duties for the development of capital programme) was a potentially fair reason for dismissal. When reaching this conclusion the Tribunal has had regard in particular to the findings/ conclusions at paragraphs 79 - 84 and 96 above including that the respondent has established that the transfer of the management of the Community Radiology Services and (including of the transfer of the claimant's line management responsibilities to the Superintendent Radiographer (Mr Burnett) were in the interests of the service (including for the purposes of clinical governance).
- (3) **In respect of paragraph (3) above** - the Tribunal is satisfied that the respondent has established, on the balance possibilities, that the principal reason for the claimant's dismissal was a reorganisation of the management of the Community Radiology Service namely SOSR rather than redundancy. When reaching this conclusion the Tribunal has given careful consideration to the guidance contained in Safeway including in particular the stage 2 and 3 questions namely:- “ (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 that state of affairs?

116. Having applied such questions to the facts the Tribunal is satisfied that the respondent has established on the facts that there was no diminution/ expected diminution in the requirements of the respondent to carry out work of a particular kind namely, the line management responsibilities and associated duties undertaken by the claimant.
117. When reaching this conclusion the Tribunal has taken into account in particular, that there was no suggestion as at 18 October (or 4 November 2019) that :- (a) the range of line management duties/ associated duties undertaken by claimant (such as 1 to 1's/ PDR's, annual leave, rota production/ management, management of sickness absence return to work, etc would cease or diminish) including as to the extent that any such duties were no longer to be undertaken by the claimant they would be undertaken by the Superintendent Radiographer (Mr Burnett) and (b) that there was any proposed reduction in the number of employees including as there would continue to be the same number of radiographers and band 7 managers (the claimant and Mr Burnett).
118. For the avoidance of doubt the Tribunal rejects the claimant's contention that there must have been a diminution in the workload as Mr Burnett would have been unable to undertake such a workload because of his clinical responsibilities (including that it would not therefore have done it so intensively / would have been undertaken by the radiographers directly) as there was no evidence before the Tribunal in support of such contention including that there was any diminution in the nature or amount of work undertaken/ expected to be undertaken.

**Issue 7 of the List of Issues- was the claimant's dismissal fair in all the circumstances (section 98 (4) of the Act).**

119. In brief summary, the claimant contended that although she accepted that the reason for dismissal was a potentially fair reason for dismissal namely redundancy, the dismissal was not fair for the purposes of section 98 (4) of the Act including as:- (a) it would be a rare case where the respondent breached the claimant's contract so seriously as to amount to a repudiatory breach giving rise to a constructive dismissal but the dismissal was nevertheless fair (b) it was substantively unfair to subject the claimant to a course of conduct which was misleading, unsympathetic and high handed and (c) it was both substantively and procedurally unfair for the respondent to fail to acknowledge that the claimant was redundant or follow due process.

120. In brief summary, the respondent contended that notwithstanding any constructive dismissal the dismissal was in any event fair for the purposes of section 98(4) of the Act as there was an extensive process of consultation prior to termination and further that the claimant was afforded a form of quasi appeal in the form of the claimant's grievance which was thoroughly investigated and considered notwithstanding the termination of the claimant employment.

### **The conclusions of the Tribunal**

121. Having given the matter careful consideration, the Tribunal is satisfied, in all the circumstances of the case, that the claimant's dismissal was unfair for the purposes of section 98 (4) of the Act. When reaching this conclusion the Tribunal has taken into account in particular, the serious nature of the breaches of contract (express and implied) identified previously above including in particular the respondent's failure to appreciate/ acknowledge the correct contractual position with regard to the claimant's existing terms and conditions/the unilateral imposition of the new job title/ job description/ terms and conditions in anticipatory repudiatory breach of the claimant's contract of employment.

### **Issues 8- 10 of the List of Issues – Statutory redundancy payment**

122. The Tribunal is satisfied for the reasons already set out above that the claimant was dismissed for the purposes of section 136 (1) (c ) of the Act. The Tribunal is however further satisfied, for the reasons set out at paragraph 114 onwards above, that the respondent has established that (a) the reason for the claimant's dismissal was SOSR and that (b) the definition of redundancy contained in section 139 of the Act was not satisfied.

### **Issue 11 of the List of Issues – if there was a redundancy situation for the purposes of section 139 of the Act did the respondent make an offer to renew the claimant's employment or re- engage her under a new contract of employment for the purposes of section 141 (1) of the Act.**

123. In case however that the Tribunal is incorrect and there was a redundancy situation for the purposes of section 139 of the Act, the Tribunal has gone on to consider whether the respondent made such an offer for the purposes of section 141(1) of the Act.

124. In brief summary, the respondent contended that if there was a redundancy situation for the purposes of section 139 of the Act (which it denied) the respondent in any event made a valid offer to renew the claimant's contract of employment on the terms set out in the final job description (page 485) which included a trial period. The respondent contended that the offer did not need to be contained in a formal

document and could, by way of example be given to an employee individually or made on a notice on the company noticeboard – **Mc Creadie.**

125. In brief summary, although the claimant accepted that section 141(1) of the Act did not require an offer to be in writing she contended that, upon the application of standard contractual principles, the terms of the offer needed to be reasonably certain and open for acceptance by the claimant. The claimant also contended in particular that in the letter dated 22 August 2019 (page 242) the claimant was told that it was expected that she would work under the revised job description with effect from 4 November 2019 which amounted to an instruction or requirement rather than an offer including as it was not open for the claimant to reject it. The claimant further contended that “any offer” did not, in any event, comply with the terms of section 141 of the Act as there was no offer which was expressed to take effect on the end of the claimant’s employment because the claimant’s employment was not contemplated to end.

### **The conclusions of the Tribunal**

126. Having had regard to the findings of fact, relating in particular to the meeting on 6 August 2019 (paragraph 49) and the respondent’s letter dated 22 August 2019 (paragraph 52), together with the provisions of section 141 of the Act, the Tribunal is not satisfied for the reasons advanced by the claimant that the respondent made a valid offer for such purposes.

**Issues 12 and 13 of the List of Issues – can the respondent, in any event, show, if the respondent had made a valid offer for the purposes of section 141 of the Act that it was offer of suitable employment in relation to the claimant and further that the claimant had unreasonably refused it.**

127. In brief summary the respondent contended that the offer was, objectively, clearly suitable and further that (subjectively) the claimant unreasonably refused the offer as :- (a) the claimant did not want to accept the offer because she wanted to receive a redundancy payment instead and/or (b) on the facts as they ought reasonably to have appeared to a person in the claimant’s position all her objections to the proposed role had been answered by the respondent.

128. In brief summary, the claimant contended that:- (a) “any offer” was not an offer of suitable employment for the claimant as it consisted primarily of process including in particular, capital management rather than management and the claimant was a manager of people not processes and (b) it was in any event, assessed subjectively, reasonable for the claimant to refuse “any such offer” for the reasons stated above and further in the context of what had occurred including in the light of the respondent’s fundamental

breaches of the claimant's contract and the claimant's consequential loss of trust and confidence in the respondent.

### **The conclusions of the Tribunal**

129. Having given careful consideration to all of the above, the Tribunal is satisfied that if (notwithstanding the above conclusions) a "valid offer" was made", it was, viewed objectively, suitable alternative employment for the purposes of section 141 of the Act. When reaching this conclusion the Tribunal has had regard in particular to the following including (a) the nature of the duties including the residual operational duties contained in the final job description (192-200 ) and the claimant's existing involvement (albeit on a much smaller scale) in and experience of capital programme work for the Community Radiology Service and general knowledge and experience of radiology services (b) the respondent's proposed band 7 grading for the post and continuance other terms and conditions.

130. The Tribunal is however further satisfied that viewed subjectively, that the refusal by the claimant of "any such offer" was in all the circumstances of the case nevertheless reasonable including in particular having regard to :- (a) the claimant's long involvement in (since 2005 ) and preference for management duties in the community and (b) that the claimant's loss of trust and confidence in the respondent by that stage in the light of the respondent's breaches of contract as identified previously above.

### **Issues 14- 17 of the List of Issues- the TUPE related issues –**

131. These issues are no longer pursued by the claimant and are therefore not addressed by the Tribunal.

### **Issue 18 of the List of Issues – Polkey – namely if the claimant's dismissal was procedurally unfair would the claimant have been fairly dismissed in any event for the purposes of section 123 of the Act.**

132. In summary, the claimant contended that if she succeeded in her claim for unfair dismissal there should not be any reduction in her compensatory award for the purposes of section 123 (1) Act to reflect the chance that the claimant would in any event have been fairly dismissed. The claimant further contended that if she had been correctly assessed as being redundant :- (a) a fair process would have been followed which would have including putting her on the redeployment list which would have included not only the Radiology Services Support Manager role but also other available roles and (b) if the respondent had accepted that the claimant was redundant and approached the matter accordingly the trust and confidence between

the parties would not have been undermined and the claimant would have been amenable to reasonable offers from the respondent and (c) the respondent is a large organisation and it is likely that if the claimant had been placed on the redeployment list this would have led to a job being found for the claimant elsewhere.

133. In summary, the respondent contended that if there was any procedural unfairness the outcome would have been the same namely, that the claimant would have resigned in any event because she sought a redundancy payment and or that she was unwilling to accept any change to her role in the run-up to her retirement.

### **The conclusions of the Tribunal**

134. Having given the matter careful consideration, the Tribunal is not satisfied that it is appropriate to make any reduction to the claimant's compensatory award for the purposes of section 123(1) of the Act to reflect the chance that the claimant would in any event have been fairly dismissed.

135. When reaching this conclusion the Tribunal has taken into account in particular that (a) for the reasons explained previously above it is not satisfied that the claimant resigned in order to obtain a redundancy payment (b) if the respondent had properly appreciated that it was not entitled unilaterally to vary the claimant's existing job title/ job description and contractual duties/ impose the Radiology Services Support Manager role it is likely that the respondent, as a large employer would have considered further with the claimant possible alternative management roles for the claimant within the respondent in order to avoid her dismissal. The respondent has not however adduced any details / job descriptions for any other roles which may have avoided the claimant's dismissal in such circumstances.

136. In all the circumstances the Tribunal is not satisfied that the respondent has adduced sufficient information for the Tribunal to be able properly to determine the percentage chance that the claimant would, in any event, have been fairly dismissed for the purposes of section 123 (1) of the Act and that it would therefore be engaging in a sea of speculation.

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Employment Judge Goraj  
Date: 15 December 2020  
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