JB1

EMPLOYMENT TRIBUNALS

Claimant: Ms M Udejimba

Respondent: Central & Northwest London NHS Foundation Trust

Heard at: London Central **On:** 8 – 11 January 2017

Before: Employment Judge Auerbach

Representation

Claimant: Ms S Fraser Butlin, Counsel

Respondent: Mr A Aamodt, Counsel

REASONS

Introduction

1. The Claim Form was presented on 12 July 2017. A response was put in defending the claims on their merits. There was a Case Management Preliminary Hearing in September 2017 at which the claims and issues were clarified. The Particulars of Claim and Grounds of Resistance were both subsequently amended. At the start of the hearing before me, I was provided with opening notes by both counsel, a short chronology and draft list of issues. The claims and the issues to which they give rise were reviewed with counsel both before and after my initial reading and before I heard the first witness.

2. The Claimant was dismissed in October 2016 on the given ground of redundancy, but then appealed and in March 2017 was reinstated. It was common ground before me, that the effect in law, was that the prior dismissal was retroactively expunged. So, she was to be treated as having remained employed with retroactive effect up to, and continuing through, the reinstatement. However, she then went on to resign a few weeks later in April 2017.

3. Against that background, it was common ground that it was that resignation that had brought the employment to an end. However, the Claimant claimed to have resigned in circumstances amounting to constructive dismissal.

She then complained that such dismissal was both unfair and attributable to redundancy, so that she was entitled to a redundancy payment.

4. There were also claims for wages and holiday pay, said to have been outstanding on termination of the employment in April 2017. As to that, following the initial dismissal in October 2016, the Claimant had received a payment in lieu of notice. Then a further payment was made to her in April 2017 and then a further payment in January 2018, before the start of this hearing. During the course of the hearing I was told that the parties had agreed the position regarding what remained outstanding in terms of wages and holiday pay, and I was able to give judgment by consent in relation to those complaints. However, as a separate matter, the handling of the pay question following the announcement of the appeal decision featured as part of the constructive dismissal claim.

5. Accordingly, the substantive claims before me, were that the Claimant was constructively unfairly dismissed and that she was constructively dismissed in circumstances giving rise to the entitlement to a redundancy payment.

6. As to the claim for a redundancy payment, it was common ground that the closure of the Claimant's workplace at Holloway Prison had led to what may for shorthand be called a redundancy situation. It was also common ground that, were I to find that she was constructively dismissed, and that this was attributable to the redundancy situation, then she would be entitled to a statutory redundancy payment.

7. In particular, during the employment, there had been an issue as to whether the Claimant's rejection of offers of positions in Hendon and Willesden amounted to an unreasonable refusal of suitable alternative employment. However, it was common ground before me that, in terms of the statutory provisions relating to redundancy payment entitlement, both positions were suitable, but the Claimant had reasonably rejected them, so that this would not deprive her of the right to a redundancy payment, if otherwise so entitled.

8. It was also confirmed that, in relation to the significance of her reinstatement following the appeal, it was no longer argued that this caused section 141 **Employment Rights Act 1996** to be engaged.

9. The claim presented to the Tribunal was for a *statutory* redundancy payment, but it was the Claimant's case that she was also entitled to a contractual payment. Mr Aamodt confirmed that it was accepted that, were I to find that she was entitled to a statutory redundancy payment, then she would also be entitled to a contractual payment – although it would not be for the Tribunal to deal with that.

10. As to constructive dismissal, the Claimant did not rely on any alleged breach of express term, but on a claim of breach of the implied duty of trust and confidence, said to have come about through a number of matters either individually or cumulatively. In the original draft List of Issues, ten such matters (with some sub-paragraphs) were identified. At the start of the hearing, without opposition, Ms Fraser Butlin added an eleventh. She also abandoned the first as a separate matter of treatment, contributing to such cumulative breach, although she relied on it as background. She also clarified that the matter numbered 6 in the list in the draft List of Issues, related to the question of suitable alternative

employment at Hackney. I will go through the details of the matters relied on later in this decision.

11. As I have indicated, the Claimant's case was that, if she was constructively dismissed then, for the purposes of the unfair dismissal and redundancy payment claims, the reason, principal reason and/or attributable reason was redundancy. In its grounds of resistance the Respondent originally did not dispute that as such, whilst resisting the prior assertion that there had been a constructive dismissal at all. However, at the start of the hearing before me Mr Aamodt applied to amend to assert that the reason for any such constructive dismissal, was some other substantial reason rather than redundancy. Ms Fraser Butlin opposed the amendment but, after hearing argument, and for reasons I gave orally, I allowed it; and Mr Aamodt clarified the basis of the alleged substantial fair reason relied upon.

12. I had a single bundle of documents before me, to which one addition was made when it became apparent that a document was missing, which was subsequently found. The witnesses from whom I heard, all of whom gave evidence by reference to prepared witness statements, were: the Claimant and then, on behalf of the Respondent, Padraig Brady HR Business Partner (whose responsibility included supporting management in relation to the closure of HMP Holloway), Zoe Newton (at the time the Head of Healthcare at HMP Holloway), Dr Cornelius Kelly (Executive Medical Director and Chair of the Appeal Panel) and Nigel Redmond (another member of the Appeal Panel who provided it with HR support). I was presented with written and oral closing submissions by both Counsel. I thanked them both for the clarity of their arguments.

13. After taking time to deliberate, I gave an oral reasoned decision, holding that the Claimant had been unfairly dismissed and was entitled to a statutory redundancy payment. The parties agreed the amount of the redundancy payment. Ms Fraser Butlin indicated that the Claimant was seeking neither reinstatement nor reengagement. The parties were agreed that, in view of the entitlement to a statutory redundancy payment, the basic award should be zero. The parties were permitted time for further dialogue, as a result of which they agreed the amount of the compensatory award, which I awarded by consent.

14. The written judgment was subsequently promulgated. At the hearing Mr Aamodt requested written reasons and these are now provided.

The Facts

15. The Respondent is an NHS Trust providing a wide-ranging healthcare service across a substantial territory covering Central and North-West London. The figures of course fluctuate but it has around 7000 staff and provides more than 300 different services across some 150 different sites and in different ways. At the relevant time, one of these locations was HM Prison and Young Offenders Institution at Holloway, where the Respondent had taken over responsibility for the provision of various health services in 2011.

16. The Respondent recognises various unions and has an agreed Change Management Policy. A section concerned with the duties of the parties in a change management situation, includes that employees are required to play an active role. There is a definition of "staff at risk" which means "staff whose post

may potentially be redundant as a result of organisational change if suitable alternative employment cannot be found". There are provisions relating to consultation, which is to be proportionate to the degree of proposed change, to the number of staff affected and the impact on individuals. Provisions for consultation with individual staff require at least one meeting with each member of staff, and for them to be provided with a copy of a consultation document that should be produced and an opportunity to comment at the meeting on the proposals including how they may impact on their personal circumstances. There is also provision for regular updates and frequently asked questions to be circulated, and for sufficient time to be allowed for meaningful consultation.

17. Where there is a reorganisation and a new structure, it is envisaged by the document that there will initially be a slotting in or ring fencing process and then subsequently redeployment considered for staff who have not been slotted in and are designated as being at risk. There is further provision in relation to support for staff who are placed at risk, including reasonable time off with pay to look for alternative work and access to NHS job vacancies. There is also provision for 4-week trial periods in new jobs which may be extended to a maximum of 8 weeks.

18. The Claimant is a dual qualified nurse, RGN and RMN. Her employment in the NHS began on 1 July 1997. She began working at HM Prison Holloway on 30 January 2000. She transferred to the Respondent when it took over those services from the MoJ in 2011. As of 2015, she was on Band 6 of the Agenda for Change pay scales. She was living in Tottenham, London N17.

19. At the time of the relevant events, there was a 24-hour 3-shift system in place at Holloway. As a matter of fact, the arrangement that the Claimant had achieved, was that she was working mainly nights, but also periodically some day shifts. She is a single mother of two children, aged 9 and 13 by the time of this hearing. She organised childcare through a network of family, friends, nannies and childminders. When she worked nights, she would either drop off her children with a childminder before starting her shift, picking them up at the end, or a nanny would stay at her home overnight. When she worked days, she would work a long shift and was more dependent on pre-school and after-school clubs, friends and childminders. I accepted that she found this overall arrangement to be manageable as long as she was not working too many day shifts, which created a greater pressure point. She mainly travelled to work by car (there was staff parking at the prison); but sometimes she took public transport.

20. On 25 November 2015 it was announced by the Chancellor in the Autumn Budget Statement that Holloway Prison was to close. This was a wholly unexpected announcement and beyond the Respondent's control. The figures I was given in evidence for the number of staff affected varied, but it is clear that there were at least around 75 of its employees who were affected by this.

21. On 26 November 2015 Ms Newton circulated an email about the closure, which was intended to be cascaded to all affected staff. It invited them to a mass meeting on 1 December and indicated that there would be an opportunity to put in questions in advance of, or at, that meeting. The Claimant was not on duty on the day of that meeting and did not attend.

22. As noted, the Respondent has a large workforce, and provides services at many locations. Vacancies within its organisation arise regularly. Managers were hopeful that there were good prospects of all the staff at Holloway being found other positions within their organisation that would be suitable for them. But they needed to come up with a process for dealing with this situation.

23. Management began to circulate briefing sheets about the process going forward, the first of these going out on 4 December 2015. HR support was marshalled with a view to having initial meetings with staff in December 2015 at a series of timetabled meetings. The first briefing referred to this. The second briefing followed on 10 December. It was envisaged that these meetings would be an opportunity for the HR team and management together to verify the relevant particulars of individual members of staff. Staff would also be asked to complete an employee profile form. It was envisaged that this data gathering exercise would be followed by a slotting in process, whereby, drawing on the information gathered, each employee would be provisionally assigned to a vacancy that it appeared might be suitable for them.

24. A schedule was drawn up for these initial meetings. It included a slot for the Claimant to meet with her immediate line manager, Fiona Osborne, and someone from HR on 18 December 2015. The Claimant did not attend. I was satisfied from all the evidence before me that this was because she never received the initial two briefings, nor an email inviting her to that meeting. That was not her fault, nor was it deliberate on the part of management. It appears that the surname being used for her email address was not the current name of her live email address. So, if there was an email, she did not get it (or if it was overlooked to send her one, that was not intentional).

25. A draft consultation document was prepared in January 2016, but it appears it was never completed or actually circulated. However, the draft, together with another document in the bundle, reflect the fact that it was proposed, and appears to have been agreed with the unions, that the normal Change Management Policy would be somewhat adapted in the situation of the unprecedented and sudden announcement of the total closure of the prison.

26. A further staff briefing was circulated at the beginning of February 2016. One way or another the Claimant did see that one. This indicated that it was hoped that staff would be notified of what was described as their redeployment post by the end of February and that the Trust was looking to minimise redundancy wherever possible. Again, this seems to me to have been in keeping with the general picture I had, that it was envisaged that a slotting in exercise was going to be carried out with the hope that everyone would be found a home to go to. But this process was still on foot as of February.

27. In February 2016, the Claimant, evidently having appreciated that there was a problem with her email address and also that she had not, unlike colleagues, had the opportunity to complete a personal information profile, exchanged emails with Ms Osborne about both of these matters and with a view to arranging to meet up with Ms Osborne. The Claimant then did fill up the employee profile form. In answer to the questions: “What CNWL locations cannot be travelled to? What cannot be considered?” and a further question cut off in the copy in my bundle, but possibly about means of transport, she wrote: “Come to work driving with my car. Takes me 30 minutes driving and 45 minutes

with public transport to work." In answer to the question: "What is your current working pattern?" she wrote: "Mostly night shift due to childcare. However flexible depending on role." In answer to the question: "Any other details that should be taken into account when considering suitable alternative [cut off]?" she wrote: "I have worked as a nurse in various roles, 19 years now. I have acquired both clinical and managerial skills with up to date knowledge to effectively work as a senior nurse in a senior managerial role."

28. By 23 February 2016, when she emailed Ms Osborne again, the Claimant was able to confirm that she had completed the form and left it with HR as well as other certificates. But she was concerned that these had not yet been processed by HR and asked Ms Osborne to follow this up.

29. There was then a planned meeting with Ms Osborne which the Claimant said she could not attend because her son had an appointment. She wrote to her: "However, I am sure that if you sort out the issue of my record, HR will be able to know who I am and what can be offered so that I do not lose out."

30. On 3 March 2016 a general letter in the name of the Chief Executive, was circulated to staff, attempting to provide them with reassurance as to what management had been doing and what progress was being made following the closure announcement. It included the statement: "We have provisionally matched as many of you with jobs as we can. In some cases where we have several vacancies this has not been a problem. For jobs where there are less vacancies, or several possible candidates per post available, or you live far away from out sites, you will understand that this is a somewhat more difficult process. Within the next few days we will be writing to you all individually about your personal situation. I'm so sorry we have not been able to do this before now; I really want you to know that you are important to us."

31. Ms Fraser Butlin argued that the phrase "we have provisionally matched as many of you with jobs as we can" reflected that, by this time, most of the Claimant's colleagues had been matched to jobs. I do not think that is what the document said, nor that this was in fact the case. The phrase, "as many of you … as we can" does not mean "many of you" or "most of you". Further, this document was meant to provide general reassurance: it was putting some spin on a situation in which it was clearly taking longer to move things forward than management had hoped or wished. Further, other evidence suggested that, for at least a substantial part of the workforce, it was only during March that the process of identifying proposed roles for slotting in was completed.

32. It was then only on 31 March that letters went out to the Claimant and others, telling them the proposed roles to which they were to be slotted in, and inviting them to meetings to discuss the proposed slotting in. So, it seemed to me, the timetable had again slipped behind that which management had hoped would be achieved when the 3 March letter had gone out, and it had been envisaged that people would receive such letters in the next few days.

33. The Claimant's letter, dated 31 March 2016, informed her that she had been provisionally matched to a role as a Primary Care Nurse at Beatrice Place and that the next stage would be to arrange a meeting to discuss this option. She was informed of her right to be accompanied at it.

34. That meeting took place on 14 April 2016, with Ms Osborne and Michelle Lopez-Wallace an HR Advisor. The Claimant had by this time looked into the Beatrice Place role, which was located between High Street Kensington and Earls Court. She expressed some reservations about its suitability for her, both because of the expected travel time and because of its focus on dementia care, of which she did not have specific prior focused experience. During the course of the meeting, an up to date new list of vacancies within the Respondent was obtained, and it was identified that these included a Band 6 role in the Hackney Addiction Service that had been advertised that day. The Claimant was much more interested in that role, because it was much closer to home and appeared to involve work that was far more familiar to her.

35. Following this meeting, there was a string of emails in April. The Claimant sought job descriptions for the Hackney post and the Beatrice Place post, but was told that the Beatrice Place post was now no longer available. She was provided with a job description for Hackney and there were attempts to get Charles Erhabor at Hackney to contact her to arrange a visit. It took some time to get a response from him. However, he responded at the end of April that he was happy for the Claimant to come and meet him. "However, we are putting a hold on taking staff at the moment to review our situation (staff going and coming) and budget." A meeting was set up, initially for 11 May, but postponed to 16 May. Eventually, the Claimant was seen, as was a colleague also interested in the post, Thembelihle Tshabangu, in late May. Mr Erhabor then indicated that Ms Tshabangu had been successful, in what had been effectively a competition between them, although the Claimant was appointable to the role.

36. The Claimant's position was reviewed at this point. It was considered that another role needed to be identified for her, and that, as a contingency, she should be put at risk. Mr Brady indicated this to colleagues in an email of 30 May 2016. On 10 June, pursuant to that decision, the Claimant was invited to a meeting scheduled for 16 June, and described as a formal meeting at which she would be entitled to be accompanied. I found, in light of the oral evidence of Mr Brady, that by this point she was one of perhaps seven or eight colleagues at Holloway who had not yet been successfully placed into a new role.

37. Pursuant to that invitation, the Claimant met with Mr Brady and Ms Newton on 16 June 2016. She was told that she was being formally placed at risk and that this was now the start of a formal 30-day consultation period. The potential calculation of her redundancy payment, should it become payable, was discussed. She was also told about an opportunity at Brent Community Addictions Service based in Willesden.

38. The closure of Holloway Prison had by this time been confirmed as taking effect at the end of June. Patients had been steadily moving elsewhere. As of 17 June, no patients remained at the prison, and there was then a winding down, until the prison closed on 30 June.

39. On 20 June 2016 Mr Brady wrote confirming the position, as discussed at the meeting on 16 June. This included the following: "We also acknowledged the lack of clinical roles in a CNWL location that were located within a reasonable travel area for you. We reviewed the initial job matching process and with regret there was an acceptance that suitable similar redeployment opportunities may be unlikely to arise before the closure of Holloway Prison." He referred to a 30-day

consultation period – although I observe that he did so by reference to statutory collective consultation provisions.

40. Mr Brady wrote, further on: "If selected for compulsory redundancy following the 30-day consultation process you will receive a formal notice period of 12 weeks." Attempts would be made, however, to redeploy the Claimant. "In the event that a suitable alternative position is identified you will commence in a trial period at this post and you will be notified that you are no longer at risk of redundancy. If within the trial period either you or the receiving directorate conclude that the post is not suitable, then you will be considered for other suitable alternative employment if this falls within the redeployment period. If the redeployment period has expired, redundancy arrangements will apply."

41. The Claimant visited Brent and then emailed Mr Brady about it on 22 June. She reported: "It took me two hours going and two hours coming back", although she added that this was during off peak and could be more during the peak period. She continued "My normal journey to work from my home address to Holloway Prison is at most thirty minutes coming and thirty minutes going back home, hence a total of one hour, and without traffic it could take me about fifty minutes. In view of the length of time it would take me to journey to Brent Service and back, unfortunately it will be a difficult task for me to undertake, therefore I will not be taking up the position at Brent Service." She added that she had contacted her union, RCN, who would be in touch. On 24 June she emailed Mr Brady that henceforth she would be represented by Mr Ridley of RCN.

42. In June 2016, an opportunity was identified with the Kensington, Chelsea and Westminster Focus Team, in W10; but there was a problem with making contact because it appears that the mobile number given by the Claimant in her CV was erroneous. Once discovered, this was corrected; but it was then subsequently indicated that there were no longer any vacancies at that location.

43. Following the closure of the prison at the end of June 2016, the Claimant was placed on garden leave and options for new roles continued to be explored.

44. The Claimant enquired about a vacancy at Uxbridge Court Diversion Service and visited there on 6 July. However, once again she found the travel time to be too great. In evidence to the Tribunal she referred to the impact of travel time combined with shift timings and the impact on her childcare arrangements. In communications with managers at the time she referred to what she understood to be the 8 to 8 shift patterns.

45. Another opportunity was identified at St Charles Hospital in Ladbroke Grove which the Claimant visited on 14 July, but again she indicated that the difficulty was the significant travel time. She wrote in an email: "The journey took me one hour forty-five minutes going and one hour forty-five minutes coming back home, making it a total of three and a half hours during the off peak that I attended. This time is likely to be more during peak period." She indicated that in view of the journey time "it is not a reasonable deployment job for me."

46. The Claimant indicated at this point that she would not attend any more interviews and wanted the process of redundancy to be started, by which she meant the process of making her redundant with the associated payment. Mr Brady replied: "In terms of reasonableness and thinking about any next steps, we

need to ascertain all factors including travel. In order to do this please can you reply to me to outline your current home to travel arrangements." He asked whether the Claimant travelled by public transport or by car and for average travel times. The Claimant replied giving Mr Brady further information about that.

47. The same day, 15 July 2016, Mr Brady emailed the Claimant about a further opportunity at Vauxhall and the Claimant replied, but again indicating that she wanted the focus now to be on preparing her formal letter of redundancy. The Claimant's evidence was that, in a phone call around this time, Mr Brady warned her that if she did not take this role she would not get her redundancy payment as it was suitable alternative employment. She said that she told him that he was threatening her and asked him to stop and to follow the redundancy process. Mr Brady, in his evidence, accepted that he had explained to the Claimant what he understood to be the position in terms of unreasonable rejection of suitable alternative employment meaning she would not be entitled to a redundancy payment. But he disputed having acted in a threatening manner.

48. At this point the Claimant took further advice from Mr Ridley. Mr Brady in the meantime followed up his enquiries of her on 18 July 2016, seeking further detail about the journey route that she took from home to Holloway and the route that she had taken from home to St Charles Hospital. They spoke again that day and the Claimant gave him further information. She also indicated that, having taken advice from the union, she was willing to visit Vauxhall to explore that opportunity. She indeed did so on 19 July, but was not appointed as it was considered that she did not meet the essential criteria for the post.

49. Then, on 20 July 2016, Mr Brady emailed the Claimant regarding an opportunity at St Pancras Hospital. The Claimant went to St Pancras on 22 July and on 27 July Mr Brady emailed her with further information. He also spoke to her on the telephone about it. On 29 July 2016 Mr Brady wrote to the Claimant with a formal offer of redeployment to the St Pancras Rehabilitation Unit, starting from 1 August, being the beginning of the trial period. He wrote that towards the end of the trial period "following an overall assessment, a decision will be made as to whether you will take up this post on a substantive basis." Further on, he wrote: "This post is a Band 6 post working 37.5 hours per week. You will need to agree your weekly working pattern directly with your new line manager."

50. On 1 August 2016 the Claimant began working a trial period at St Pancras. For family reasons she had hoped to take leave during August, but because of the length of the proposed leave, and the uncertainty about where she might be working at that point, Ms Newton had declined that request.

51. On 22 August 2016 Mr Ridley emailed the Claimant. He commented: "I happened to meet Padraig Brady at the end of last week and he was of the impression that everything is going well." I accepted from Mr Brady, that in fact he had not received any feedback either way at that point and so his assumption (not his words, but his sentiment), was that no news was good news.

52. On 25 August 2016, however, Mr Brady receive an email from Mr Allen, the Lead Nurse and Operations Manager at St Pancras, beginning "I'm afraid I have bad news about Mariatta. Whilst it has been very helpful to have someone here who is both an RMN and RGN (and we've been able to use Mariatta's mental health experience with a couple of patients), things have not worked out

and her Ward Manager (Veronica, copied into this email), does not want her redeployed here given a number of issues; reliability, unreasonable working hours during induction period and unreasonable roster requests. Veronica can provide you with more specific information should you need it, there have also been concerns about her attitude, raised to me by more than one person. Her induction period finishes tomorrow so can you please advise Veronica where Mariatta should report to next week."

53. On 30 August 2016 Ms Lopez-Wallace emailed Mr Ridley that the trial period was coming to an end and had not been successful and asking him to call.

54. The Claimant was permitted to take a period of leave in September, and a few days after she had formally begun this, Mr Brady telephoned her. There was a dispute before me about the precise words that he used, but he conveyed to her that the trial period had not been successful. He did not give her any details about the reasons. I found that this was a considerable shock to her as she had simply not been forewarned or seen it coming at all.

55. A further opportunity was identified, at a Club Drug Clinic in Vauxhall. Following a visit there, however, the Claimant was not appointed to that role and there was further feedback from Theresa Wirz, the Area Manager responsible.

56. The Claimant was then asked to try for a position at the Community Addiction Service in Harrow. She went for an interview, but it was felt that she did not have sufficient relevant experience to meet the essential requirements of this narrow and specialised role, and there was no funding for training.

57. An opportunity was then identified based at Hendon Magistrates Court and the Claimant visited there on 5 October 2016.

58. On 10 October 2016 the Claimant had a further meeting with Mr Brady and Ms Newton. The discussion focused on the Hendon position and on one with the Brent Community Substance Misuse Service based in Willesden, at the location which the Claimant had in fact already visited in June. There was discussion of travel time, with Mr Brady and Ms Newton relying on Google Maps time estimates. They conveyed to the Claimant, in one form of words or another that they considered the travel time to these locations, whilst greater than she was currently used to, not beyond the bounds of what could be reasonably expected of her. Therefore, they indicated, if she declined to take up either of these posts, she would be treated as having unreasonably refused an offer of redeployment and would lose her right to a redundancy payment.

59. On 10 October 2016 Mr Brady wrote to the Claimant by way of follow up to that meeting. He set out a summary of vacancies previously identified, and the outcome in each case. He formally set out that the Claimant was being offered redeployment to either the Willesden or the Hendon position. In relation to Willesden, he commented that "Community Substance Misuse Services are generally Monday to Friday services and the Brent Service would be able to accommodate some flexibility around staff and finish times according to service needs." In relation to Hendon, he wrote: "Zoe helpfully commented it was not dissimilar to the situation when you would be undertaking night shifts at HMP Holloway and would often be the only qualified clinical staff on shift and required to make decisions." He also offered reassurances about training.

60. Further on Mr Brady wrote: "Finally, we discussed the option if you were not to accept either of these redeployment options. Zoe and I accept and acknowledge that you have been based in your role at HMP Holloway for a significant period of time and that you have anxieties about moving into a new role. However, the Trust considers both of these roles to be suitable alternative employment and accepts that there will need to be induction training and support put in place to allow you to be able to operate successfully in either role." He then referred to the Agenda for Change regulations and indicated that the Claimant would forfeit her right to a redundancy payment, should she refuse either of these roles; and that in that case her contract would be terminated and she would receive a payment in lieu of notice.

61. On 13 October 2016 the Claimant emailed Mr Brady that she would not be taking up either post. She urged him to commence "the necessary redundancy procedures".

62. On 14 October 2016 Mr Brady responded with an emailed letter inviting the Claimant to a meeting, headed "Confirmation of Redundancy Meeting". Referring to the correspondence of 10 and 13 October, he wrote: "I outlined in my previous letter that, in accordance with the Agenda for Change regulations, your rejection of suitable redeployment options means that you would forfeit your entitlement to receive a redundancy payment." He continued that he was inviting her to a final meeting, on 19 October, to discuss the option of redundancy with her. She was informed of her right to be accompanied.

63. On 21 October 2016 the Claimant indeed met with Ms Newton and in the absence of Mr Brady, Ms Lopez-Wallace. The Claimant was accompanied by her RCN representative, Mr Ridley, the date having been rescheduled to accommodate him. The Claimant maintained that she could not accept either of the posts offered because of the travel time. The Respondent's representatives maintained that the travel time was not beyond the bounds of a reasonable margin. The meeting concluded with the Claimant being told that she was being dismissed with immediate effect.

64. The dismissal was confirmed in a letter from Ms Clements, Service Director, dated 24 October 2016, although apparently emailed on 27 October. She referred to the meetings on 16 June and 21 October. After outlining the history, she commented on the posts at Hendon and Willesden. "It is accepted and acknowledged that these options would involve an increased travelling time. It is the Trust's position that in acknowledging the increased travelling time was within a reasonable margin, that either post would be a suitable redeployment with reference to your nursing skills and professional registration, the content of the role and the pay banding (both posts are Band 6 and equivalent to your existing banding)." The letter gave the Claimant notice of the termination by reason of redundancy with effect from 21 October, which was communicated at the meeting. It stated that arrangements would be made for 12 weeks' payment in lieu of notice and the Claimant was informed of her right of appeal.

65. On 7 November 2016, the Claimant appealed. In her covering email she wrote: "Attached is my letter of appeal, following a meeting held on 21/10/2016 and a subsequent letter dated 24/10/2016 making me redundant without any redundancy pay." The letter stated: "… I am writing to appeal the terms of my

redundancy from my post with CNWL formerly based at HMP Holloway. Whilst alternative posts were offered, I disagreed with the Trust's stated perspective that 2 of these such posts constituted suitable alternative employment and indeed no such suitable alternative employment has been made available. In this respect, I therefore believe I should be entitled to the full redundancy monies as afforded to me under Agenda for Change based on my 19 years of NHS service."

66. The letter went on to assert that the Respondent had failed to follow correct consultation, at risk and redundancy processes, and there was a failure effectively to consult her, because she was not formally placed at risk until June. As a result, opportunities that arose between December 2015 and June 2016 were not automatically ring fenced. She had been fully engaged in the process. The travel times to Brent and Hendon were significantly more than her journey time to HMP Holloway "to the point that I do not feel these are suitable."

67. On 21 November 2016 the Claimant was invited to an Appeal Hearing on 6 January. On 9 December, a management Statement of Case, with attached documents, was tabled by Ms Newton. It stated: "The Trust believes that the redeployment options based at Willesden and Hendon, with induction support and training, do form suitable alternative employment" and that the increase in travel time was reasonable. It replied to other points in the notice of appeal.

68. Mr Ridley was not able to make 6 January 2017, so the meeting was rescheduled for 13 January. There was also a change in the panel, which was now to be Dr Kelly, Mr Redmond and another Divisional Director, Lorna Payne.

69. On 13 January 2017 the Appeal Hearing began. At the start, Mr Ridley tabled a written Statement of Case and there was a short adjournment. When the meeting reconvened, the panel indicated that it was to be adjourned generally to enable the management side to consider this document further, although neither the Claimant nor the management side had requested a postponement.

70. The Claimant's Statement of Case set out some background relating to her and to the closure of the prison. It went on to complain of the lack of a consultation document being produced, the initial meeting with the Claimant scheduled for 18 December 2015 not having taken place, and no meeting having taken place until 14 April 2016. It described the difficulties that arose with the St Pancras trial, commenting that the Claimant was restricted in her availability due to childcare needs, which had not been a problem at HMP Holloway.

71. Regarding the Hendon and Willesden posts, the document stated that the difficulty was the additional travel requirements. It set out a detailed analysis of the Claimant's travel times to Holloway, Willesden and Hendon. In conclusion it stated: "The Trust have failed to find suitable alternative employment that satisfies the clinical aspects; the needs of Ms Udejimba in respect of childcare responsibilities; and is within reasonable reach by appropriate transport means without a significant increase in total delay. Daily travel time. Ms Udejimba reluctantly accepts that she has been made redundant from a post she enjoyed for many years and now expects that she is appropriately compensated in accordance with agreed provisions for this inconvenience."

72. The appeal hearing continued on 1 February 2017 and there was substantive discussion of the appeal issues. Mr Brady was recorded as

accepting that the travel time to the St Charles Hospital post was too great. Mr Ridley commented that that was a total of 3.5 hours compared with 4 hours for Brent and Hendon, and therefore questioned why the Claimant's case in relation to those posts was not also accepted. Mr Brady responded that management's understanding was based on Google Maps travel times, which would have been longer to St Charles. The ending of the Claimant's trial period at St Pancras was explored, with Mr Brady indicating that they were adamant that they did not want her. Ms Newton was recorded as saying: "I have worked with MU over the years and nothing was brought to my attention regarding shift work or childcare. She has always worked a 24 hour shift pattern over 365 days per year."

73. During the course of the meeting, various documents were referred to that were not before the panel. They concluded that these needed to be gathered, and adjourned for that purpose. Further documentation was then collated, and the hearing resumed on 1 March 2017. Ms Newton read out a prepared closing summary of the management's position. This included the following: "With regards to the matter of childcare limitations – we accept this is an important issue. However, in all the meetings at which suitable alternative employment was discussed and the responses from Ms Udejimba, there is no mention of limitations due to childcare – it is only afterwards this emerges as a matter of significance to prevent the offer of suitable alternative employment." Further on the document stated: "She had a preference for nightshifts, but she clearly was working a pattern of rotating shifts and covering a period of time 24/7. As I have said in practice, Ms Udejimba worked more nightshifts than others but this was mostly after the rota would have been issued and she privately arranged swaps with colleagues or senior managers."

74. At the end of the meeting the panel announced their decision to uphold the appeal and order reinstatement. This was with a view to management having further discussions with the Claimant to identify a suitable post for her.

75. This was followed by a letter from Dr Kelly of 7 March 2017. After referring to the St Pancras trial and acknowledging the time that it had taken to conclude the appeal, it continued: "The panel believed that management had followed the process within the Change Management Policy in spirit but found that management had not adhered strictly to the requirements of the policy to produce a consultation paper or report at the end of the consultation." They agreed with Mr Ridley's submission that what had happened in this "unusual wholesale closure of a single service" was something from which there was learning to be taken on both sides, and recommended that this should be investigated by the Joint National Council.

76. The letter continued:

The panel concluded that the most important issue to be addressed regarding the suitability of the alternative employment offered to you is around travel time and that management did not make enough effort to take account of that. We heard from you that this was not *per se* an issue to do with childcare and acknowledgement that flexibility is important from both sides in considering opportunities for redeployment. We concluded that the amount of travel time that would be reasonable is difficult to quantify. We would want there to be meaningful discussion between yourself and the management side, in line with policy, to identify a more suitable post with better travel time. We agreed with management's assertion that there are posts currently vacant

within the Trust that would be able to make best use of your skills and abilities and the unusual position of your being dual qualified.

We have therefore decided that you be reinstated to employment with the Trust to take effect from the date when your notice pay would have ended. We will also ask Zoe and Padraig to ensure that suitable alternative employment is identified for you that would enable your redeployment.

The letter was marked as having been copied to the other panel members, Mr Ridley, Ms Newton and Mr Brady.

77. Ms Newton had no further involvement in matters. Mr Brady was on leave from 6 to 14 March 2017 but had been present at the appeal hearing on 1 March, and had heard the oral announcement of the outcome.

78. On 20 March 2017 there were email exchanges in which Mr Brady explained to payroll administration that the Claimant was entitled to back pay, which needed to be processed. He was told that March payroll had already been run. He asked for a manual payment to be made by the end of March; but for whatever reason this did not happen.

79. It appears that Sue Lister of RCN had a brief conversation with Mr Brady around the end of March or start of April, but this was confined to the pay question. Apart from that, the Claimant did not proactively seek to contact Mr Brady or Ms Newton, and neither Mr Brady nor Ms Newton sought to proactively contact the Claimant, or indeed any of her representatives, apart from the brief contact with the RCN on the subject of payroll that I have mentioned.

80. On 13 April 2017 Ms Lister wrote to Dr Kelly on the Claimant's behalf:

I write in response to your letter dated 7 March 2017.

Our member has instructed me to reject your offer of reinstatement. Our member asserts that the Trust has repudiated her contract, including by reference to the circumstances which culminated in the termination of employment on 21 October 2016, so that she has been constructively dismissed by reason of redundancy. She is accordingly entitled to receive her statutory and contractual redundancy payments.

She understood that the employment would be treated as having terminated with immediate effect. She set out calculations of sums that she believed were due.

81. On 26 April 2017 the Claimant received a further payment from the Respondent.

The Law

82. Section 98 **Employment Rights Act 1996** provides, so far as relevant:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…

(c) is that the employee was redundant, or

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

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

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

83. The concept of dismissal, for the purposes of an unfair dismissal claim, includes, at section 95(1)(c), a case in which the employee terminates the contract under which he is employed (with our without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is what lawyers call constructive dismissal.

84. Where a dismissal is followed by an appeal which results in reinstatement in a manner contemplated by the contract, that will, in law, lead to the previous dismissal being extinguished, and the employee treated as continuously employed through the period from the dismissal to the reinstatement. See: **Roberts v West Coast Trains** [2005] ICR 965. As I have noted, it was agreed that that was the correct analysis, in fact and law, of what happened in this case.

85. The general principles regarding the concept of constructive dismissal are established in a well-known body of authority and were not in dispute. I can therefore set them out briefly. First, there must be a fundamental breach of contract by the employer. Secondly, the employee must not, by the time of the resignation, have conducted herself in a way that conveys that she has chosen to treat the contract as continuing, so relinquishing the right to treat the breach as bringing it to an end. Lawyers call this affirmation. Mere inaction over time is not, by itself, enough to amount to affirmation, though it may form one part of a wider set of circumstances, in which it is said that affirmation has occurred. Thirdly, the fundamental breach must be a contributing or material cause of the resignation, though it need not be the principal cause.

86. The implied terms of a contract of employment include the implied duty not, without proper and reasonable cause, to act in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is well established that a breach of this term can come about through a single incident or episode, or through cumulative conduct. Where cumulative conduct is relied upon, the last straw, that is, the most recent conduct relied upon, need not itself be blameworthy or unreasonable, so long as it contributes in some meaningful way to the overall cumulative breach.

87. Whether there has been a fundamental breach is an objective question of fact. The Tribunal does not, in answering *that* question, apply a "band of

reasonable responses" approach. See: **Buckland v Bournemouth University HEC** [2010] ICR 908 (CA). If there *has* been a fundamental breach, and the employee has not affirmed, then the employer cannot by its own further action unilaterally cure the breach, and thereby rob the employee of the right to elect to treat it as bringing the employment to an end: see **Buckland** at paragraph 44.

88. A further doctrinal point arose in the present case. Mr Aamodt submitted that where, as here, the employee is dismissed and then appeals, the submission of the appeal *must* be treated, in law, as an act of affirmation in respect of any fundamental breach that occurred prior to the dismissal. He relied on **Brock v Minerva Dental Limited** [2007] ICR 917 (EAT) in support of that proposition.

89. In that case the employer dismissed the employee, on notice, for alleged misconduct. The employee appealed. The employer then allowed the appeal, stating that the employee was reinstated. But at the same time, it reinstituted the disciplinary process and an absence management process. The employee responded that the relationship of trust and confidence had been destroyed, and the employment came to an end on the date given in the original notice. The EAT held that the Judge below had been right to find that, applying the **Roberts** principle, the allowing of the appeal had the effect of expunging the prior dismissal. Accordingly, the original claim of actual unfair dismissal could not be maintained. However, the EAT also held that the Judge below was wrong not to allow an amendment to introduce a claim of constructive unfair dismissal.

90. Mr Aamodt relied on the EAT's statement, at one point, that, in appealing the original dismissal the employee sought its withdrawal, and expressly or impliedly consented to it. However, I agreed with Ms Fraser Butlin that this was part of the EAT's analysis of how and why the **Roberts** doctrine applied in this case, so that there had been no actual dismissal. The *constructive* dismissal claim was allowed to be pursued. In fact it appears to have been based on conduct coincident with the allowing of the appeal, rather than prior to it. But, in any event, there is nothing in this authority that establishes that, in law, appealing a dismissal *necessarily*, in every case, expunges the right to rely on prior conduct, if the appeal is successful.

91. If there has been a constructive dismissal, there may still be a further dispute as to whether such dismissal was fair. The employer may still seek to show that the reason or principal reason is a fair one. For those purposes the reason(s) for dismissal is taken to be the reason(s) for the conduct that amounted to a fundamental breach. If the employer shows a fair reason, the Tribunal will then determine the fairness or not of the dismissal by applying section 98(4).

92. Section 136 of the 1996 Act defines dismissal for the purpose of a statutory redundancy payment claim. It includes language in the same terms as section 95(1)(c), so an employee may claim to have been constructively dismissed as the gateway to such a claim, as well as to an unfair dismissal claim.

93. Section 139 includes provision that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the employer ceasing to carry on the business in which the employee was employed, in the place where they were employed, or if its requirements for employees to carry out work in that place have ceased or diminished. I refer to such a scenario as a redundancy situation. The effect of

section 163(2), is that, for the purposes of a redundancy payment claim, the reason for a dismissal is taken to be redundancy, unless the contrary is proved.

The Tribunal's Further Findings and Conclusions

94. I consider first the question of whether there was a fundamental breach of the implied duty of trust and confidence on the part of the Respondent. I bore in mind, in accordance with **Buckland**, that I was not applying a band of reasonable responses test. Rather, I had to decide, objectively, whether each of the matters relied upon was capable of contributing to a cumulative fundamental breach, and whether, overall, such a cumulative breach had been established.

95. The List of Issues, as revised, identified ten matters relied upon, although there were also some sub-elements, and, inevitably, elements of interaction and overlap. While considering each of these in turn, the Tribunal also needs to step back and consider the wider picture.

96. Consideration of these matters also needs to be placed within the wider background and context. This was the decision to close Holloway Prison. That decision, was, as I have described, unexpected, not taken by the Respondent, and the timescale was also outside of its control. It is obvious that the Claimant, for her part, did not wish this to happen, or expect it; and the process which the closure announcement set in train was painful and distressing for her. It was also a particularly challenging process for the Respondent to manage, given that it came without warning, the large number of staff affected, elements that were beyond its control, the initial uncertainties over timescale, and so forth.

97. In this case, as is often the case in such situations, the Claimant and the Respondent had somewhat different perspectives. The Claimant, of course, was concerned about the personal implications for her. She had worked in the NHS, and at Holloway Prison for many years. She had achieved, in practice, a working pattern which fitted well with her personal circumstances and childcare needs. If another role was found for her, it might entail a considerable upheaval in both her working and her personal life. It might involve new and unfamiliar responsibilities, different work patterns, and increased travel time. At the other extreme, she was at risk of being out of a job altogether, but, if so, stood potentially to receive a significant contractual redundancy payment. Any employee in such circumstances might want to weigh up with particular care, the implications of a proposed new role.

98. The Respondent's perspective, however, was in some respects different. It had to manage the process in respect not just of the Claimant, but the whole affected workforce. It also, I accepted, wished to take account of the desirability of retaining and redeploying skilled employees with valuable qualifications and experience, going forward, if it could. I accepted that it regarded the Claimant as such, given her dual qualification and many years of experience.

99. I accepted also that managers genuinely considered that they had some duty to safeguard public money, and not too lightly to concede that an affected employee should be declared redundant, when it seemed to them that other options deserving consideration might yet present themselves. On this last point, Mr Redmond referred in evidence to the Staff Council terms, which indicate at paragraph 16.21 that: "Employers have a responsibility, before making a member

of staff redundant … to seek suitable alternative employment … either in their own organisation or with another NHS employer. Employers should avoid the loss of staff through redundancy wherever possible, to retain valuable skills and experience where appropriate within the local health economy."

100. There is nothing wrong in the parties having these different perspectives. But they will inevitably give rise to a degree of tension if, as here, the employer is unable to offer voluntary redundancy, and, as the process unfolds, the employee is not offered redeployment to a position with which she is comfortable.

101. Against that background, I did not regard this element of tension, and the fact that the Claimant found the process frequently to be stressful and upsetting, to be necessarily, by itself, a sign that the Respondent had handled some particular aspect in a way that contributed to an undermining of the duty of trust and confidence. These features were, to *some* degree, inherent and unavoidable. Another way of making the same point is that the wider context provided an element of proper and reasonable cause for conduct that was bound to have *some* damaging effect on the parties' relationship. However, all of that being said, the Respondent was still the employer in this situation. It had an overall duty of care to manage the process with due regard for the stresses and uncertainty with which the Claimant was faced, and her personal circumstances; and this too was to be borne in mind when considering, objectively, whether its cumulative conduct fell below the standard set by the implied duty of trust.

102. I turn then to the matters specifically identified in the List of Issues as contributing to the breach of implied term, although I take them somewhat out of order from how they appeared there.

103. First, it was said that there was an inadequate consultation process, in particular by the Respondent not producing a consultation document as required by the Change Management Policy. I did not regard the failure to follow that Policy, as such, as particularly significant, particularly as it was accepted by the union that it needed to be adapted. My focus was more on the substance of how the Respondent actually handled its interactions with the Claimant. Ms Fraser Butlin relied on the failure to have an initial meeting with her in December 2015. Had it taken place, she would have been able to put her individual circumstances and concerns to managers face to face, to feed in to the slotting in process, as well as being given the personal information form to fill up at that point.

104. As I have found, the failure to hold that meeting does not appear to have been deliberate, but the result of an email problem, and/or oversight. Further, the Claimant had picked up on the problem by February 2016. I bore in mind that that was a couple of months down the line. She felt distressed and concerned by this, particularly as she was aware that colleagues had had individual meetings. But as a matter of fact, as of February management was still at the information gathering stage, and the proposals for slotting in were still to come. Further, I accepted Mr Brady's evidence that, following the Claimant filling in the personal form, and giving it to HR, he did at some point see it.

105. However, I accepted that, because no-one met the Claimant in person before the slotting in proposal for her was devised, she did lose the opportunity to put her circumstances to managers in person, including, had she wished, to tell them more about the childcare issues to which she only alluded briefly in the

form. It does not follow that managers would have been obliged entirely to accept her perspective on those matters, but they did not have the benefit of hearing from her in person, when considering what was the most appropriate role to propose to slot her into. There was, therefore, in my judgment, some potential contribution here to an undermining of the trust relationship.

106. I turn to the next specific matter relied upon, described as the failure to offer the Hackney post. There was some dispute in evidence about the precise sequence of events. As to that, I found Mr Brady's account to be reliable: it was consistent with the email trails, and he would have had direct knowledge. I found that, at some point before 14 April 2016, a vacancy at Hackney had been identified as suitable for the Claimant's colleague, Ngozi Mbilitam, who was then given that job. The Claimant at some point learned of that from Ms Mbilitam herself. But on 14 April a second vacancy at Hackney was advertised; and it was for that post that the Claimant was then considered, along with Ms Tshabangu.

107. The Claimant's argument was that, had consideration of her slotting in been informed by managers having met her first, in December 2015, then she at least might have been proposed for the first Hackney post, alongside Ms Mbilitam. For the purposes of what I have to decide at this point, I accepted that, when the Claimant learned from Ms Mbilitam that she had secured a position at Hackney, she felt that she had missed out on the opportunity to be considered for that first post. This feeling of having missed out was reinforced when she did not get the second post; and I accepted that this contributed to some further undermining of the relationship of trust and confidence.

108. It was also submitted by Ms Fraser Butlin that the meeting with managers on 14 April 2016 did not itself contribute anything to the consultation process because it was not a consultation meeting, but a slotting in meeting; hence, that there was no meaningful consultation at all before 16 June, by which time, it was submitted, there was nothing left to consult with her about. However, I did not agree with those submissions. First, the prison was always going to close, and consultation with her was never going to be about whether it would close, or whether, as a result, her existing job would disappear. The substantive focus of dialogue was always going to be on finding the Claimant another job that both sides considered acceptable and thereby avoiding her being made redundant. The 14 April meeting, and other interactions about other possible jobs for the Claimant after that date, *did* all make meaningful contributions to that process.

109. However, I considered that the bigger problem with how this process was managed, was the Respondent's approach to what was called slotting in. In the Tribunal's experience, where an employer intends to continue with a particular operation, but in a restructured form, then the implications for employees working in that operation may be worked through in two stages. Firstly, some employees may be "slotted in" to new roles within the same restructured operation, which have been created as part of the restructuring. Then, for those who cannot be slotted in in that way, consideration is given to whether there are any opportunities for suitable alternative employment elsewhere.

110. That type of two-stage approach might have been apposite, had it been the case, say, that Holloway prison was not to close, but the Respondent was restructuring how it was to deliver its service there, creating new and different positions within the same operation. But that was not this case. There were to

be no new roles at the prison, so the situation did not naturally lend itself to that sort of two-stage approach. Rather, the first stage, described in this case as slotting in, was *itself* simply a part of how management went about finding suitable alternative employment, elsewhere in the organisation, for those affected by the impending closure.

111. I accepted that managers faced the constraint that they did not control the timing of the closure, which was also initially uncertain. Further, within the Respondent's wider organisation, vacancies came up all the time. So the picture was constantly changing. But greater attention needed to be given to ensuring, so far as possible, within those constraints, that where a single vacancy might be suitable for more than employee currently working at Holloway, some form of level playing field was applied. It appeared to me that less attention was given to this than should have been, perhaps because, initially, managers were confident that there would be enough suitable vacancies for everyone, so that ad hoc "slotting in" could be applied. However, I concluded that insufficient attention was given to this aspect, and, in terms of how this impacted on the Claimant, this did contribute something to the undermining of trust.

112. Next, there was complaint of failure to put the Claimant at risk at the earliest opportunity. I saw *some* force in the managers' arguments that they had a balance to strike here: between ensuring that people had access at the right time to the safeguards of the procedure triggered by being formally placed at risk, whilst not doing so prematurely, when it was thought that suitable roles might be found, possibly for everyone. However, this point might have been more compelling, had there been a true bright line between the so-called slotting in stage, and then the suitable alternative employment stage. But, in my view, there was not; and I concluded that putting off declaring the Claimant at risk in this case until June 2016, did contribute something further, potentially, to the undermining of trust and confidence in this case.

113. Next there was a group of issues raised under the heading of conduct in respect of redeployment and offer of suitable alternative employment. The first particular matter under that heading was described as "failure to expedite expressions of interest." That seemed to me to cover ground that I have already traversed, and indeed was not specifically separately addressed in Ms Fraser Butlin's written submission.

114. Next, there was a complaint of failure to provide sufficient notice and adequate information, in respect of posts that the Claimant was interviewed for. The gist of the complaint, in substance, was that the Claimant was often sent to appointments in relation to new vacancies with little, notice – sometimes only a working day – and that she was often taken by surprise by the degree to which she was subjected to testing or assessment by the managers concerned. It was clear to me that the Claimant did find this aspect of the process particularly unsettling and stressful. However, it seemed to me that such meetings were bound to be something of a two-way process, with her wanting to assess how suitable the vacancy might be for her, and the managers concerned, how suitable she might be for the vacancy. The Claimant also appears not to have adjusted to this reality, over the course of the various visits that she undertook.

115. I also accepted that Mr Brady was keen, as each new vacancy came to his attention, to encourage the Claimant to consider it, and to set up for her to

visit the local managers at the earliest opportunity. But once again, the ad hoc way in which this was handled, seemed to me to be reflective of how better overall management and co-ordination of the overall process of consideration of suitable alternative employment, might have alleviated the stress caused to the Claimant, and enabled a better consideration of what roles might be suitable for her. This was, in my judgment, a further illustration of how the deficiencies in the management of the wider process contributed something to some undermining of trust, rather than a freestanding additional point.

116. Next there was there a complaint that management had insisted that the Claimant explore what were patently unsuitable roles for her. I considered that there is often a dilemma for management in such situations. They may be criticised if they do not allow an individual to be considered for a role that it might later be said could have been suitable alternative employment for them. Further, in principle, a site meeting with the managers concerned would provide the Claimant with the best opportunity to find out more about a given vacancy, try out the commute, and so forth. And an individual might potentially decide, as a result, that a vacancy appears more attractive than it did on paper; but, equally, it might not work out. I considered, therefore, that managers should not be over-criticised for encouraging the Claimant to investigate a wide range of vacancies.

117. The Claimant's evidence was that, on more than occasion when communicating with her about a vacancy, Mr Brady had threatened and bullied her, by his manner of warning her that she might lose out on a redundancy payment if she did not consider it. As to that, it was clear to me that the Claimant was concerned about a number of the vacancies, in particular where the nature of the work looked unfamiliar to her, and/or because of the amount of travel involved, compared, in both cases, with what she was used to. She was also considered about the implications for managing her childcare. Managers, for their part, took the wider perspective that I have already described. Within that, they considered it reasonable to expect the Claimant to accept some degree of change, both in terms of role and travel times; and that they were in principle entitled to expect her to explore roles that might be suitable. Mr Brady also considered that he was entitled to remind the Claimant that her right to a redundancy payment was not unconditional.

118. I concluded that what to the Claimant, against the background of her concerns and anxieties, felt like excessive pressure, to Mr Brady was fair and proper management of these competing considerations. I accepted that she perceived his behaviour to become excessive and to amount to bullying, but I did not find on the evidence before me, that that was, objectively, a fair description of his conduct in relation to this aspect.

119. Pausing there, I had so far identified a number of things that had the potential to contribute towards a cumulative breach of the implied term, but I judged that their cumulative effect was not yet such as to establish a breach.

120. Next, the Claimant relied upon the decision to terminate the trial period at St Thomas' Hospital. The email trails show that Mr Brady did receive feedback from more than one person there, raising more than trivial concerns about the Claimant's behaviour. He was also explicitly told that they did not want to keep her on at the end of the trial period. However, although RCN was approached, Mr Brady did not tell the Claimant about this, right away. Nor, when he told her

on 9 September 2016 that the Hospital did not want to keep her on, did he offer her any explanation. No doubt that was a difficult conversation, but he was the HR manager, and it was part of his responsibility to support the Claimant. Furthermore, he made no attempt to contact the Hospital managers to explore their concerns further, and whether there might be any way to address them. The Change Management Policy allowed for a possible four-week extension of the trial. This was a potential crunch point for the Claimant and the Respondent. The Claimant was also at this point on leave, giving something of a breathing space to explore if the show could be kept on the road.

121. Of course, had Mr Brady attempted to salvage the situation, he would not necessarily have succeeded, even if the trial were extended. However, his management of the situation, in his conduct of the conversation on 9 September, and in failing to make greater efforts with the local management, did, in my view, fall short of the Respondent's duty to the Claimant, and did significantly further contribute towards a potential undermining of trust and confidence.

122. Next, the Claimant relied on the refusal to accept that she had reasonable grounds for rejecting the Willesden and Hendon posts. As to that, it was clear that the Claimant was unhappy about the increased travel time, concerned about the impact on her childcare arrangements, and had other reservations about the roles themselves. However, the situation was equally not of management's choosing, and they were entitled to expect her to be prepared, to some degree, to tolerate longer travel times, a more demanding schedule, and to adapt to some degree of change in her responsibilities.

123. Further, although, in the personal information form, the Claimant had referred to childcare, she did not there spell out the position, or its implications as she saw them, in any detail. Further, it was notable that her emails relating to the various jobs that she tried for, whilst setting out considerable detail about travel times, did not, in general, refer to the child care issue. Nor, generally, did she raise this in the face to face discussions during this period, although there are one or two references by her to it. She may have had her reasons for this, but the result, it appeared to me, was that managers were plainly left with the impression, that her resistance was based much more on the increased travel times, as such, than on their interaction with management of childcare.

124. But though the Claimant could have been more forthcoming, once again, I considered that the primary responsibility here lay with management. Whilst they were entitled to test and question her willingness to tolerate increased travel times, it was also their responsibility, in an appropriately sensitive and supportive way, to explore what lay behind her concerns, and to bring out the childcare issue, so as to understand better what she was saying was the interaction between journey times, shift times and childcare management.

125. Overall, the picture that emerged to me, was that over the months from April through to October 2016, there was an appreciable deterioration in the relationship between the Claimant and the managers with whom she was dealing. That occurred on both sides and, over this period, to some extent patience with the process began, on both sides, to run out. This in turn diminished the possibility for constructive dialogue about how a given opportunity might be made to work. However, it was, in my judgment, management that

must take the greater share of responsibility for this. It was their responsibility, as employer, to manage the situation and to support the Claimant through it.

126. I concluded that there was, therefore, some appreciable accumulation of matters of conduct by the Respondent, prior to the Claimant's dismissal in October 2016, which could make a real contribution to the undermining of trust and confidence, although this was also ameliorated by some of the factors I have described. Things did not in my judgment reach a point, by the time of the dismissal, where the cumulative effect was so serious as to place the Respondent in breach of the implied term at that point. However, nor did I consider that the cumulative impact of what had occurred thus far was, as it were, washed out by the dismissal or the act of appeal. What had occurred prior to the dismissal was, in any event, not irrelevant to a consideration of whether there was a fundamental breach overall by the time of the Claimant's later resignation, following the appeal outcome. I say that for the following reasons.

127. Firstly, the effect of the **Roberts** decision, applicable in this case, is that the relationship is to be treated as continuing throughout the period from the original start date (before the original dismissal), up until the eventual resignation. That, indeed, accords with the industrial reality of what was in practice a continuing relationship, between the dismissal and the appeal outcome, through the medium of the ongoing appeal process.

128. Secondly, a closely related, although conceptually slightly different, point, is that, in the real world, what occurred during the period up to the dismissal, continued to impact on the ongoing relationship after the dismissal, and after the appeal outcome. It was part of the actual history of the relationship. It formed, at least, relevant factual background when considering the impact of what came later. That cannot sensibly be judged in a vacuum and ignoring that background.

129. Thirdly, I did not accept that, by the act of appealing against dismissal, the Claimant was conveying that what had happened up to that point was to be regarded as water under the bridge. That is for essentially two reasons. Firstly, the grounds of appeal themselves concerned her treatment in a number of these areas: the grounds themselves therefore conveyed that these were not matters that she was willing to overlook and put behind her. The Claimant was looking for some redress through the appeal process in relation to them, but plainly the outcome of the appeal was yet to come. So it could not be assumed that it would deliver redress which she would regard as to her satisfaction, even if that outcome were to include reinstatement.

130. In addition, it is only when a fundamental breach is complete, and has occurred, that it can then be the subject of affirmation. But as I have found, although there was an accumulation of some conduct, prior to the dismissal, capable of contributing to such a breach, this had not yet achieved the cumulative gravity of amounting to such a breach. At the point of dismissal and appeal, there was, therefore, as yet, no breach, such as might be affirmed.

131. Even had I thought that there had been sufficient conduct to amount to a fundamental breach, by the time the Claimant was dismissed and then appealed, I would still not have found that the presentation of the appeal amounted to an affirmation. As I have identified, the authorities do not indicate that that is a necessary consequence in law, and, for reasons I have set out, I would not have

found it to have occurred in fact, in this case. For completeness, I add that, nor would I have found there to be any act of affirmation during the course of the appeal process, as the Claimant's underling stance did not materially soften during the course of that process. No different signal was sent by her.

132. I turn to further matters complained of, that occurred, in point of time, subsequent to the notice of appeal. Firstly, complaint was made of the time taking to dispose of the appeal. The Claimant relied in particular on the provision in the Respondent's Appeal Procedure for a hearing within 28 days, and the fact that it was approaching four months from the date of appeal to the date of oral notification of the outcome. It was submitted that this delay, of itself, did further damage to the relationship.

133. However, in considering this aspect, account needs also to be taken, of the reasons for the delay, of which the Claimant was made aware. First, I accepted that, particularly with a body of this sort, it inevitably does take some time to identify an available panel, and convenient diary dates for a hearing. In this case the timing also straddled a holiday season. There was also some short delay to accommodate the Claimant's representative. So, the delay between the date of the appeal and that of the first hearing, in January 2016 did not appear to me to have been the result of any deliberate foot dragging by management.

134. However, complaint was also made of the two adjournments. As to the first, Ms Fraser Butlin submitted that this had been unnecessary, as it had been sought neither by the management side nor by the Claimant. But Mr Redmond and Dr Kelly both noted, in evidence, that the appeal procedure indicated that the written submission should have been tabled in advance; and they independently considered an adjournment necessary to ensure that it was fully considered. I accepted, having heard from them, that they were being genuinely cautious here, given that the submission *had* been put in late, and notwithstanding that no adjournment was sought by the management team.

135. As to the second adjournment, again, I accepted that the panel had a genuine concern that mention had been made of a number of documents, which were not before them, and that the extent of this only became apparent during the course of the second hearing itself. Again, the appeal panel may have been erring on the side of caution, but I accepted that the decision was a genuine one, mindful, one might infer, of the risk of criticism, were the appeal to be determined without consideration of what they were being told were material documents.

136. I accepted that, from the Claimant's point of view, these delays were a source of continuing frustration and stress. Her appeal remained unresolved and she remained without a job and an income. At a certain point the period covered by the payment of twelve weeks' notice money that she had received would have passed, leaving her with no ongoing cushion. However, I did not find that the panel was, for some tactical reason, deliberately drawing out the process, or careless of the amount of time it was taking. I did not find that there was, in this aspect, conduct which lacked reasonable and proper cause, such as might make a material contribution to a potential breach of the implied term.

137. I turn to the appeal outcome. As to that, it was submitted that the outcome letter did not properly address all of the discrete points of complaint raised by the appeal. In particular, there was a failure to acknowledge that the

Claimant had had reasonable grounds for refusing to accept the Willesden or Hendon jobs, and that this should have been accepted at the time, and to address all her complaints about the process that was followed.

138. On the question of process, the outcome letter did acknowledge the Claimant's point about the lack of a consultation paper; but she was right that it does not address her point about the impact of the late timing of being placed at risk and what she said was the failure to ring fence posts for which she might have been considered.

139. On the question of the Claimant's rejection of the Willesden and Hendon jobs, the evidence of Mr Redmond and Dr Kelly – which reflected the wording of the appeal decision itself – was the travel time question was a difficult one, and they believed that it needed to be reconsidered within the context of management having a further, more detailed, engagement with the Claimant.

140. I had *some* sympathy with that. The task of assessing where the line is crossed between a subjectively reasonable refusal of an offer on such grounds, and one which is unreasonable, may not be easy. However, the disagreement between the Claimant and management over this issue was one of the points at the very heart of this appeal. Further, the panel was not bereft of hard data. In her statement of case, the Claimant set out a detailed analysis as to why she said that the travel time entailed by both positions was more than she could reasonably be expected to accept. Further, the panel had adjourned the first hearing to give the management team a full opportunity to engage with that document. The flipside of some delay having to be borne so that these matters could be fully considered and addressed, is that the Claimant then had a stronger legitimate expectation that, when the panel's decision finally came, it would fully engage with the case she had presented, and pronounce upon it.

141. I concluded that there was some contribution to the undermining of trust and confidence by the failure of the appeal panel to give the Claimant a decision as to whether it should have been acknowledged that she had reasonably rejected these two posts on account of travel times.

142. Complaint was also made of what was said to be the continuing refusal to pay a redundancy payment. However, the Respondent's appeal procedure sets out, in terms, that an appeal against dismissal may have a number of different possible outcomes, one of which, unsurprisingly, is reinstatement. I was told in evidence that the panel considered that this was the best outcome for both sides. I considered that it was, in principle, open to them to take that view. However, given that the prison had closed, and the Claimant's former job had gone, and that, at the point of the appeal decision, no suitable position had been identified for her, the decision to reinstate carried with it an onus on the appeal panel to spell out, and provide some reassurance, as to the process by which such a job would then be found.

143. The Claimant did not claim that there was, here, a breach of an express term, but I did consider that the fact that, at the time of the appeal decision, no such job had been identified, and the handling of this aspect, could certainly contribute to a breach of the implied duty. This, in turn, meant that what did or did not happen next was, potentially, of critical importance. That was the subject of the final, eleventh point (which had been added by amendment) relied on in

the List of Issues, being the lack of any proactive engagement by management with the Claimant, on the question suitable alternative employment, following the announcement of the appeal outcome.

144. I considered that, having been told that she was reinstated, but not to what job, and that this was something to be further explored and discussed with her by management, the Claimant had a legitimate concern that she may be facing Groundhog Day. The prior background of what had happened before the initial dismissal is relevant here. As I have stated, I did not consider, objectively, that the Claimant was bullied. But with no guidance from the panel on how specifically to resolve the question of travel time, and no specific job identified at the point of reinstatement, it is understandable that she was fearful that she might be heading for a rerun of all the previous arguments. She also had a legitimate expectation that she would, following this decision, receive some prompt reassurance regarding her pay, retrospective and prospective, particularly given that the period covered by her payment in lieu of notice had run out.

145. In summary, the Claimant was entitled to expect that the appeal decision would be followed by some further prompt communication from management, giving her some reassurance as to what would happen next, and when, and as to her status, and what she was supposed to be doing, pending the identification of a new role from her. Even if it was anticipated that it would take a little more time to do this, she should at least have been given some reassurance that the process was under way and what it was envisaged the next steps would be. Indeed, both the members of the appeal panel who gave evidence to the Tribunal were candid that this was what they, themselves, expected should happen.

146. However, as I have recorded, this did not happen. Mr Brady went on leave, but in point of time after the appeal decision was known. He did not, personally, contact the Claimant at any time thereafter. Nor was there any contact from Ms Newton, who appears to have had no further involvement in the matter at all. There was, as I have described, just one limited contact with the Claimant's union representative, in the discussion about pay, around the end of March 2016. It is true that the Claimant, herself, did not approach management; but I considered that the onus in terms of communication, and action, was plainly on them. Mr Brady's only explanation for the lack of communication, when this was put to him in cross examination, was that management was, during this period, looking for suitable vacancies for the Claimant; but I did not understand how that precluded him from making contact with the Claimant. It was not an adequate explanation for the failure to do so, at all.

147. The combination of the lack of further guidance in the appeal decision on the question of the impact of travel times, and what the appeal panel made of the Claimant's detailed arguments on that subject, the fact that there was no job identified for her at the point of reinstatement, and the lack of any proactive contact with the Claimant on the question of her status or action being taken going forward regarding her future role, together, in my judgment, was so serious as to amount to a fundamental breach of the implied duty of trust and confidence on the part of the Respondent. This, I add, was compounded by the handling of the question of pay, though I would have considered the other aspects to amount to a fundamental breach, even had her pay been promptly reinstated.

148. Did the Claimant affirm the breach before resigning? The Respondent relied upon the fact that some six weeks elapsed between the date when the decision was announced and the date of resignation, during which there was no communication from the Claimant.

149. In some cases, there may be a wider context in which inaction on the part of the employee over an appreciable period of time, does have the effect of conduct amounting to affirmation. But this was not, in my judgment, such a case. This was a case in which the onus was on the Respondent during this period, to take the initiative, not the Claimant. Further, as I have found, management's failure to communicate with the Claimant during this period, itself contributed to the breach. There was, in these circumstances, no affirmation of that breach.

150. Was the breach a contributory cause of the decision to resign? As noted, it did not have to be the main cause; but it did have to make some meaningful contribution. As to that, I did note that, in her witness statement, the Claimant focussed on her concern with events that occurred *before* the dismissal. Further, the emphasis in her appeal documents was on her desire to receive a redundancy payment. Mr Aamodt also suggested that it was significant that, in the litigation, matters occurring post the appeal decision had only been raised by late amendment. He also suggested that the content of the resignation letter cast doubt on whether events post the appeal outcome had affected the decision to resign.

151. I considered that these features certainly lent support to the argument that it was events prior to the appeal (including the taking of the stance, when she was dismissed, that she was not entitled to a redundancy payment) that were at least the principal cause of the decision to resign. However, on consideration, I did not consider that the fundamental breach had not also made, at least, a meaningful contribution to that decision. My reasons were as follows.

152. As to the resignation letter, there is no rule of law that it must state the reason (or all the reasons) for resignation; but, of course, its contents may be argued to shed evidential light on what the reasons or reasons in fact were. However, Ms Fraser Butlin made the point that the reasons which this letter gave were not expressed to be exhaustive. I also accepted that its reference to the reasons *including* matters prior to dismissal, could be read as designed to forestall any argument that these were not, or could not be, *among* the matters relied upon, not as indicating that they were the only, or principal, such matters.

153. Secondly, as already noted, I accepted Ms Fraser Butlin's submission that the Claimant was, when she put in her appeal, genuinely looking for some redress, but whether she considered she had achieved that, could and would only be judged by her as and when the outcome was known. To put the point another way, I did not think the appeal was mere window dressing or tactics.

154. Thirdly, it did not seem realistic to me to suppose that the Claimant's reflections on her situation, after receipt of the appeal decision, were unaffected by the appeal panel's failure to address her points of appeal more fully, and its failure to give her a clear answer to the question of whether it should have been accepted that she had reasonably rejected the positions at Hendon and Willesden. Nor did I think it realistic to suppose that she was unaffected, in her

deliberations, by the lack of any communication from management following the appeal decision.

155. On that last point the Claimant's witness statement did refer to her pay, and how this was handled (or not), post the appeal outcome. But, even putting to one side the question of pay, and, more significantly, I concluded, in her oral evidence she said that she was waiting, following the appeal decision, for some reassurance that things were now going to be different. The evidence before me indicated that during this period she was liaising with her union and getting some advice about what to do, which may, I inferred, have contributed to the overall time which elapsed before she made, and communicated, through the union, her decision to resign. But it did not, in my view, follow, that I should assume that that lack of any proactive contact from management throughout that period had no material influence on her decision when she came to take it. Even if she had, possibly, been initially minded to resign, it was not realistic to suppose that the lack of any communication from management, or, hence, any indication as to what job she would be doing, where, or when, did not contribute to that decision, if only by solidifying any preliminary inclination that she may have had.

156. For all of these reasons, I concluded that the fundamental breach on the part of the Respondent was not followed by affirmation, and it did make a sufficient meaningful contribution to the decision to resign, though it was one among other reasons. I therefore found that the Claimant was constructively dismissed.

157. Was this a dismissal for redundancy, for the purposes of the unfair dismissal and redundancy payment claims? I note that there is a difference in language between the wording of section 98 of the 1996 Act, and that of section 139. The former refers to the reason or principal reason for dismissal, the latter to whether the dismissal is wholly or mainly attributable to what I have called a redundancy situation. However, in my view, both formulations are driving at the same thing, and at any rate I did not think that anything turned on the difference in language in this case, particularly given that this was a case of constructive dismissal. Nor did the difference in the burden of proof in respect of the two complaints, lead to different outcomes in this particular case, as I was satisfied that I was able to reach clear conclusions based on my findings of fact.

158. The authorities indicate that the reason for dismissal in a constructive dismissal case is the reason for the conduct amounting to the breach. Whilst recognising that there is a degree of artificiality in that approach, they require the Tribunal to carry out that exercise of attribution. Standing back, the wider picture and context here was that the prison was to close, giving rise to the redundancy situation. That was the overall driver of everything that followed. At the time of the appeal decision that had not changed. The prison closure had happened, the old job had gone. It had not reappeared, and, at that point, no other specific job had yet been found for the Claimant to do.

159. Those were the overriding facts and context, which lead to the initial dismissal and appeal, in which the appeal panel gave their decision, and in which management then failed to be proactive in their communications with the Claimant thereafter. In these circumstances I considered it would be wholly artificial to salami slice, and to say, for example, that the immediate and operative reason for the conduct amounting to the breach was the pusillanimity of the

appeal panel in failing to grasp the nettle of the travel issue, or the neglect by Mr Brady to contact the Claimant, rather than the redundancy situation.

160. Nor was this a case of a reorganisation which might be said technically not to amount to a redundancy situation but to a substantial fair business reason for the purposes of the unfair dismissal claim. Therefore, the repeated use of the term "reorganisation" in the further particulars tabled by Mr Aamodt in this regard, did not advance the Respondent's case. This was not a reorganisation falling within the concept of substantial business reasons, but a straightforward textbook redundancy situation, falling within the concept of redundancy.

161. I concluded that this was not a dismissal for some other substantial fair reason or principal reason. It was a dismissal for the principal reason of redundancy, and, for the purposes of section 139, one that was wholly or mainly attributable to a redundancy situation. There is a nice point as to whether, since the reason for dismissal was not that relied upon by the Respondent, it could rely on the reason in fact found, which was itself within the categories of fair reasons, for the purposes of the unfair dismissal claim. But, in any event, as to section 98(4), no particular argument was advanced by the Respondent, the burden was neutral, and in all the circumstances that I have described, I did not find this to have been a fair dismissal in all the circumstances of the case.

Outcome

162. For all of the foregoing reasons the unfair dismissal claim therefore succeeded and I declared that the Claimant was entitled to a statutory redundancy payment. The calculation of that was agreed. As noted, remedy for unfair dismissal, and the outcomes of the wages and holiday pay claims, were thereafter disposed of by consent.

Employment Judge Auerbach on 31 January 2018