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# THE EMPLOYMENT TRIBUNALS

**Claimants:** (1) Mrs Catriona Stevenson  
(2) Mrs Cathrona Leeke  
(3) Mrs Sarah Stewart

**Respondent:** Mid Essex Hospital Services NHS Trust

**Heard at:** East London Hearing Centre

**On:** 11, 12, 13, 14, 20 and 21 June 2019

**Before:** Employment Judge Burgher

## Representation

**Claimants:** In person

**Respondent:** Mr I Scott (Counsel)

## JUDGMENT

1. Mrs Catriona Stevenson's claims against the Respondent for unfair dismissal, a redundancy payment and breach of contract fail and are dismissed.
2. Mrs Cathrona Leeke's claim against the Respondent for unfair dismissal succeeds. Mrs Leeke was procedurally unfairly dismissed and it is the judgment of the Tribunal that there was a 50% chance that she would have been fairly dismissed had a fair procedure been completed. The Tribunal finds that Mrs Leeke had a 50% contribution to her dismissal by unreasonably refusing suitable alternative work.
3. Mrs Leeke's claims against the Respondent for a redundancy payment and breach of contract fail and are dismissed.
4. Mrs Sarah Stewart's claims against the Respondent for unfair dismissal, a redundancy payment and breach of contract fail and are dismissed.

# REASONS

## Issues

1. At the outset of the hearing the following issues were identified as relevant.

### Breach of contract

2. Did paragraph 16.26 of Agenda for Change amount to a condition precedent to contractual entitlement to an enhanced redundancy payment?

3. If so, what did the condition require?

4. Did each Claimant fulfil such requirements on or before the date of termination (such that there is jurisdiction to hear the claim)?

5. If there is jurisdiction to hear the claim, was each Claimant contractually entitled to an enhanced redundancy payment? This involves consideration of whether:

5.1 Were the Claimants offered suitable alternative employment?

5.2 If so, did they unreasonably refuse it?

6. Mrs Stevenson and Mrs Stewart maintained that the Tribunal should consider the breach of contract claim even though the maximum award that it could make, of £25,000 (under the ET Extension of Jurisdiction order 1994), was far less than their respective potential contractual redundancy entitlements.

### Statutory redundancy payment

7. Were the Claimants offered suitable alternative employment under s.141(1) and s.141(3)(b) Employment Rights Act 1996 ('ERA 1996')?

8. If so, did they unreasonably refuse the offer under s.141(2) such that they lost the right to a statutory redundancy payment on termination of their employment?

### Unfair dismissal

9. The Respondent contends, and the Claimants accept, that the Claimants were dismissed by reason of redundancy, a potentially fair reason under s.98(2) ERA 1996.

10. Was the dismissal fair or unfair in all the circumstances under s.98(4) ERA 1996? The Claimants allege that the following matters occurred and gave rise to unfairness:

10.1 The consultation was predetermined, and there was a repeated refusal by Ms Foulkes to acknowledge the level the Claimants worked at was comparable to other senior staff working at Southend Hospital and Basildon Hospital;

- 10.2 Alternative employment offered was not suitable;
- 10.3 The offers of alternative employment were made to avoid paying enhanced redundancy payments and were not genuine;
- 10.4 There was suitable alternative employment available namely:
  - 10.4.1 A 6 month post at Basildon Hospital advertised on 28 November 2017; This was not pursued in evidence having been accepted by all Claimants that they did not wish to relocate and that they wished to remain working at the Respondent's Broomfield site; and
  - 10.4.2 Head of Operations of Human Resources in Southend for the Respondent, advertised between late November and early December 2017. During evidence this allegation was changed to refer to the position of interim Head of Human Resources that was posted for advertisement by the Respondent on 29 November 2019.
- 10.5 There were delays in responding to issues and a failure to provide accurate information.
- 10.6 The Claimants were given formal notice of redundancy instead of being put 'at risk'.
- 10.7 There was a failure to properly consider the points raised on appeal;
- 10.8 The appeal outcome contained an unjustified assertion that the Claimants had not proposed changes to the job description when they had done so in a formal meeting with Ms Foulkes.

11. If the Claimants were dismissed in a manner which was unfair by reason of the procedure adopted, had a fair procedure been adopted what was the likelihood that they would have been dismissed in any event and if so when?

12. If the Claimants were unfairly dismissed, did they contribute to that dismissal by reason of their own culpable conduct? The Respondent contends that the Claimants contributed to their dismissals by failing to apply for alternative employment and/or accepting suitable alternative employment offered to them.

### **Procedure**

13. Although the cases of Mrs Stevenson, Mrs Leeke and Mrs Stewart were heard together, I was mindful and careful of the need to consider them entirely separately in relation to all the relevant factual matters which had to be assessed.

### **Evidence**

14. Each Claimant gave evidence on their own behalf and in support of each other.

15. The Respondent called the following witnesses to give evidence on its behalf.
- 15.1 Ms Mary Foulkes, former Chief Human Resources Director of the Respondent;
  - 15.2 Ms Karen Hussey, Human Resources Business Partner; and
  - 15.3 Ms Clare Panniker, Chief Executive Officer of the Respondent.
16. The Tribunal was also referred to relevant pages in an agreed hearing bundle of over 1400 pages and permitted a number of additional supplementary documents to be submitted during the course of the hearing.

## **Facts**

17. The Tribunal has found the following relevant facts from the evidence.
18. The Respondent, Mid Essex Hospital Services NHS Trust (MEHT) worked closely with the Basildon and Thurrock University Hospitals NHS Foundation Trusts (BTUT) and Southend University Hospital NHS Foundation Trust (Southend) since 2015. Consequently, in April 2016, a memorandum of association was agreed between the three Trusts and a formal committee was then established to oversee the common interests in May 2016.
19. New governance arrangements across the three Trusts were then implemented resulting in the creation of a Joint Working Board (JWB) and a Joint Executive Group (JEG). The JWB comprised of delegated officers of each Trust and the remit was to work together to undertake strategic planning and make decisions about the delivery of high quality care across all three organisations. The JWB discussed reforms including, amongst other things, how HR and other corporate functions could be transformed to offer a single service across all three Trusts. A plan to integrate HR services across all three Trusts followed.
20. Each Claimant was employed by MEHT as a Head of Human Resources. They worked at the Respondent's Broomfield Hospital.
21. Mrs Stewart commenced employment with MEHT on 1 July 2002. Her primary focus as Head of HR was organisational HR duties including recruitment, retention and employment of Bank staff.
22. Mrs Stevenson commenced employment with MEHT on 1 September 2004. Her primary focus as Head of HR was on complex case management, HR policies, partnership working and Agenda for Change.
23. Mrs Leeke commenced employment with MEHT on 10 July 2014. Her primary focus as Head of HR was operational HR duties including Occupational Health and Governance.
24. At the relevant time, all Claimants reported to Mr Bernard Scully, Director of HR. The Claimants had a very good working relationship with Mr Scully. They trusted and respected him. Prior to December 2014, Mr Scully was supported by a Deputy Director

of HR. However, when the Deputy Director of HR left the employment of MEHT, Mr Scully decided to distribute specific duties of the Deputy Director to each of the Claimants. The role of Head of HR was then created and the Claimants were appointed to this position and were upgraded from band 7 to Band 8a.

25. The Claimants worked very closely together, they worked in the same office and discussed all matters affecting them in detail. They had experience and knowledge of the HR operations across MEHT and worked closely together to ensure that the HR services were delivered. Their roles were not limited to undertake matters only related to their primary focus. Flexibility was evident. The Claimants discussed matters with one another in detail and agreed the messaging and strategy that they wished to take when dealing with matters that concerned them.

26. All of the Claimants were aware of the existence of the JWB and JEG and the objective to identify and implement plans to integrate HR across all three Trusts. In fact, Mrs Stewart had acted from August 2016 as the lead for MEHT working alongside the other two Trusts in seeking to amalgamate both the HR and Bank departments.

27. By July 2017, the Claimants were fully aware that there were plans for the HR departments across all three Trusts to work in close alignment. By this stage the Claimants were also aware that officers in the other two Trusts who were undertaking similar duties to them and were paid at a higher grade. The Claimants discussed amongst themselves and agreed that they would ask for their roles to be re-evaluated. They had discussed this with Mr Scully and on 12 July 2017 and Ms Stevenson emailed him (on behalf of all three Claimants) a revised Head of HR Job Description that they submitted for re-banding in accordance with Agenda for Change terms and conditions.

28. On 13 July 2017, Mr Scully responded by saying that Ms Foulkes had informed him that the JEG had agreed that any requests for re-evaluation for posts were embargoed in relation to actual or pending consultations. Ms Foulkes gave evidence that the JEG had agreed this on 10 July 2017.

29. The Claimants assert that Ms Foulkes had lied to Mr Scully when stating that there was a JEG agreed embargo at that stage. However, I do not accept the Claimants assertion in this regard. The Claimants refer to the Joint Staff Side meeting of 24 July 2017 and the lack of knowledge of an embargo by the Union representative at the time as evidencing that there could not have been agreement about the embargo prior to this date. However, at the 24 July 2017 meeting, it is noted that Ms Foulkes confirmed that there is an embargo on all current posts being put forward for job evaluation which was stated as being relevant for all corporate functions.

30. Ms Foulkes stated in an email of 28 July 2017 to the Union representative that the embargo will be lifted at the end of the consultation process. She stated that the rationale was that there needs to be clarity at the outset on the pooling of posts, cost and suitable alternative work. She stated that the embargo prevented the domino affect of others who may be disadvantaged as a result of another being promoted. In this same email Ms Foulkes stated that the posts of Heads of HR and Deputy were deleted and so realignment of these existing posts in the current process was therefore not relevant.

31. I therefore find that there was an embargo on re-evaluation of roles due to the impending restructure and that the Claimants were properly informed about this by Mr Scully on 13 July 2017.

32. Subsequent high level discussion with the staff side took place between the JEG about the HR restructure. A consultation meeting was held on 24 July 2017. The Union and staff side representatives were able to put forward their views.

33. Phase 1 of the restructure of the three Trusts Group HR team was consulted upon on 28 July 2017. A consultation paper, dated 28 July 2017, was sent to each of the Claimants on this date. As far as the Claimants were concerned it was proposed that there be the creation of two Group Human Resource Director posts at Band 9 who would report to the Chief HR Director. It was proposed that there be three Head of HR posts at Band 8c who would be members of the Site Leadership Team, reporting to one of the Group HR Directors. However, following consultation feedback the new Head of HR posts were re-banded to 8d.

34. Insofar as relevant, the affect of the proposal was for the deletion of one of the three Trust site HR Director roles from the structure and the three Head of HR roles at band 8a that the Claimant did to be removed from the structure. It was intended for overall headcount to be reduced by two whole time equivalent posts. The new structure would have the effect of meaning that there would be another layer of management between the Claimants and the Group HR Director role, similar to when there was a Deputy Director in situ at MEHT.

35. The Claimants were informed that the consultation was to run until 30 August 2017. The Claimants were provided the Group Organisational Change Policy and they were invited to provide their views and ideas regarding the paper. The introduction of the paper stated that the Trusts recognised the value and importance of obtaining views and suggestions of all affected staff as well as their Trade Union representatives about any proposal for change as proposals are usually improved by the collective knowledge and experiences of those directly involved.

36. The Claimants believed that the consultation process was a sham and that their dismissals were predetermined. They refer to the email of Ms Foulkes to the union dated 28 July 2017, where Ms Foulkes states that their roles of Head of HR were deleted. However, this email was written in the context of Ms Foulkes addressing questions relating to the embargo. The content of the consultation paper of 28 July 2017, and the cover letter, clearly evidence that consultation and sharing information was the intention.

37. The Claimants did not approach the consultation process with a cooperative mindset. Matters may have turned out very differently had they done so. During the consultation, the Claimants did not provide any indication about why the proposed restructure would not work or suggest any alternative ways of proceeding. The Claimants lack of cooperation and input to the consultation is clearly evidenced by the email sent on 2 August 2017 by Mrs Stewart to Mrs Foulkes (on behalf of all 3 Claimants) requesting notice of redundancy with immediate effect.

38. However, contrary to their initial wishes, the Claimants were not put on notice of redundancy. Ms Foulkes proceeded to consult to seek their views and held one to one consultation meetings with each Claimant on 8 August 2017.

39. During Mrs Stevenson's one to one meeting on 8 August 2017 she raised a number of questions about the consultation paper, which Ms Foulkes answered. Mrs Stevenson highlighted that there were errors with the job descriptions that had been circulated as part of the consultation. Mrs Foulkes confirmed that she would get them corrected and re-circulated. This was done the following day. Mrs Stevenson queried where she would fit in the new structure and it was explained that it depended on the vacancies that were available. It was anticipated that the second phase of the restructure and consultation may generate more opportunities.

40. Mrs Stevenson also raised questions about the limitation of ring fencing for the role. The upshot of the consultation was that all Claimants were ringfenced for roles and guaranteed an interview regardless of the rule limiting ringfencing to one grade above the current grade. The Claimants concern in this regard was therefore addressed.

41. Mrs Stevenson stated that as far as alternative work was concerned any new role in the new structure should be part time, based at MEHT site at Broomfield due to her family commitments.

42. During Mrs Leeke's one to one consultation meeting on 8 August 2017, Mrs Foulkes explained that the wrong job description had been circulated but that this would be corrected and would be re circulated. Mrs Leeke asked where she would fit in the new structure and Mrs Foulkes answered that it depended on what happened if the Head of HR posts were filled with internal candidates and that Phase 2 may generate some opportunities.

43. Mrs Leeke also raised concerns about why she was not eligible for a ring-fenced interview for the proposed new Head of HR role. Ms Foulkes explained that she considered that site leadership role very different to their current role in scope and responsibility. Ms Foulkes explained that although the decision had been made by Mr Bernard Scully to divide the Deputy Director HR post into three, and she believed that there was a big gap between a Band 8a and 8c role. Mrs Leeke was determined to seek to demonstrate that the responsibilities that she and the other Heads of HR undertook were comparable to those at other Trusts who were paid at a higher band.

44. For alternative work, Ms Leeke stated that she required flexible working and sought a ringfenced interview for higher graded posts. She also stated that she would like to be based at Broomfield going forward.

45. During Mrs Stewart's one to one consultation on 8 August 2017, she said that the proposal portrayed there was a gap between MEHT Heads of HR capabilities and those of the other two Trusts but that the only difference was the banding as what they did at MEHT was comparable. Mrs Foulkes explained that Mrs Stewart had a Band 8a role and people were to be considered for posts one grade above and below their current posts. Ms Foulkes explained that her view was that as the Head of HR role had been divided into three roles, it was not as complex as someone doing the role alone. Despite this, Mrs Foulkes agreed to review this again and asked for Mrs Stewart to send her job description to her for further consideration.

46. For alternative work Mrs Stewart stated that her preferred location was Broomfield for health reasons and that she would like to continue flexible working.

47. Instead of engaging in the detail of the proposed organisational changes, the Claimants focused their energies on seeking to get the embargo lifted for their post to be re-graded. They compiled an updated job description for their roles was compiled and Mrs Leeke sent this on behalf of all three Claimants on 9 August 2017.

48. On 16 August 2017 the Claimants submitted a collective grievance to the Chief Executive Officer, Ms Panniker, about their concerns about the embargo and request to re-band their role. Ms Foulkes responded stating that she believed regrading was irrelevant as part of the consultation process as she had guaranteed ring fenced interviews for the Claimants, regardless of their grade. In any event, Ms Foulkes decided to lift the embargo on re-grading for the Claimants positions. On 5 September 2017 the Claimants roles were re-banded as Band 8b. The Claimants then confirmed that their grievance was resolved.

49. Also on 16 August 2017, Ms Foulkes invited the Claimants to group consultation meetings to provide them with the opportunity to seek further clarification on any outstanding issues and also to present alternatives to the proposed structure.

50. Mrs Leeke and Mrs Stevenson requested further one to one meetings as part of the HR consultation. Consequently, Ms Foulkes met with Mrs Stevenson again on 22 August 2017 and a number of queries relating to ring-fenced positions and other matters concerning the restructure, such as timescales, notice periods and further clarification on job descriptions were discussed.

51. Mrs Foulkes wrote to Mrs Stevenson, Mrs Leeke and Mrs Stewart on 25 August 2017 with a summary of the discussions of their respective individual consultation meetings.

52. Ms Foulkes met with Mrs Leeke again on 29 August 2017. Ms Leeke was concerned to understand why roles were being ringfenced and why duties had been removed from aspects of job descriptions. Ms Foulkes sought to address the matters that were being raised.

53. The HR Group Consultation process ended on 30 August 2017 and the Claimants were sent an email inviting them to attend a meeting on 8 September 2017.

54. On 31 August 2017 Ms Foulkes emailed the Claimants advising them that she would be circulating the response to the proposal, the appointments process and interview dates, updated job descriptions and the consultation paper.

55. On 1 September 2017 Ms Foulkes emailed the Claimants inviting them to individual outcome of the consultation meeting. The meeting was to take place on the 8 September 2017. The email indicated that they would be given formal notice of risk of redundancy.

56. Ms Foulkes was aware that during the phase 1 process there was a lack of clarity around transformation funding and which could delay the full implementation of



the restructuring plan. A brainstorming session was held on 4 September 2017 with the HR Directors to discuss what phase 2 of the restructure may look like.

57. A meeting was held with the Claimants on the 8 September 2017 and formal notice of redundancy was issued to them. The consultation outcome paper contained a number of typographical mistakes that the Claimants identified and corrected. The Claimants took this to be a further indication of Ms Foulkes' unprofessional approach.

58. The Claimants were informed that their employment would come to an end on 8 December 2017. Their letters of redundancy stated that in the event that they are offered suitable alternative employment and they unreasonably refuse the offer, they would forfeit entitlement to a redundancy payment. The Claimants were all provided with a right of appeal. No appeals were submitted.

59. Mrs Stevenson was informed that her redundancy payment would be £71,404. Mrs Leeke was informed that her redundancy payment would be £12,128. Mrs Stewart was informed that her redundancy payment would be £54,336.

60. The Claimants believe that Ms Foulkes lied to them about the potential role in the Phase 2 planning as there was no mention of potential roles being offered at that stage.

61. The Claimants believed that they should have been placed at risk rather than given notice to be done, in accordance with organisational change policy. There was an expectation that the Claimants should be given access to restricted jobs on NHS jobs in giving priority to agency or interns employed at the Trust and given priority for vacant posts in the Trust.

62. The Claimants were not put on the list to register for NHS jobs and were only sent a limited number of about alternative roles during their notice period. Ms Karen Hussey, was employed as HR Business Partner and she was tasked with arranging this by Ms Foulkes. However, Ms Hussey was employed in Southend and was not fully aware of the vacancies available at Broomfield, the Claimants preferred location. Ms Hussey also had periods of sickness absence that affected the efficient dissemination of roles. Whilst this was the case, the Claimants, through Ms Stewart in particular, could have readily accessed all available alternative vacancies within Broomfield by making enquiries with Mr Scully or relevant HR Business Partners in Broomfield. They did not do so.

63. On the 15 September 2017 the Claimants were asked if they would like to express an interest in band 8d Head of HR post by the 20 September and the job description was provided for them to consider. All Claimants submitted expression of interest forms.

64. Mrs Leeke emailed Ms Foulkes on 22 September 2017 explaining that the Claimants were feeling increasingly stressed and anxious and that the lack of communication from Ms Foulkes was leaving them feeling vulnerable and unsupported. Ms Foulkes responded to this email on the same day stating that she considered their comments about being unsupported unfounded and unnecessary and commented that they could have contacted her, or Karen Hussey earlier. The Claimants were unhappy with this response and contacted Ms Lisa Hunt, Managing Director of the Respondent,

to convey their concerns about the lack of support and upset about their perception regarding Ms Foulkes' behaviour. They considered that Ms Foulkes was not honest, unprofessional and they did not trust her intentions.

65. On 27 September 2017 Ms Panniker met with Ms Foulkes and was made aware of the skills shortage if the Claimants left the Trust. Ms Foulkes was keen to retain their skills and knowledge. They had operational memory, organisational knowledge and experience that was necessary to be utilised going forward. Options were discussed for retaining the services of the Claimants including offering them project work and bringing forward Phase 2. Ms Foulkes was able to obtain a mandate to bring phase 2 of the reorganisation forward and finalise the details of suitable alternative roles for each of the Claimants.

66. After this meeting Ms Foulkes met with Mr Scully and asked him to draft a job description for the new band 8b role using the recently evaluated 8b job description. Ms Foulkes discussed with Mr Scully the work required in the HR team and the current proposed structure and it was decided that the three senior positions that previously been discussed at the brainstorming session in early September could be fast tracked.

67. The Claimants disputed the genuineness of the creation of these roles and believed that they were only put forward because the trust could not afford the redundancy packages and there was no genuine intent for them to have such roles. They believed that Ms Foulkes was not honest when she asserted that the roles were always intended and referred to notes of 4 September 2017 edited handwritten notes that suggested a different structure than that was now being implemented. I find that the offer of suitable alternative role was genuine. The Claimants accept that during the meeting with Ms Lisa Hunt on 22 September 2017, she was very sympathetic and she confirmed she understood the problems and that she wanted to help the Claimants within the Trust. Ms Hunt stated she would meet with Ms Panniker and Ms Foulkes to discuss this and she promised to try and help them.

68. The Claimants accept that Ms Hunt gave them reassurance in relation to the roles not being offered to them in phase 2 but stated they had no confidence that their views would be taken into account at the time when Phase 2 actually occurred.

69. Following the meeting with Ms Hunt on 27 September 2017, by letter dated 29 September 2017, she wrote to the Claimants stating that they remain valued members of the Trust corporate team, that they would be offered substantive alternative employment at grade 8b based at Broomfield hospital. The letter stated that they would receive a formal offer not later than 5 October 2017 with a revised job description. Ms Hunt also offered external resource for personal support and professional development if they required.

70. The Claimants were invited to attend interviews for the band 8d Head of HR role.

71. On 4 October 2017 Ms Stevenson stated that she did not want to attend an interview for this role as she had received and accepted an offer of employment from Essex County Council. This role paid £5000 more per year than her current role. Mrs Stevenson sought the consent of the Respondent to bring forward her termination date to 26 November 2017 so she could commence employment with her new employer.

72. On 5 October 2017 Mrs Stewart advised Ms Foulkes that she had accepted work outside the trust and her last day would be 8 December 2017. Ms Stewart did not proceed with the Head of HR band 8d interview.

73. Mrs Leeke attended interview for the band 8d role. It did not go as well as Ms Leeke had hoped and she was disappointed with how it was conducted. Ms Leeke continued to seek alternative roles and had a number of discussions relating to matters of interest to her.

74. Ms Foulkes sent the Claimants an offer of suitable alternative work by letter dated 5 October 2017. This was in accordance with the express timetable specified in Ms Hunt's letter of 29 September. The letter included the job description and person specification for the new role of Senior HR Lead. The letter stated that if the offer was accepted there would be a trial period, which could be extended for the purposes of retraining. It recorded that if the Claimants unreasonably rejected the offer of alternative work either from the outset or during the trial period and the post is considered suitable, then they would not be entitled to a redundancy payment.

75. Agenda for Change terms provide the basis for redundancy entitlement within the NHS Trusts.

16.20 Employees shall not be entitled to redundancy payments or early retirement on grounds of redundancy if:

- Unreasonably refuse to accept or apply for suitable alternative employment with the same or another NHS employer.

16.21 Employers have a responsibility, when making a member of staff redundant or agreed early retirement on grounds of redundancy, to seek suitable alternative employment for that person, either in their own organisation or through arrangements 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.

16.22 Suitable alternative employment for the purposes of paragraph 16.20 should be determined by reference to sections 138 and 141 of the Employment Rights Act 1996. In considering whether post is suitable alternative employment, regard should be had to the personal circumstances of the employee. Employees will, however, be expected some flexibility.

16.26 Claims for redundancy payment or retirement on grounds of redundancy must be submitted within six months of the date of termination of employment. Before payment is made the employee will certify that:

- They had not obtained, been offered or unreasonably refuse to apply for or accept, suitable alternative health service employment within four weeks of the termination date and they understand that payment is made only on this condition and undertake to refund it if this condition is not satisfied.

76. The Respondent's organisational change policy reflected the Agenda for Change provisions.

Clause 2.3 states shall be the policy of the trust to seek to retain staff wherever possible and all reasonable efforts will be made to find suitable alternative employment for those staff affected.

Clause 4.8 states constitutes suitable alternative employment is not clear in law. Factors such as pay band, status, location, and nature of the job can all affect the decision whether or not an alternative role is suitable.

Clause 5.3.3 states that employees are required to participate in relevant meetings and in instances of redeployment should actively search for alternative roles and undertake trials in posts that identified as suitable, as well as undergo relevant training required.

Clause 11 of the organisation change policy states that outcome of the consultation process can result in staff being placed at risk of redundancy. Clause 11.8 states that there may be situations where it is necessary to give notice of redundancy in accordance with the contract of employment at the end of the consultation process.

Clause 12 provides for suitable alternative work. Clause 12.3 states that consideration will be given to the personal circumstances of the employee and that employees are expected to show flexibility to reflect their skills, knowledge and experience and the needs of the organisation. Clause 12.6 states that it is up to the employee to decide whether the alternative work is suitable, however, if an offer of employment is made that the Trust deems as being a suitable alternative, but the employee unreasonably refuses to accept it, the employee will lose their right to redundancy pay.

Clause 13 provides for trial periods. Clause 13.3 states that the purpose of the trial period is for both the Trust and the employee to establish whether the job is in fact suitable for the employee.

77. On 17 October 2017 Mrs Stevenson refused the offer of Senior HR Lead role stating that there were significantly reduced levels of autonomy, significantly reduced status and that the loss of status and autonomy would impact negatively on her career progression. Mrs Stevenson stated that she had been successful in securing a role outside the trust and she believed that the Senior HR Lead role was only created after the intervention of Ms Hunt. She observed that the role was not in the consultation documentation and that there was significant uncertainty as to how the role would operate and where it would fit in the new structure. She stated that she had no confidence in the job security of the post.

78. Mrs Stevenson also stated that there were a number of defects in good employment practices and breaches of the organisational change policy and she had a lack of confidence in the leadership of the HR team which was compounded by a lack of compassion and sensitivity shown by them.

79. On 19 October 2017 Mrs Leeke refused the offer of alternative employment on a similar basis to that expressed by Mrs Stevenson.

80. On 19 October 2017 Mrs Stewart refused the offer of alternative employment again for similar reasons as expressed by the other two Claimants.

81. During the hearing it was apparent that the key concern regarding suitable alternative work related was status. However, it was evident that a lack of trust in Ms Foulkes and the HR team played a significant part in the Claimants assessment of the suitability of the role offered.

82. Ms Foulkes expressed the view that there was not a loss of status in respect of the Senior HR Lead role. They Claimants would have reported to a Head of HR who would report to the Managing Director in group HR about it. They would therefore still have been one step removed from the Managing Director. Ms Foulkes stated that budgetary responsibility was delegated to them by the Director of HR at his discretion and therefore they were not currently accountable for the budget management. In respect of the new job description the words 'allocated' and 'directed' were used in relation to managing group projects across three Trusts.

83. Ms Foulkes met with Mrs Stewart on 2 November 2017. The contents of her refusal letter was discussed. Ms Foulkes acknowledged that the whole process was stressful and she apologised for any mistakes that may have contributed to that and stated that there was no ill intent on behalf of the trust. Mrs Stewart stated that she felt the wording of the job description needed to change to reflect the level of seniority and autonomy in the new role. Ms Foulkes stated that it could be amended to reflect this.

84. Mrs Stevenson met with Ms Foulkes on 3 November 2017 to discuss her refusal to accept the Senior HR Lead role. Ms Foulkes addressed the concerns and stated that the job description could be amended to accommodate her concerns. Ms Foulkes did in fact do this but did not send the amendments to the Claimants before their employment came to an end. Following questioning the Claimants accepted that the proposed changes may have helped them overcome their concerns. Had the Claimants sought to follow up the changes that Ms Foulkes had readily indicated during the meetings that she would make then it is unlikely that their employment would have come to an end at all. However, this was not consistent with the plans of Mrs Stevenson and Mrs Stewart who had accepted employment outside of the Respondent and would have benefitted from significant redundancy payments. Mrs Leeke was conflicted, she was seeking employment within the Trust but she had no trust or respect in Ms Foulkes as leading HR team and she was not able to break ranks and dissent from the views of Mrs Stevenson and Mrs Stewart as to do so would have undermined their redundancy entitlement claim.

85. On the 7 November 2017 Ms Foulkes met with Mrs Leeke to discuss the refusal to accept alternative work. The meeting was tense given the refusal by Ms Foulkes to allow Mrs Leeke to tape record the meeting. Ms Leeke believed that her current role was equivalent to the role of the Deputy Director that was undertaken in 2015. Ms Foulkes stated that she had discussed the role with Ms Hunt and Mr Scully and the role she was undertaking was not equivalent to the current 8d level role. Mrs Leeke acknowledged this. Mrs Leeke expressed her suspicion about whether the Senior HR Lead role was genuine

and Ms Foulkes explained the genesis of it. The remainder of the meeting addressed perceived HR mistakes and errors made by Ms Foulkes and her team.

86. Mrs Stevenson, Mrs Leeke and Mrs Stewart were subsequently informed by letters dated 24, 29 and 30 November 2017 respectively that Ms Foulkes did not consider the reasons they gave for refusing suitable alternative employment were reasonable and informed them that on the basis of their refusal they would not be entitled to receive a redundancy payment. The Claimants were informed of their right of appeal and the method of doing so.

87. On 27 November 2017 Mr Scully authorised the recruitment of an interim HR role to undertake the Claimants existing duties. This was done because the Claimants had refused to accept the Senior HR Lead role and there was a gap in resources going forward. The interim role was not specifically offered to the Claimants. However, Mrs Stewart and Mrs Leeke were aware of the role before their employment came to an end on 8 December 2017 and they did not apply for it.

88. On the 7 December 2017 the Claimants appealed the decision on the grounds that the role offered was not suitable and that there were reasonable grounds to refuse the offer.

89. The appeal was heard as a collective grievance and considered at a meeting on 26 January 2018. This meeting was chaired by Ms Panniker who was assisted by Ms Norma French, an independent HR adviser who was a Director of Workforce at Whittington health NHS Trust. Ms Panniker considered the appeal and took advice from Ms French. She concluded that the Senior HR Lead role was suitable alternative work and that the reasons given by the Claimants for refusing the role were unreasonable. The Claimants were informed of this by letter dated 8 February 2018.

## **Law**

90. For unfair dismissal, section 98 of the Employment Rights Act 1996 states:

(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3)...

(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.

91. I had regard to the submissions of the parties and the principles in the cases submitted by Mr Scott on behalf of the Respondent. In particular in the case of Williams v Compair Maxam [1982] I.C.R. 156 Browne-Wilkinson J stated at pages 161 and 162

For the purposes of the present case there are only two relevant principles of law arising from that subsection. First, that it is not the function of the industrial tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the tribunal must be satisfied that it was reasonable to dismiss each of the applicants, on the ground of redundancy. It is not enough to show simply that it was reasonable to dismiss an employee; it must be shown that the employer acted reasonably in treating redundancy "as a sufficient reason for dismissing the employee," i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.

In law, therefore, the question we have to decide is whether a reasonable tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down \*162 in very general terms what a properly instructed industrial tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this appeal tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this appeal tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in *all* circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as

possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

92. Section 141 of the Employment Rights Act 1996 sets out the provisions for considering entitlement to redundancy payment.

#### 141 Renewal of contract or re-engagement

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

(a) to renew his contract of employment, or

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

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

(3) This subsection is satisfied where—

(a) the provisions of the contract as renewed, or of the new contract, as to—

(i) the capacity and place in which the employee would be employed, and

(ii) the other terms and conditions of his employment would not differ from the corresponding provisions of the previous contract, or

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

(4) The employee is not entitled to a redundancy payment if—

(a) his contract of employment is renewed, or he is re-engaged under a new contract of employment, in pursuance of the offer,

(b) the provisions of the contract as renewed or new contract as to the capacity or place in which he is employed or the other terms and conditions of his employment differ (wholly or in part) from the corresponding provisions of the



previous contract,

(c) the employment is suitable in relation to him, and

(d) during the trial period he unreasonably terminates the contract, or unreasonably gives notice to terminate it and it is in consequence terminated.”

93. The Tribunal was referred to the case of Devon Primary Care Trust v Readman [2013] EWCA Civ 1110 where Lord Justice Pill state at paragraphs 20 and 21

20 ...the first is whether, as the EAT found, the Tribunal erred in law in its consideration of whether the respondent unreasonably refused the offer of employment. If it did, the second issue is whether the EAT was entitled to substitute its own view, or whether it should have remitted the case to the Tribunal as fact-finding Tribunal. At its first hearing, the EAT relied on the first issue on the test provided by Phillips J in the *EAT in Everest's Executors v Cox* [1980] ICR 415 at page 418:

“The employee’s behaviour and conduct must be judged looking at it from her point of view on the basis of the facts as they appeared or ought reasonably to have appeared to her at the time the decision had to be made.”

21. The Tribunal applied the correct test, in my judgment, at paragraph 22, when it stated:

“The reasonableness or otherwise of the refusal depends on factors personal to the employee and is assessed subjectivity from the employee’s point of view at the time of the refusal. By way of illustration of the application of the section, in *Fuller v Stephanie Bowman (Sales) Ltd* [1977] IRLR 87 , a secretary refused to move to new offices because they were located over a sex shop. The Tribunal concluded that the claimant was being unduly sensitive and held her refusal to be unreasonable. It was however stated that the test was not the attitude of a reasonable woman, but the reasonable objections of that claimant.”

## **Conclusions**

94. Having considered the facts and the law outlined above my conclusions on the issues are as follows.

### Redundancy payment

95. Following evidence the Respondent did not pursue the jurisdictional challenge under paragraph 16.26 of Agenda for Change. Had Counsel for the Respondent, Mr Scott done so I would have concluded that the Claimants refusal to accept alternative work in writing would have been sufficient for them to certify that they believed that they had not unreasonably refused alternative work for the purposes of paragraph 16.26.

96. The issues for contractual and statutory redundancy payment are therefore whether the Claimants were offered suitable alternative employment by the Respondent and if so, whether the Claimants unreasonably refused it.

### Suitable alternative work

97. I conclude that the offer of the Senior HR Lead role to the Claimants was suitable alternative work. It was offered on the same grade, pay, location and hours as their previous roles. As far as status was concerned, the role was at a comparable level

and although their previous specific duties were not necessary going forward their skills and experience in a more expansive group role was.

98. Ms Foulkes addressed the Claimants concerns about perceived reduced levels of autonomy and reduced status by stating that the job description could be amended. Whilst Ms Foulkes did not actually send the revised job description to the Claimants before their employment came to an end, the Claimants did not make any enquiries about the changes that Ms Foulkes agreed she would make. I accept Ms Leeke's evidence that had Ms Foulkes shared the revised job description they could have reached agreement to avoid the redundancies. The changes made were not substantive and this demonstrates that the role offered was suitable. However, the communication difficulties founded on the mistrust by the Claimants towards Ms Foulkes prevented towards agreement. They were inflexible and uncooperative towards her.

99. The Claimants were aware that Ms Panniker the Chief Executive Officer and Ms Hunt, the Managing Director, were very concerned to keep them employed within the Trust and this was expressly conveyed to them. The support of these two officers should have given the Claimants the confidence in the genuineness and job security of the Senior HR Lead role. However, the Claimants distrust of Ms Foulkes undermined their judgement.

100. In respect of status, Mr Leeke in particular placed emphasis on the fact that the word Manager was no longer in the job title. She stated that she perceived the role to be a demotion. Ms Panniker considered this at the appeal and was assisted by an experienced and independent HR professional who found that there was no loss of status. Looked at reasonably, with an organisational restructure consolidating the corporate HR functions of three Trusts with a much greater number of employees and workers to manage, I do not conclude that the Senior HR Lead role was of a reduced status.

101. The Senior HR Lead role therefore amounted to suitable alternative work.

#### Unreasonable refusal

102. The next issue to consider is whether the Claimants unreasonably refused suitable alternative work. The Claimants behaviour and conduct must be judged looking at it from her point of view on the basis of the facts as they appeared or ought reasonably to have appeared to her at the time the decision had to be made.

#### Mrs Stevenson

103. I conclude that Mrs Stevenson unreasonably refused suitable alternative work. She adopted a closed mind to this alternative. Her judgement about the suitability for the Senior HR Lead role was clouded by the external role she had accepted, the large redundancy payment she had hoped to receive and her negative feelings towards Ms Foulkes.

104. Mrs Stevenson had accepted a job outside the Trust before the alternative was proposed, in the full knowledge that Ms Hunt expressed an intention to keep her in the Trust and wished to support her. Mrs Stevenson was not able to provide any reasonable

basis for doing this. The fact that she accepted a role outside the Trust heavily influenced her view of the suitability of the role.

105. The lack of trust that Mrs Stevenson had in Ms Foulkes going forward also influenced her decision. However, I was not required to assess the reasonableness of her continuing to work with Ms Foulkes, which would have occurred if there was no redundancy, I assessed whether Mrs Stevenson was unreasonable in refusing the Senior HR Lead role.

106. The amount of redundancy payment that Mrs Stevenson would be entitled to if made redundant, of £71,404, was also significant in her refusing the alternative role. She had secured a better paid job outside the Trust and sought to ensure that this payment was made. Accepting the Senior HR Lead role would not have resulted in such a payment.

107. Finally, and equally significantly, the failure of Mrs Stevenson to consider a trial period demonstrated her closed mind and inflexible approach to continued employment with the Respondent. Had Mrs Stevenson undertaken a trial period and then refused the role, I would have been more amenable to the suggestion that her refusal was reasonable. She would have then been able to base her concerns on real, as opposed to self-serving objections.

Mrs Stewart

108. I conclude that Mrs Stewart unreasonably refused suitable alternative work. She adopted a closed mind to this alternative. Her judgement about the suitability for the Senior HR Lead role was clouded by the external role she had accepted, the large redundancy payment she had hoped to receive and her negative feelings towards Ms Foulkes.

109. Mrs Stewart had accepted a job outside the Trust before the alternative was proposed, in the full knowledge that Ms Hunt expressed an intention to keep her in the Trust and wished to support her. Mrs Stewart was not able to provide any reasonable basis for doing this. The fact that she accepted a role outside the Trust heavily influenced her view of the suitability of the role.

110. The lack of trust that Mrs Stewart had in Ms Foulkes going forward also influenced her decision. However, I was not required to assess the reasonableness of her continuing to work with Ms Foulkes, which would have occurred if there was no redundancy, I assessed whether Mrs Stewart was unreasonable in refusing the Senior HR Lead role.

111. The amount of redundancy payment that Mrs Stewart would be entitled to if made redundant, of £54,336, was also significant in her refusing the alternative role. She had a job outside the Trust and sought to ensure that this payment was made. Accepting the Senior HR Lead role would not have resulted in such a payment.

112. Finally, and equally significantly, the failure of Mrs Stewart to consider a trial period demonstrated her closed mind and inflexible approach to continued employment with the Respondent. Had Mrs Stewart undertaken a trial period and then refused the role, I would have been more amenable to the suggestion that her refusal was

reasonable. She would have then been able to base her concerns on real, as opposed to self-serving objections.

Mrs Leeke

113. I conclude that Mrs Leeke unreasonably refused suitable alternative work. She adopted a closed mind to this alternative. Her judgement about the suitability for the Senior HR Lead role was heavily influenced by the plans and intentions of Mrs Stevenson and Mrs Stewart and her negative feelings towards Ms Foulkes.

114. The lack of trust that Ms Leeke had in Ms Foulkes going forward influenced her decision not to accept the Senior HR Lead role. However, I was not required to assess the reasonableness of her continuing to work with Ms Foulkes, which would have occurred if there was no redundancy, I assessed whether Mrs Leeke was unreasonable in refusing the Senior HR Lead role. Mrs Leeke was aware that the alternative was proposed, in the full knowledge that Ms Hunt expressed an intention to keep her in the Trust and wished to support her.

115. Mrs Leeke maintained that having the word manager in her job title was very important to her and as she was coming to the end of her career this status was fundamental. However, I have no doubt that if Mrs Stevenson and Mrs Stewart had accepted the Senior HR Lead role Mrs Leeke would have followed. Mrs Leeke was conflicted, she wished to remain working in the Trust but did not wish to break ranks from her close working team. To have done so would have undermined their claims for substantial redundancy payments. As both Mrs Stevenson and Mrs Stewart had unreasonably refused the Senior HR Lead role, Mrs Leeke's decision to follow them was also unreasonable.

116. Finally, and equally significantly, the failure of Mrs Leeke to consider a trial period demonstrated her closed mind and inflexible approach. Had Mrs Leeke undertaken a trial period and then refused the role, I would have been more amenable to the suggestion that her refusal was reasonable. She would have then been able to base her concerns on real, as opposed to not well founded and in any event heavily influenced objections.

117. As all Claimants unreasonably refused alternative work, their claims for contractual and statutory redundancy payments fail and are dismissed.

#### Unfair dismissal

118. The Respondent has established that there was a potentially fair reason for dismissal, namely redundancy. The Claimants sought to challenge this during the hearing stating that their redundancies were a sham and that they were unnecessary. However, I conclude that the Respondent has established that there was a consolidation of three Trust HR functions into one and this reorganisation led to a resulted in the redundancies.

119. When considering whether the Claimants dismissals were fair and reasonable in all the circumstances I considered the guidance in Williams v Compair Maxam. As far as the particular issues raised in the case I conclude as follows:

- 119.1 It is evident that the Claimants did not respect the professionalism of Ms Foulkes, and between themselves, they questioned her integrity. This negatively affected the extent to which they were prepared to engage with Ms Foulkes and assist in creating the optimal structure going forward. The Claimants, who were very experienced and directly affected, were very well placed to make observations and suggestions but did not do so at the time. Before me they were able to eloquently and credibly advance possible gaps and further consideration necessary for the best structure. However, they did not do this at the time. The Claimants remained unhappy at the decision that was taken to impose an embargo on re-banding during the restructure and also focused on administrative and typographical mistakes made by Ms Foulkes during correspondence to justify their disquiet.
- 119.2 The Claimants focus on the level that they worked was not relevant to the fairness of their dismissals. The Claimants were offered ringfenced interviews regardless of their grade and Ms Foulkes lifted the embargo and re-banded their roles following it being pursued by the Claimants.
- 119.3 There was a fair consultation process, collective consultation with Unions and Staff side and individual consultation meetings with the Claimants. The Claimants did not properly engage.
- 119.4 The Senior HR Lead role offered was suitable and the Claimants were unreasonable in refusing it.
- 119.5 The offers of the Senior HR Lead role were genuine. Phase 2 of the reorganisation was brought forward with the specific intent to maintain the skills of the Claimants in the Respondent. There was also a need to ensure that large redundancy payments were not paid out if this could be avoided and the creation of the suitable alternative role was to facilitate these objectives which were set out in Agenda for Change.
- 119.6 Roles outside Broomfield Hospital were not suitable for the Claimants. The interim Head of HR role was created on 27 November 2017 following the Claimants refusal to accept the Senior HR Lead role. This was a suitable alternative role for Mrs Stewart and Mrs Leeke. Mrs Stevenson chose to take up employment elsewhere before this date.
- 119.7 There were delays and mistakes made in the communication from Ms Foulkes and Ms Hussey to the Claimants. This had no impact on the fairness of the redundancies.
- 119.8 It was not outside the band of reasonable responses for the Respondent to place the Claimants on long, 12 week notice, of termination instead of placing them at risk following the end of the consultation period. This

provided ample time for the Claimants to be offered suitable alternative work, which proved to be the case.

119.9 The Claimants points were all fully considered at the appeal. There was no impact on the fairness of the dismissals by the appeal outcome.

119.10 The Claimants had not followed up their changes on the job description for the Senior HR lead role prior to their dismissals. Ms Foulkes had stated at meetings to discuss this that she would have been prepared to make changes.

Mrs Stevenson

120. Given my conclusions above, the Respondent informed and consulted with Mrs Stevenson and offered her suitable alternative work to avoid dismissal. Mrs Stevenson had a job elsewhere and took it.

121. Mrs Stevenson's criticisms of Mrs Foulkes do not impact on the fairness of the dismissal. Redundancy can be a stressful process and the need for flexibility and cooperation is necessary to reduce the stress. Mrs Stevenson was aware that she had the support of Ms Hunt and Ms Panniker and when she raised concerns these were properly dealt with.

122. I therefore conclude that Mrs Stevenson's claim for unfair dismissal fails and is dismissed.

Mrs Stewart

123. The Respondent informed and consulted with Mrs Stewart and offered her suitable alternative work to avoid dismissal. Mrs Stewart had a job elsewhere and took it.

124. Mrs Stewart's criticisms of Mrs Foulkes do not impact on the fairness of the dismissal. Mrs Stewart was aware that she had the support of Ms Hunt and Ms Panniker and when she raised concerns these were properly dealt with.

125. The interim Head of HR role was a role that Mrs Stewart could have done, it would have been reasonable for the Respondent to have specifically offered it to her and Mrs Leeke prior to dismissal. However, Mrs Stewart was aware of the role and did not apply for it. Given that Mrs Stewart had secured another job outside the Trust and that one of her focus points was to receive a large redundancy payment. I conclude that this procedural failure by the Respondent had no impact on the fairness of the dismissal and that her dismissal would have occurred in any event.

126. I therefore conclude that Mrs Stewart's claim for unfair dismissal fails and is dismissed.

Mrs Leeke

127. The Respondent informed and consulted with Mrs Leeke and offered her suitable alternative work to avoid dismissal. Mrs Leeke decided against accepting this or undertaking a trial for it.

128. Mrs Leeke did apply for the band 8d role and attended for interview and made enquiries for other roles across the Trusts. Mrs Leeke was demonstrating that she wished to remain in employment with the Respondent. However, there were limited roles of interest to Mrs Leeke.

129. Mrs Leeke was not made fully aware of all the roles available at Broomfield, there were communication failures made by the Respondent due in part to the Ms Hussey not being based at Broomfield and having some time off during the notice period.

130. Mrs Leeke's criticisms of Mrs Foulkes do not impact on the fairness of the dismissal. Mrs Leeke was aware that she had the support of Ms Hunt and Ms Panniker and when she raised concerns these were properly dealt with.

131. The interim Head of HR role was a role that Mrs Leeke could have done and it would have been reasonable for the Respondent to have specifically offered it to her and Mrs Stewart prior to dismissal. Mrs Leeke was aware of the role and did not apply for it. Mrs Leeke wished to remain employed by the Trust. She was conflicted in being able to accept the Senior HR Lead role. If she had been specifically offered the interim Head of HR role there is a chance that she may have accepted it.

132. I therefore conclude that Mrs Leeke's claim for unfair dismissal on this procedural ground, succeeds.

133. In order to continue working in the Respondent, Mrs Leeke would have had to put aside her concerns about continuing to work with Ms Foulkes. Further Mrs Leeke did not apply for the interim Head of HR role, even though she was aware of it. I therefore conclude that if the interim Head of HR role had been offered to Ms Leeke there is a 50% chance that she would have refused it. As such there is a 50% chance that the dismissal would have occurred if the Respondent had acted reasonably and offered her this role prior to her dismissal.

134. I also considered whether Mrs Leeke contributed to her dismissal by her conduct. I conclude that Mrs Leeke's failure to accept the Senior HR Lead role and her failure to undertake a trial period for the role was culpable. I assess this as a 50% contribution. Mrs Leeke's financial remedy will be adjusted to reflect this.

### **Remedy hearing**

135. The remedy hearing in respect of the Mrs Leeke's successful claim will take place on 1 and 2 August 2019.

136. Mrs Leeke is ordered to provide to the Respondent by **23 July 2019**:

136.1 A witness statement in relation to remedy sought and the attempts she has made to find alternative work; and

136.2 An updated schedule of loss outlining the sums claimed

137. Mrs Leeke is ordered to bring 4 copies of these documents to the remedy hearing.

Employment Judge Burgher

16 July 2019