



# EMPLOYMENT TRIBUNALS

BETWEEN

**CLAIMANT**

**V**

**RESPONDENT**

Ian Akin

Central and North West London NHS  
Foundation Trust

**Heard at:** London South  
Employment Tribunal

**On:** 23 January 2020

**Before:** Employment Judge Hyams-Parish (Sitting alone)

**Representation:**

**For the Claimant:** In Person

**For the Respondent:** Ms K Fudakowski (Counsel)

## JUDGMENT

The Claimant was dismissed by reason of redundancy and is therefore entitled to be paid a redundancy payment.

The Respondent is ordered to pay the Claimant a redundancy payment of £30,962.64.

## REASONS

### Claim

1. By a claim form presented to the Tribunal on 14 November 2018, the Claimant brings a claim for a redundancy payment and constructive dismissal. There is no claim for unfair dismissal and the only monetary award that the Claimant is seeking is the redundancy payment that he would have been paid by the Respondent had they made him redundant.

2. The decision in this case was given at the hearing on 23 January 2020, with oral reasons. These written reasons are provided at the request of the Respondent.

**Legal issues**

3. At the outset of the hearing, I identified and canvassed with the parties, certain questions I needed to answer in order to determine the Claims. These are set out below and were agreed by the parties:
  - a. Was there a fundamental breach of contract on the part of the Respondent that repudiated the contract of employment?
    - i. Did the Respondent breach an express term in the contract?
    - ii. Did the Respondent, without reasonable and proper cause, conduct its business in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?
  - b. Did the employer's breach cause the employee to resign?
  - c. Did the employee delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal?
  - d. Was the reason for dismissal the fact that the Claimant was redundant?
    - i. Did the requirements of the Respondent for employees to carry out work of a particular kind, cease or diminish or were they expected to cease or diminish?
  - e. Should the Claimant be denied a redundancy payment?
  - f. Did the Claimant act unreasonably in refusing suitable alternative employment?
    - i. Was the new job suitable as an alternative?
    - ii. Was the refusal of the new position unreasonable?

**Findings of fact**

4. The Respondent is an NHS foundation trust providing a range of mental health, addiction, eating disorder, sexual health, community health and learning disability services across sites and community settings predominantly in London.

5. The Claimant started work with Surrey Primary Care Trust as a sexual health nurse on 4 June 2007 and began working in the HIV outpatient's clinic within six months of joining, as he had acquired post registration qualifications in HIV care, together with acute hospital experience in this field.
6. The Claimant was promoted to the role of HIV nurse specialist in June 2008 at pay band Grade 6. As the job developed, the Claimant took on roles assisting patients and local trusts (such as East Surrey Hospital) visiting newly diagnosed inpatients, counselling at antenatal screening, as well as managing the outpatient HIV clinics at Earnsdale in Redhill.
7. In 2015, the Claimant took on additional work as an HIV research nurse for a year and had an article published in 2016 along with consultant, Dr Usha Natarajan, on an unusual HIV presentation.
8. The Claimant met all professional requirements and standards to keep his practice up to date in HIV care and in 2017 studied for a professional qualification allowing him to prescribe HIV medication to allow patients better access to treatment. The majority of study the Claimant undertook to maintain his professional registration was in the field of HIV care and he is listed in the HIV specialist nurse directory for the South Thames region.
9. I accept that the Claimant's role as an HIV specialist is a complex one, requiring specialist knowledge and skills that other nurses he worked with at Earnsdale did not have, for example, informing patients of their HIV diagnosis and supporting them emotionally and practically through what was a challenging time for them.
10. During his employment, the Claimant managed a cohort of patients, requesting and interpreting specialist investigations, discussing and prescribing HIV treatments and dealing occasionally with end-of-life care. He acted as a resource for both patients, community groups and colleagues. He took part in a weekly HIV multi-disciplinary meeting where complex cases would be discussed, and his opinion was sought on particular cases. He was a source of knowledge, had become an expert in his field and was respected by colleagues as such.
11. The Claimant undertook this role at Earnsdale clinic in Redhill and his colleague, Ruth Simm, undertook the same role at another clinic in Guildford, albeit she was a Grade 7 nurse. The Claimant said in evidence, and I find as fact, that the Claimant was performing everything that Ms Simm did as part of her role notwithstanding that she was a Grade 7. However, I accept what the Claimant said in evidence, which is that pay had never been a priority for him and therefore he did not pursue or take up the pay difference between him and Miss Simm or the fact that they were on

different pay grades. Indeed, the importance of the distinction between Grade 6 and 7 was only later to take on significant importance, as we shall see later.

12. On 1 April 2017, the Claimant's employment transferred to the Respondent, the Respondent having won a competitive tender for the service in which the Claimant worked, from Virgin Care.
13. It is important to say at this point that the Claimant's contract of employment could not be located by the Claimant or the Respondent for the purposes of these proceedings and therefore was not before me. I could therefore not look at the contract and consider an express term relating to the Claimant's job title and role. I therefore had to consider what the witnesses said about this.
14. The Claimant was quite clear as to the role that he was performing up to the transfer of his employment to the Respondent and produced a name badge confirming his job title as HIV specialist nurse. I also considered what the Claimant said about his role in the years leading up to the transfer. I found the Claimant to be a genuine and credible witness who spoke honestly about his role which he felt passionate about. He said that up to the transfer he was performing an HIV specialist role for 55-60% of his time. I had no reason to doubt this or what has been said already about the role the Claimant performed from the time he started in 2007. I concluded that what the Claimant said about his role was true.
15. Whilst there was no contract for the Claimant during these proceedings, a job description was found (produced by Virgin Care) which said that the post title was Sexual Health Nurse Practitioner (HIV). The Respondent attempted to argue that the Claimant was performing another role identified on a structure diagram found on page 1 of the said job description, called Sexual Health Nurse Practitioner (Integrated Contraceptive, GUM, HIV and Health Advisors). The Claimant denied that this more general role was his job, not least because contraception was not something he was qualified to do. He also produced a name badge which said, "Specialist Nurse". It did not mention HIV because the Claimant said that patients did not like it because it potentially disclosed to others that they were seeing a HIV nurse. I also noted that on the emails in the hearing bundle from the Claimant that he is described as "HIV Nurse".
16. Again, on the evidence I had little difficulty finding as fact that the Claimant was an expert in HIV with the Respondent and performed a specialist role as outlined in the job description referred to above.
17. Likewise, I accept what the Claimant said about his role with the Respondent. He accepted that the specialist work in HIV reduced with the Respondent to about 35%. He was not happy with it but that is the situation

he faced. This meant that he spent two days a week performing his specialist HIV role. I accept the Claimant's evidence that he was not simply doing admin on the Thursday and that he was seeing patients as part of a normal clinic. I also conclude that it is entirely possible, as the Claimant suggests, that the coding used to produce the document at page 324 of the bundle does not accurately describe the percentage of time devoted to HIV work. There were only two witnesses in this case, Mr Tucker and the Claimant. I accept that 35% of the Claimant's time was devoted to specialist HIV work and that broadly accords with the document at page 324 which shows the Claimant spent two days on HIV duties.

18. Turning now to the specific events leading to the end of the Claimant's employment. In December 2017 the Respondent produced a consultation document headed "*Consultation on proposals to reorganize services to implement the final service model for integrated Sexual Health and HIV services in Surrey*". This came about mainly for two reasons: firstly, at the time the Respondent won the Virgin care contract which resulted in the Claimant transferring to the Respondent's employment, it also won two other contracts. This clearly resulted in the Respondent looking at how it should best provide its services and resulted in a reorganisation. Secondly, specifically relating to HIV, I heard that the treatment of HIV has evolved and developed over the years such that the way the Respondent cares for HIV patients has also changed. Medication and care can now be provided in other ways which do not rely on the traditional model of patients having to attend a clinic all of the time.
19. A number of group meetings were held with staff during which feedback to the proposals was given. It is clear that the proposals envisaged, and did in fact lead to, 19 members of staff being made redundant.
20. The original plan envisaged that the HIV service to patients would be provided by two medical consultants and two HIV nurse prescribers. Whilst the Claimant gave feedback during the group and one individual consultation meeting on 20 December 2017, he had felt that as there were two HIV specialists at that time, and the Respondent was proposing to have two HIV specialists going forward, that his position would be safe. During the individual consultation, the Claimant stated that he would like to be considered for a HIV specific role and he raised the fact that historically within the organisation there were discrepancies between the job bandings, such that people were being paid different salaries when they were doing the same or similar job.
21. By 22 February 2018, a final consultation document was produced, and it immediately became apparent to the Claimant that there was a significant change to the plans because the Respondent now only envisaged one HIV nurse being employed on a 0.5 basis and operating at Grade 7.

22. The Claimant wrote to Donna Green on 26 February 2018 expressing his unhappiness at the new proposals and he received a response from Mr Tucker on 27 February 2018. In this email Mr Tucker gave reasons for the change and indicated that as the Claimant was a Band 6 Nurse that he would be included in the ring-fenced pool for a competitive selection interview for a senior staff nurse, Band 6 role, this role being closely aligned, in Mr Tucker's view, to the Claimant's role. The correspondence continued with a further email from the Claimant, again expressing his disappointment and unhappiness at the decision and he received an email from Mr Tucker on 30 April 2018 referring the Claimant to a previous response and inviting the Claimant to use the grievance procedure.
23. At the end of April, the Claimant received a letter inviting him to an interview for a Band 7 post. I accept that he thought he was being invited to interview for the HIV Band 7 post and that it only became clear at the end of the interview that what he was being interviewed for was a combined Contraception/Sexual Health nurse role at Band 6. When the error and misunderstanding became apparent, the panel apologised for the error and advised the Claimant to contact HR. I accept the account of the interview as given by the Claimant. He was the only witness at this hearing that attended the interview and his account is consistent with an email which he sent to Jeval Leconte on the day of the interview and then to Mr Tucker on 15 May 2015 in which the Claimant takes issue with Mr Tucker's understanding about what happened at that interview.
24. Despite this, the Claimant received a letter on 25 May 2018 informing the Claimant that he had been successful at interview and was offered the role. The role offered was described as Sexual Health Nurse Practitioner (GU/HIV) at Band 6 yet it was clear from the evidence before me that the new role would not involve any HIV work for the Claimant. In addition, it involved contraceptive work which the Claimant says he had never done and would need to qualify for; and it involved seeing females when his work previously had involved male patients.
25. There followed correspondence about flexible working but there was confusion about whether the Claimant's email was specific to the role which he had been offered, or whether he had simply been responding to a general email from Jillian Doran asking all employees to put in any requests for flexibility. In any event, I accept that the principal reason why the Claimant did not accept the alternative post was because it was not a specialist HIV post, he would not be seeing HIV patients under the new role and that he was being asked to do a job he was not qualified to do. Whilst the opening times were a concern for the Claimant, I find that this was not the main driver in his decision to not accept the post.
26. On 29 June 2018 the Claimant wrote to Mr Tucker confirming that he was unable to accept the new post. On 09 July 2018, Mr Tucker wrote back to

him in which he said, "*Whilst I accept that you have a strong desire to continue to treat HIV patients, there is no post available at your grade delivering that service in the new model*". He goes on to say that he considered the new post a suitable alternative post and outlined the right to appeal.

27. The Claimant did in fact appeal. As part of the appeal process, Mr Tucker presented a management report. In that report, I note that Mr Tucker described the Claimant's role as Sexual Nurse Practitioner (GU/HIV) and referred to a job description as an appendix. This is somewhat confusing as the only job description in the bundle of documents is a job description which provides a job title "*Sexual Health Nurse Practitioner (HIV)*". The appeal was heard by Service Director, Sexual Health and HIV Services, Mark Maguire. I note in the letter a statement by Mr Maguire which states "*you had accepted reluctantly that your role no longer existed*". Having summarised the evidence, Mr Maguire said he had reached the conclusion "*that it was a reasonable management instruction to offer you a post at the same grade, within the same broad specialty*".
28. The Claimant's employment came to an end on 31 August 2018, the Claimant having agreed to stay on to perform an orderly hand over.

### **Legal principles**

29. Section 135 of the Employment Rights Act 1996 ("ERA") provides a right to a redundancy payment in circumstances where an employee is dismissed by reason of redundancy.
30. It is therefore clear that I need to be satisfied, firstly that the Claimant was dismissed, and secondly that he was dismissed by reason of redundancy.
31. Section 136(1)(c) of the ERA provides:

***(1) .....an employee is dismissed by his employer if (and only if)—***

***(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.***

32. In order to claim constructive dismissal, the employee must establish that:
- there was a *fundamental breach* of contract on the part of the employer that repudiated the contract of employment;
  - the employer's breach *caused* the employee to resign; and
  - the employee did not *delay* too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

33. The breach may be of an express or implied term in a contract. Where the term is the implied term of mutual trust and confidence, the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
34. A breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer that cumulatively amount to a repudiation of the contract.
35. Section 139 of the ERA contains the definition of redundancy and s.139(1)(b) is the part of that section which is relevant to this case. It states that there is a redundancy situation where the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they are employed, have ceased or diminished. This covers three separate situations:
- where work of a particular kind has diminished, so that employees have become surplus to requirements;
  - where work has not diminished, but fewer employees are needed to do it, either because:
    - the employees have been replaced by, for example, independent contractors or technology;
    - because of a reorganisation which results in a more efficient use of labour;

**Submissions by the parties**

36. Before reaching my decision, I considered carefully the submissions by the parties.

**Analysis, conclusions and associated findings of fact**

*Was the Claimant dismissed?*

*Was there a fundamental breach of contract on the part of the employer that repudiated the contract of employment?*

37. As I have made a finding that the Claimant was employed as a HIV Nurse Specialist and that he did in fact perform that role for a significant proportion of his working week, I accept that these were terms of his contract. Over a significant number of years', he had performed that specialist role and that had become his job. It is unfortunate that there is no contract in existence



but notwithstanding this, I feel able to reach that conclusion on the evidence. To take away that role and that ability to be a specialist in his field, and therefore to lose that status as a HIV specialist, only to replace it with a more general sexual health role is, in my view, a fundamental breach which goes to the root of the contract.

38. Whilst the Respondent has drawn my attention to a flexibility clause contained in a document produced by Virgin Care, there is no evidence satisfying me that this had contractual effect.
39. Further, I conclude that the Respondent breached the implied term of mutual trust and confidence. In reaching that conclusion I have taken into account all of the evidence but particularly the following:
  - a. Imposing the new post on the Claimant had the effect of de-skilling him as an HIV specialist. I find that there was a lack of acknowledgment on the part of the Respondent of the effect of this on the Claimant, even at appeal where the issue simply seems to have been swept aside. The Respondent does not seem to acknowledge that the Respondent is an HIV specialist, and this appears to have infected the way in which they dealt with the Claimant. There was no attempt to discuss with the Claimant how he might maintain his skills and expertise.
  - b. There can be little doubt that the process of interviewing the Claimant for the alternative post was flawed. Accepting that there were errors and that mistakes do happen, there was no active attempt to consult with the Claimant after the interview. Indeed, despite it being clear that there was a clear discrepancy between what the panel thought they were interviewing for and what the Claimant thought he was being interviewed for, at least up to the end, he received a letter offering him a post without any conversation with him. It was put to the Claimant that he could have made attempts to have a meeting with Mr Tucker, but in these circumstances, I find that the Respondent should have done more to discharge its duties to consult the Claimant prior to offering him a post he says he was not qualified to do and which completely changed his role and status as an HIV specialist.
  - c. There was no consideration given to whether the Claimant was in effect operating at a Grade 7 which would have opened up the possibility of him being interviewed for the HIV post. I reject the assertion that because he was a Grade 6, he could not be considered for it. If his grade did not accurately reflect the job he was doing, which is a point that the Claimant raised, it was unreasonable for the Respondent not to properly consider it.

d. At the appeal, the appeal officer did not appear from the letter to deal with the essential parts of the complaint. Indeed, the letter is brief, rationale for the decision is not clear, and there are not minutes to the meeting.

40. I therefore conclude that the Respondent did not conduct itself reasonably and that this was likely to, and did, seriously damage the trust and confidence between the Claimant and his employer.

41. I conclude that these were the reasons for the Claimant's resignation. I do not find that the Claimant delayed, such that he affirmed the contract, notwithstanding the breach. Indeed, this is not a point taken by the Respondent.

42. For the above reasons I find that the Claimant was constructively dismissed.

*Was redundancy the reason for dismissal?*

*Did the requirements of the Respondent for employees to carry out work of a particular kind, cease or diminish or were they expected to cease or diminish?*

43. I conclude that the requirements for there to be two HIV nurse practitioners had diminished, such that under the new model they would only need one person performing a 0.5 role. On the evidence before me, two nurses were no longer required to provide the service. In those circumstances, there appears to be little doubt that the definition of redundancy is satisfied. I do not accept that moving some duties to a consultant should affect this conclusion. It appears to be accepted in the documents provided by the Respondent as referred to above, including the appeal outcome, that the Claimant's role had disappeared. I conclude that the reason for the Claimant's dismissal was therefore that he was redundant.

*Did the Claimant act unreasonably in refusing what the Respondent suggested was suitable alternative employment?*

32. In these particular circumstances, where the Claimant had achieved specialist status in the field of HIV, and he was asked to take on a role that had no HIV work at all, I conclude that the alternative post was not suitable. Further, and principally for those reasons, I do not consider that the Claimant acted unreasonably in accepting it. Potentially he would have lost all of the experience and expertise that he had built up over a number of years. He was effectively being asked to start again, undertake training to become qualified to work in contraceptive medicine and care, and in those circumstances, it was reasonable for the Claimant to refuse that post in the hope of securing an HIV post elsewhere which is in fact what happened.

33. For all of the above reasons, it is my conclusion that the Claimant was dismissed because he was redundant, and he is therefore entitled to a redundancy payment. His claim is therefore well founded and succeeds.
34. The Respondent is therefore entitled to be paid a redundancy payment of 30,962.64.

.....  
**Employment Judge Hyams-Parish**  
**12 March 2020**

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