



EMPLOYMENT TRIBUNALS

Claimant: Miss Z Charlesworth
Respondent: Walsingham Support
On: 31 March 2021
1 April 2021
22 April 2021
11 and 26 May 2021 (in Chambers)
Before: Employment Judge McAvoy News

Appearances:

For the Claimant: Mr P Kerfoot, Counsel
For the Respondent: Mr A Watson, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not well-founded and is dismissed.
2. The Claimant's claim for automatically unfair dismissal is not well-founded and is dismissed.
3. The Claimant's claim for a statutory redundancy payment is not well-founded and is dismissed.

REASONS

Background and issues

1. This has been a remote hearing which has not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. An agreed list of issues was provided at the outset of the hearing. It was agreed that the purpose of this hearing would be to determine liability alone; a separate remedy hearing would follow if necessary. The agreed issues were as follows:

Unfair dismissal

3. What was the reason for the Claimant's dismissal?
4. Was the reason for dismissal a potentially fair reason within the meaning of s.98(2) Employment Rights Act 1996 ("ERA")? The Claimant argues redundancy or alternatively the TUPE Transfer (as defined later); the Respondent argues some other substantial reason. This requires consideration of the following:
 1. Had the requirements of the Respondent's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
 2. If the answer to 4.1 is yes, was the Claimant's dismissal wholly or mainly attributable to that state of affairs?
 3. If the answer to 4.2 is yes, the Claimant was dismissed by reason of redundancy.
 4. If the answer to 4.1 or 4.2 is "no", was the sole or principal reason for the Claimant's dismissal the TUPE transfer which took effect on 1st July 2019?
 5. If the answer to 4.4 is "yes", the Claimant's dismissal is automatically unfair under reg.7(1) TUPE Regs 2006 ("TUPE").
 6. If the answer to 4.4 is "no", was the sole or principal reason for the dismissal an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after the 1st July 2019 TUPE transfer?
 7. If the answer to 4.6 is "yes", then the dismissal will be regarded as for some other substantial reason under reg.7(3)(b)(ii) TUPE Regs 2006.
 8. If the answer to 4.6 is "no", was the reason for the Claimant's dismissal nonetheless some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held?
 9. If the answer to 4.8 is "yes", the reason is some other substantial reason; if the answer is "no", the Respondent has failed to prove a potentially fair reason for dismissal and the Claimant's dismissal is therefore unfair.
5. If the reason for dismissal is either redundancy or some other substantial reason justifying dismissal, did the Respondent act reasonably in treating the reason as a sufficient reason for dismissing the Claimant? The Claimant does not put forward a positive case that the Respondent acted unreasonably in dismissing the Claimant within the meaning of s.98(4) ERA 1996.
6. If the Claimant's dismissal was unfair under s.98(4), what compensation is she entitled to, taking into account in particular the following questions:

1. Would the Claimant nonetheless have been dismissed anyway but for any unfairness which the Tribunal has found (and, if relevant, what is the percentage chance of this occurring)?
2. Did the Claimant contribute to her dismissal through her own blameworthy conduct?

Statutory redundancy payment

7. Had the requirements of the Respondent's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
8. If the answer to 7 is yes, was the Claimant's dismissal wholly or mainly attributable to that state of affairs?
9. If the answer to 8 is yes:
 1. Did the Respondent make an offer to re-engage the Claimant under a new contract of employment within the meaning of s.141(1)(b) ERA 1996?
 2. Is s.141(3) ERA satisfied, i.e.: would the provisions of the renewed/new contract as to (i) the capacity and place in which the Claimant would be employed and (ii) the other terms and conditions of her employment not differ from the corresponding provisions of the previous contract; or would they differ but in circumstances such that the offer constitutes an offer of suitable employment in relation to the Claimant?
 3. If so, did the Claimant unreasonably refuse the offer, such that she is not entitled to a redundancy payment under s.141(2) ERA 1996?
10. If the answers to 9.1 and 9.2 are "yes" and the answer to 9.3 is "no", the Claimant is entitled to a redundancy payment.
11. The Claimant was no longer pursuing a claim for breach of contract in respect of her alleged entitlement to an enhanced redundancy payment. This claim had previously been withdrawn but not dismissed.
12. During submissions, the Claimant sought to expand her claim beyond the above as follows:
 1. There was a redundancy situation as defined in s. 39(b)(ii) ERA in that the requirements of the Respondent's business for employees to carry out work of a particular kind in the place where the employee was employed by the Respondent had ceased or diminished or were expected to cease or diminish; and
 2. In respect to issue (5) above, under Regulation 4(5) of TUPE, the Claimant's consent was required before the Respondent could vary the terms of her employment. The changes were therefore void under Regulation 4(5) of TUPE. Additionally, the Respondent did not follow a fair redundancy process prior to the Claimant's dismissal. These points

were relevant to the Tribunal's assessment under section 98(4) of the ERA.

13. The Respondent objected to the Claimant's claim being expanded in this way at this very late stage and consequently I invited the Claimant to make an application for permission to amend her claim. The Claimant did not wish to do so and therefore the issues in the Claimant's claim remained as summarised in paragraphs 3-10 above.

Evidence

14. The Claimant served a witness statement and was cross examined on that statement. On behalf of the Respondent, Laura Parker (Head of Operations and Development), Allison Alford (Project Manager/Dismissing Manager) and David Byrne (Head of Operations and Development – Southern Region/Appeal Manager) served witness statements and were cross examined on those statements.
15. I also had sight of a bundle of documents containing 394 pages together with a small amount of documents provided immediately before and during the course of the hearing.
16. Having considered the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities.

Findings of fact

Background

17. The Claimant started her career in Nursing as a Nursing Assistant in 1986, working for Barnsley NHS. She was a Student Nurse in 1988 and qualified in 1991. Since then the Claimant was a Staff Nurse and, more specifically, a qualified Learning Disability Nurse.
18. Since April 2011 the Claimant was employed by Rotherham, Doncaster and South Yorkshire NHS Foundation Trust (RDASH). At the time of her dismissal, the Claimant was based at the Gardens Lane service.
19. The Claimant's period of continuous employment commenced in July 1986. Under the NHS Agenda for Change Terms, if the Claimant's role was redundant, she would have been entitled to an enhanced redundancy payment.
20. The Respondent is a registered charity which provides support for people with learning disabilities, autism, brain injuries and complex needs.

Staff Nurse role v Deputy Manager role

21. A comparison of the Staff Nurse and Deputy Manager roles are significant to the conclusions I have reached in respect of this case and, therefore, I have addressed my findings in this regard first.
22. Several of the Claimant's contracts of employment with RDASH refer to her role as being "Staff Nurse". However, one contract, dated 23 July 2013, refers to her role as being "Staff Nurse/Team Leader" [62]. This contract of employment also stated: *"You will be based at Rotherham Registered Homes (Cranworth) but you may be required to carry out the duties of your employment in any part of the Trust or the premises from which its services are delivered"*.
23. Immediately prior to the TUPE Transfer (defined later), the Claimant was employed as a "Staff Nurse – Band 5". In accordance with her Job Description for this role, she reported to the Locality Manager / Registered Manager. At the material time, this would have been the Manager for Gardens Lane.
24. There was another Band 5 role within RDASH's structure. This was referred to during the hearing as Deputy Manager and Deputy Team Leader inconsistently. The Claimant contended that this role was a different role to her own, notwithstanding the same banding. She explained that this role was more management focused than her own and, if she ever wanted to undertake this role, she would need to apply for it.
25. However, a comparison of the job descriptions and consideration of the evidence given during this hearing suggests this was not the case.
26. According to the job description for the Staff Nurse role, two of the four key aspects of this role involved *"support[ing] the Locality Manager / Supported Living Manager / Registered Manager in the day to day management of the home"* and *"to routinely manage shifts delegating duties accordingly to junior members of staff"* [66]. Within this job description are 18 principal responsibilities relating to management. Additionally, the job description stated that the Claimant's role was to *"ensure each service user receives care and support to meet their individual needs by undertaking a named nurse role for a specific number of service users"* and to *"assist the Locality Manager / Supported Living Manager / Registered Manager to promote a caring and supportive environment for the service users"*. During cross examination, after questioning the Claimant on these four key aspects of the job description, the Respondent put to the Claimant that the Staff Nurse role was primarily a management role to which the Claimant replied, *"yes – considering these 4 points – but they were not 25% each"*. After further questioning of this point, the Respondent put to the Claimant that her role was not focused on the primary delivery of care but on supporting those people that do this work, to which the Claimant replied, *"yes agree"*.
27. Prior to the TUPE Transfer (considered later), the Respondent reviewed the relevant job descriptions and considered the RDASH Deputy Team Leader and Staff Nurse roles to be the same. An internal job mapping process was undertaken which indicated that these roles mapped across substantially to

the Respondent's Deputy Manager role. Ms Alford initially undertook this job mapping exercise and found the similarity to be in the order of 60%. After a more detailed job mapping exercise was undertaken by the Respondent's Development Officer the similarity was found to be 74%.

28. As part of this more detailed job mapping exercise, the Respondent considered each item on one job description and considered whether that task or responsibility was replaced in the other. The Staff Nurse job description was mapped against the Deputy Manager position and then vice versa. The Respondent accepted that it did not speak to the Claimant to ascertain whether the Staff Nurse job description reflected the work which the Claimant undertook. However, the Claimant accepted in cross examination that she believed that it did and no concerns regarding the use of the Staff Nurse job description were raised by the Claimant or her trade union during the consultation process (considered later).
29. The Claimant also raised a number of complaints regarding the job mapping exercise used by the Respondent during the course of the hearing. These included the weightings applied to the specific duties. However, the Claimant accepted in evidence no complaint was made about this job mapping exercise at the time.
30. During cross examination, the Respondent questioned the Claimant about similarities between the RDASH Staff Nurse and RDASH Deputy Team Leader job descriptions. The Claimant accepted that there were similarities between the principal responsibilities for both roles. Upon further questioning about the similarities between these two roles the Claimant replied, "*I have not compared one to another*". The Respondent reminded the Claimant that Ms Alford had previously raised, during the internal process mentioned later in these Reasons, that the roles of RDASH Staff Nurse and RDASH Deputy Team Leader were "*virtually identical*", that the Claimant was given an opportunity to respond and the Claimant did not provide any explanation why the roles were different. In response the Claimant said, "*It doesn't work like that that, I can't remember*". The Claimant maintained that she considered the RDASH Deputy Team Leader role to be more senior than her RDASH Staff Nurse role but accepted that she did not raise this during the consultation process. Furthermore, the Claimant did not clearly explain these differences, despite having an opportunity to do so, during the course of this hearing.
31. The Claimant stated in evidence that her role as a Staff Nurse for RDASH was clinical in nature and whilst she did not have the full range of clinical skills that a general Staff Nurse would have, she was required on a daily basis to use her judgement to assess the health and wellbeing of the people that she cared for. By way of example, the Claimant said this could include administering treatment herself (where she had been trained to do so) or referring the service user onto the relevant professional. Looking at the Claimant's Staff Nurse job description, there are 19 principal responsibilities relating to service user care and support. However, many of these responsibilities involve ensuring that service users are provided with the appropriate care and support, as opposed to providing such care and support herself. During cross examination the

Respondent put to the Claimant that the vast majority of these responsibilities were supervision or managerial in responsibility which the Claimant agreed to.

32. The main responsibility on the Claimant to provide such care herself was to *“undertake the role of “Named Nurse/Key Worker” and use the written guidance available to ensure the role is fulfilled according to the service standards”* [67]. In this regard, the Respondent’s evidence was that a named Nurse is the named individual who co-ordinates the support and care provided to a patient/service user. However, that named Nurse does not need to do everything. By co-ordinating the care and support that the patient/service user is receiving, they are managing their care provision.
33. The Respondent asked the Claimant to be specific about the nature of the “clinical” work undertaken at RDASH to which the Claimant replied, *“when working for the Respondent, with minor injuries or small cuts I had to complete a RADAR and send to a different manager. I could have treated minor injury myself. This didn’t need to be referred. I would deal with small cuts and abrasions myself prior to the transfer”*. The Claimant later explained that this would involve putting a dressing/plaster on the cut or abrasion, that this was basic first aid and accepted that a Support Worker could undertake this as well.
34. During cross examination, the Claimant made a number of concessions regarding the “clinical” work undertaken by herself and others at Gardens Lane. She confirmed that a residential care and supported living social worker would assess the care needs of the service users, rather than herself, leading to an assessment of that service user. The Claimant accepted that RDASH did not employ her to provide Nursing care and that the Care Quality Commission (“CQC”) regulations did not require RDASH to employ a Nurse at Gardens Lane. In this regard, a CQC inspection visit took place on 26 November 2018 and was published in January 2019. As part of this, Gardens Lane was given a “residential care” status as opposed to a “Nursing care” status. As such, there was no legal requirement for RDASH to employ Nurses to work in Gardens Lane. Nevertheless, the Claimant maintained that she believed RDASH chose to employ her because she was a Nurse and they felt it was a good practice requirement to engage a Nurse at Gardens Lane. There was however no other evidence put before me supporting this belief.
35. The Claimant also said that there were aspects of the Deputy Manager role which were not part of the Staff Nurse role. This included, for example, the requirement to undertake disciplinary investigations and other people management issues. The Claimant maintained that, at RDASH, these duties would be undertaken by someone more senior than her. In respect of sleep ins, the Claimant maintained that the way in which this work would be done would be different, e.g. rather than sleeping in at Gardens Lane (which would have been the case when employed at RDASH) she was required to be “on call” from her home.
36. The Claimant alleged that if she was not a Staff Nurse she would lose her registered qualified Nurse status. To do so she would need to undertake 150 hours of clinical work which she believed was not possible when undertaking

the Deputy Manager role. The Respondent put to the Claimant that she would still be a registered Nurse if she maintained her registration, to which the Claimant agreed. The Respondent also put to the Claimant that, during the internal proceedings considered later in these Reasons, the Respondent suggested solutions that may have assisted the Claimant with this. The Claimant replied that she never found out whether the suggestions made by the Respondent were possible and that she did not contact their regulator, the Nursing and Midwifery Council (“NMC”), in order to make enquiries of her own.

37. The Claimant complained about the fact that, as a Deputy Manager, she would be required to undertake some of her duties from the Respondent’s registered office, as opposed to working from Gardens Lane exclusively. This office was 5-6 miles away from Gardens Lane. As highlighted earlier, there was a mobility clause in the Claimant’s contract of employment with RDASH. There was no clear evidence on the amount of time the Claimant would be required to spend working from the registered office. This point was not addressed in any of the witnesses’ statements. Ms Alford said that this could vary. She initially said this would be 50%/50% but then, bearing in mind the changes that the Respondent made to the Deputy Manager role during the consultation process (considered later), she approximated 70% of the Claimant’s time would be spent at Gardens Lane and the other 30% would be spent working from the office. RDASH had previously stated in its letter to the Claimant on 13 June 2019 that: *“most of your time will be based within services supporting the residents and staff”* [153].
38. The Claimant disagreed and explained that, after the TUPE Transfer, she hardly ever saw any of the management team at Gardens Lane, meaning that they were spending the majority of their time at the Respondent’s registered office. In respect of one particular manager, the Claimant said she saw her at Gardens Lane for less than 10% of her working time. However, this manager was not called as a witness and the Claimant’s evidence in this regard was not reliable. It was not contained in her witness statement, it was not put to the Respondent’s witnesses and the Claimant was unable to say how she arrived at this percentage.
39. The Respondent put to the Claimant that she was not permitted to use the service users home as an office because to do so would invade their personal space and create problems for the Respondent in respect of its registration with the CQC, to which the Claimant agreed. During cross examination the Respondent put to the Claimant that, irrespective of this, the work that she was required to undertake was the same. The Claimant initially disagreed but then said, *“All the same in effect. However, if I was a Deputy Manager I wouldn’t have spent time with those people and staff. How could I support them?”*
40. The Claimant repeatedly said during cross examination that her objections to the Deputy Manager role were the fact that this role would prevent her from being a Nurse, caring for the service users at Gardens Lane. However, the Claimant was pressed on the specific differences between the nature of the two roles in which regard the Claimant accepted there was *“lots of cross over”* and said she *“can’t go to the Staff Nurse job description and highlight the duties*

that she undertook after the transfer that were not in the Deputy Manager job description". The Respondent took the Claimant through the first six bullet points in the Deputy Manager job description [331] and asked the Claimant whether she would undertake all these duties as a Staff Nurse, to which the Claimant agreed. The Respondent acknowledged that the specific reference to being a "named Nurse" was missing from the Deputy Manager job description but put to the Claimant that this was covered under point 1, leadership and management, to which the Claimant agreed. The Claimant later accepted that, because of her objection (considered later), she did the same work that she had done prior to the TUPE Transfer for almost one year and there had been no breakdown in the provision of care to the service users.

41. The Respondent then put to the Claimant that the roles were *"fundamentally the same"* as they concerned the co-ordination and supervision of care plans for service users, to which the Claimant replied, *"they are the same but they are done in a completely different way"*.

TUPE transfer to the Respondent

42. On 14 January 2019, the Claimant was invited to a meeting arranged for 23 January 2019 to discuss the Doncaster Learning Disability Community Homes Services ("Services") Tender [109]. RDASH had reviewed the provision of care for people with a Learning Disability in Doncaster and decided that it could no longer afford to deliver the services to Doncaster Metropolitan Borough Council (DMBC) in its existing model, namely as a residential service. As such, a procurement process was initiated which led to the Respondent being appointed to run a Supported Living Service in Doncaster on behalf of the DMBC.
43. The initial due diligence undertaken by the Respondent indicated to the Respondent that job roles and structures in place within RDASH were aligned to roles recognised within the Respondent's structure. For example:
1. The role of Registered Homes Manager within RDASH aligned with the Respondent's role of Operations and Development Manager;
 2. The role of Team Leader within RDASH aligned with the Respondent's role of Locality Manager; and
 3. The roles of Deputy Team Leader and Staff Nurse within RDASH aligned with the Respondent's Deputy Manager role.
44. The Respondent's evidence was that through discussions between RDASH management and the Respondent, the Respondent learned that Staff Nurses were not undertaking clinical roles within the registered homes and had not completed tasks within the services that required clinical qualification for some considerable time. This was because, following social worker assessments carried out by DMBC between 2018 and 2019, the people living at Gardens Lane had a social care need rather than clinical needs meaning Nursing care was not required. Some "clinical" duties were undertaken by Staff Nurses, e.g., administering medication, but this could be administered by other members of staff not holding a Nursing qualification.

45. The transfer of the Services from RDASH to the Respondent did not result in any changes to the physical homes in which the service users lived except that, under the Supported Living model, the service users would hold tenancies. There were also no changes to the service users. The nature of the services provided under the Supported Living model differed from the services provided under the Residential Care model in that the Supported Living model, unlike the Residential Care model, allowed people with a disability to live independently in their own home, with an individual secure tenancy, and appropriate support and individually tailored care plans. Both models required registration with the CQC and needed to meet the requirements of the Care Standards Act 2014. However, neither model required a practising Nurse.
46. After a series of meetings it was confirmed to the Claimant in writing on 19 March 2019 that the contract to provide the Services had been awarded to the Respondent and consequently the Services would transfer from RDASH to the Respondent on 1 July 2019. It was explained a TUPE process would be taking place and that the Claimant would be represented by a Regional Unison Representative during that process [112]. No objections were made by the Claimant to the application of TUPE to this change in service provision.
47. On 17 April 2019, it was confirmed that the Claimant's employment would transfer to the Respondent pursuant to TUPE on 1 July 2019 ("TUPE Transfer"). In this letter, RDASH confirmed the dates and times for five staff briefings and formal consultation meetings taking place between 30 April and 25 June 2019. On 29 April the Respondent wrote to RDASH setting out the measures it proposed to take following the TUPE Transfer [119-121]. These included changing transferring employees' job titles [120]. On 7 May 2019, RDASH wrote to the Respondent setting out concerns that had been raised by some of RDASH's workforce connected with the TUPE Transfer. This included questions such as "will there be a full restructure?", "will there be changes to existing job descriptions?", "what do the new job descriptions look like?" "we would like copies of the job descriptions prior to the transfer" and "what does the term management structure mean and who does this involve?"
48. The Claimant said that she attended the briefings but, to begin with, she did not think that the Nurses would form part of the TUPE Transfer. As of 10 May 2019, the Claimant continued to believe this was the case as "*we kept being told that Walsingham didn't need nurses*". The Claimant's evidence was that she learned she was in scope to transfer for the first time on 15 May 2019, notwithstanding the contents of the letters mentioned above.
49. The notes of the 15 May 2019 meeting record that:
1. the Claimant's "*role as a qualified and practising clinical nurse will not be available within employment for Walsingham Support*";
 2. the Claimant's "concern that [she] will be doing a job that is not the one chosen"; and

3. the Respondent informed the Claimant that if the Claimant chose not to continue with her qualification, this would not affect her employment with the Respondent.
50. During cross examination, the Respondent questioned the Claimant about her position as presented during this meeting. It put to the Claimant that she was not open to the idea of not being a Nurse and she was concerned about the loss of her Staff Nurse job title. The Claimant replied, *"That was part of it. However, I wanted to be in a professional role, practising as a Nurse"*.
51. RDASH wrote to the Claimant on 23 May 2019 with the Respondent's answers to the questions raised earlier in the process. RDASH informed the Claimant that there would not be a redundancy situation and that the roles of Deputy and Qualified staff would be amalgamated into the Respondent's role of Deputy Manager. It was agreed that the job descriptions would be shared prior to the TUPE Transfer.
52. During a consultation meeting on 28 May 2019, it was discussed that a professional Nursing qualification was not needed for the roles at Gardens Lane. However, a discussion took place about how employees may be able to maintain their professional registration with the NMC. Ms Alford gave evidence about the fact that she was previously a registered Nurse who moved out of a hospital setting into a team leader role and maintained her professional registration in case she wished to use it again in her later career.
53. RDASH wrote to the Claimant again on 10 June 2019. In this letter it was confirmed that the Deputy Managers would be required to work from the Respondent's registered office and would "work into" the homes [141].
54. Soon before the TUPE Transfer, the Respondent asked RDASH to indemnify them in respect of claims made by three employees after the TUPE Transfer, including the Claimant. RDASH did not agree to do so.
55. On 28 June 2019, the Respondent wrote to the transferring employees, welcoming them to the Respondent. It confirmed that their employment transferred to the Respondent with effect from 1 July 2019. In that letter the Respondent stated: *"During July we are asking that managers continue managing the services "as usual" to allow the opportunity for the post TUPE consultations and to determine what operational changes need to happen as a priority"* [173]. Around 80 other former employees of RDASH transferred to the Respondent, under TUPE, at the same time.

Post TUPE transfer consultation process

56. Following the TUPE Transfer, on 19 July 2019, a consultation regarding the Deputy Manager role took place which the Claimant attended. A PowerPoint presentation stated that the role comprised the following four key elements:
 1. Providing direct management support to staff team;
 2. Working from the office base into the services;

3. Providing support during all daytime hours (8/10 * 365 days per year); and
4. Providing responsive on call out of hours (with support) [179].

57. The Claimant said that this role was very different to her role as Staff Nurse. As a Staff Nurse she was (i) only in charge in a supervisory role when no-one more senior was around (ii) based exclusively from the care home in Gardens Lane, rather than in Doncaster, and this change would remove her contact from her patients, which would in turn lead to the collapse of her professional status.

58. The notes of this consultation meeting record the Claimant raising a number of concerns regarding the changes to on call working. They also record the Claimant as saying: *“Completely stripped of nurse title. Not manager – not done cover rota – didn’t come into job to be based in office”* [199] and *“Like Support Workers, I feel we have been pushed into these roles with other things put onto us. Would not have done Deputy Manager role on Band 5”*. In respect of the requirement for the Claimant to work from the office base into the services, the notes record:

ZC: Not worked in this way. Time split between office and work base. What dictates where you spend your time?

AA: What you need to do. LP will work with you to agree those duties and requirements then you can decide where you need to be to do those tasks. Fit your diary around those tasks to complete i.e. medication audit = in service, supervisions = here in office. Does that help?

ZC: Yes, in past different system.

59. A separate consultation meeting took place which the Claimant did not attend. According to those minutes [201-208], the majority of the concerns raised related to working on call.

60. The Claimant attended a further meeting with the Respondent on 7 August 2019. The notes of this meeting record as follows:

AA: don’t need qualified nurses but need expertise/skills/knowledge
jobs matched – high level
is compatible
not purely management. Management care and support [211]

61. When asked about the clinical elements to the Deputy Manager role, the notes record that the Respondent said: *“people with complex needs moved on therefore reduction in nursing needs”* [211]. Ms Alford explained that everyone living at Gardens Lane had been assessed by social workers as needing social rather than Nursing care and therefore a supported living registration was suitable. She also explained that the role was not purely management focused and there remained a strong emphasis on care and support.

62. The Claimant attended this meeting with a document entitled: *“Reasons why I am contesting that transferring from a Staff Nurse post within the Learning Disability Community Homes Service with RDASH into a Deputy Manager role with Walsingham support is not a suitable alternative”* [212]. A summary of the Claimant’s reasons were:

1. the Deputy Manager role did not require her to be a Nurse;
2. her Staff Nurse role required her to be based on site at the care home whereas the Deputy Manager role required her to be based at the main office, travelling to other bases within the community homes service;
3. whilst she accepted that the Staff Nurse role required some managerial and supervisory duties, her role was not managerial and such duties were only undertaken in the absence of someone more senior;
4. sleep in duties would be removed and unsocial working hours would be reduced, causing a reduction in her pay and pension; and
5. she would be required to undertake “on call” duties whilst not on duty, including days off, whereas the Staff Nurse role only required these duties to be undertaken when she was on a sleep in duty.

63. On 13 August 2019, the Respondent emailed the Claimant and explained that the Staff Nurse role was not redundant meaning that the Deputy Manager role was not being identified as a “suitable alternative” in order to avoid redundancies. It stated: *“The role of LD Staff Nurse has been mapped across to a Deputy Manager role. The approach taken was to examine the tasks and responsibilities within both roles. The roles were found to be the same in substance and a high percentage match identified. This was shared as part of the TUPE consultation”* [214].

64. On 27 August 2019, the Claimant wrote to the Respondent stating that she deemed her role as a Staff Nurse as redundant and she did not consider the Deputy Manager role to be a suitable alternative. She requested that the Respondent pay her a contractual redundancy payment. She explained that the Respondent was making significant changes to her role *“in particular the removal of some of my clinical duties, removal of my status/profession along with the removal of my registration as a qualified Staff Nurse amongst others”* [219]. The Respondent replied the next day stating: *“As there is no job with “Nursing” in the title, the closest role was that of Deputy Manager. This role was reviewed and the duties confirmed as 74% the same duties, so is an appropriate role”* [218].

65. On 30 August 2019, the Respondent wrote to the Claimant to confirm that the consultation period for the Deputy Managers was extended until 15 September 2019 [220].

66. On 5 September 2019, the Respondent wrote to the Claimant to summarise the outcome of a consultation meeting which took place on 22 August 2019. It confirmed that Deputy Managers and Locality Managers would be required to be on call for one week at a time using a rolling rota that would be developed.

67. On the same day the Respondent wrote to the Claimant regarding a meeting which took place on 29 August 2019. It repeated that it did not consider the Claimant's role to be redundant, that the Staff Nurse and Deputy Manager roles were equivalent and it was consulting with her about the changes needed to the delivery of her role arising from the change from a Residential to the Supported Living Model. Ms Alford confirmed that, prior to this meeting, she had re-read the job descriptions and reviewed the job mapping exercise carried out prior to the TUPE Transfer and concluded: *"the likeness or correlation is extremely high. In accordance with the job descriptions, the roles you have performed in terms of arranging and managing care and support for people with learning disabilities have not changed significantly"* [223]. Ms Alford noted the Claimant's core objection namely that she would no longer be practising as a qualified Nurse and reiterated that the Respondent would be able to support her continued registration as a Registered Learning Disabilities Nurse by using some aspects of practice within her Deputy Manager role to demonstrate continued professional development [223-224].
68. On 11 September 2019, the Claimant's trade union representative wrote to the Respondent on behalf of the Claimant and her colleague. She stated that the Respondent was aware prior to the TUPE Transfer that no Staff Nurses function would be required as part of the new model and as Staff Nurses were not required a redundancy situation existed. She noted that the Respondent had raised a TUPE challenge with RDASH prior to the TUPE Transfer in relation to the Staff Nurse roles but that this challenge was later withdrawn [225-228]. In respect to this TUPE challenge, the Claimant noted in her witness statement that no documents had been disclosed by the Respondent concerning this. Such documents were made available to me at the outset of the hearing. These documents concern the Respondent's request for RDASH to indemnify them, as explained earlier in these Reasons.
69. On 11 September 2019 the Claimant emailed the Respondent to confirm that she did not accept the proposed changes to her Staff Nurse job role, she would continue to work to her Staff Nurse job description and would be working under protest [232]. The Claimant repeated this protest on 4 October 2019 [237]. A series of similar emails passed between the parties (including the Claimant's trade union) from that point onwards whereby the Respondent insisted that the Claimant work to the full requirements of the Deputy Manager role and the Claimant refused, insisting that her role was redundant.
70. In accordance with her Staff Nurse job description, the Claimant continued to complete her administrative duties from the care home. On 23 December 2019, the Respondent informed the Claimant that the support homes should not be used to complete administration duties and requested the Claimant do so from the Respondent's office [240-241].

Dismissal process

71. On 6 January 2020 the Respondent wrote to the Claimant referring to the above mentioned correspondence. The Respondent informed the Claimant that it was a business requirement for the Claimant to comply with the

requirements set out in her job description and stated: *“we cannot risk having a situation where any of [our] services are non-compliant with legal and regulatory requirements”* [242-243]. The Respondent explained that unless the Claimant agreed to undertake the requirements of the Deputy Manager role in full, a formal process, which it hoped to avoid, would need to be commenced. On 17 January 2020, the Claimant confirmed that she maintained her previous position [244] following which, on 29 January 2020, the Respondent wrote to the Claimant to invite her to a formal hearing to consider the termination of her employment and make an offer of re-engagement. That hearing was arranged for 4 March 2020 (but was later adjourned to 26 March 2020, 29 May 2020 and then 2 June 2020 due to the COVID-19 pandemic) and the Claimant was informed that its purpose was to consider whether it was necessary to terminate her employment and offer her re-engagement in the role of Deputy Manager. It explained that the reason for this was that, following the TUPE Transfer, the Claimant had refused to accept the Deputy Manager job role requirements fully, listing the requirements that the Claimant had refused to undertake [246]. The Claimant was informed that she had a right to be accompanied to this meeting and that its outcome might be the termination of her employment. Relevant materials were closed. It stated: *“we cannot operate a service in which an employee is not complying with the job role requirements and which is non-compliant with the legal and regulatory requirements”*.

72. On 19 February 2020, an interim consultant for the Respondent emailed the Claimant to request a meeting to offer some suggestions for changes to the Deputy Manager role that may resolve the impasse. A meeting was arranged for 28 February 2020 and, in advance of that meeting, on 27 February 2020, the Respondent confirmed the following changes to the Deputy Manager role that it proposed to discuss with her:

1. The job title would be Deputy Manager – Care; and
2. The requirement to complete/participate in On Call, Staff Recruitment, Disciplinary Investigations and Disciplinary Hearings would be removed.

73. The Respondent explained that the Claimant would need to work out of the registered office and this requirement arose as a result of the Domiciliary Care Standards. This was because the service users at the care homes held tenancies and they had private residencies; they were no longer registered care homes. The Claimant was also informed that she would need to complete all training relevant to her role.

74. The Claimant declined to attend this meeting as the above proposal did not address her concerns and consequently her position remained the same.

75. The formal hearing took place on 2 June 2020. It was chaired by Ms Alford. The Claimant attended with her trade union representative. In discussing the differences between the Staff Nurse and Deputy Manager roles during this meeting the notes record the Claimant’s trade union representative stating: *“The main difference is ZC professional qualification as a nurse. By doing the Deputy Manager role she would be de skilled. SK stated that ZC wants to be*

a nurse and when she transferred, she was transferred as a nurse" [294]. The Respondent asked the Claimant what she did in her Staff Nurse role that didn't form part of the Deputy Manager role to which the Claimant confirmed that she could make referrals to others such as speech and language and physios [301].

76. The Respondent explained that as the Claimant had refused to attend training that was considered as being essential for the role of Deputy Manager, the Respondent was in breach of its contract with DMBC and it was failing to comply with the CQC regulations. The Claimant stated that she understood that the Respondent would be in breach and replied that she would do any training required of the Staff Nurse role but not training specific to the Deputy Manager role.
77. The Respondent explained the regulatory reasons regarding the requirement for the Claimant to be based at the registered office and "work into" the home (as summarised above) which the Claimant confirmed that she understood but she maintained she was employed as a Staff Nurse rather than as a Deputy Manager [297]. The Respondent referred the Claimant to the above mentioned term of the Claimant's contract of employment and asked the Claimant whether she accepted this meant that the Respondent could require the Claimant to change her base of work. The notes record that the Claimant did accept this [299].
78. The Respondent asked the Claimant whether she accepted that Gardens Lane was registered as a residential home rather than a Nursing home, and the notes record that the Claimant confirmed she did [300].
79. When asked whether she agreed that the Deputy Manager and Staff Nurse roles were equivalent the Claimant replied *"this is not a Staff Nurse role. The Deputy Managers are in the office on the computer"* [301].
80. In respect of the Claimant's continued professional development, the Claimant accepted that, at RDASH, it was her responsibility (rather than her employers) to maintain her registration with the NMC [301].
81. At the end of the meeting the Respondent asked the Claimant whether there was anything further it could do in order to persuade her to take on the role as Deputy Manager to which the Claimant replied: *"no, as they cannot make [me] a Nurse and work at Gardens Lane"* [302].
82. On 8 June 2020 the Respondent wrote to the Claimant to confirm its decision to terminate her employment with notice. Although it accepted that the job titles of the two roles (Staff Nurse and Deputy Manager) were different, it stated that the actual job content was substantially the same. It stated that the location of the Respondent's registered office was within a reasonable travelling distance of the Claimant's home and Gardens Lane and the Respondent was permitted under the Claimant's contract to move her job locations. It concluded: *"In view of your continued refusal to agree to accept and comply with the above requirements I consider that the only reasonable option now is to terminate*

your contract of employment but that you be offered a final opportunity to agree to the requirements and continue your employment in the role of Deputy Manager” [308]. A right of appeal was offered.

Dismissal appeal process

83. On 22 June 2020, the Claimant appealed against her dismissal [311-312]. The Claimant maintained that her role as a Staff Nurse had been made redundant and the Deputy Manager role was not a suitable alternative. In this regard, the Claimant stated:

1. In order to maintain her qualified Nurse status, she would need to undertake 150 hours of clinical work which was not possible when undertaking the Deputy Manager role;
2. Due to the clinical nature of her Staff Nurse role, she has never been office based whereas the Deputy Manager role is office based;
3. The Deputy Manager role required her to be “on call” whereas the Staff Nurse role did not require this; and
4. The Deputy Manager role did not require the Claimant to undertake sleep in duties, which formed an important part of the Staff Nurse role.

84. The appeal meeting took place on 15 July 2020. The hearing was chaired by Mr Byrne. The Claimant was accompanied by her trade union representative. During this hearing the Claimant stated that a new job needed to be at least 75% equivalent to the existing role in order for it to be suitable and, upon Mr Byrne’s request, agreed to obtain some further information from her legal advisers regarding this [320].

85. The Claimant maintained that she did not wish to be office based whilst people she cared for are based elsewhere.

86. The Respondent asked the Claimant to explain what roles she undertook which were not part of the Deputy Manager role at the Respondent. The Claimant replied, *“To make it brief, a lot of decisions I could make as a nurse have been removed”*. When she was asked to be more specific, the Claimant replied, *“Any kind of referrals – through to OT or physiotherapy. Now we would have to go through the GP. I would have none of the authority I have as a nurse to do things off my own back. Also I would not be based with the people I am meant to be caring for and I have always been”*.

87. The Claimant raised the fact that not undertaking clinical duties would impact upon her common professional development, which was not the case at RDASH. The Respondent noted that, prior to the TUPE Transfer, the service had transferred from Nursing care to residential care and asked the Claimant to explain what duties undertaken after such transfer, contributed to such professional development. The Claimant replied, *“Things like assessing, monitoring people. I was the named nurse for their care” [321]*. The Claimant said she had seen the work undertaken by the Deputy Managers and it was purely management. She explained that she rarely saw the Deputy Managers at the home. Mr Byrne informed her that, from his own experience, Nurses who

had been integrated into management roles were able to maintain their Nursing PIN by working as managers of supported living centres and, in his evidence to this Tribunal, cited a number of examples of this being done.

88. On 23 July 2020 the Respondent confirmed the outcome of the Claimant's appeal, namely to uphold the decision to dismiss. The Respondent concluded that *"the Deputy Manager role is similar enough and that it is reasonable to ask you to carry out this role"*. In respect of the percentage requirement raised during the hearing, the Respondent concluded: *"Pip Foulsham, Interim HR Consultant and I asked where this 75% was rooted in law. Sarah sought clarification from your solicitor, however, there is no reference to a 75% requirement within their response. I therefore conclude that there is no definitive percentage that is required to confirm a role as suitable"* [325]. In respect of the 150 clinical hours the Respondent stated: *"I did outline from my experience, nurses who moved to management roles within organisations such as Walsingham Support, were able to provide this evidence from their training, supervisions and management of others, report writing and maintaining daily records from the people we support and they have managed to maintain their nursing PIN successfully"* [325].

Submissions

89. I had the benefit of helpful written submissions provided by the representatives of both parties which were then supplemented orally. They are not set out in detail in these reasons but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.
90. The Claimant submitted that the reason for her dismissal was redundancy. Her role as Staff Nurse with RDASH required the Claimant to be a qualified registered Nurse and required her clinical judgement to be exercised. Following the TUPE Transfer, the Respondent decided that it did not need to employ a practising Nurse when it changed from a residential care model to a supported living model. The need for a registered Nurse therefore diminished due to the change in employer and the change in living model, hence the Claimant was offered a role as a Deputy Manager. This role was more management focused than the Staff Nurse role and many key Nursing responsibilities were removed. The requirement for the Claimant to exercise clinical judgement or deliver care personally was removed. This included dressing wounds and attending to minor injuries herself. This impacted upon the Claimant's ability to maintain the requirements of her CPD. Additionally, the need for the Claimant to be in the home delivering care diminished as the Claimant was required to perform administration tasks from a designated office, away from the home, rather than at the home. The fact that the Respondent had dismissed and sought to re-engage the Claimant on the new terms demonstrated that the need for the Staff Nurse role had diminished. The Deputy Manager role was not suitable alternative employment because of the reduction in clinical work and increase in management work, impacting upon the Claimant's ability to satisfy the CPD requirements. The job-mapping exercise used by the Respondent, which indicated a 74% similarity between

the two roles, was flawed as the Respondent did not establish from the Staff Nurses themselves what their role entailed and erroneously gave all aspects of the relevant role equal weight and importance. The Claimant's refusal to accept this role was not unreasonable considering the Claimant's passion to work in a clinically focused rather than management role, which was largely based outside of the care home.

91. In the alternative the Claimant submitted that the reason for her dismissal was the TUPE Transfer. The new role had become necessary as a result of the TUPE Transfer and the consequent change of living model.
92. The Respondent submitted that the reason for the Claimant's dismissal was that she was refusing to (i) attend all job training relevant to the Deputy Manager role (ii) be based at the domiciliary care office and (iii) accept the job title of Deputy Manager and adhere to the job description of that role. This was some other substantial reason for the dismissal. Delivery of the supported living contract for which the Respondent had successfully tendered required a minor reorganisation of job roles and, therefore, there were sound, good business reasons for making such alterations. The Claimant's refusal to accept the changes to her role was placing the Respondent at risk of being found to be in breach of its legal and regulatory requirements (i.e. its contractual obligations to DMBC and its registration with the CQC).
93. There was no redundancy situation. The work done by Staff Nurses before and after the TUPE Transfer was fundamentally the same. Whilst the Claimant may have been called a Staff Nurse, she was not doing any Nursing work, and the law of redundancy focused on substance not labels. In this regard: (i) Gardens Lane was registered as a residential care home not as a Nursing home meaning that it was not permitted to provide Nursing care – therefore, the nature of the care being provided was social care not Nursing care (ii) none of the service users at Gardens Lane prior to the transfer had been assessed by social workers as having any Nursing care needs (iii) the only concrete example of Nursing care provided by the Claimant, given by the Claimant at the disciplinary and appeal hearings, were that she was referring service users to physiotherapy (iv) during this hearing, the Claimant added to this the fact she would treat minor injuries with a plaster or a dressing, or administering PRN medication (e.g. an EpiPen or paracetamol) but that a support worker with first aid training and, in respect of PRN medication, with a GP prescription, could do those things as well (v) whilst the Claimant said in evidence that Nursing assessments were different from social worker assessments, she could not explain when asked what she meant by this. Furthermore, the Claimant conceded that (i) her role in respect of care (as a "named Nurse") was to make managerial level decisions about how care was provided (ii) her role was not focused on the delivery of care but on the supervision of people who provide the care (iii) the vast majority of the individual points she was required to do on her Staff Nurse job description were supervisory or managerial in nature. Although as a Deputy Manager the Claimant would not be based at the care home all of the time, this was necessary under the Supported Living model as administrative work could not be carried out in the

service user's home. However, this did not change the type of work being done and Deputy Managers were still required to be in the home regularly.

94. If the Staff Nurse role was redundant, the Deputy Manager role was suitable alternative employment. The Claimant was working with the same service users based in largely the same place. Her terms and conditions remained the same. The duties she was required to perform were very similar. The Claimant would have been able to maintain her professional registration if she put in the work herself, which she was required to do at RDASH. Her status would not change because, even though her job title would change, everyone would still know that she was a registered Nurse. It was unreasonable for the Claimant to accept the Deputy Manager role as (i) she proceeded on a false assumption that because she was based in an office, the role was a desk job, when it was not (ii) she did not engage properly with whether it was possible for her to maintain her Nursing registration (iii) whilst she may have considered herself to have been doing Nursing work when she was employed by RDASH, she was mistaken (iv) she was mainly concerned about losing her Staff Nurse job title.
95. In regard to the Claimant's alternative argument, the TUPE Transfer did not lead to the Claimant's dismissal. Instead, the change in care model and the Claimant's refusal to confirm to alterations to her role arising from this change led to the Claimant's dismissal. This was an organisational reason. The TUPE Transfer was coincidental to the need for a change in the way the work was done; it was not the cause of that need for change.

The Law

96. The relevant parts of s.98 ERA state:

- (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*
- (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.*

97. S.135 of the ERA states:

*An employer shall pay a redundancy payment to any employee of his if the employee—
(a) is dismissed by the employer by reason of redundancy*

98. S.139(1)(b)(i) of the ERA states:

*For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.*

99. S.141 of the ERA states:

*(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.*

100. S.163(2) of the ERA states:

For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.

101. Regulation 7 of TUPE states:

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—

(a) paragraph (1) does not apply;

(b) without prejudice to the application of section 98(4)4 of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—

(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or

(ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(3A) In paragraph (2), the expression "changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).

102. In **Safeway Stores Plc v Burrell [1997] I.C.R. 523** it was held that while there might be a number of underlying causes leading to a true redundancy situation, including a reorganisation in the interests of efficiency or a reduction in production requirements, the only question to be asked under the Employment Protection (Consolidation) Act 1978 s.81(2)(b) was whether there was a diminution or cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation or such cessation or diminution in the future. If the answer to that question was "yes", s.81(2) of the Act required that the tribunal must then determine the issue of causation, namely whether the dismissal of the employee was wholly or mainly attributable to the statutory redundancy situation. It held that the "contract" and "function" tests were based on a misconceived reading of the words of s.81(2)(b). It held in this case the tribunal erred in failing to ask itself whether there was a true redundancy situation, looking at the overall requirement of S for employees to carry out work of a particular kind and whether that situation caused B's dismissal.

103. In **Murray v Foyle Meats Limited [1999] ICR 827** the then House of Lords approved the EAT's decision in **Burrell** and held that when determining whether work of a particular kind had ceased or diminished the terms of employment were relevant, but not decisive, as was the nature and extent of the work. The "contract test", which focused on an employee's contractual terms, and the "function test", which focused on the actual duties performed,

were irrelevant in deciding the issue of redundancy where what had to be established was that the dismissal was "attributable" to the diminution of work. The causal connection was a matter of fact to be decided on the evidence and not as a matter of law.

104. In ***Shawkat v Nottingham City Hospital NHS Trust [2002] ICR 7 (CA)*** there had been no diminution in N's requirements for employees to carry out particular work, namely thoracic surgery, when S refused to sanction alterations in his employment contract which would have required him to carry out cardiac as well as thoracic work. S submitted that given that his replacement did both thoracic and cardiac work, N's need for employees to carry out thoracic work had to have diminished. The CA disagreed finding that the fact that a new post or work undertaken by a replacement differed from the previous post or work done by an employee did not necessarily demonstrate that the employer's requirement for employees to carry out work of a certain kind had diminished.
105. In ***Berriman v Delabole Slate Ltd [1985] I.C.R. 546*** it was held that when assessing whether an employer has an ETO reason entailing changes in the workforce for an employee's dismissal, Tribunals are required to assess whether there is a change in the overall number or the functions of the personnel employed.
106. In ***Porter and anor v Queen's Medical Centre (Nottingham University Hospital) 1993 IRLR 486, QBD***, a relevant transfer occurred where the supply of paediatric and neonatal services moved from two District Health Authorities to an NHS Trust. Following the transfer, the Trust decided to reorganise the way that the services would be performed, with a focus on the importance of highly developed specialisms. It did not re-engage P or N, two consultant paediatricians who had been dedicated to the services in question prior to the transfer, and instead carried out a recruitment process focusing on the desired specialisms, which included neonatology, neurology and community health care. P and N brought a legal action in the High Court, but the Court accepted that, owing to the reorganisation of the way in which the service was to be performed, the Trust had dismissed the claimants for an ETO reason.
107. In ***Ffoulkes v Danwood Group Ltd ET Case No.3502523/10***, F was employed by the transferor at its head office in a town six miles outside Leicester doing senior accounts work. The company's directors sold the company to DG Ltd, which told all the employees informally that their jobs were safe but that it would be necessary to change the location of the office. Eventually it was decided that F's job had to be performed at DG Ltd's head office in Lincoln. As F did not want to commute to Lincoln, she was made redundant. An employment tribunal concluded that although F was dismissed as a direct result of the transfer, there were sound economic and organisational reasons for the transfer. Accordingly, F's dismissal was for an ETO reason.
108. In ***Hollister v National Farmers' Union [1979] ICR 542*** the CA held that dismissal of an employee may be justified where an employer needs to

reorganise their business, and has sound business reasons for doing so, and the employee declines to co-operate with such reorganisation.

109. In ***Corus and Regal Hotels plc v Wilkinson EAT 0102/03*** it was held that each case involving consideration of the question whether a business reorganisation has resulted in a redundancy situation must be decided on its own particular facts. The mere fact of reorganisation is not in itself conclusive of redundancy or, conversely, of an absence of redundancy.
110. In ***Barot v London Borough of Brent EAT 0539/11*** the EAT accepted that a reorganisation of a business that involves simply reshuffling the workforce may not create a redundancy situation if the business requires just as much work of a particular kind in question and just as many employees to do it, even if individual jobs disappear as a result. There, it upheld an employment tribunal's decision that the significant restructuring of the Council's Children and Families Directorate entailed a reduction in the kind of work being done by B. The reorganisation involved a reduction in lower level, 'number-crunching' tasks and an increase in capacity for more senior and strategic work, which the EAT decided the tribunal was entitled to find met the statutory definition of redundancy.
111. The reasonableness or unreasonableness of a refusal to accept an alternative role depends on factors personal to the employee and is assessed subjectively from his or her point of view at the time of the refusal as held in ***JF Everest v Cox 1980 ICR 415, EAT*** and by the Court of Appeal in ***Devon Primary Care Trust v Readman***.
112. In ***Bird v Stoke-on-Trent Primary Care Trust EAT 0074/11*** B's post, which was 80 per cent managerial and 20 per cent clinical, was at risk of redundancy due to restructuring and she was invited to apply for whatever posts were available. At that time the only jobs available were exclusively managerial and so she did not make any applications. The Trust later offered B three alternative roles, which B rejected. One of such roles was 15 per cent managerial and 85 per cent clinical; the other was 20 per cent managerial and 80 per cent clinical. B was eventually made redundant but without being paid a contractual or statutory redundancy payment as the Trust considered that these two roles were suitable alternatives and that B's refusal of these roles was unreasonable. An employment tribunal dismissed B's subsequent claim for a redundancy payment on the basis that she had unreasonably refused these offers of suitable alternative posts. However, the EAT overturned that decision. The tribunal had wrongly substituted its own view about the reasonableness of B's refusal, finding that her view that the offered roles involved a demotion was irrational, rather than considering whether someone in B's particular circumstances could reasonably have taken that view. If B had taken one of the two posts, it would have meant moving from managing a team of physiotherapists and occupational therapists to being managed within a team, with the result that she could no longer call herself manager within the NHS. The EAT was unable to say what conclusion the tribunal would have reached if it had approached the issue in the correct way and therefore remitted the case to a differently constituted tribunal.

113. In *Harris v E Turner and Sons (Joinery) Ltd 1973 ICR 31, NIRC*: H was a joiner who was promoted to apprentice instructor, a position which carried with it staff status and higher pay. After six years the employer discontinued the joinery apprenticeship scheme and offered H alternative employment, on the same pay, as a bench hand in the joinery production shop. H refused the offer and sought a redundancy payment. A tribunal held that because H was a skilled joiner, this was a suitable offer which he had unreasonably refused. On appeal, the National Industrial Relations Court (the predecessor to the EAT) held that employment is not necessarily suitable simply because the employee has the skills necessary to perform it. For example, an offer of employment as a teller would not be suitable for a bank general manager. The tribunal had misdirected itself by not giving enough weight to the instructional content of H's work and to the status that went with it, which made the alternative work offered to him unsuitable.

Conclusions

What was the reason for the Claimant's dismissal?

114. The reason for the Claimant's dismissal was, as advanced by the decision maker, Ms Alford, the Claimant's refusal to undertake the full requirements of the Respondent's Deputy Manager role which included being based from and spending a proportion of her working time at the Respondent's registered office as well as the care home at Gardens Lane and undertaking training specific for the role.

115. At the heart of this claim is whether this amounted to a redundancy situation. Considering s.163(2) ERA, the Respondent must prove, on the balance of probabilities, that the Claimant's dismissal was not for redundancy. The Respondent has satisfied this burden.

116. The key question I am required to answer is: had the requirements of the Respondent's business for employees to carry out "work of a particular kind" ceased or diminished or were they expected to cease or diminish?

117. Therefore, I have had to consider:

1. what was the "work of a particular kind" that the Claimant did as a Staff Nurse for RDASH which she continued to do until her employment with the Respondent terminated; and
2. had that work ceased or diminished and, if not, was it expected to cease or diminish.

118. In respect of (1), the Claimant submits that the "work of a particular kind" that had ceased or diminished was largely clinical work, exercising her clinical judgement as a registered qualified Nurse, exclusively from Gardens Lane, rather than from a registered office as well as Gardens Lane.

119. In respect of the cessation or diminution of clinical work, I find that the Claimant has overstated the amount of clinical work which she did prior to the TUPE Transfer. In this regard, I note that:

1. prior to the TUPE Transfer, Gardens Lane was registered as a residential home, rather than a Nursing home, therefore, in accordance with the CQC registration, there was no requirement for Nursing care to be provided. This had been the case for some time prior to the TUPE Transfer;
2. prior to the TUPE Transfer, none of the service users at Garden Lane were assessed as needing Nursing care;
3. the vast majority of the Claimant's Staff Nurse job description consisted of managerial work, supervising the provision of care by others, as opposed to clinical work which she was required to do herself; and
4. the Claimant undertook very little clinical work, that required the exercise of clinical judgement, in practice. At various stages prior to her dismissal the Claimant was asked to specify what clinical work she actually undertook as a Staff Nurse. The Claimant's responses to this point were vague. They remained vague during this hearing as the Claimant was questioned at length in this regard during cross examination. The answers which the Claimant gave demonstrated that the clinical work, that required the clinical judgement of a registered qualified Nurse, that the Claimant believed that she did was in reality work that could be undertaken by non-qualified Nurses, such as support workers. This included basic first aid, addressing minor injuries, administering PRN medication and making referrals to e.g. physiotherapists and GPs.

120. In respect of the requirement to work out of the Respondent's registered office as well as Gardens Lane, I am conscious that the Claimant had at all times alleged there was a redundancy situation within s.139(1)(b)(i) and not s.139(1)(b)(ii) ERA. Nevertheless, I have considered whether, based on the evidence presented and the submissions heard, it is the case that the requirement for the Claimant to undertake part of her work from the registered office as opposed to exclusively from Gardens Lane gives rise to a redundancy situation. I find that it does not. This is because:

1. the work that the Claimant would have been required to do from the registered office (largely managerial work) was substantially the same as the work which she would have previously done at Gardens Lane. She was required to care for the same service users, with the same care needs and in the same care home. As she was managing the provision of care to those service users it was not necessary for the Claimant to be present alongside them; and
2. the registered office was six miles away from Gardens Lane and the Claimant's contract of employment contained a mobility clause.

121. In relation to the above, there is additional uncertainty regarding how much time the Claimant would have been required to work from the registered office and no helpful evidence regarding this point was given by either party.

From the Respondent's side, this is not unexpected given how the Claimant pleaded her claim, as explained above.

122. As part of answering questions from me on this point, Ms Alford said that she expected the split to be 50/50 which would adjust to 70/30 (with 70% at Gardens Lane) when some of the Claimant's management duties were removed as part of the change from Deputy Manager to Deputy Manager – Care. In response to this evidence, the Claimant said in her oral evidence that she expected that she would have had to spend 90% of her time working from the registered office and in support of this she relied upon what one of her colleagues had done after the TUPE Transfer. However, this colleague did not give evidence and the Claimant did not explain how she arrived at this calculation. The Claimant also did not include this evidence in her witness statement or put this calculation to Ms Alford or any other witnesses for the Respondent. I find it would have been impractical to suggest that the Claimant was taking a log of this colleagues' whereabouts and, therefore, any basis upon which the Claimant could have arrived at this calculation would have questionable reliability.
123. Whilst I find that Ms Alford would not have been able to monitor the Claimant undertaking this role herself, even if the Claimant had met the full requirements of the Deputy Manager role, I find Ms Alford's account is likely to be more reliable than the Claimant's. Considering her role and her previous experience of working for the Respondent, I find that she would be more accurately able to comment on this split than the Claimant.
124. Furthermore, had the Claimant pleaded her claim as being one pursuant to s.139(1)(b)(ii) ERA, the Respondent may have called evidence on this point, e.g. the evidence of a Deputy Manager to explain the split of work between these two locations. The Respondent should not be penalised for not calling such evidence given the basis upon which the Claimant's claim was pleaded right up to the submissions hearing, which took place after all of the evidence had been heard and cross examined.
125. In respect of (2), the work referred to above had not ceased and it did not diminish, nor was it expected to. The clinical work which the Claimant says she did was overstated. The Claimant had not undertaken such work for several years. The remainder of the Claimant's work was substantially the same. There were some changes in the way in which the work was done (for example, changes to the "on call" system as well as changes to the location of where part of the work needed to be undertaken), but this did not result in the "work of a particular kind" that the Claimant did as a Staff Nurse for RDASH ceasing or diminishing.
126. Considering a comment made during the pre TUPE Transfer redundancy consultation process, I can understand why the Claimant may have considered that the "work of a particular kind" that she did as a Staff Nurse for RDASH had ceased or diminished or was expected to cease or diminish. This was statement that, following the TUPE Transfer, the role of a qualified practising clinical Nurse would not be "available". Although, RDASH continued to employ

qualified practising Nurses, for the reasons explained in these Reasons, RDASH had no requirement for a qualified practising clinical Nurse for some time prior to the TUPE Transfer. The lack of availability of a role, in the context of the analysis undertaken above, on the facts of this case, does not meet the definition of a redundancy situation. The Claimant believed that RDASH felt it was good practice to employ a qualified practising clinical Nurse but, even if this was the case, this does not mean that there were significant clinical duties that were required of the Claimant's role which, following the TUPE Transfer, were no longer required, when considered against the analysis undertaken above.

127. There is an argument that, because the Deputy Manager role required the Claimant to undertake new and additional duties (e.g. disciplinary investigations, disciplinary hearings and performance management), and the Claimant's hours of work did not change, there must have been a diminution in some of the work that the Claimant undertook as a Staff Nurse. However, the analysis undertaken above suggests that, if there was, such diminution was immaterial and is likely to be accounted for as part of the 26% difference in the two roles identified by the Respondent in the job mapping process.
128. The Claimant criticised the Respondent's handling of the job mapping process. However, the specific concerns were not raised at the relevant time nor has the Claimant made a positive case for how this job mapping process ought to have been done. Furthermore, whilst the job mapping process was relevant to the Respondent's assessment of where, if anywhere, the Claimant's Staff Nurse role should fit within the Respondent's structure, its relevance to my assessment of whether there was a redundancy situation or not is limited. What is of greater relevance is the assessment I have undertaken above.
129. The Claimant was, rightly, very proud of being a Learning Disability Nurse and wished to keep her Staff Nurse job title, despite the fact that her role had evolved from the usual requirements of a Staff Nurse role long before the TUPE Transfer. I have concluded that this change in job title formed a significant part of the Claimant's objections. However, a change in job title does not of itself meet the test for a redundancy situation.
130. One point raised by the Claimant was that, as the Respondent had dismissed her from the Staff Nurse role and offered her reengagement into the Deputy Manager role, this meant that her Staff Nurse role had been made redundant. The Claimant submitted that, if it was not redundancy, the Respondent could have disciplined on conduct grounds. I do not agree. The process of dismissing and offering re-engagement into another role does not always equate to a redundancy situation. There should be no presumption that this scenario gives rise to a redundancy situation when a situation envisaged by s.139 ERA has not arisen. Furthermore, offering re-employment alongside dismissal may have been relevant to whether the Respondent acted reasonably when dismissing the Claimant for conduct, had this occurred and had the Claimant challenged it.

131. The Claimant also sought to rely upon the Respondent's request that RDASH indemnify it in respect of any claims brought by the Claimant and her colleagues. Although this suggests that the Respondent had some concern about claims arising following the TUPE Transfer, it does not follow that this means that a redundancy situation existed.

Was the Claimant dismissed because of the TUPE Transfer?

132. No. The sole or principal reason for the Claimant's dismissal was not the TUPE Transfer contrary to Regulation 7(1) of TUPE.

133. The Claimant's position was that the change in employer led to a change in policy which resulted in the removal of the Claimant's Staff Nurse role. The Claimant said that her dismissal was "connected" to the TUPE Transfer.

134. I find that, had the TUPE Transfer not taken place, the Claimant may not have been dismissed. There may therefore be a "connection" between the TUPE Transfer and the Claimant's dismissal. However, the test under Regulation 7(1) is not "was the dismissal connected with the TUPE transfer?" but is, instead, "was the sole or principal reason for the Claimant's dismissal the TUPE Transfer?" The test is not "but for" the TUPE Transfer, has the Claimant been dismissed which appears to be case advanced by the Claimant in her submissions.

135. Whilst the change in service model led to a change in the way that the Respondent organised its work, this was not the sole or principal reason for the Claimant's dismissal. Had the sole or principal reason for the Claimant's dismissal been the TUPE Transfer, the Claimant is likely to have been dismissed much sooner. However, rather than dismiss her promptly after the TUPE Transfer, it retained her for 11 months and sought to persuade her to remain in her employment, making those adjustments to her role that it was able to make. This is not the conduct of an employer who wishes to dismiss an employee because of a TUPE transfer. Instead, I find, as stated above, the sole or principal reason for the Claimant's dismissal was the Claimant's refusal to undertake the full requirements of the Respondent's Deputy Manager position.

136. As I have found that the sole or principal reason for the Claimant's dismissal was not the TUPE Transfer, there is no requirement for me to consider whether the Respondent had an ETO reason for the Claimant's dismissal. However, for completeness, I have considered this. As stated above, the sole or principal reason for the Claimant's dismissal was the Claimant's refusal to undertake the full requirements of the Respondent's Deputy Manager position which included being based from and spending a proportion of her working time at the Respondent's registered office as well as Gardens Lane. These changes to the requirements of the Claimant's role arose because of the change in service model, from a residential care model to a supported living model. The Claimant's refusal to accept these changes was placing the Respondent at risk from both a regulatory compliance and contractual perspective. Although there are few authorities on this point,

considering the authorities referred to above together with the ordinary meaning of this term, I find that this is an organisational reason for the change. Although there was no evidence of there being a change in the overall number of employees, there was a change in the Claimant's job function as explained in these Reasons. Considering *Berriman*, I am satisfied therefore that this organisational reason entailed changes in the workforce of the Respondent.

Was that a potentially fair reason?

137. Yes, pursuant to section 98(1) ERA. The Claimant was dismissed for 'some other substantial reason'. The Respondent had sound business reasons for reorganising how the work in the care homes was undertaken, which was necessitated by the change in care delivery model from a Residential Home model to a Supported Living model. This resulted in changes to the way in which the Claimant needed to undertake her role. The Claimant resisted these changes which created regulatory and contractual difficulties for the Respondent. The Claimant accepted that these difficulties had arisen.

Did the Respondent act reasonably?

138. Yes. Although no positive case has been put forward by the Claimant in this regard, I am conscious that the burden of proof is neutral and, therefore, I am required to consider it as part of reaching my decision. The Respondent engaged in a lengthy consultation process with the Claimant as part of which it adjusted the requirements of the Deputy Manager role in order to address several of the Claimant's concerns. Addressing the Claimant's concerns about the job title, it also relabelled the role as Deputy Manager – Care. Prior to attending the formal dismissal meeting, the Respondent sought the assistance of a consultant in order to continue to negotiate with the Claimant. However, the Claimant refused to engage. I find there was little more that the Respondent could have realistically done prior to dismissing the Claimant. As the Claimant herself said in oral evidence, she and the Respondent were "going around in circles". The Claimant was informed that the termination of her employment was a last resort and, when the Respondent commenced that process, it followed a fair and transparent process. After dismissing the Claimant, it offered her a right of appeal and such appeal process was conducted impartially and fairly. There were no procedural errors raised and none identified by myself.

Was the Deputy Manager role a suitable alternative?

139. As I have found that there was not a redundancy situation, the answer to this and the following question are not relevant. However, for completeness, I have answered them.

140. Yes, the Deputy Manager role was a suitable alternative. All of the Claimant's terms and conditions, including her pay, remained the same. The Claimant's duties remained substantially the same. The main differences were that the Claimant was required to do part of her role from a different location, which was within a reasonable travelling distance, there were some additional

managerial duties which the Claimant was required to undertake and the Claimant's job title was different.

141. As the Claimant was offered the Deputy Manager – Care role, I have considered whether this was a suitable alternative as well. I find that it was. My findings in the paragraph above apply equally to this role save that adjustments were made to this role, at the Claimant's request, to encourage her to accept it. This included removing the above mentioned managerial duties that the Claimant objected to undertaking.

Did the Claimant unreasonably refuse to accept the Deputy Manager role?

142. This question requires consideration of the Claimant's personal and subjective reasons for refusing to accept this role. I am conscious that it is not necessarily the case that, if a role is suitable, an individual's refusal is unreasonable.

143. The Claimant's reasons for refusing to accept this role largely concerned the:

1. perceived lack of clinical duties;
2. lack of a "Nurse" job title, and the status that came with such including the Claimant's qualified nurse status; and
3. the requirement for the Claimant to undertake part of this role from the Respondent's registered office.

144. In respect of the former point, as stated above, there is a difference between the amount of clinical duties which the Claimant did and the amount which she appears to have thought she either did or was required to do. The Claimant was mistaken about the amount of clinical duties that her role as a Staff Nurse entailed. There was no significant difference in the amount of clinical duties required for the Staff Nurse and Deputy Manager roles.

145. In respect of the second point, whilst the Claimant would not have been referred to as a "Nurse", she could have maintained her registration as a Nurse. However, despite the Respondent providing information about how this could be done, the Claimant refused to engage. It is understandable why the Claimant would wish to be called a "Nurse" however a desire to maintain a job title that does not accurately reflect the work undertaken is not reasonable. To assist the Claimant in this regard, the job title for this role was changed to Deputy Manager – Care. However, the Claimant still refused to accept it.

146. In respect of the final point, it can be reasonable for employees to refuse alternative roles where the location of the role has changed. I am required to consider this from the subjective viewpoint of the Claimant, which I have done. Part of the Claimant's role would still need to be undertaken from Gardens Lane. There was no evidence that requiring the Claimant to spend some of her working time at the registered office, which was 5-6 miles away from Gardens Lane, would disadvantage the Claimant in terms of travel costs or for any other reason. There would be no need for her to relocate. She would be spending

less time with the service users which I acknowledge would be relevant to her decision making. However, as found earlier, the Claimant's role did not involve the provision of very much direct care to the service users. Instead, it primarily involved the supervision and management of the care provided by others.

147. Consequently I find that the Claimant did unreasonably refuse to accept the Deputy Manager and the Deputy Manager – Care positions.
148. Accordingly, in all the circumstances, I find that the claims are not well-founded and are dismissed.

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