Case number: 2603512/2020
2603521/2020

Reserved

EMPLOYMENT TRIBUNALS

Claimants: Mrs K Wayt (1)
Mrs M McPherson (2)

Respondent: Boots Management Services Ltd

AT A FINAL HEARING

Heard: Remotely by CVP (nominally at Nottingham)

On: 23-30 May 2022
And in chambers in private on 7 July 2022

Before: Employment Judge R Clark (Sitting alone)

Appearances

The claimants: Mr A MacMillan of Counsel
The respondent: Mr A Leonhardt of Counsel

JUDGMENT

1. The first claimant's claim of unfair dismissal **succeeds.**
2. The first claimant's claim for a statutory redundancy payment **succeeds.**
3. The second claimant's claim of unfair dismissal **succeeds.**
4. The second claimant's claim for a statutory redundancy payment **succeeds.**
5. Remedy will be determined at a future hearing, if not agreed.

REASONS

1. Introduction

1.1 Mrs Wayt and Mrs McPherson were both employed by the respondent for many years. They were both experienced and competent area managers and well regarded as such. They were both required to take on new and substantially enlarged areas as a result of a reorganisation which reduced the number of areas by about 40%, and increased the size of each area by about 70%. Both regarded the scale of the new roles as being unmanageable. After raising their concerns from the outset without success they both resigned. They claim constructive unfair dismissal and a statutory redundancy payment. They say the new roles, the manner in which they were brought about and other aspects of the employer's response to their complaints amounted to a repudiatory breach entitling them to resign without notice. They say that is a dismissal in law and the reason for it was redundancy. Even if it was a fair dismissal, they say they are entitled to a statutory redundancy payment.

2. The issues

2.1 The issues for me to determine were identified and agreed at an open preliminary hearing on 11 May 2021.

2.2 The claimants withdrew their original common law claims of breach of contract. Those claims have not been dismissed as the claimants intend to litigate that dispute elsewhere as its value is said to exceed the jurisdiction of this tribunal. I did explore the implications of that decision where a claim of constructive unfair dismissal remains before me which, by definition, requires the claimant to prove a repudiatory breach of contract. Mr Leonhardt also raised a concern that one of the alleged acts or omissions said to be part of the conduct in the unfair dismissal claim overlaps with what he understood the breach of contract claim to be. It is not ideal for parties or courts and tribunals to have to weigh implications across two jurisdictions and I explained I would do what I could to limit fact finding and other conclusions to those matters essential for the claims before me. However, I decided that the tribunal has exclusive jurisdiction to determine the claim of constructive unfair dismissal, that it was founded on a breach of the implied term of trust and confidence (and not any other express term that might be the foundation of the common law breach of contract claim) and that I was, therefore, bound to consider the facts of that matter so far as they may contribute to a breach of the implied term.

3. Preliminary matters

3.1 There were some practical issues concerning one of the respondent's witnesses being able to attend. As a result, the parties had agreed that the respondent's evidence was called first. I learned on day two that Mrs Wayt was unable to be present for parts of this week and next. I was not comfortable with that but took a pragmatic approach, subject to any other

implications arising. One such implication was that I was not prepared to deliver an extempore judgment in the absence of a party.

4. Evidence

4.1 For the claimants I heard from: -

a) Mrs Wayt.

b) Mrs McPherson.

c) Mr Pitt, PDAU assistant general secretary.

4.2 For the respondent I heard from: -

a) Andrew Francis – Mrs Wayt's new line manager.

b) Mo Hassam – who conducted Mrs Wayt's grievance.

c) Kevin Alavoine – who conducted Mrs Wayt's appeal.

d) Richard Stead - Mrs McPherson's new line manager.

e) Maxine Smedley who conducted Mrs McPherson's grievance.

f) Anne Higgins, who conducted Mrs McPherson's appeal.

4.3 All witnesses called affirmed or adopted their evidence on oath and were questioned. I received a bundle running to around 600 pages. Both Counsel made written and oral closing submissions.

5. Facts

5.1 It is not my function to resolve each and every last dispute of fact between the parties but to focus on those matters necessary to determine the issues before me and to put the case in its proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2 The respondent is a well-known high street pharmacy and retailer. It is a large and well-resourced employer. It has internal HR and other professional advisers on matters relating to employment. It publishes a range of relevant employment policies and procedures. It operates a network of stores and pharmacies across the country. They range from small local pharmacies focused on the pharmacy services, to extremely large stores focused more on general retail. They also include 'flagship' stores and travel format stores. Like many multiple retail outlets, it operates a geographic management structure at varying levels. Unlike many other retail stores, the business model is not simply about selling goods. Its role as a major pharmacy provider means it also has to engage with the professional and regulatory obligations that arise including matters of clinical governance and public safety. The customers of its clinical services range from individual members of the public to large

care establishments. Some pharmacies dispense to care homes. Some provide it to many care homes meaning they operate on a scale commensurate with a large NHS hospital pharmacy. All that brings its own demands and clinical governance obligations.

5.3 This case centres on the implications of a reorganisation. It is convenient to adopt the language used at the time in differentiating the "old world" before, and the "new world" after, February 2020. In the old world, there were the following four management levels: -

a) Individual stores with a store manager.

b) Each store fell within a geographic area and each store manager reported to an area manager.

c) Each area fell within a region and each area manager reported to regional manager

d) Each region fell within a division and reported accordingly. Up to the retail director.

5.4 Mrs Wayt and Mrs McPherson were both very long serving employees of the respondent having 30 and 37 years' service respectively. They started their pharmacy careers at Boots and developed their careers working only for Boots. Most recently, they were performing the roles of area manager. In the "old world", area managers typically held responsibility for up to 15 stores. Specifically, Mrs Wayt was responsible for 13 stores. Mrs McPherson was responsible for 14 stores. I accept there was some scope for slightly more or slightly fewer stores depending on the circumstances such as the make-up and nature of the stores involved. I find Area Managers would also be expected to 'buddy up' to cover each other's areas during annual leave, albeit not for more than a week or so at a time. A significant aspect of this arrangement was the expectation that the buddy would clear lose ends and provide a handover of current issues likely to arise in advance.

5.5 Both claimants were employed on full time contracts of employment, notionally of 37.5 hours per week. There is no dispute, and I find, both were highly competent, experienced and conscientious area managers. I find dealing with the workload generated by the stores in their respective areas occupied more than their notional working hours. Frequently, the demands of the job would require evening and weekend working in the sense of extra hours. Of course, modern opening times means weekends are the norm. Mrs McPherson calculated a 60 hour working week not being unusual. There was no complaint from either. Their conscientious approach to their duties and successful track record meant they were regarded as the type of area manager that could deliver results and could be asked to take on specific or additional tasks without complaint. I find they were both prepared to put the hours in as was necessary and that both derived a great deal of professional satisfaction from their jobs. I can be confident that there were no issues about the way they did their roles as, unbeknown to each of them, their respective line managers at the relevant time would secretly score them extremely well in advance of the reorganisation being announced.

5.6 With that length of service, it is no surprise that they had both been through reorganisations in the past and had played their part in the process. The last restructure of

area managers was a few years ago. Over time, new stores open and other stores close. It does not take many years before an imbalance can develop in the areas. Some areas might end up with more stores, I was told sometimes up to 18. Others might lose stores and I was told this had been as low as 9 stores. Inevitably, that calls for a realignment of areas and both claimants anticipated one was due in 2020.

5.7 I also find the claimants were used to the respondent's practice of routinely using non-disclosure agreements with its staff. The purpose was to manage and control the cascade of information to those that needed to know, when they needed.

5.8 As well as experiencing organisational change as employees, they were both used to implementing it as managers. A feature in this case was an ongoing project called 'project Hippo". That was shorthand for the process of closing certain stores and the employee implications arising from it. That process engaged with the respondent's published redundancy policy. It is sufficient to record merely that that policy contains all the topics one would expect to see in such a large organisation like this. It includes procedure, consultation, voluntary redundancy, notice, redeployment and time off to look for new work. It sets out the sort of laudable aims one would expect of retaining staff, engaging with trade unions where appropriate, avoiding job losses and minimising the disruption caused by compulsory redundancy dismissals. One of the stated aims is to adopt a fair and transparent process.

5.9 An aspect of project Hippo raised in evidence which was not disputed, was the way in which store managers of a "Hippo store" were managed at the time of the closure and potential redundancy. They were at risk and entitled to apply for suitable alternative employment, essentially a store manager of another store was regarded as suitable alternative employment with one restriction. That was the size of the store. Even though all store managers were employed on the same job profile, the respondent did not deem it suitable for a store manager of a smaller store to take on a bigger role at a larger store and they were not permitted to apply for such a larger role, at least under the added protection of the redundancy scheme. In due course, the claimants would seek to draw comparisons with this approach to their own situation.

5.10 At some point in 2019, the respondent embarked on a plan to reorganise its geographic store management. It was driven by a new retail director with a different vision for store management who wanted a flatter management structure. This project was kept secret and codenamed "project daffodil". It resulted in what has been termed the "new world". This was more than the periodic rebalancing of areas the claimants were anticipating.

5.11 I find one aspect of project daffodil was to remove the divisions altogether and to reduce the number of regions and areas within each region. I find the respondent decided that by having fewer, larger, areas it could reduce the number of area managers it employed from 170 to 100. It was therefore known that there would be a significant reduction of around 40% of the requirement for Area Managers and around 70 of the current workforce doing that work would no longer be employed.

5.12 This was intended to serve two objectives. The first was a business objective of getting “senior leaders” closer to the customer so that the business could respond to customer needs quicker. The second was to save money. In respect of the latter objective, one can see an obvious and immediate saving to the employer of 40% of its Area Manager wage bill. In respect of the former objective, whilst that may have been part of the rationale for project overall, I have not been able to understand how that featured in respect of changes to area managers. The new area managers would sit in the same part of the structure as before. I find they had the same relationship with their stores as they did before. They are no closer to, nor further from, the customers. They would report to a “head of stores” role in an equivalent way to the previous regional management. The real difference is that there are simply 40% fewer of them meaning they are each spread thinner across a larger area dealing with operational, staffing and other issues that arise from nearly twice as many stores in each area. The nearest the evidence took me to any material change in the way of working was Mr Alavoine’s suggestion that they were not expected to actually go into stores with anything like the frequency of the old-world area manager role. That contention is not consistent with the way the new Heads of Stores understood the role. Mr Stead understood there to have been a marginal reduction in the area managers’ expected attendance in stores reducing from every day to four days of the week, albeit he also understood the objective of the new structure to take Managers “closer to the stores”. It was certainly not how the claimant’s understood the role. I find there was no clear direction to the effect that area managers were not expected to perform anything other than exactly the same range of tasks as they had done previously in the old world. Whilst the evidence now before me might suggest some unspecified tasks are being asked of store managers which might previously have been done by area managers, I find that is a more recent development and, at the material time I am concerned with, it is clear to me that the role had not changed. The fact that there is now some degree of change appears to me to be a late recognition of the scale of the task being expected of the new area managers. On the limited contemporary documentation produced by the respondent, there is a new “role profile”, in effect a job description but one which sets out behaviours rather than tasks, functions or responsibilities. These behaviours put the focus of the role on attending in store in order to “speak with customers and pharmacists”, deliver response to complaints and taking consequential actions, being “visible and available in my store”; taking time to “be with my pharmacists and pharmacy teams”, give feedback “in the moment” and to “walk the shop floor with the store leader”. These support the idea that area managers remained present in stores in the new world. That is not to say there is no role to play away from the stores, but an area manager in the old world could not be present at all 14 stores at the same time and the idea of remote leadership in the new world seems to me to be no more than a recognition of that same fact, save that in the new world the area manager would have around 25 stores. On balance, I prefer the claimant’s analysis that the aim of “getting closer to the stores” was directed at the retail director level and the main change was the removal of a layer of divisional management and introduction of new reporting lines so that the director and stores became closer.

5.13 I find the level of responsibility of the new area manager roles did not change. The weight or ‘value’ of the area manager job itself was not altered in any respect. However, the

volume or scale was dramatically increased. Viewing the 40% reduction from the other perspective, the 100 or so area managers left in post now had to cover the same patch as had been covered by 170 area managers previously: a 70% increase in the potential volume of work for each of the remaining area managers.

5.14 I find the terms and conditions of employment did not change in the new world. I find the management relationship between area manager and store manager did not change. I find the organisational support for area managers did change and that it was effectively reduced. The only convincing evidence I had on the nature of the surrounding support came from the claimants which I accept. I find the area administrative support was to be shared across two areas in the new world, effectively halving the level of support at a time when the areas themselves were increasing by 70%. After the time that I am concerned with, I find this changed again and the administrative support was centralised. Similarly, regional management above area managers lost their dedicated HR business partners, they also being reorganised into a central support. Other areas of support for operational and pharmacy matters went through its own similar re-organisation. Fundamentally, the support available to area managers did not change in its nature, but the scale of it reduced. Pharmacy Operations and Governance Managers became Pharmacy Support Managers and continued to be aligned to two areas, although of course each area they served also increased meaning their two "patches" increased from around 25-30 stores to 50 stores. They too were spread thinner and the available support in effect almost halved.

5.15 I find there was no process to assess the effect on the workload each area manager would take on as a result of the increase in stores. I was not persuaded by evidence of what "would have" happened, based on other reorganisations. There was no reason why there could not have been evidence of what in fact did happen. I accept Mr Hassan's evidence that areas were arrange without any assessment of the concentration of issues arising in the revised area although I don't accept his view that "one could not know" that in advance. Therefore, at the time of mapping an appointable area manager to their new area, I find it was not known what level of issues were likely to arise area by area. The respondent accepted that, for the claimants, they were given a particularly exceptional level of operational, HR, pharmacy and other issues. These were all waiting for them as the new area manager to engage with immediately.

5.16 The absence of any convincing evidence of workload analysis is more surprising as I learned the respondent still operates a form of "time and motion" system at store level which analyses the tasks and functions involved in a store of that size and, depending on the turnover or retail and pharmacy items moved, is able to set a staffing level and budget. Nothing along those lines occurred for Area Managers. Someone in the respondent's organisation planning project daffodil must have had some basis for settling on the figure of 25 stores per area. Whatever that rationale was, it is not before me. In the course of their evidence, the claimants were challenged about the new way of thinking and delivering the role insofar as the value of the sales in an area did not directly go to the size of their workload. Otherwise, their contention that the role substantially increased in volume was not challenged. I accept their evidence albeit recognising that is itself imprecise. It is, however,

the best evidence before me of the job of the area managers. One particular focus was on the challenges of employee relations issues. I accept that this was a big issue for both but they were each a competent manager. The real issue was that the demands of taking on a large group of stores, many of which had issues or were poorly functioning, meant that they were diverted from the professional obligations they had for clinical governance, patient safety and regulatory implications. Mrs Wayt's area included stores subject to special remedial focus on their pharmacy activity and one had been subject to a regulatory investigation following a death of a patient linked to its dispensing. I accept that it was not an option for any conscientious area manager to simply focus on the top 10 stores in their patch, as would later be suggested as a solution for dealing with the workload. Even attempting such a strategy could not be achieved without first having full grasp of all 25 stores to be able to identify which were the top 10.

5.17 I find that the totality of the plan was designed and settled in secret before it was then simply implemented. The implementation occurred in phases working down the management chain. There was no consultation on either a collective or individual level. Instead, project daffodil continued in relative secrecy during which each level of manager being brought in was required to sign a non-disclosure agreement and each was then informed only of that which was necessary for their involvement as managers, or as employees themselves when appointed to their own new roles in the structure. The business says it required NDAs because it was briefing employees on a sensitive project and was giving information and knowledge about future ways of working. Once in post as the Head of Stores, those managers then focused on the next level of management, the area managers below. The Heads of Stores were tasked with performing a "Desktop Assessment" of each of the existing area managers in post. That is, a paper exercise done in secret with only the managers, HR and a director involved. This was, to all intent and purposes, a selection exercise albeit the focus of the test was not to directly to determine which 70 area managers would be selected to lose their employment, but which of the 100 would be offered one of the new area manager posts. As can be seen, it indirectly amounts to the same thing. A range of criteria was developed with a marking scheme. I find this exercise took place in early January 2020 for these two claimants, as it probably did for all area managers then in post.

5.18 In essence, the top scorers were the ones who would be offered jobs but I accept Mr Hassan's evidence that it did not always work like that. The reason was because one other objective of the reorganisation was to deploy area managers in areas closer to home. As a result, the selection happened in two interrelated stages. One was the scoring against the criteria. The other was the "mapping". That is, a process of assigning an appointable employee to an area near their home. It follows that the hierarchy had to be modified on a geographic basis to appoint the best in that area to the available area manager posts. The logical consequence of this meant that, somewhere amongst the 170 old world area managers, there will have been someone who was not offered a new world position because of geographic limitation, even though they scored higher than someone else who was offered one.

5.19 I find the Heads of Stores discretion in this process was extremely limited. The scores had to be moderated or approved by director level. There may have been some scope to shuffle some of the stores at the margins of areas but the areas themselves were set as were the number of stores and numbers of areas. They merely had to decide who would be offered one of these new posts.

5.20 I find that somewhere within the respondent's senior management, a conscious decision was made not to treat project daffodil as a redundancy situation. I find this was at a level much higher in the organisation than any of the witnesses the respondent has called to defend this claim. It seems to me more likely than not that the new retail director, whose project this was, may have made that decision but I have not heard from any of the policy decision makers and I need not identify the actual decision maker. The head of stores described themselves as not being involved in the "logic or reasoning of this decision". I find none of the witnesses had any involvement with the decision making about this process, why it took the course it did, or the detail of it. All were simply following directions as to the implementation and essentially reading from a script. According to Mr Alavoine, "the consequence of the respondent's plan was to reduce the area manager headcount and, to do it, a decision was made to go through the compromise agreement approach".

5.21 Mr Francis underwent his own passage through the regional management reorganisation to end up as responsible for the patch in which Mrs Wayt was to be employed. They had not worked together and he knew of her by her positive reputation only. As a result, he asked her immediate line manager, Ritesh Bakrania to undertake the desk top assessment for her.

5.22 Consistent with their experience, competence and commitment to their roles, unsurprisingly both claimants scored very well. They were then "mapped" across into new area manager roles close to their homes. Whilst the process envisaged the director level scrutiny, I have no reliable evidence of what that entailed, whether in fact it happened and if it did, what effect it had.

5.23 I then turn to the process to inform the claimants of the outcome. Once the scoring had been completed in early January and the mapping done to identify who would be offered posts and where, the area managers had to be told. The respondent's plan was to attempt one-to-one meetings during a single week. That ambitious target proved impossible and in fact took over 2 weeks during the later weeks of January 2020,

5.24 It is worth restating that at this point, the Area Managers were completely unaware of what had happened with their roles. They typically received a telephone call one day asking them to attend a meeting the next day. They were not told the reason. I find those with long service and experience of this employer's approaches understood that being taken into a meeting without being told the purpose was a very stressful thing. It tended to mean, at best, that you were attending an investigatory meeting related to disciplinary or grievance about them. At worst it meant you were out of a job. In Mrs Wayt's case, on the day of her meeting

she also became aware that two of her area manager colleagues had already suffered that result.

5.25 On arrival at one of these meetings, I find the area manager was required to sign a non-disclosure agreement as a first step to being told anything at all about the purpose of the meeting. They were not given a copy of the NDA to keep. The terms of the agreement required total confidentiality. They were told they were not to talk to anyone about the changes. As I have said, the NDA is a tool regularly used by the respondent. I find the practice exists in part because of legitimate commercial interests arising from the implications of the change in question, but also in part because it chooses to adopt a change process which is less than transparent and attempts to implement fundamental changes almost overnight. I cannot see on what basis this NDA was a binding contractual agreement but it clearly had relevance to the ongoing employment relationship and, in any event both Mrs Wayt and Mrs McPherson signed it when required to do so. They were then given the news.

5.26 In the region Mrs Wayt worked, Mr Francis was the Head of Stores and responsible for these meetings. He had 14 area managers to speak with. In what I find must have been a split broadly proportionate to the planned total reduction of 40%, some of those meetings were to inform the area manager of their success in being selected for one of the new roles. Conversely, other meetings were to inform them that they had no role and were out of a job. In all cases, the subject and content of that meeting was a total surprise to the individual area manager concerned. The same occurred in the region that Mrs McPherson was assigned to. Mr Stead was the new Head of Stores. He had a similar mix of news to break.

5.27 On or around 22 January 2020, Mrs Wayt was contacted and invited to a meeting with Mr Francis the next day. She attended. At the meeting she met Andy Francis and Donna Addison of the Respondent's HR. The meeting lasted around 20 minutes. Once the NDA was signed, I find Mrs Wayt was then congratulated by those present and advised she was part of the new structure with the area of East Staffordshire and Sutton Coldfield. I find this was a patch closer to her home address. It was no doubt a potential advantage to be working closer to home but much depended on the practical implications as, in Mrs Wayt's case, a longer distance to an area driven mainly on motorways could easily involve less time travelling than the shorter distance through large conurbations. I accept this claimant's evidence that she regarded that factor as neutral and that it was grossly outweighed by the substantially more negative factors of the change.

5.28 She was given details of the new patch she would be managing. From her perspective it contained a long list of "infamous" stores. She knew instinctively and immediately that she could not successfully deliver on this scale. I find it was clear in that meeting that she was not happy with the change, although Mr Francis did not appreciate at that time the extent of that unhappiness. In the course of Mrs Wayt's meeting, I find she asked if she had a choice whether to reject the offer and, in line with the briefing given to Heads of Stores, she was told no. Her patch would very nearly double from 13 to 25 stores. Everything she was currently doing with 13 stores would be required to be done for 25 stores. She articulated her instinctive view that she would not be able to manage that scale of area. She referred to her

old area manager job no longer being available. She sought to explore alternative options and I find within that conversation did raise the prospect of leaving the business making reference to redundancy or 'compromise' or 'package' or words to that effect. She was told that was not available to her. Her options were to take it or resign. She could not afford to simply resign. I find Mrs Wayt left that meeting with no arrangements for communicating the change to her existing teams at the time and nor was a commencement date for the new structure clear. At that stage, Ms Wayt was also told that she could not talk to anyone about the content of their conversation except for Andy, Donna and her line manager Ritesh Bakrania.

5.29 At the end of the meeting, Mr Francis raised the situation of the two other old world area managers' departure from the business earlier that day. This was exceptional as in every other respect the NDA meant everyone was restricted from discussing anyone else's situation, and everyone was restricted from learning the fate of others. Mr Francis bent that rule in this case as the needed an area manager to manage the stores they left behind until the project daffodil went live. For the next three weeks or so that took her stores to somewhere around 45. This news hit Mrs Wayt hard. Not only had she lost two of her very close colleagues but she was expected to cover their work. It was unlike the cover provided during holidays as the outgoing managers did not know of their termination before it happened, they had not prepared any handover and they had not tied up any lose ends. Mrs Wayt was expected to hold a conference call with both areas the very next morning to inform the store managers of the departure of the two area managers and the temporary arrangements. The NDA meant she was prohibited from speaking with them even on legitimate business matters necessary for her to discharge that temporary cover role. She was similarly prohibited by the NDA from speaking with her trade union and was clearly told the limit on who she could speak to. I find Mrs Wayt left the meeting stunned and clear she had no say in any of the decisions fundamentally affecting her working life. The way this particular part of the meeting was handled was poor and underestimated the impact it would have on Mrs Wayt. That is not simply my finding of fact, it was a concession Mr Francis acknowledged in hindsight and he said, if given the same situation again, he would now approach it differently.

5.30 Turning to Mrs McPherson, I find her experience to have been largely the same in all material aspects. She was equally in the dark as to project daffodil. She was aware that they were due a realignment as happened periodically. She was contacted by the Director North and invited to the same type of one-to-one meeting although she would not know the purpose until she attended. In her case, the meeting was held on 28 January 2020 and chaired by someone who would turn out to be her new manager, the new head of stores, Richard Stead supported by Nina Barnes. She was similarly required to sign the NDA. I find the script was the same as used by Mr Francis. Neither individual was known to the claimant.

5.31 I find Mr Stead set out the background to the changes including those that had already happened at his own level and above and what was now happening for Area Managers. He described the area Mrs McPherson would be assigned to and the number of stores and

provided a spreadsheet identifying them. He explained how Mrs McPherson had scored well and how he was delighted she was joining his team.

5.32 From Mr Stead's perspective, as with all head of stores, their first substantial task in role had been to implement this change meaning they had to sit down with all area managers and, in 2 out of 5 of such meetings, their job was to terminate someone's employment immediately. The 3 out of 5 that were remaining must have seemed like welcome light relief when they could share what they expected to be good news and they assumed that would universally be the case. It is no surprise that he and Mr Francis were somewhat wrongfooted by the response they got from the claimants. Where they saw good news in someone retaining their employment, the claimants saw themselves being unilaterally moved to a much enlarged, near impossible area.

5.33 Mrs McPherson went into this meeting with her own personal pressures. She was juggling a number of family issues and was of an age where she found herself caught between caring responsibilities for her youngest son, then aged 16, and her elderly mother who lived in Ireland. Her mother's dementia was deteriorating, she was in the midst of service provision disputes with a hospital and social services and her sibling group were not unanimous in their view of their mother's future care plans. This had been going on for some time and by January 2020 had reached a critical stage. She was having to make regular visits to Ireland to deal with those issues. Despite the scale of these significant personal demands on her, she had been able to remain successful in her work. She had developed her area, the managers and teams under her and the systems within it in such a way that she could not only keep on top of both home and work demands but continued her record of success at work. She knew the area and the issues that were likely to arise. Equally, her team knew her. Perhaps more important, her then line manager knew of her situation and was not only supportive of her knowing that she needed time to deal with that but was also confident in her commitment to her role and her ability to continue delivering.

5.34 I find that when she went into that meeting she carried all of that with her. She joined a meeting with two people she did not know and who knew neither her nor her circumstances. She wanted a different conversation with a manager, focusing on her current situation and continuing the support she had available. She listened to what she was being told would be her new working world and, in particular, the size of it. She knew from her vast past experience in the business that taking on any new area required an initial period of extreme personal investment of time and energy in order to get to grips with the area, the issues and the new team. Even on the scale of the old-world areas, that would take at least 6 months of extremely intense hours which she knew she simply could not do. I find it presents another layer of concern as it must follow, and I find, that the larger and more complex the area is in itself, the longer and more demanding that initial intense period will be for the new area manager. In her words, she instantly knew she could not take on the size of what was being described to her. She made an instant decision in the meeting to enquire if there were other options. She said she was happy to stay in her old role. She had developed that to a point it was well run and "in a good place". She said if you are looking to lose people, she could be one of them. I find she was told there were no other options and, whilst it may not have been

put quite as bluntly as this, the employer's position was that she could take the role or she could resign, as had been given to Mrs Wayt. She said she deeded to digest what was being asked of her. I find Mrs McPherson to be shocked by the blunt manner in which the option was essentially one of take it or leave it.

5.35 It is not in dispute that those about to be told they had no job were also asked to sign a non-disclosure agreement. They were then immediately invited to accept a compromise agreement. The terms are not, and need not, be before me save to say they provided an enhancement to the minimum statutory and contractual entitlements. They were required to leave work immediately. There was no script or directions to the managers of how to deal with anyone who did not agree to sign the NDA, who rejected the offer of new employment or refused to enter into a compromise agreement. Some of these matters were canvassed by the Heads of Stores at a briefing shortly before they had to undertake the one-to-one meetings. In terms of those who did not want to accept the new role, they were told the situation was "business as usual". By that, the employee could either accept it or resign which, as can be seen, is consistent with the message actually delivered to the claimants.

5.36 After the meeting Mrs McPherson had time consider her initial instinctive view that it was not viable to expect anyone to deal with the new role. She had time to quantify it more objectively. She discovered that the number of stores would increase from 14 to 26. I accept her analysis of the practical implications for her as the area manager. Her direct reports went from 15 to 26; total employees went from 190 – 480; Retail sales went from £7,800,000 to £39,000,000 per annum; online sales went from £312,000 to £780,000 per annum; NHS items went from 880,000 to 2,340,000 per annum; care home beds went from 550 to 2300; dispensing sales went from £2,760,000 to £23,400,000 per annum; Mrs McPherson illustrated the scale of the new area. She equated it to a change from a small district hospital pharmacy to that of St Barts or St Thomas' teaching Hospital in Central London. Her conclusion was compounded further by the reduced level of support

5.37 A key finding I have to reach is whether I accept the nature of the new role and the manner in which it was put to the claimant were the reasons for them seeking an alternative or whether they each went into those January meetings looking for an exit. I am satisfied the scale of the change was the only reason they raised alternatives. Although Mrs McPherson had significant issues in her personal life to deal with, these had been present for some time without affecting her ability to do what was then her very demanding job. I accept she intended to continue working. Both claimants were long serving and committed Boots managers and I do not believe news of this change was hijacked by them in order to angle for a compromise that they were otherwise looking . If that were the case, I do not accept the events would have unfolded as they in fact did. I find both claimants genuinely needed to work and that both would have preferred to work out their days within Boots.

5.38 It is also relevant to some degree for me to consider how their responses compared to the other 100 area managers who were told they had been appointed to a new, enlarged area. That is something that has not been evidenced with any detail. It is, of course, unsurprising that there was no initial collective reaction as none of the Area Managers were

permitted to talk with each other about the changes. From the limited picture I have, there is no evidence of wholesale rejection but I do accept the claimant's evidence of the discussions they later had with other "surviving" area managers as they termed it, particularly at the launch event for the new world. The universal view was that this scale of change was not welcomed and that there was a general sense of concern about how the role could be fulfilled. That is consistent with the head of stores' recollection that others did comment that the job was substantially different in size and scale. I do not know the seniority, experience or length of service of the other area managers and I find it more likely than not that Mrs Wayt and Mrs McPherson were two of the, if not the two, longest serving managers amongst the area manager cohort. They were likely to be best placed to assess the requirements of the new role. I find that Mrs Wayt and Mrs McPherson were the only area managers in the areas to be managed by Mr Francis and Mr Stead to resign. I can also find that the same number of areas and the structure remains in place to date but I have not been told what turnover of staff there may have been in the area manager post or what changes in working practices have arisen over the last two years. I accept some, possibly many, of the appointed Area Managers simply tried to do the new job to the best of their ability out of necessity.

5.39 Returning to the chronology, on 28 January 2020 Mrs McPherson spoke with her line manager Ritesh Bakrania. She had a similar conversation the next day with the then divisional director, North Ghada Beal. In both I find she explained her concerns and the difficulties she faced with domestic commitments and her view of the process and the scale of the new role. Mrs McPherson was emotional during these conversations. I find these two managers were supportive, and Ms Beal intimated she would make enquiries but their remit was such that nothing could be done to influence the settled decisions that were already made.

5.40 On Friday 31 January 2020 I find Mr Stead called McPherson to confirm there were no other options available to her. I find the only option put to her was again one of take the job or resign. I do not accept that this was said in a dismissive way or even maliciously, but it was said and it reflected the brutal reality that the Head of Stores had no real discretion, were bound by the organisation's approach to this change and did not know what else to do in the situation. That limitation was illustrated by the very limited scope in the only alternative to arise at a later stage. That alternative option was to work for 3 months to get the area up and running and then be offered 3 months garden leave. Even that was only a mere possibility, explored by HR and requiring higher approval. In any event, Mrs McPherson's circumstances had not changed, she needed to work and could not be without work. Other than that, I accept Mr Stead began exploring whether more flexibility in the work pattern would help Mrs McPherson. I accept he was genuinely looking for something to offer Mrs McPherson and would revisit this in future discussions. I do not accept the options actually discussed went as far as he suggested in evidence but I do accept what he said in evidence illustrated the range of what he had in mind. The issue for Mrs McPherson was that none of them addressed the fundamental scale of the role and were largely things she had previously been able to manage as part of her own discretion in the area manager role anyway.

5.41 On 1 February 2020 there was a further phone call chasing her as to whether she was going to accept or reject the role. Mr Stead again stated that he was delighted to have McPherson on his team but if she did not want the role she would have to resign. I find Mrs McPherson did not ever say she was rejecting the role, but she did clearly protest that she wanted the issues she was raising to be considered.

5.42 The new world was implemented within a week or so. Neither side could tell me with confidence the date on which the new world commenced. The claimant's believed it was Monday 10 February 2020. The respondent's best evidence was Monday 17 February 2020. Insofar as it is necessary to reach a finding, I suspect the claimants have better reason to recall more accurately and I prefer their evidence. It is a date which may also be more consistent with the regional team building event that Mr Stead held in Cambridge for his new team on 11 and 12 February.

5.43 The near doubling of the volume was described in the respondent's evidence as an initial temporary disruption which would settle down. There is nothing before me to suggest aspects of the old area manager role were no longer expected. All the existing deliverable standards and individual tasks and interventions remained in place for the new area managers. I find there was an expectation of simply doing more for the same reward, and substantially more at that. I also find, no two areas are the same. They all have a unique mix of small pharmacy and large retail stores. There are some that might run themselves, and others which come with known challenges. From Mrs Wayt's perspective, I have found the new area she was given to be one that came with qualitative changes such as four sites providing professional specialist care home support and seven stores that were classed as high risk and on an internal pharmacy focus register due to their potential risk to public safety. That marked a potential increase in workload for the claimant irrespective of the volume of stores. In addition, it was known that this area came with its own particular challenges in staffing and operational problems.

5.44 On 4 and 5 February 2020, the respondent held a launch event for the new areas and all the remaining area managers were invited individually. That meant they did not know who else would be in attendance until they arrived. I accept the claimant's evidence that the mood was sombre and that, against the task they now faced they felt exploited and some even held the view that the departing managers were the ones that had got the better deal. They did not feel "lucky". Arising from that conference I make the following findings of fact:

a) All the successful area managers were sent individual invitations. I find the purpose was to set out the 'new world'. The structure was set out by the Retail Director and Chief Operating Officer. The conference confirmed how the respondent needed to lose cost from the business and instead of taking more from the stores, the structure had to change to achieve this.

b) There was no reduction in demands or targets of the area manager role. The explanation of the role profile and the range of KPI's remained as it was before. The

objective was to get the managers closer to the stores, not for area managers to spend less time with the stores.

c) A particular emphasis was placed on the area manager's responsibility for security, especially in respect of staff security. An emotional presentation was given retelling the situation of a member of staff that had been stabbed with the message that each area manager should ask themselves each day, "have you done everything possible to keep the store staff safe?"

d) I find the increase in scale and the implications it might have for the remaining area was something the respondent must have recognised as the conference also included guest speaker sessions on topics referred to as "productivity Ninja", aimed how to manage an increased workload, and mental health coaching, aimed at combatting work related stress.

e) I reject the suggestion that this conference included instructions as to the tasks, roles or functions of area managers that could be left to store managers. I have seen next to no documentation concerning the event. Moreover, if there had been such direction or guidance, I would have expected that to have been the initial focus of the respective Head of Stores' responses and evidenced in the respondent's case before me. I suspect the evidence of changing expectation that was put before me to reflect the later evolution of this new scale of role and not how it was first implemented. I find the expectations and reality of the scale the role has demanded to be such that something had to give and further support has since been put in place.

5.45 I find despite their initial protest, and in the reality of having no other immediate option, both claimants attempted to deal with the role. I find both were quickly overwhelmed by the size of the task.

5.46 Mrs Wayt had numerous telephone contacts with Mr Francis who was increasingly now becoming aware that the area she had inherited was packed with problems and issues. I find she suffered a moment of overwhelming pressure one day sat in her car when she realised the volume of unanswered emails she now had in her inbox. Similarly, Mrs McPherson's fears about the work were confirmed. She inherited complex businesses, with very intense issues outstanding. She found a high proportion of Store Managers were new to their role. She knew that meant a difference in the demands on her as her interactions could not be in the nature of coaching if the store manager didn't yet know the job well enough. She knew she was not going to be able to spread herself thinly enough to deliver the new role especially as her concerns about the reduced support was also coming into reality. She inherited four serious security incidents, one involving 5 men encircling a member of staff late at night after the loss prevention people had gone. She had clinical governance concerns in 6 of her new stores.

5.47 I find both formed the view that the role was only feasible to do safely and competently with either or both more support and a decrease the number of stores.

5.48 One difference between the two claimants in their journey through this change was the initial direction of their respective head of stores. Mrs McPherson was now in a region reporting to Mr Stead. He had decided to undertake a “go live” and team building event over two days in Cambridge on 11 and 12 February 2020. I find that was focused on Team Building. Mrs Wayt and the other area managers in her region did not have that as Mr Francis had decided it was not necessary.

5.49 On Friday 6 March 2020, Mrs McPherson and Mr Stead held a joint store visit. They met in a coffee shop before and discussed the situation with the role. During that meeting I find she articulated fully her feelings about the role, whether it was manageable and the effect it had on her ability to manage work and personal life. The discussions about flexibility and hours of work continued. I find she disclosed her previous mental health history and was concerned that she was under too much pressure and her health was in jeopardy. Over the weekend her health did in fact deteriorate and she visited her GP on Monday 9 March. She was signed off sick for one month. Her GP fit note gave the reason of stress and depression. She would never return to the new role of area manager or any other employment for the respondent.

5.50 I find during that week she had contacted her Union. She was advised to consider raising a grievance. I find that Mrs McPherson instructed Mr Pitt of the PDA Union of her circumstances and the nature of her grievances. He put together a draft grievance letter. Mr Stead attempted to contact Mrs McPherson during that week out of what I accept was concern for her wellbeing. During that same week I find Mr Pitt was also advising Mrs Wayt of the same issues arising from her circumstances and I find he did the same for her. Although the two claimant’s circumstances are subtly different, they raise essentially the same grievance. The two grievance letters that would in due course be submitted are unsurprisingly the same in all material respects.

5.51 On 13 March 2020 Mrs Wayt met with Mr Francis in a local coffee shop after which they visited one of her new stores. During this meeting Mrs Wayt says Mr Francis responded in an unsympathetic manner, including saying that her attitude was the problem, not the job, that he needed "people on the top of their game"; that "you may decide this isn't for you" and that he was " just putting it out there". The claimant took this as a further invitation to her to resign. It is not disputed that these phrases were said by Mr Francis. However, I accept his evidence that he intended this meeting to be supportive. There is obviously no transcript but Mrs Wayt did prepare detailed notes soon afterwards which, I suspect, arose from the fact she was already seeking advice from her trade union about the changes and the possibility of raising a grievance. She sets out how he introduced his purpose of the visit as being because he knew she had a lot on and wanted to support her. He was looking for ways of helping and she records aspects of the conversation consistent with this aim and intentions. I find the following arose at or from that meeting: -

a) Mr Francis acknowledged that he knew the January meeting when she was told of the new role would have been a difficult time for her, that she wouldn’t have known what

to expect and that he could see by how she behaved on the day that she was unsure how to react.

b) She still didn't feel the job was doable, she was running on empty and couldn't work harder than she already was.

c) The proposals to address the unmanageable workplace were in the nature of what might be said to a novice area manager new to the role and were things Mrs Wayt had already considered or adopted. Similarly, some of his understanding of the issues was incomplete such as why she was having to be involved in certain grievance matters and could not simply delegate it to store managers.

d) She had to explain the seriousness of some of the issues being dealt with, including a clinical governance issue that had potentially resulted in the death of a patient.

5.52 That mismatch of understanding may explain why certain comments had the effect they did. Discussing her 'mindset' and that 'if she didn't believe it was doable then it wouldn't be' may be more understandable to be part of a supportive pep-talk when the senior manager is not fully aware of the scale of the problems. Equally, however, it is entirely understandable why Mrs Wayt left feeling as though the blame was being put on her. He may not have been deliberately ignoring the reality of the scale of work she faced, it may also be that he knew full well it was not something he could change. His comments seem to me to be an attempt to explore other ways of thinking about the problem, without actually tackling the problem itself. The bottom line is there is common ground by this time that all understood there was a problem with the nature and volume of the issues faced in the area. Mr Francis seems to have acknowledged deficiencies with the implementation of the change referring in his evidence to having "shot himself in the foot" by not having a regional conference at the outset

5.53 At some point over that weekend, I find both claimants were in discussion with Mr Pitt and both decided to submit their respective grievances challenging the nature and manner of the change to their role. On the following Monday, 16 March 2020, their grievances were submitted. They were not submitted by the claimants themselves. They were not even submitted on their behalf individually. They were both submitted together by Mr Pitt of the PDAU. There is an issue in this case which means I need to set out in full the initial email exchanges. Mr Pitt wrote to Mr James, the Chief Executive, advancing both grievances on their behalf. It said: -

> ***Kerry Wayt and Liz McPherson are members of the PDA Union and wish to raise grievances related to the recent structural changes within Boots which has detrimentally impacted on their roles as Area Managers.***
> ***We are instructed to submit the attached grievances on our member's behalf direct to yourself and hard copies will follow shortly.***
> ***Please note our interest in this matter and both Kerry and Liz are unwell at present and not in work; arrangements for their respective grievance meetings should be made through ourselves so that we can provide the necessary support for them at this difficult time.***
> ***I would be grateful if you could appoint a suitably senior and independent manager to investigate these complaints and forward the attached subject access requests to the relevant***

team.
If you would like to discuss this further, please do not hesitate to get in touch and I look forward to your reply.

5.54 This was forwarded to Mr Clements, the respondent's then HR Director, within about 6 minutes of its receipt. Within a further 5 minutes, a duration I find insufficient to digest the content of the attached lengthy grievances, Mr Clements had himself sent an email to 5 colleagues. If find those included colleagues involved in the collective employee relations and some members of his HR team. Amongst them was Anne Higgins who would also become the decision maker for Mrs McPherson's appeal in due course. It was not sent to the claimants or Mr Pitt or anyone that could have been expected to share it with any of them. He wrote: -

All
Please see attached.
Clearly the AM role is beyond their remit. Kirsty can we prepare a response.
best
Nathan

5.55 This reply was not seen by the union or either claimant until much later. I return to its content at the point in the chronology that it is seen by the claimants.

5.56 Returning to their grievances, there were some similarities and some differences between the two. Each alleged the changes amounted to a redundancy and there had been a failure to follow a redundancy process or any fair and considerate process of consulting with the area managers in advance. They both set out the implication to them and their wellbeing and alleged that amounted to a protected disclosure, albeit there is no consequential detriment alleged. They both allege the implications for them at their age amount to age discrimination, in essence that the cost to the business of them being selected in a redundancy exercise was used as a reason not to take that approach. It is through those allegations in particular that the common theme is advanced, that there had been a unilateral imposition of a new area with a substantially increased workload and there is too much work expected of the role for it to be achievable.

5.57 On 16 March, Mrs McPherson was contacted by Mr Stead. I accept his approach was welfare driven in view of her fit note. She sent a text message back to say she had already put a grievance in and declined the chat.

5.58 A week later, on Monday 23 March 2020, Mrs Wayt herself went off sick and presented a GP fit note indicating unfitness for work due to work related stress for four weeks. She too would never return to the new area manager role or any employment with the respondent.

5.59 Arrangements were made for the grievances to be heard. Around this time the UK had seen the initial implications of Covid-19 and entered its first lockdown meaning many of the hearings that followed took place remotely. These were grievances that had been presented to the chief executive, not the immediate line manager. They raised issues with the approach taken to the reorganisation, not just its implementation at the local management level but the high-level decision making. They challenged the policy decision concerning the manner in

which what they regard as a redundancy situation was dealt with in secret and resulting in them being unilaterally given much enlarged workloads without any consultation, scope to influence the decision or any consideration of their personal situations. The people ultimately appointed to hear the grievances were heads of service in other regions. Although largely unconnected with the claimant's recent work, they were themselves at the level of implementing the new area manager arrangements in their own patch. Significantly, they were at the same level as those who have previously said were removed from the "logic and reasoning" of the decision to implement the changes in this way. I find the Union were understandably concerned that these individuals could not answer the grievance and would not have sufficient authority to investigate or challenge the essence of the claimant's concerns. That was rejected on the basis that the individuals appointed were "neutral and independent", which does not seem to me to go to the point being raised.

5.60 The first grievance hearing held was that of Mrs McPherson which took place on 8 April. It was heard by Maxine Smedley. The hearing was principally to explore the grievance and ensure it was properly understood. I find Ms Smedley was prepared to spend time on investigating the detail of who said what at various meetings and the basis on which the claimant had been scored. However, I do not accept that two central issues in the grievance were addressed. The first of which being the nature of the change, whether it was a redundancy situation and why the redundancy process was not followed. The second being the difference in scale of the two roles.

5.61 On the question of the change process, Ms Smedley immediately and unhesitatingly dismissed the redundancy challenge in the course of the meeting. She simply said she did not believe it was a redundancy situation. There was no further examination or investigation of this in her consideration of the grievance. The outcome, sent in the outcome letter dated 6 May 2020, responded to the challenge in these terms: -

> ***Successful AMs were identified through a desktop selection exercise completed by their line manager. As your line manager had very recently left the business, Ritesh completed this for your Region. He was deemed to be the most appropriate person since he had line managed you and your colleagues most recently. This process was followed by a mapping exercise to ensure home to work travel was minimised as far as was reasonably practicable. Those AMs that were not successful have since left the Company. Therefore, since successful AMs such as yourself were never put at risk of redundancy, this meant there was no need to go through the redundancy process with you due to being successfully mapped into the new structure. I do not agree with your view that all AMs should have been taken through a redundancy process. In any case, had the Company gone through such a process with you, the outcome would have been the same for you i.e. you would have still secured one of the new AM roles in the new structure.***

5.62 On balance, I find this was the organisation's position and the outcome given was driven by the view of HR or others. It was effectively repeated by others in other stages of the claimants' grievance processes. I do not accept those I have heard from had sufficient understanding to be able to answer what is and is not a redundancy situation. I do not accept they would articulate such a response in this instinctive and immediate manner. That leads me to conclude they did not simply guess or assert their position from ignorance. I conclude that this was a topic that was discussed beforehand with others and the respondent's position was maintained. That is consistent with other evidence that an organisational position was in

fact taken to “adopt the compromise route”, in respect of which there was no investigation or consideration. The respondent’s case is based on the fact that neither claimant was ever at risk of redundancy. None of the witnesses grappled with the fact that there was an undisputed diminution in the employer’s requirements for employees to perform work of a particular kind, namely that of area manager. It was the approach Ms Smedley and others had been required to implement in their own regions.

5.63 Ms Smedley’s outcome included a restatement that the company has a right to reorganise work and its approach will vary depending on the changes. I find, as the respondent had to accept, that there was a stage after the decision to reduce headcount from 170 to 100 but before the scoring exercise when anyone in the pool could be said to be at risk of losing their employment. The claimant’s analogy with project Hippo was not explained further.

5.64 The challenge to the scale of increase in the role was dismissed on the basis that it was the same role, Ms Smedley rejected the increase and felt Mrs McPherson had the skills to do it effectively. She wrote

> ***When we discussed the role profile you confirmed you'd read it and commented it was no different really. There was therefore no need to provide you with any trial period for this new AM role or other opportunity to consider whether the role was a suitable alternative. I acknowledge that the stores in your area were new to you and team engagement, set up and stores visits to an entirely new area does take time, and that functional support roles were also set up differently. I also acknowledge that you have more stores currently than in your previous area, but in my view the AM role is not significantly different to before and is not 3 times larger, and I believe you have the skills to be successful in the role, which continues to be focused on delivery of results, KPIs and the leadership of a team.***

5.65 The associated discrimination was dismissed as being irrelevant to the desktop exercise as was the disability discrimination allegation and the age discrimination allegation. The outcome concluded with: -

> ***I accept you had expectations about what approach the Company might follow when the AM and field roles were next restructured, and that you were disappointed that your feelings weren't considered, or you weren't offered an opportunity to leave the Company. As explained the Company has taken an opportunity to restructure and the approach followed was a way to achieve this legitimate aim. It is not uncommon for businesses to take reasonable steps to restructure at appropriate times to meet future business needs.***

5.66 She spoke with Ritesh Bakrania on 21 April 2020. He confirmed the circumstances in which he came to be appointed as a head of stores and was asked to undertake Mrs McPherson’s selection assessment. He set out his positive assessment of Mrs McPherson and confirmed the individual’s personal circumstances were not part of his assessment. He confirmed a call with Mrs McPherson shortly after she had been told of the outcome and was surprised that she was not happy with the outcome but he did not know about her personal circumstances and she told him she couldn’t see how she could make the new role work even though it was closer to home. He was tested on consistency. It is not entirely clear to me how these matters were either in dispute or the role the information played in the grievance outcome.

5.67 Before this outcome was sent, I find Ms Smedley had undertaken some further investigations. She spoke to Mr Stead on 23 and again on 30 April 2020. In the first he set out the scoring, his lack of knowledge of Mrs McPherson and the meeting when the news was broken. He spoke of his surprise that she was not happy with the news and steps to consider alternatives including the offer of 3 months' pay in lieu of notice. He confirmed she needed to keep working. In the second the focus was on support offered to Mrs McPherson in respect of her personal circumstances. He set out the discussions exploring different permutation of work patterns. He confirmed he did not share anything further with Mrs McPherson about what might be on offer, just shared his thoughts. Nothing came of it.

5.68 Mrs Wayt's grievance hearing took place the day after Mrs McPherson, on 9 April 2020. Another newly appointed Head of Stores for the Southeast was assigned to decide it. That was Mo Hassam. I find his approach was in all material respects the same as that of Ms Smedley. He was equally prepared to examine in detail who said what at various meetings and the process of scoring. He was, I find, equally superficial in engaging with the central substance of the grievances.

5.69 A similar range of issues arose. First, he was challenged on his suitability to hear the grievance and, again, was maintained on the basis he was independent because he knew nothing of Mrs Wayt. He agreed he had undertaken the same task in his area and was not privy to the logic or reasoning of the number of stores in each area or number of areas, merely the implementation of the retail director's decision. The redundancy point, central to the claimant's challenge was something Mr Hassam was not willing to engage with in the hearing. He answered with how he would rather "take it away and not impose my thoughts". The parties explored the headlines of the grievance further in a hearing lasting around 2¼ hours.

5.70 Mr Hassam undertook further investigations. He spoke to Andy Francis on 15 April 2020. He spoke of his initial meeting with Mrs Wayt on 23 January 2020 and confirmed she had expressed concern about the size of the area and the challenging role being expected. He expressed regret in hindsight about the way he had handled his request for her to look after the areas of two of her departing colleagues. He confirmed her concerns about the support available to Area Managers. He felt she had been struggling with the role in the early days and was quiet hence why he arranged the meeting on 13 March and set out his recollection of that meeting.

5.71 Later the same day Mr Hassam spoke with Ritesh Bakrania who confirmed the process undertaken and his prior and subsequent exchanges with Mrs Wayt. He confirmed she had never indicated a desire to leave the respondent but would have appreciated an area closer to home.

5.72 The outcome was sent by letter dated 29 April 2020, about a week before Mrs McPhersons was sent. All aspects of the grievance were rejected. In summary, the respondent's position is that there was no substantial difference between the claimant's old

and new jobs. In particular it answered the specific complaints in this way. So far as the appropriate internal procedure was concerned, he wrote: -

> ***Successful AMs were identified through a desktop selection exercise completed by their line manager, followed by a mapping exercise to ensure home to work travel was minimised as far as was reasonably practicable. Those AMs that were not successful have since left the Company. Therefore, since successful AMs such as yourself were never put at risk of redundancy, meaning there was no need to go through the redundancy process due to being successfully mapped into the new structure, I do not agree with your view that all AMs should have been taken through a redundancy process. In any case, had the Company gone through such a process with you, the outcome would have been the same.***

5.73 On the scale of the role he wrote: -

> ***While I acknowledge that you have more stores currently than in your previous area, in my view the AM role is not significantly different to before and I believe you can be successful in role given your skills and experience. The role continues to be focused on delivery of results, KPIs and the leadership of a team. To facilitate and support AMs with managing an increased number of stores, the business is working towards minimising administration workload for AMs. Given your significant experience and demonstrated ability to perform the AM role well, along with the fact that the actual role of AM itself has remained unchanged in the new structure, I do not believe a trial period to carry out the new role would have been necessary or appropriate.***

5.74 I find some common themes emerge from the two grievance outcomes. To an extent I accept that some degree of similarity was highly likely as the two grievances were both so similar and both were advanced by Mr Pitt in a similar manner. However, I find the outcomes reflect more of a coordinated central response to the grievances in the following respects: -

a) First, there was a theme in both grievance hearings of a reluctance to permit the trade union to speak on behalf of the employee concerned. I would go so far as to describe this as demonstrating an annoyance with the union, in the guise of Mr Pitt, perhaps driven by HR and the sense that these two individual grievances might be thought of as collective grievances. Ms Smedley described Mr Pitt as trying to take the conversation down a different route and that she was trying to keep it on tack. I don't find that to be the case. Mr Pitt's contributions in both hearings seem to me to be entirely in line with the grievance lodged by each respective claimant.

b) Secondly, neither grievance chair spoke to anyone involved in the decision making concerning why it was that "a decision was taken to go down the compromise route".

c) Thirdly, neither addressed the change in scale of the role in any substantial way.

d) Fourthly, both claimants had requested disclosure of the applicable redundancy policy and the plan to achieve the headcount reduction, a copy of her NDA, any briefing notes, guidance and scripts used by line managers for the completion of the "Selection Assessment Form"; disclosure of which directors involved in the review and verification process, Stores Directors briefing/instructions for the review and verification process, anonymised notes/minutes of the review and verification process undertaken by stores directors for the AM population, a complete anonymised matrix for all AMs to include assessment criteria/score, age, gender and salary with the outcome for each person.

All requests were refused save for the two-page desktop selection undertaken. The others were said to be irrelevant to dispose of the grievance.

e) Fifthly, the language of the grievance outcomes goes beyond coincidence that the two decision makers arrived at exactly the same form of words. Although each obviously contributed to some of the specific individual issues and conclusions relating to the particular claimant, I find the outcomes overall were drafted for them by unknown individuals and particularly so in respect of the central issues in the grievances of whether this was a redundancy and whether the scale of the roles had substantially increased.

f) Sixthly, the challenge to whether the process should have been a redundancy process was substituted in the respondent's answers to one of whether the grievance decision maker felt the process that was in fact followed was fair and equitable.

5.75 Despite Mr Hassam being able to articulate a long list of matters that might amount to support to Mrs Wayt to do her new role, which I don't accept were as substantial as suggested or in place at the time, I am not satisfied either grievance outcome focused on resolving the problems as opposed to justifying why the grievances were not upheld.

5.76 Overall, I find the outcomes to these two grievances were designed to close off the complaint and maintain the existing decisions concerning the reduction of area managers and the adoption of the compromise approach. They do not address that part of it nor do I accept that either grievance manager would or could have realistically altered that. Both had an incomplete and erroneous understanding of the meaning of redundancy. I do not accept they could have answered the question without input from elsewhere and Mr Hassam, who conceded employment was not his field of expertise, accepted the response was driven by HR and employment lawyers. They either did not address it at all or accepted a corporate line on the answer consistent with the decisions already made. It is no surprise to me that both claimants felt their grievance and the outcome were deficient.

5.77 I find each claimant intimated their wish to appeal the outcome and, on 21 May 2020, each lodged grounds of appeal.

5.78 Mrs Wayt set out three headline concerns in her ground of appeal. They were that the investigation was of poor quality, lacked rigour and was very limited in scope; that Mo had reached the wrong conclusions and had not supported his views and beliefs with any evidence and that the interviews he undertook were superficial exercises given the durations of 24 ad 29 minutes respectively. She went on to set out how she could not understand how he could maintain there was no difference in the roles and summarised the issues with the reductions in support. She complained of the unilateral variation done without consultation and asserted that the new role was not a suitable alternative.

5.79 Mrs McPherson's ground of appeal referred to her having lost confidence in the leadership and the outcome has reinforced that. She set out 6 headline grounds. They started with a "key point" that the role offered was substantially larger than the old role and

she felt the grievance did not recognise that. The second was what she regarded as a precedent when a role is no longer available based on project Hippo and the offer of redundancy where a role of a similar size was not available which she also felt had not been addressed. The third was being told her only choice was to accept or resign which was not explored in the further investigations. The fourth was the failure to question Mr Stead about his enquiries of others resulting in her being told others were adamant she would not be considered for a package. The fifth bullet point was a failure to explore the impact on her health and she was critical of Ms Smedley's reasoning for this. The final point was a failure to interview Ghada Beal. Her grounds then went on to assert the role has been fundamentally changed with an area turnover now three times the previous level. She expressed concern about the lack of consultation on the unilateral change and that she did not regard the new role as suitable alternative role. She set out further concerns about the secrecy of the process. She concluded by expressing her view she could not return to work to a role which has and will continue to damage her health.

5.80 Appeal hearings were arranged for 10 and 23 June 2020. Before the appeals were heard, the claimants made data subject access requests. I have already referred to the email from Nathan Clements dated 16 March 2020 which was disclosed as part of this request in the hours shortly before Mrs McPherson's appeal hearing before Ann Higgins on 10 June. At that time, it was redacted and the names of all the individuals were not shown. The claimant and Mr Pitt believed the context was such that it was probably written by Mr Clements and regarded the content to be referring in critical terms to the claimants' ability to perform the role of area manager from which they not only took great offence but regarded his attitude as being influential in the way their grievances had subsequently been conducted.

5.81 Anne Higgins was the Stores Director for Pharmacy. She was appointed to determine Mrs McPherson's appeal meeting on 10 June 2020 supported by Karen Davidson of HR. It was conducted remotely by Teams. As before, Mrs McPherson was represented by Mr Pitt.

5.82 The first issue raised was this email from Nathan Clements and its meaning, which she and Mr Pitt described as a dismissive and contemptuous response. Ms Higgins gave her word she would investigate and, although it was a new matter, took it as the first point of the grievance appeal

5.83 Mrs McPherson then set out her assessment of the scale of increase in workload based on measurable aspects of the new area and no increase in support. Mrs McPherson was clearly setting out her view that this change should have been conducted as a redundancy exercise and she should have had the option of taking redundancy. Ms Higgins gave her response in the meeting that the role evaluations of store managers scale or role did not apply to area managers but that she would include it in part of her investigation.

5.84 Before the outcome was issued, opportunity was given to the union to amend the notes of the hearing which was taken up with some significant amendments being proposed. Ms Higgins undertook further investigation. She met Ghada Beal on 15 June 2020 as Mrs McPherson stated that Ms Beal was the only senior manager to provide support. Ms Beal was

not interviewed as part of the initial grievance; She spoke with Katherine Oakes, Head of HR, on 16 June 2020 so far as she was involved in any wellbeing concerns; She spoke with Maxine Smedley, as the original grievance decision maker; She spoke with Nina Barnes, HR Business Partner on 16 June 2020 in respect of her role supporting Richard Stead at the meeting with Mrs McPherson and Richard Stead himself on 18 June 2020; she spoke with Ritesh Bakrania on 18 June 2020 in respect of the original desktop scoring exercise; She spoke with Ruth Jamieson, Head of HR - Stores on 19 June 2020 as Mrs McPherson raised in her appeal letter that Ms Jamieson was sympathetic to her circumstances in light of her long service; She spoke with Kirsty Pitcher, HR Director on 22 June 2020, in respect of her being adamant there was no exit package; She spoke with Nathan Clements on 22 June 2020 in respect of the 16 March email. That amounted to him being referred to the email and, whilst no specific question was asked, confirming the email was from him and giving an explanation that the sentence "clearly the AM role is beyond their remit" related to the PDAU bargaining unit. He went on to say he had no knowledge of any discussion about a settlement agreement for Mrs McPherson but on a general point, if there are roles to do we are not in the business of handing out settlement agreements. She also spoke with the retail director on 26 June 2020 who confirmed he had been involved in exploring options to support the claimant with various permutation of work pattern, confirming her job was not redundant and offering 3 months' pay in lieu of notice.

5.85 Insofar as I have to make my own findings of the intention of Mr Clements' email, I find it to be a reference to the reach of the collective bargaining recognition agreement, which does not extend to area managers. I understand the process of obtaining recognition had been long fought and there may be personal animosity between the characters involved. The manner in which these grievances were presented together by the union may well have been read initially as a collective union grievance. The respondent relies on the meaning of "remit" which whilst in no way determinative I regard as more naturally a reference to the scope of what the union can or cannot do under the recognition agreement. If the author had been referring to the two individuals lodging grievances, it would make more sense to say "them" and not "their remit". I have already concluded that the time between receipt and the reply being sent means no consideration of the grievances can realistically have been made.

5.86 Mrs McPherson received the outcome by letter dated 30 June 2020. In respect of the change in the scale of the role, Ms Higgins confirmed the business considered a ratio of 1:15 stores was no longer relevant to its current business, that area Managers did not need to be in store 4 ½ days per week and that the business needed to save costs. She confirmed this new role was evaluated at the same level as the old area manager role. She set out details of the Mercer job evaluation system. I don't accept that this explanation dealt with the workload, as opposed to the value of the role. It misses the essential point that everyone agreed the role and the expectations of it were the same before and after the change. It was now simply bigger. Ms Higgins did note that "the span of control has increased" and accepted certain measures were now three times that of the old areas but maintained the new job was not three times bigger but was at the same level. She concluded with a view that

Mrs McPherson's experience meant she should be able to manage the initial demands of the new role with the support available.

5.87 The outcome also gave a list of changes said to support the area manager and stores. I don't accept this addressed the issues being raised by Mrs McPherson about the effect the changes had on the available support and that they were substantially reduced.

5.88 The claimants claim that there was a precedent based on the closure of Hippo stores was rejected. In part that was on the basis the business reserved its right to reorganise work and structure when needed and the approach will vary.

5.89 On the complaint that she was presented with a choice of accept or resign, she summarised her findings. Mrs McPherson was clear it had been put in that way. Mr Stead had said he could not be sure who said it between them but was sure there was a business as usual conversation. Despite that balance of evidence before her, she nonetheless found the issue was raised by Mrs McPherson and that Mr Stead had acted appropriately and dismissed the complaint.

5.90 The complaint of there being an adamant position Mrs McPherson would not be offered a package was rejected. She found the claimant had a desire to leave the business but that apart from the offer of 3 months' pay in lieu of notice, the business did not want her to leave and had no legitimate reason to make her redundant.

5.91 She rejected the complaint concerning Ghada Beal not being interviewed.

5.92 Mrs Wayt's appeal process unfolded a few weeks behind that of Mrs McPherson. Her appeal meeting was heard on 23 June 2020 and chaired by Kevin Alavoine, then the Director of Stores for London who was also support by Karen Davidson of HR.

5.93 The intervening stages took a similar approach with amendments to notes and some further enquiries before an outcome letter was sent dated 30 July 2020 in which Mrs Wayt's grievance appeal was rejected. Her three initial headline concerns were addressed after a similar response to the concerns over Mr Clements' email of 16 March. Each point was rejected. I find the central thrust of the complaints were not dealt with. It is significant that a substantial part of the appeal outcome reasoning, particularly in respect of the scale of the new role was expressed in identical terms to that in the outcome letter sent to Mrs McPherson.

5.94 I find a there was a closed approach to both grievances principally because everyone was restricted to the way the change had happened. It was not possible for any grievance or appeal to undo it and none addressed the reality that the business had chosen to implement this change on the scale it did in a secretive process adopting the compromise approach. No one was prepared to examine that and give a frank response.

5.95 Before then, on 23 July 2020, Mrs Wayt had accepted new employment with Amazon as a Delivery Station Manager. I have no doubt she had been concerned about the likelihood of the respondent making any changes and had to consider her personal circumstances. I

find she had been open with the prospective new employer and had stated how if things did change at boots, her ability to take on that role might also change.

5.96 Both claimants remained absent on sick leave after receipt of their grievance appeal outcomes. Four weeks after receipt of hers, by email dated 28 July 2020 Mrs McPherson resigned with immediate effect. Similarly, two weeks after receipt of her grievance outcome, on 16 August Mrs Wayt resigned with immediate effect by email. Both resignation letters are lengthy and reflect the claimants' emotions and feelings after giving 37 and 30 years respectively to the respondent. I find the reason stated for the resignation to be clearly focused on the manner and nature of the change in role and the employer's response to their concerns.

6. Unfair dismissal

Law

6.1 It is axiomatic that in order to claim unfair dismissal, the claimant must have been dismissed. In this context, section 95(1)(c) of the Employment Rights Act 1996 ("the Act") provides the statutory definition of dismissal: -

> ***(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—***
>
> ***(a)…***
>
> ***(b)…***
>
> ***(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.***

6.2 I have reminded myself of the essential authorities on "constructive" dismissal generally. That starts with **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761** on the application of common law principles of repudiatory breach, acceptance and causation within the context of contracts of employment. I remind myself of the definition of the implied term of trust and confidence set out in **Mahmud v BCCI [1997] UKHL 23** that an "Employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence'.

6.3 In the context of an employer's right to relocate or vary the work, I have not been taken to any express contractual provisions. I accept that, absent inconsistent express terms, there must be implied into a contract some degree of flexibility for the employer to redesign the work. It is well settled that any term entitling an employer to reorganise the work and location of work, whether express or implied, must still be exercised in a way that does not offend any other contractual term, in particular the implied term of trust and confidence. This much is clear in the context of an express mobility or relocation clause. (**White v Reflecting Roadstuds Ltd [1991] ICR 733**). Moreover, in the case of a mobility clause, even an

express term has to be read with a requirement to give reasonable notice and also that it must not be exercised in a way to that makes performance of the role impossible (**United Bank Ltd v Akhtar [1989] IRLR 507 EAT**)

6.4 The case is not really put on a last straw basis but there is a period of time over which various acts or omissions are said to contribute to the breach. To the extent it becomes necessary to consider last straw principles, I have had regard to **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493** on the necessary contribution of a "last straw" event not needing to be a breach in itself but adding something of substance to the character of the overall state of affairs, being more than utterly trivial; to **Kaur v Leeds Teaching hospital [2018] EWCA Civ 978** on the approach to take in last straw cases.

6.5 I also note **Croft v Consignia PLC [2002] 1160/00/3009** on the measure of conduct capable of amounting to a fundamental breach of the implied term and the requirement for both parties to absorb "lesser blows". That is really focusing on the fundamental nature of the breach. In most cases, a breach of the implied term of trust and confidence will be regarded as a fundamental, repudiatory breach but it is a point I need to be satisfied of.

6.6 I must then be satisfied that the breach has not been waived (or rather the continuation of the contract affirmed). This may arise explicitly. It may arise by implication, often by the effluxion of time. In that sense the passage of time does not, in itself, provide the answer. What is important is what has happened during that time. Often, the time provides the opportunity for the performance of the new state of affairs for a sufficient time to be able to infer acceptance. What is required is an unequivocal acceptance of the new state of affairs. Working under protest is equivocal. Invoking the internal grievance procedures is not to be treated as an unequivocal affirmation of the contract. (See **Kaur**, per Underhill LJ at para 63)

6.7 As to causation, it is not necessary that the contractual breach is the only reason for the resignation or even that it is the principal reason for the employee's resignation. It is sufficient that the repudiatory breach "played a part in the dismissal" (**Nottinghamshire County Council V Meikle [2004] EWCA Civ 859 [IRLR] 703; Wright v North Ayrshire Council [2013] UKEAT 0017/13)**

6.8 If a resignation amounts in law to a dismissal, the provisions of section 98 of the Act then engage. It is for the respondent to prove the reason, or if more than one the principal reason, for dismissal and that that reason is a potentially fair reason. The respondent relies on "some other substantial reason', having abandoned its original alternative reason of capability.

6.9 For a reason to be "another substantial reason" so as to fall within the catch all of section 98(1)(b) of the ERA 1996 it has been held that it must meet certain characteristics or qualities: -

a) It must be substantial, meaning it must not be frivolous or trivial, and must not be based on an inadmissible reason such as race or sex (**Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors 2006 ICR 1552**).

b) It need only be genuinely held, it need not be sophisticated. A decision to dismiss cannot be substantial if it is whimsical or capricious (**Harper v National Coal Board 1980 IRLR 260, EAT**),

c) It must be something that *could* justify dismissal, it is not necessary to consider if it does justify it at the time of the section 98(1) question (**Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC**)

d) An employer does not have to show that a reorganisation was essential, merely that there was a 'sound, good business reason' for it. (**Hollister v National Farmers' Union 1979 ICR 542**) and it is not necessary that the survival of the business is at stake (**Catamaran Cruisers Ltd v Williams [1994] IRLR 384**).

e) Nor is it the tribunal's concern to measure the extent to which the changes might achieve a business aim. As long as the advantages are clear the employer does not need to show any particular 'quantum of improvement' achieved (**Kerry Foods Ltd v Lynch 2005 IRLR 680, EAT**). This is closely related to satisfying the tribunal that the reason was genuine.

6.10 The reason is the set of facts known to, or beliefs held by, the employer which causes it to dismiss the employee. In a case of constructive dismissal under s.95(1)(c), where it is the employee that brings the contract to an end by acceptance of a repudiatory breach, the focus turns to the employer's reasons for the conduct which entitled the employee to resign and the burden of proving the reason remains with the employer (**Berriman v Delabole Slate Ltd 1985 ICR 546 CA)**

6.11 If the respondent does not establish a potentially fair reason, the dismissal is unfair without more. The fact that the claimants assert the reason was redundancy does not in itself mean that is the reason by default.

6.12 If the respondent does show a potentially fair reason, I must then consider whether that dismissal was fair having regard to the provisions of section 98(4) of the Act. That statutory provision provides the only test of fairness. However, case law has established particular factors that might illuminate whether that test is made out or not in any particular case which vary from reason to reason.

Discussion and Conclusions

6.13 The first issue is that of a dismissal. The starting point is the conduct of the respondent alleged to breach the implied term. What actually happened and is it conduct that can be said to have been calculated or likely to destroy or seriously undermine trust and confidence? If it is, I must consider whether the conduct was done with reasonable and proper cause.

6.14 The list of issues identified at the preliminary hearing sets out nine acts or omissions. Some are discrete. Some overlap. Whilst I have to consider them all, it is not the case that they stand in isolation. The whole may create a different result to the sum of the parts and

they are all said to contribute to a state of affairs where the conduct is likely to serious undermine trust and confidence. In this case, the nine allegations of conduct broadly fall into two groups. The first 5 relate to the nature and scale of the changes and the manner in which the change was implemented. The final four relate to the employer's response to the claimant's challenges to that.

6.15 The first discrete allegation is that the respondent acted oppressively in requiring the claimants to sign a non-disclosure agreement in order to be told of the changes and their new role. There is no dispute they were required to sign one, the question is whether it was oppressive. In isolation, I would struggle to see why this is likely to seriously undermine trust and confidence especially where both claimants, over their long service, have regularly been asked to sign similar agreements and, it seems, the use of such agreements is a regular feature of change management in this employer. Similarly, viewed from the other perspective I might be able to conclude in isolation that the respondent's desire to manage a controlled dissemination of information about a new structure is likely to be reasonable and proper cause. In isolation, it does not seem to me that this would breach the implied term of trust and confidence. However, it starts to take on a new complexion when coupled with the second alleged conduct.

6.16 That second allegation is the failure to warn or consult about the change. Here the employer is not only deciding not to share its plans for change with those affected by it but is doing so under the restriction of the non-disclosure agreement. Even then, when viewed in isolation, the absence of warning or consultation is not absolute and may not in itself answer whether trust and confidence is likely to be seriously undermined. The gravity of the omission is likely to depend on the nature and scale of the change that comes with it. In general terms, there is unlikely to be a breach of the implied term if an employer unilaterally imposes quite minor changes to working practices without warning or consultation. Similarly, detailed consultation on a substantial change could mean its later imposition does not seriously undermine trust and confidence.

6.17 In this case, the scale and nature of the change is engaged in the third allegation. That is requiring the claimants to accept a new role which I have found to be very different in scale from that which had gone before. These three separate allegations now begin to come together in this case as part of the totality the changes. This allegation also goes hand in hand with the fifth allegation which is that the new role was excessive and unmanageable. I have found that the scale of the change was substantial. I preferred the evidence of the two claimants in the role as an accurate description of the unmanageable nature of the new demands based on their vast experience and professionalism in the role. They were entitled in the circumstances in which the changes were imposed to expect themselves to be held (and to hold themselves) to the same professional standards and measures of success they had adopted and enjoyed previously. They knew what it had taken to get their areas to be the successes they were and I accepted they could not foresee how this level of increase in area and reduction in support could be manageable.

6.18 No contractual terms have been put before me concerning area or volume of work. In the absence of express terms to the contrary, I accept that an employer is entitled to vary and reorganise the work. There is no breach merely by the fact of an employer asking an employee to do more. Such is the foundation of crude productivity increase. But there comes a point when the scale and degree of the new demands is so much greater that it may then amount to conduct seriously undermining trust and confidence. I am satisfied the scale of the change in this case was of a sufficient order to amount to a repudiatory breach. The claimants, as "successful" area managers being retained, were part of the surviving cohort required to take on 70% more work in order to cover the same stores in the newly drawn areas. My findings show that from the claimants' perspective, they were already more than fully occupied and efficiently working in the old-world role. Conversely, the respondent has not evidenced the basis for the need or rationale for this scale of change beyond the abstract saving of money. This scale of increase in workload was such as to be capable of seriously undermining trust and confidence especially when viewed alongside the other changes to the support available and, as a fact I find it did for both claimants. They were also moved from their current areas. In my judgment it is no answer to say that they were moved closer to home. Firstly, that is not necessarily an advantage. As Mrs Wayt noted, reduced distance is not necessarily synonymous with reduced travelling time. Secondly, it ignores the professional and personal connections built in the previous area. It is at best a neutral aspect of the change when implemented without consultation. Nor do I accept breaches can be offset by other gains and the claimants were entitled to take the view that the imposed move of location, even though geographically closer to home, did not offset the other negative changes. It is then necessary to see that change in the context of the surrounding allegations.

6.19 The fourth allegation is presenting an ultimatum of accepting or resigning. This is closely related to the second allegation of a failure to consult but it goes further than being simply the corollary of it. It reinforces the fact the employers mind was made up without regard to the views of the employee. The scale of the change was being imposed without consultation, in a take it or leave it manner and the employee at the centre of this change was then told they could not discuss it with anyone, including any advisers or trade union. I am satisfied that was conduct likely to seriously undermine trust and confidence.

6.20 Those first 5 allegations of conduct all relate to characteristics of the initial decision to change the roles and how that was implemented. The final four specific allegations of conduct by the employer relate to its response to the claimants' internal grievances and challenges to the changes encapsulated in the first 5 allegations.

6.21 Turning to those, the sixth is said to be the failure to admit there was a redundancy situation and the consequential failure to adopt the typical procedural steps of a redundancy procedure, largely as the respondent's own policy expects. None of the witnesses were able to persuade me that they understood the legal definition of redundancy. In many respects it is not necessary for witnesses of fact to know the law but in this respect the very question they were dealing with in a grievance required them to answer it. What they did convey to me was incorrect or incomplete. This was central to the claimant's grievance complaints and I was not able to conclude as a fact that this was considered. The response was to baldly

dismiss their contention on the basis that they have kept their employment. The claimants were entitled to conclude the employer was not addressing this. That in itself is conduct likely to undermine trust and confidence.

6.22 The seventh is said to be an unsympathetic response to the claimants. In this respect in isolation, I would not accept the claimants' contentions. I accept that on a personal level the respective managers were sympathetic to the claimants but they were themselves tied to the settled policy of how the new world would look. Mr Francis intended his discussions to be supportive of Mrs Wayt albeit they were miscalculated and she was entitled to construe his language as she did. Mr Stead similarly did what he could to further Mrs McPherson's wishes. Even the grievance managers considered certain limited aspects of the grievances but were simply unable to go outside of the confines set by the new world policy and the control of HR over the process.

6.23 The eighth is Mr Clements' email. I do not accept this does amount to a breach of the implied term or contribute to it. I have found that its substance relates more naturally to the collective bargaining remit of PDAU rather than the competence of the claimant's. Moreover, this email was never intended or expected to become known to the claimant employees. It is neither calculated to seriously undermine trust and confidence nor was it likely to when it was not reasonably foreseeable to ever come to their knowledge. It was only brought to their attention because the employer had reasonable and proper cause to do so in compliance with the entirely separate statutory process of a DSAR request. I do accept that the investigation on this point appears superficial. There was scope to explore what did or did not happen with the response instructed to be sent by Mr Clements which was not explored and might have been helpful context and the questions of Mr Clements were limited. They were effectively accepting his initial response. On the other hand, the context admits of collective representation, and Ms Higgins was entitled to consider who it was that he sent his email to in order to draw her own conclusion his account was accurate and truthful. The suggestion that it was aimed at the claimants also sits against the factual reality that he did not know these two individuals, both of whom were very competent individuals who the business had not only assessed as such weeks earlier but who it wanted to retain.

6.24 Additionally, I don't accept that his email had any bearing on the conduct of the grievances. The only person relevant in receipt was Anne Higgins. I accept she could not recall seeing it before it was raised even though it appears to have been sent to her. However, for other reasons, I do accept that there was some global coordination to the two grievances and that that was led by HR. That is unrelated to this email.

6.25 The ninth allegation is that the grievances were superficially investigated and rejected inappropriately by adhering to a demonstrably false position that there was no significant difference between the new role and the claimant's previous role. I am satisfied this is made out. For some issues in the grievances, the respective grievance managers put off dealing them during the meeting itself on the basis that they were neutral, needed to gather the facts and needed further investigation. That is understandable but at times, in particular the challenge as to why the redundancy process had not been followed, the issue was closed off

with immediate responses by individuals that did not have sufficient understanding of the issue to make such an immediate response. Also, I do not accept that the respondent did address one of the key issues in both claimant's grievance which was the increase in size of the role. That is central to this whole case. At times I found the respondent's case confused and inconsistent on whether the job was the same or not. The bulk of the evidence asserted forcefully that the role and expectations were the same, only more of it was now required. The answer to the claimants' complaint that it was a larger job was answered in a qualitative sense referring to job evaluation. In that regard everyone agrees it was the same job and the same value. The relative weight of the Area Manager job between old and new world had not changed because the role, expectations and KPI's had not changed at all. Any job evaluation would return the same grade, weight or valuation. That, however, is not what the claimants were challenging. It was the fact that there was more of it to do and so much so that they regarded it as unmanageable and detrimental to their health. The focus on job evaluation weight rather than volume feels like the respondent's objective was to reject the grievance and this gave some means of appearing to justify that. To the extent that elsewhere the outcomes did acknowledge that the task was bigger, it still did not address any measure and dismissed the increase simply as something the claimants should be able to cope with. I am satisfied the claimants were entitled to regard this response as their point being brushed aside and that this adds to undermine trust and confidence.

6.26 I am satisfied that from 23 and 28 January 2020 respectively, each claimant was exposed to conduct by the employer that was likely to undermine trust and confidence. That was first on the communication of the decision. The decision and the manner of implementing the decision is what the claimants set out in their first 5 allegations. They agree to the new role under protest and swiftly lodge their internal grievances. Allegations 6, 7 and 9 then serve only to further undermine trust and confidence. The answer to whether that amounts to a repudiatory breach or not depends on whether the respondent had reasonable and proper cause for its conduct. I am not satisfied that it has shown that it did.

6.27 As with whether the conduct was likely to undermine trust and confidence, it is artificial to consider each in total isolation to the others. What is important to prevent a package of conduct amounting to a breach is whether there was reasonable and proper cause for that package. For example, in isolation there may well be reasonable and proper cause for the use of non-disclosure agreements to manage the cascade of the changes proposed. In this case, it is used as part of a conscious decision to "go down the compromise route" and adopt a process without any warning or consultation to unilaterally impose changes. That is, the second allegation which I have considered sits closely with the fourth, to require the claimants to accept the change or resign ultimatum. What is the reasonable and proper cause for taking that approach? The answer is I don't know and the respondent has not evidenced its reasons beyond the simple fact that someone decided to implement the changes in that way. I know nothing more about the reason to be able to conclude there was reasonable and proper cause. On that basis I cannot say that that conduct was done with reasonable and proper cause.

6.28 The third and fifth also go together. Substantially, they relate to a unilateral requirement to take on a new larger area they viewed as unmanageable. I accept that the employer's right to change aspects of an employee's role means the simple fact of a change by a senior manager's decision may well satisfy the reasonable and proper cause in itself. I have to include with that the fact that the claimants each were alive to the potential for a "realignment" after 3 or 4 years. As I have already said, that is subject to the scale a degree of change. In this case, the scale of the change together with the process of getting to it has not been shown to be with reasonable and proper cause. I am unable to accept the justification of "managers getting "closer to stores". That applies to the very senior management, not the Area Managers. The same conclusions apply in respect of the objective of removing a layer of management between stores and retail director, it does not go to explain the change to the Area Managers. In a case such as this, I might want to consider the factors behind the decision to reduce from 170 areas to 100 with the commensurate result that each area was around 70% larger. The reality is I don't know what was behind that as the respondent has not evidenced the reasoning to establish reasonable or proper cause for that part of the decision. I do not accept saving money in the abstract satisfies that in the absence of further explanation of the particular reasoning. Even that would not explain the full picture. I must also be satisfied there is reasonable and proper cause for the decision not to engage with any of the affected staff by way of notice or consultation. It too has not been evidenced. The most I have is that there was some a higher-level decision somewhere to "go down the compromise route". So far as there is commercial sensitivity, I am left without an explanation why the use of an NDA could have been deployed alongside some speedy process of consultation. Ultimately, the respondent has not adduced evidence of its reasoning of the change. It has not called anyone to speak to the decision making. The Heads of Stores were, by their own evidence, were not involved in the "logic or reasoning" of the project daffodil. I am satisfied that the conduct likely undermining trust and confidence has not be shown to have been done with reasonable and proper cause. The aspects founded on the employer's responses to the grievances by their nature are not with reasonable and proper cause either.

6.29 For completeness, although I have rejected the 8th alleged conduct concerning Mr Clements' email as being likely to undermine trust and confidence, even if the claimant's seeing the content was likely to undermine trust and confidence because of the meaning they attributed to it, I have found that not to be the reason that it was written. Although Mr Clements was mistaken as to the purpose of the Union's email when he drafted his email, I am satisfied that was not an unreasonable mistake to make such that the respondent could still rely on reasonable and proper cause for that particular conduct alleged.

6.30 For those reason, I conclude that there was a repudiatory breach entitling the claimants to resign without notice.

6.31 The next question is one of causation. I am satisfied both claimants resigned in response to that breach. That is the scale of change, viewed in the context of the manner with which it was implemented and the way their concerns were responded to was a material reason for each resignation. It is not necessary that it is the main reason still less the only

reason. I am reinforced in that conclusion by the fact that but for this state of affairs neither would have resigned. The facts underlying the breach is the only reason each resigned. I am led to that conclusion by the facts that both were particularly long serving and I have no reason to think they would not have continued to retirement. I am satisfied that Mrs Wayt finding new employment was out of caution and only against the background of these changes. That was her first job interview in 30 years. The fact that she anticipated the respondent's appeal outcome standing by the same approach it had already taken did not mean she did not hope it would not. Similarly, the fact she had the sense to do that does not remove the breach as the operative reason. I take the fact that she obtained new employment demonstrates that she would have continued working, and for other reasons I concluded she would have continued working for Boots had it not been for these matters. I am satisfied it does not suggest she was looking for a way out of Boots.

6.32 I accept Mrs McPherson's circumstances require more careful consideration. She had reason at the time of the changes to contemplate leaving but having examined those factors in my findings, I found it was the imposed changes on this scale that was the reason she raised the possibility of other options or compromise. I can also dismiss the continued desire to be able to look after her mother in Ireland as being the real reason as, at the time of the resignation, the Countries were still managing their covid responses in a way that would have undermined the ability to travel freely. The breach was the operative reason for her resignation also.

6.33 I am satisfied that both Claimant's sought to challenge the decision and manner of the implementation in their grievance. Every element of each grievance was rejected. The appeal outcome marked the end of the internal procedure. Both made their decision to resign with a few weeks of learning the outcome at a time when there are no other reasons apparent.

6.34 I then turn to the question whether the claimants affirmed the contract. The respondent says I need only look to the delay between January and July/August to answer that question against the claimants. It says affirmation can be implied by the fact that neither Claimant resigned for at least six months following them learning of the central issue relied on as breach and which they refer to in their letters of resignation. In the abstract, I would accept that an employee that performs a contract for six months after the imposition of a new state of affairs is likely to have affirmed the contract either expressly or that affirmation can be inferred. However, this passage of time is not to be considered in abstract. The time frame was largely at the control of the respondent as most of it reflects the time it took for the initial grievances to be determined followed by the subsequent appeals and on top of that, during the covid lockdown. There is a short period of 4 weeks for Mrs McPherson before she is first absent on sick leave and 5 weeks for Mrs Wayt before she is also absent on sick leave, although they each actually perform the new role for less. Within that time they both make their informal protests formal. That period of time might be on the cusp of what is long enough to infer acceptance but, in this case, I have concluded it does not warrant such an inference. The delay needs to be seen against the background of their initial objections and protests which continued informally before being formalised in the internal grievance. Then,

from 9 and 23 March respectively, Mrs McPherson and Mrs Wayt were off sick and not actively performing the new way of working imposed on them. They would never return to that work. There is nothing about their continued employment relationship on sick leave that can be said to be an unambiguous acceptance of the new role. They are not only not performing it, but they have marked their protest. After they learned of their grievances appeal outcomes on 30 June and 30 July respectively, Mrs McPherson and Mrs Wayt then spent a further 4 and 2 weeks each in employment. That too adds to the delay in resigning but I am satisfied there is still no basis for inferring affirmation. Resigning from employment is a very serious decision for anyone but the law requires it to be made promptly. In this case both had to come to a conclusion on a momentous decision for any employee to make, but for these two it meant abandoning 30 and 37 years' service. They are entitled to some time to weigh that decision even before accounting for the fact both had to do that within the context of their continuing ill health. Importantly, neither claimant did anything which could be said to be inconsistent with their long-stated position of protest at the change. There is nothing from which I can properly infer affirmation. In summary, I am not satisfied that the claimant's lost the right to accept the repudiatory breach. As a result, the circumstances of section 95(1)(c) are engaged and there was a dismissal in law.

6.35 In the alternative, if there was affirmation before the grievance and appeal outcomes, each of those added to the breach such that, to the extent these facts can be viewed as a last straw, the appeal outcome started a new period against which affirmation could be assessed and this too would result in the claimants not having affirmed the contract.

6.36 In a related matter, the respondent also invites me to make a finding that the Claimants would each have resigned irrespective of any breach, in line with the guidance in **Wright v North Ayrshire Council [2014] IRLR 4.** I am not able to do so. Mr Wayt's attempts to secure a backup offer of employment demonstrates her continued need to work. Her 30 years' service satisfies me she would have preferred to meet that need by remaining in Boots. I am not satisfied that she would have resigned but for the repudiatory breach. Mrs McPherson similarly would have continued for the foreseeable future.

6.37 Having found a dismissal in law, it falls to the respondent to establish the reason for dismissal. In its ET3 response, the respondent put the reason in terms of capability or some other substantial reason.

6.38 The respondent no longer relies on the pleaded case of capability. It now relies on some other substantial reason. In his submissions, Mr Leonhardt puts it: -

> ***The actions of the Respondent, even if found to be repudiatory breaches, were justified for some other substantial reason: they formed part of or resulted from a restructuring exercise that the Respondent considered necessary to efficiently carry out its business***

6.39 The task is to consider the reasons for the conduct which led to the repudiatory breach. That is not simply the restructuring exercise. It is the scale of it and the manner of its implementation.

6.40 The structure of section 98(1) splits the analysis of "the reason" into two concepts. The first is the facts that led to the decision. The second is that those facts fall within one of the four potentially fair reasons listed or, if not one of those four, is another substantial reason of a kind to justify dismissal. It is no answer to say the reason was some other substantial reason without explaining the operative facts any more than it would be to say conduct was the reason, without explaining what it was that the employee had done wrong to amount to (mis)conduct.

6.41 The employer has not assisted me in this task. I can do no more than extract from the facts those matters that might go to the reason for the conduct. Some arise from the analysis of reasonable and proper cause. I remind myself at the first stage of identifying the reason, that I simply need to identify a genuine reason which is substantial, that is not whimsical or capricious, and which could be a basis of a fair dismissal. At this stage I do not need to engage with whether they are fair.

6.42 In that regard, there is no real evidence before me of the driving force behind these changes. Many of the respondent's witnesses refer to the aims of "getting closer to the customers" which I accept so far as the very senior management are concerned but cannot reconcile it with the area manager role. Cost saving may be another reason behind the increase in areas and a reduction in headcount, but I have heard no evidence on the costs and needs for savings.

6.43 I also have a glaringly obvious alternative reason jumping out of the papers so far as the facts of this "restructuring" is concerned. That is redundancy. Project daffodil meant there was a diminution in the respondent's requirements for employees to perform the role of area manager by about 40%. The area manager work is work of a particular kind. Whichever way I try to look at this set of facts, I cannot view it in a way which takes it out of the statutory definition of redundancy set out in section 139 of the 1996 Act. There is no reason to label it as some other substantial reason when the real reason is redundancy. So far as the respondent seeks to establish the factual reason as being something else, it has not done so. So far as it is the totality of project daffodil, that clearly is the reason in fact and that is the reason of redundancy in law.

6.44 The link between that and the claimant's ultimate dismissal cannot be broken. The new world Area Manager that came out of that redundancy situation was the same role, only with near-double the volume of work. That redundancy situation is inextricably linked to the factual result that the 100 that were kept on were expected to cover the workload previously done by 170. The two employees concerned knew from the outset they could not meet that workload. They tried under protest and crumpled under the pressure within a matter of weeks. Their insight into what was expected was clear from day one, they could see the volume was unachievable. The nature, timing and circumstances of their case remain firmly within the scope of the decision to reduce to the need for the number of AM roles.

6.45 I have no evidence that the respondent was over resourced previously, or that Area Managers had an easy job with lots of capacity for additional work under the old world. Far

from it. Moreover, the approach to the implementation has had the effect of circumventing certain statutory rights of employees in a redundancy situation.

6.46 Finally on the question of the reason, the act permits of more than one reason to be engaged in which case it is the principal reason that is the focus. Nothing arises in that respect as between redundancy and the reorganisation. I do not regard those as being different reasons, merely different legal labels. There is, however, scope for different reasons in this case as these are constructive dismissal cases and the reason is for the conduct that breached the implied term, not the reason for an actual dismissal in fact. As the conduct straddles both the reorganisation and the response to the claimant's protests, there is scope for other reasons to engage. I do not consider that alters my conclusion. First, the respondent has not sought to explain the reasons for those in any separate way and secondly, even if different, redundancy would remain the principal reason.

6.47 As the respondent has not established the factual reason, the dismissals are unfair without need to consider section 98(4). For what it adds, to the extent that what it seeks to rely on is the potentially fair reason of redundancy, which is not the respondent's case, it may still be necessary to consider whether the dismissal is nevertheless fair for that reason. Frankly, however, it is not possible to bring the facts of this case within what is generally required of a reasonable employer to satisfy a fair redundancy dismissal. There is no notice or consultation, no opportunity to understand or influence the selection process in individual consultation, and no opportunity to trial alternative work.

7. Redundancy Payment

Law

7.1 The entitlement to a redundancy payment requires first that the employee is dismissed. Section 136(1)(c) defines what is usually termed a "constructive dismissal" in identical terms to section 95(1)(c), set out above. Consequently, the answer to that will also satisfy section 136. The subsequent provisions of section 136 that limit the circumstances of such a dismissal do not engage in this case.

7.2 By s.135, an employer shall pay a redundancy payment to an employee who is dismissed by reason of redundancy. For redundancy to be the reason, the facts behind the reason for dismissal must engage with s.139 of the Act which defines the concept in law. In this case, the relevant part of the section is: -

> ***(1)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—***
>
> ***(a)…***
>
> ***(b)the fact that the requirements of that business—***
>
> > ***(i) for employees to carry out work of a particular kind, or***
> >
> > ***(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,***

have ceased or diminished or are expected to cease or diminish.

7.3 Section 138 of the Act sets out a deeming provision whereby, for these specific statutory purposes under this part of the Act, there will be no dismissal in cases of renewal or re-engagement. The relevant parts provide: -

(1)Where—

(a) an employee's contract of employment is renewed, or he is re-engaged under a new contract of employment in pursuance of an offer (whether in writing or not) made before the end of his employment under the previous contract, and

(b) the renewal or re-engagement takes effect either immediately on, or after an interval of not more than four weeks after, the end of that employment,

the employee shall not be regarded for the purposes of this Part as dismissed by his employer by reason of the ending of his employment under the previous contract.

(2)Subsection (1) does not apply if—

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

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

(ii)the other terms and conditions of his employment,

differ (wholly or in part) from the corresponding provisions of the previous contract, and

(b)during the period specified in subsection (3)—

(i)the employee (for whatever reason) terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated, or

(ii)the employer, for a reason connected with or arising out of any difference between the renewed or new contract and the previous contract, terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated.

(3)The period referred to in subsection (2)(b) is the period—

(a)beginning at the end of the employee's employment under the previous contract, and

(b)ending with—

(i)the period of four weeks beginning with the date on which the employee starts work under the renewed or new contract, or

(ii)such longer period as may be agreed in accordance with subsection (6) for the purpose of retraining the employee for employment under that contract;

and is in this Part referred to as the "trial period".

(4)Where subsection (2) applies, for the purposes of this Part—

(a)the employee shall be regarded as dismissed on the date on which his employment under the previous contract (or, if there has been more than one trial period, the original contract) ended, and

(b)the reason for the dismissal shall be taken to be the reason for which the employee was then dismissed, or would have been dismissed had the offer (or original offer) of renewed or new employment not been made, or the reason which resulted in that offer being made.

(5) ….

(6) ….

7.4 I have considered the few authorities there are on the operation of section 138 in the context of constructive dismissal. Mr Leonhardt referred me to **Optical Express Ltd v Williams [2008] ICR 1** as authority for the proposition that the statutory four-week period cannot be extended other than in accordance with the provisions in section 138(6) relating to retraining. It also considered **Air Canada v Lee [1978] IRLR 392 EAT** and **Turvey v C W Cheyney & Son Ltd [1979] IRLR 105 EAT**. These two earlier cases were of a time before the implied term of trust and confidence was fully developed. Those cases also relied on repudiation of express terms going to the nature of the work or location. They are also of the time when **Western Excavating** was clarifying the essence of the concept of constructive dismissal including the element of affirmation. Their references to a trial period before electing on their position needs to be read with that in mind.

7.5 **Turvey** deserves treating with caution because of the way it did, or did not, deal with the two distinct statutory provisions of the statutory claim for a redundancy payment and that of unfair dismissal. Although this statutory right operates in the context of a dismissal or a constructive dismissal, its focus is on the right to a redundancy payment only. Engaging section 138 in itself does not mean that there is not still a case of unfair dismissal. Conversely, a fair dismissal may still warrant a redundancy payment.

7.6 I do not interpret **Williams** as saying there can never be a statutory redundancy payment where there is a constructive dismissal relating to a change in work in what turns out to be a redundancy situation. That is so even if the rejection of the new work happens after what might have been statutory four-week period. **Williams** is premised on the fact that the parties expressly sought to operate a trial period in a redundancy context as an alternative to a redundancy dismissal. The common law did not serve to extend any notion of a trial. **Williams** distinguished the older cases on the basis that in neither of those did either party purport to operate the statutory trial period in the context of what was otherwise a redundancy dismissal, albeit there clearly was in both a period of a trial at the new working arrangement. Williams includes an observation at para 37 that: -

> ***Of course there will be hard cases, but the much better and more sensible course is for both employer and employee to know where they are, in terms of the availability of this procedure. In this case, both went into it with their eyes open. Understandably the claimant was reluctant, had reservations, but, particularly with the benefit of legal advice, she should and could have exercised her right in time.***

7.7 An offer made at a point in time before the dismissal is itself in contemplation cannot be an offer of renewal or reengagement for the purposes of section 138 (**McHugh v Hempsall Bulk Transport EAT 410/90)**.

Discussion and conclusions

7.8 I start with the observation that despite the obvious overlap in various concepts, the statutory claims of unfair dismissal and the statutory claim for a redundancy payment are two separate and distinct statutory rights.

7.9 The claim is obviously only available to those who are dismissed. My conclusion under s.95(1)(c) applies also to the test under 136(1)(c). Similarly, the claim for a redundancy payment comes with a statutory presumption that the reason for that dismissal is redundancy. I have found that was the reason for dismissal but, the main effect of that in this context is that, by the same analysis, the statutory presumption has not been rebutted.

7.10 Those two conclusions mean that the regime entitling the claimants to a redundancy payment is made out unless the fact of them being given the new enlarged area manager role engages the provisions of section 138(1) which deems there to have been no dismissal for the purpose of this statutory right. That is the determinative question in this part of the claim.

7.11 I am not satisfied that the provisions are engaged for these interrelated reasons. First is whether there was an "offer". An offer is only an offer if it is something which can be accepted or rejected. On the facts of this case there was nothing to accept or reject and no expectation of any decision being made by the employee. The consequences of rejecting only came to light when the position was challenged.

7.12 Second is the nature and circumstances of any offer. **Air Canada** states that in order for [section 138] to have any application (i.e. "shall not be regarded as being dismissed") the circumstances must be such that were it not for the provision the employee would be regarded by reason of the ending of his employment as having been dismissed. That is not the respondent's case. The facts show the respondent never identified a dismissal or a risk of dismissal. Indeed, its entire case is that the claimants were never at risk of redundancy and therefore no question of a trial period arises. In respect of Mrs Wayt it was said:-

> ***"along with the fact that the actual role of AM itself has remained unchanged in the new structure, I do not believe a trial period to carry out the new role would have been necessary or appropriate."***

7.13 In respect of Mrs McPherson, it was similarly said: -

> ***When we discussed the role profile you confirmed you'd read it and commented it was no different really. There was therefore no need to provide you with any trial period for this new AM role or other opportunity to consider whether the role was a suitable alternative.***

7.14 Against that, it is impossible to give any meaningful effect to the words "renewal" or "reengagement" as a means of characterising any offer there might have been. The words renewal or reengagement clearly require the offeror to be anticipating the existing contractual relationship ending. At most this was a unilateral variation of terms. The respondent was not offering the role as an alternative to dismissal, it was simply telling the employee that her new role would be. There can therefore be no renewal or reengagement in fact that could said to have arisen "in pursuance of an offer…".

7.15 The third reason, which is related to the second, is the timing of any dismissal. Dismissal is not contemplated nor does it happen by the employer's actions in January.. Dismissal happens as a matter of law when the claimants accept the repudiatory breach. The employment did not end until July and August respectively. January marks only the start of the events that breach the implied term of trust and confidence. It is settled that the contract

continues to exist in the face of a repudiatory breach until the repudiation is accepted by the injured party **(Société Générale (London Branch) v Geys [2012] UKSC 63**). Applying that to the two temporal conditions set by Section 138(1)(a) and (b) show that both are not made out. If the imposition of the new area could be said to amount in law to "an offer of renewal or reengagement under a new contract of employment", I accept that the timing required by section 138(1)(a) is satisfied in that this offer occurred before the end of the old contracts in July/August respectively. However, where it fails is in respect of the necessary timing required by section 138(1)(b). There is no offer of renewal or reengagement that begins immediately after the end of the employment in July or August respectively. Section 138 is therefore not engaged to deem what would be a dismissal, not a dismissal. Viewed another way, the employer cannot have offered alternative employment with the new area manager role as, following **McHugh**, there was no dismissal contemplated at the time.

7.16 Fourthly, and more generally, the simple notion of a "trial" only makes sense when considered against the alternative of the old job. An employee does not "trial" every new instruction in their work given to them by their employer for the simple reason that it is not being tried as an alternative to some other state of affairs. To fall within section 138, the alternative is patently the prospect of being dismissed by reason of redundancy.

7.17 Fifthly, I cannot see that an employer can take a course that imposes a unilateral change and then pray in aid that unilateral change as a statutory trial as an alternative to redundancy in order to relieve itself of the liability that by then it has incurred. I draw some reassurance in my conclusion from the observations in **Curling and Ors v Securicor Ltd** [1992] IRLR 549 EAT. Whilst the EAT was dealing with the exercise of a mobility clause, it arose in the context of what otherwise would be a redundancy. Knox J said:

> ***"14. There are two quite different attitudes which an employer can take in a situation such as arose at the Beehive at Gatwick, of the closing down of a part of his business. The employer can invoke the mobility clause in the contract and require the employee to go to a new location or job, if the clause entitles him to do so, whereupon no question of redundancy will arise. Alternatively, the employer can decide not to invoke the mobility clause and rely instead on alternative suitable offers of employment as a defence to claims to a redundancy payment. In the former example, the original employment continues, in the latter it ceases but is replaced in circumstances which, unless the employee unreasonably refuses the offer of suitable alternative employment, provide the employee with continuity of employment but relieve the employer of liability to make a redundancy payment. What the employers cannot do is dodge between the two attitudes and hope to be able to adopt the most profitable at the end of the day."***

7.18 Mr Leonhardt says that the right is not given by the employer or under the contract but arises as a matter of statutory right and is there for the employee to exercise or not. Whilst the origin of the scheme is undisputedly one of statute and not contract or discretion, I do not think it fairly describes the operation of the provision. The right may be statutory, but that is because the claim for a redundancy payment is purely statutory. The right to that payment may be lost in certain circumstances. It is the existence of the circumstances that might engage the right in the first place which provides the foundation for 138 to remove it. I am satisfied that whilst the right is not given by the employer or by contract, the parties must go into the situation against a background of redundancy. On a technical point, the respondent has not pleaded that the right has been lost but more importantly, what it has pleaded is

inconsistent with this argument. Whilst this is a matter of law for me to engage with, it is inconsistent with both the pleadings and the facts to seek to rely on it. Over and above everything I have concluded so far, it seems to me the respondent has some obstacle to fairly arguing this point.

7.19 I am therefore not satisfied that the law permits a respondent in this situation to seek to defend the later dismissal in law in the way now argued. The facts do not engage the particular provisions and for that reason, I am not satisfied that the right to a statutory redundancy payment has been lost.

7.20 Finally, I emphasis that it is the right to the statutory redundancy payment which has not been lost. I do so as it is clear to me that it would make no difference to the claimant's compensation in this tribunal as even if the right to a redundancy payment had been lost, the right to a basic award for unfair dismissal is unaffected. Of course, this claim was not otiose as some remedy would have survived a finding of a fair redundancy dismissal but I suspect the reason for it being argued may have had as much to do with the contract claim currently waiting in the wings.

EMPLOYMENT JUDGE R Clark

DATE 22 July 2022