EMPLOYMENT TRIBUNALS

Claimant: Mr T Mahenga

Respondent : Chelsea & Westminster Hospital NHS Foundation Trust

Heard at: London South Croydon, in person, in public

On: 23-26 January 2023 and in chambers on 27 January & 14 March 2023

Before: Employment Judge Tsamados
Members: Ms J Cook
Mr J Havard

Representation

claimant: In person
respondent : Mr B Jones, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1) The claimant's complaints of disability and race discrimination are not well-founded and are dismissed;

2) The claimant's complaint of damages for breach of contract in respect of entitlement to payment for unsocial hours is dismissed on withdrawal;

3) The claimant is entitled to a statutory redundancy payment, the amount of which will be determined at a remedy hearing if necessary.

REASONS

Background

1. Mr Mahenga, the claimant, has brought two claims against his former employer, the respondent, an NHS Trust.

2. The first in case number 2300087/2021 was received on 8 January 2021 and contains complaints of unfair dismissal, race and disability discrimination. This followed a period of early conciliation which commenced and ended on 17 November 2020.

3. The second claim in case number 2301842/2021 was received on 21 May 2021 and contains contractual claims for redundancy pay and loss of unsocial hours. This followed a period of early conciliation which commenced on 25 March and ended on 6 May 2021.

4. In two responses, the first received on 15 July 2021 and the second on 4 August 2021, the respondent denies the claims in their entirety.

5. In a letter to the parties dated 17 November 2021, the Tribunal consolidated both claims and asked the claimant to provide further information of his first claim as had been requested by the respondent at paragraph 51 of the grounds of resistance to its first response.

6. On 29 March 2022, the Tribunal notified the parties that the full hearing would take place from 11 to 15 August 2022 and also sent suggested case management orders.

7. A case management discussion was conducted by telephone on 28 April 2022. At that hearing, Employment Judge ("EJ") Corrigan re-listed the full hearing for 23-27 January 2023 and made revised case management orders. She also amended the respondent's name as it appears above. Her Case Summary sets out the claims and issues discussed at that hearing and directed the parties to agree a final list of issues by 23 June 2022.

8. Following that hearing, the respondent presented an amended response on 23 June 2022.

9. A public preliminary hearing on whether the Tribunal had jurisdiction to hear the claimant's complaints was conducted by Cloud Video Platform ("CVP") on 1 August 2022. At that hearing, EJ Norris, decided the following: that the Tribunal had no jurisdiction to deal with two of the claimant's complaints of direct race discrimination, those having been presented out of time; allowed two other complaints of direct race discrimination to proceed on the basis that they formed part of a continuing course of conduct; struck out the complaint of unfair dismissal, this having been presented out of time; and struck out the complaint of damages for breach of contract in respect of the claimant's entitlement to enhanced redundancy pay on the basis that it had been brought before his employment had actually ended. EJ Norris went on to case manage the claim to prepare it for the full hearing. In particular, the respondent was directed to forward the revised final draft list of issues to the claimant for agreement by no later than 15 August 2022.

10. In an email to the Tribunal dated 4 January 2023, the claimant sought witness orders in respect of 6 of the respondent's employees. The respondent in reply objected to this application essentially on the basis that these witnesses could not give relevant testimony. In a letter dated 16 January 2023, a letter was sent an instruction of EJ Wright refusing claimant's application on the

basis that it did not appear that these witnesses will assist the Tribunal in the matters would need to determine.

The issues

11. The respondent has provided a revised list of issues following the preliminary hearing on 1 August 2022. This takes account of the elements of the claim which were struck out at that hearing and also added an omitted date. The parties indicated that this was an agreed list of issues and I made it clear that we would not depart from them unless there were exceptional reasons to do so.

12. The claimant sought to resurrect his damages for breach of contract claim in respect of contractual redundancy pay. I explained to him that it was too late to do this now and that what he should have done was to have sought an amendment to include that claim in advance of this hearing. I did advise him that he was at liberty to bring that claim in the County Court, if he wished, where there was a six-year limitation.

Evidence and documents

13. We were provided with an electronic hearing bundle consisting of 1266 pages. This was intended to be an agreed bundle. Where necessary we will refer to this as "B" followed by the relevant page number.

14. However, the claimant also provided his own bundle of documents. He produced an electronic bundle entitled "Irrelevant Hearing Bundle" consisting of 833 unnumbered pages and also a paper bundle entitled "Claimant's Evidence Bundle" which contained an index showing 47 documents, no page numbers and the pages themselves were unnumbered. He explained that these were documents that the respondent had refused to put in the joint bundle without explanation. However, it was clear from the discussion that ensued that the respondent had not included them because it did not believe them to be relevant to the issues.

15. The claimant said that he had since narrowed them down for use at our hearing. But he only produced the Irrelevant Bundle on the morning of the first day of the hearing and the respondent had not had the opportunity to go through it. In addition, his witness statement contained exhibited documents which the respondent believed to be the narrowed down documents. However, it was unclear what the narrowed down documents were. When I asked the claimant how he was going to deal with them, he said that he would need about two hours to go through the additional documents. I told him that this was not possible and that we would only look at referenced documents referred to in or attached to his witness statement.

16. In addition, the claimant referred to audio recordings that he had disclosed to the respondent. The respondent in turn told him that there were too many hours of these recordings to listen to and they had asked him to provide transcripts. The claimant responded that he did not have the skills or the facilities to provide these. I explained to him that if a party was going to rely on audio recordings it was expected to provide copies of these plus

transcripts of the recordings, the latter for agreement. I further explained to him that it was too late to do that now. The claimant in turn said that he was not intending to rely on the audio recordings.

17. The claimant also indicated that he wanted to show us documents on a laptop because this would allow him to show us the date stamp, indicating when they were created, which would prove to us that the respondent had fabricated its evidence. Mr Jones replied that the respondent was unaware of the evidence referred to. I said to the claimant that it was up to him to provide a laptop for use at the Tribunal but if he wanted to rely on documents that we do not already have paper or electronic copies of it is too late to open things up in this way. I added that we could only go on the basis of the documents disclosed and that he should have disclosed documents he now referred to in a paper or electronic format ie by including what I assume to be the metadata of each of the disputed documents. In the circumstances, I refused the claimant's application to rely on a laptop to show us the disputed documents.

18. The respondent provided us with a proposed hearing timetable, a cast list, a chronology, as well as the revised list of issues. In addition, the respondent provided us with an opening skeleton argument.

19. We were provided with a bundle containing the witness statements. In addition, the claimant provided a separate witness statement. We will refer to this witness statement as the "first witness statement" and his statement within the witness statement bundle as the "second witness statement" where necessary.

20. We heard evidence from the claimant by way of his two witness statements and in oral testimony. We heard evidence on behalf of the respondent from Nicholas Wright, Tracy La Rocque and Richard Turton by way of written statements and in oral testimony.

Conduct of the hearing

21. The hearing was conducted in person over 23 to 26 January 2023 during which we heard evidence and submissions.

22. At the start of the hearing I explained mainly for the benefit of the claimant the procedure that we would be following as to the giving of evidence and submissions. There was initially some dispute from the claimant as to whether he had the same paper bundle of documents as was available on the witness table. I gave him a spare copy of the paper bundle and invited him to check through it during our reading adjournment to determine whether it matched the bundle he had previously been sent.

23. We met privately in Chambers on 27 January and 14 March 2023 to reach our decision. I would apologise to the parties for the amount of time it has taken to perfect this judgment. This was due to pressure of work and my part-time work pattern.

Findings of Fact

24. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

25. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

26. We have initialised the names of any persons who were not present or giving evidence to the Tribunal.

27. The claimant commenced employment as a Band 3 Clinical Support Worker ("CSW") in the respondent's Clinical Site Team ("CST") in September 2016. Prior to this the claimant had worked from January 2002 as a Bank Health Care Assistant at the West Middlesex University Hospital ("West Mid"). His employment was terminated by virtue of redundancy on 28 April 2021.

28. The respondent does not accept that the claimant was an employee prior to September 2016. Beyond reference to this period of time within Mr Nick Wright's witness statement (who at the time was the Deputy Head of Site Operations at the West Mid), we heard no evidence as to the position regarding the claimant's employment status prior to September 2016.

29. The respondent is an NHS Trust, which employs more than 6,000 staff and provides care to a community of over 1.5 million people. The respondent operates across two main hospital sites, Chelsea and Westminster Hospital ("the Chelsea & Westminster") and West Middlesex University Hospital ("the West Mid"), and across 12 community-based clinics within North West London.

30. We were not provided with the claimant's contract of employment or even a statement of written particulars of employment. We were referred to a number of policy documents which we will identify if appropriate. These included the Grievance Resolution Policy and Procedure (at B330-342) and the Sickness Absence Policy and Procedure (at B303-329).

31. The claimant is Black. He has a long-term joint problem. An Occupational Health ("OH") report dated 26 August 2020 identifies that he has experienced symptoms in his left hip since about 2015 and also lower back pain which comes with his hip difficulty (at B618). The condition itself is referred to as Femeroacetabular Impingement although we were unclear when this diagnosis was made and were not referred to any medical documents in support.

32. The respondent accepts that this impairment amounts to a disability within the meaning of the Equality Act 2010 and that it had knowledge of the claimant's disability upon receiving OH advice dated 19 August 2020. The claimant's position is that he also told Mr Wright at the start of his employment.

33. We were referred to a letter to the claimant from the respondent dated 8 May 2017 containing a conditional offer of employment as a CSW Band 3 although at that point the site was to be confirmed (at B392-393).

34. The CSW Job Description is at B382-389. CSWs provide administrative and clinical support to the medical team as required. Part of the claimant's role was to provide night support to wards within the West Mid, including assisting with phlebotomy, cannulation and other clinical procedures. His role also involved taking blood, catheterisation, turning and lifting patients and pushing trollies. It was essentially a mobile role.

35. The claimant's evidence was that he mainly worked night shifts because the level of physical activities required was lower because patients were sleeping, there was less work and he was less on his feet. The respondent did not agree. Its position was that whilst there was less work, there were less staff and the work was more complex, for example taking blood from an elderly or frail patient at night was more difficult than from a patient who was alert and awake during the day. On balance of probability, we accept the respondent's evidence.

36. We were referred to the current organisational chart at B639 which sets out that there were two sites, the Chelsea & Westminster and the West Mid. The CSWs at each site were line managed by Clinical Site Managers (CSMs") and they in turn reported to their Deputy Head of Site Operations who in turn reported to the Head of Site Operations and Discharge.

37. The claimant worked under the direction of medical staff and CSMs who allocated tasks for the CSWs to complete.

38. We heard evidence from Mr Wright, who at the time of the events in question was Deputy Head of Site Operations and part of his role was to manage the CST at West Mid. Mr Wright did not have regular day to day contact with the claimant in his role but did manage the CSMs. As such, the CSMs would escalate any issues within the department to him.

39. The claimant's evidence is that in June 2019 he had issues with some of his colleagues arising from his refusal to undertake certain duties which were outside of his job description, he did not have the necessary training for or were against policies.

40. As a result, he states that he was called into the office by Mr Wright on two occasions. On the second occasion, Mr Wright cited him for insubordination and threatened him by saying that his behaviour would lead to disciplinary action and dismissal.

41. In oral evidence, Mr Wright denied the claimant's allegations.

42. The claimant referred us to emails to and from Mr Wright on 21 and 22 June 2019 in the appendix to his second witness statement (witness bundle at pages 58-61). The first occasion referred to in his email of 21 June appears to refer to the first occasion he sets out in his witness statement. The reply

from Mr Wright explains that at times the claimant may be required to assist in various duties, queries with the site team the duties that the claimant was required to undertake and agrees with the claimant that he may require some training. Mr Wright's email further states that he will take this up on his behalf with MR, the Bed Manager.

43. Whilst the emails indicate that there were issues of the nature described by the claimant in his first witness statement, it appears that these are being dealt with and not in the way that he alleges Mr Wright said in their second meeting. Mr Wright's denial is as to the face to face meetings and the threats made.

44. The significance of these matters to the claimant is that he believes that this is the motivation for Mr Wright later on deliberately and without any basis altering his contract, which we will come to later on.

45. In or about October 2018, it appears that the claimant expressed an interest in the role of Nurse Associate. In an email dated 1 October, sent to CH, the Director of Nursing, and copied to Mr Wright, the claimant asked for more information about the role. In particular, he wanted to know what the Nurse Associate would be able to do once qualified because he wanted to develop his role as a CSW within the Hospital at Night (at B500). In reply (on the same page), CH sent the claimant information about the role (at B501 and set out the following:

"The course involves one day a week to college and then placements in different wards and community/mental health.

You would continue working with your own team for 50% of the two years."

46. She suggested that the claimant met with her and Mr Wright to discuss the matter further.

47. The Nurse Associate role was designed to bridge the gap between Registered Nurse and Healthcare Support Worker. The training involved a two year course, which was paid for by the respondent Trust. Individuals who undertook the course gained a foundation degree and progressed into a Band 4 post upon completion.

48. Mr Wright was of the opinion that the claimant was intelligent and had a lot of potential. He therefore felt that this was a good opportunity for him to progress.

49. On 9 October 2018, the claimant had a Performance and Development Review ("PDR") with TR (at 502-515) during which he expressed his interest in the "Associate Nurse" position within the section headed "Career Development" at B509.

50. There was a period of time between the claimant expressing an interest in, being accepted on and starting the course. We understand that part of this was as a result of the claimant having to obtain an English language qualification. The course was conducted by the University of West London and we considered their letter to the claimant dated 25 November 2019 at

B517-530. The course commenced on 5 December 2019 and the letter set out a summary of syllabus and attached an Apprentice Agreement for Nurse Associate which the claimant signed and returned.

51. We would point out that the Nurse Associate position is on a number of occasions referred to by the parties as the Apprentice Nurse Associate or by use of the initials "ANA".

52. The claimant was advised by CH that he would have to move out of CST to a home ward to facilitate his training and was given the choice of the Acute Medical Unit ("AMU") or the Lampton Ward. The claimant chose Lampton because AMU involved duties that were too heavy for him to undertake given the nature of the ward and his joint problems. The claimant moved to the Lampton Ward in January 2020.

53. The claimant alleges that on leaving CST, he spoke to Mr Wright and asked him if there were any plans to restructure the role given that at this time he was the only CSW left at West Mid. He further alleges that Mr Wright answered that there were no current plans. In oral evidence, Mr Wright did not answer whether this conversation had taken place or not but he did say that were no plans to restructure at that time. The claimant also alleges that he told Mr Wright he would be booking some ad hoc work to maintain his skills and Mr Wright said okay. Mr Wright denied that the claimant told him this.

54. Mr Wright's evidence is that he had a number of conversations with the claimant about the apprenticeship, including one as to whether he could remain in CST whilst undertaking the course. Mr Wright explained that they could not accommodate ANAs in the department because CSWs work solely at night and are not involved in regular 1:1 care and there was only ever one Band 8a CSM working in CST who would not be able to provide the support and supervision required for the role.

55. On balance of probability, we accept Mr Wright's evidence.

56. Unfortunately, in February 2020, the claimant was experiencing problems with his hip. He informed CH and asked if he could pause or withdraw from the course. We were referred to an email he sent to CH on 24 March 2020 at B531 which does not appear to be the start of their conversation about the matter (but that was all we had). The claimant sets out his health condition and says that he would like to return to his previous role:

"I have had my interview with physio, I had hoped this time around the outcome would be different from 2 years ago. Following the interview, the head physio said, exercise would alleviate the problem temporarily. Rather I would benefit from hip surgery long term. Due to the current Covid pandemic, referral will be delayed. Personally I would like to delay having surgery, I was and still very anxious about the outcome as I am still young.

I would like to return to my previous role, it suited my circumstances best? I apologize for the inconvenience this may cause you. I look forward to hearing from you."

57. CH replied as follows (at B531):

"I would urge you not to rush into a decision to drop off the course.

It might be that we end up pausing the course for a while and it might be that the site team would like you back during this outbreak time.

I can check with them when I am back at work tomorrow.

For the moment, don't rush into anything."

58. In the event the course was paused.

59. The claimant alleges that CH told him that due to the Covid-19 pandemic, CSWs were being redeployed to the wards and so he would not be able to return to CST. He further alleges that this was "a lie". The claimant further states that his fellow ANAs were redeployed to the wards. He remained on Lampton.

60. In oral evidence Mr Richard Turton, who at the time was the Head of Site Operations and Discharge, explained that at this point in the pandemic, the plan was to redeploy everyone to the wards but in the event the CSWs were not redeployed because their roles were critical. Mr Wright said in oral evidence that by this time the last CSW had left West Mid.

61. On balance of probability, we accept the respondent's evidence.

62. The claimant subsequently sent an email to Tracy La Rocque, Deputy Head of Site Services, on 22 April 2020 (at B538) enquiring as to whether there was a CSW vacancy and explaining that he was looking to step down from the apprentice programme because of the ongoing problem with his hip.

63. Ms La Rocque responded on 23 April 2020 expressing her concerns and pointing out that if a ward is difficult then running around the hospital will be worse. In addition, she stated that the respondent had no vacancies at the moment and she was not looking to recruit. In her written evidence, she stated that the reason why she informed the Claimant there were no vacancies was not attributable to his hip condition. It was because at that time a reorganisation of the CST was under consideration (which we will later come to).

64. The claimant alleges that what Ms La Rocque told him in her email was "a lie" and there were vacancies but the respondent was not filling them.

65. Mr Wright's written evidence is that the respondent was not recruiting any CSWs at that time due to changes in the service. He refers to an occasion when he bumped into the claimant in or around March or April 2020 in a hospital corridor and the claimant mentioned in passing that he was interested in returning to the CST as a CSW. Mr Wright further stated that he explained to the claimant that the role was not available anymore as there were two Band 8A CSMs in post along with a Band 7 Nurse. The implication of this was that the CSW duties could be undertaken by these nurses and therefore there was no requirement for the CSW role at West Mid.

66. On balance of probability, we accept Ms La Rocque and Mr Wright's evidence.

67. The claimant was absent from work due to ill-health from 20 May to July 2020. He wrote to CH by email on 15 May 2020 at B541 as follows:

> *"Greetings, I hope you are doing well. Am writing to update you on my progress and also to enquire what are my options. I have been doing physio, my GP has me on Co-Codamol and Lyrica for pain management and trying to lose weight (3kg so far 17kg to go). I recently spoke to Sister Eden and have been re-referred to Occu-Health and am waiting for an appointment with the consultant.*
>
> *Am also waiting on a re-referral from my GP to the Orthopedic (sic) Consultant.*
>
> *I have had problems with my joints from the age of 10, it comes and goes and have learnt to live with it. When I cannot tolerate it, I have taken time to rest, this has worked for me for the most part. I have no official diagnosis, however, the assumption is arthritis. My left hip has been problematic for the best part of 6 years, starting in 2015. In 2017, it was proposed I have surgery, I opted not to.*
>
> *My role involves physical dexterity. I have to find balance between caring for patients, supporting my colleagues and also caring for myself. I felt at the time, and still do, that there are times when I cannot or with difficulty fulfil this role. I have been on and off work, for the best part of a month, trying to rest my hip. To clarify, I have always carried out the physical aspects, of my role to my own detriment, even though I felt I could not.*
>
> *I would like to ask, going forward, what are my options are? And, what support is available for me to complete the course. I do not want to be a burden for my colleagues. I look forward to hearing from you. Also, with regards to the course, what will happen? When can we look forward to the course being resumed?"*

68. It does appear that the claimant was not covered by a medical certificate at this time but was absent due to the problems with his hip and to rest his leg. It is surprising that he is asking on the one hand to resume the course and on the other saying that he cannot make an informed decision to leave the course pending referral for physiotherapy. We would observe that it would perhaps have made more sense for him to enquire how long can I remain on the course without attending it?

69. The claimant returned to work on 6 July 2020 and was working in Outpatients. He alleges that on his first day back he was contacted by DG, the Lead Nurse for Emergency and Integrated Care, who asked him what he was going to do about his course. The claimant replied that he would be returning to his role as CSW and DG responded, that would not happen. When he asked why, DG said there had been a restructure. The claimant said he would move to the Chelsea site and DG said, that was not going to happen because the role no longer existed across the Trust.

70. We would add that it is unclear from the evidence when the claimant was off work or came back to work. A letter dated 31 October 2020 at B679 containing the outcome of an OH Case Conference held with the claimant on 28 September 2020 refers to him being off work due to leg and hip pain since 20 May 2020.

71. DG was interviewed as part of the subsequent external investigation into the claimant's complaints and said he did not remember having a conversation about his role being disbanded.

72. The claimant's evidence is that he was in a lot of pain on that day. He left DG and went straight to speak to CH, told her what had happened and asked her to contact Mr Wright, DG and whoever else was involved so that they could also it down. His further evidence was that he was asked decision a

room and was informed that DG was on his way. However, DG never showed up.

73. The claimant further alleges that he then asked CH to bring a witness as he intended to make a formal complaint. VS, the Director of Nursing, attended as the witness. He also alleges that he told them that the most likely outcome of his complaint would be that he loses his job and nothing would come of it. Indeed, his further evidence is that he was subsequently proved right.

74. On 9 July 2020, the Claimant sent an email to CH cc'ed to VS at B550. This appears to relate to their conversation on 6 July and the claimant's forthcoming grievance and what he referred to as reviewing a number of Trust and NHS policies.

75. VS and CH both responded later that day (at B550-551 and B552-553 respectively).

76. VS expressed her concern that the claimant was in so much pain when they met and also having to deal with his area of work. She told him that his place on the ANA courses paused and he can later discuss with Ms Hill whether he wishes to re-join the course not. She also stated that she was going to refer him to OH with regard to his medical condition. She further set out her understanding position as follows (at B551):

"My understanding is that you were transferred from the site team as an internal transfer – usually this happens where a member of staff comes forward wishing to work in another area, if there is a vacancy they transfer. As it was not possible for you to be mentored within the site team for the ANA course due to only having 1 member of staff on for most shifts there was a decision to move you to Lampton as a home base where you would be er supported for the course. I am sorry if you did not feel involved in this decision. I have attached the transfer form & guidance.

With regards to moving to OPD this was done with the best of intentions to see if it would be physically helpful to you, clearly that has not been the case.

I have spoken to Nick about returning to the site team, but the site team since you have moved, no longer has any HCA's within the establishment. A review was undertaken as the team were down to 1 HCA & there was a decision to redeploy that individual to CW site & change the establishment for the site team. If you had still been a member of the team you would have come under the redeployment procedure which I have attached."

77. CH set out her understanding of the position (at B552):

"As (VS) stated, when it became clear that you would not be able to be supervised doing the course by the site team, we used the internal transfer policy to move you. You and I met and discussed which ward you would preferred to be relocated to and you chose Lampton. I'm just sorry that this has not worked out as expected due to the pain you have been experiencing recently.

As you know I had rotated you to out-patients for one of your ANA placements as I was hoping this would involve less manual handling of patients which I know aggravates your condition, and we then made the decision to reduce this to half days initially.

You queried in your text message to me today what (DG's) role is as you have no recollection of him being involved with the ANA programme nor him being part of the site team.

In (DG's) capacity as Lead Nurse for Medicine, part of his responsibility is for the broader workforce within the division. As I explained earlier in the week, on Friday when I updated (EC) (your ward manager) that you had requested to pause on the ANA course, and that you were finding it difficult working in out-patients due to the amount of standing which was aggravating your pain, we had together wondered if the discharge lounge would be a suitable area for you to work in.

As the discharge lounge also sits under (DG's) remit, (EG) stated that she would discuss this with him on Monday as there was already a HCA working in the Discharge Lounge but wanted to talk it over with him in order to try and find you a suitable area to work in.

I believe (DG), with the best intentions, then started thinking through another alternative area of work for you which would not require as much standing.

As we agreed yesterday, as you have now paused the course and are not able to tolerate the standing involved in working in out-patients I moved you back on Healthroster back to Lampton again so you can be supported by your normal ward manager and you would also be clear as to who to report your sickness to.

I do hope that managing your back and hip pain is easier at home and that your future scan and appointment help you to find a way in taking this forward."

78. On 10 July 2020, the claimant sent a further email to VS, CH Mr Wright at B553. Mr Wright had had no dealings with the claimant since April 2020. In essence, the claimant addresses the email to Mr Wright and seeks a copy of the internal transfer form authorising his transfer to Lampton and the policies that were referred or the advice given in reaching that decision. He also informs Mr Wright that he is making an official complaint against him of *"bullying, abuse of position, and fraud"*. He asks VS to assist him in making sure that Mr Wright provides the signed copy of the internal transfer for which his signature was required and he has no recollection of signing it. His email ends with the following:

"Nick, we are all subjects under the law. I trust you have policies you can reference an explanation for my absence signature. I will rely on the law."

79. On 30 July 2020, the claimant sent an email to a number of people including CH and VS attaching his grievance against Mr Wright. This is at B571-582. This is a lengthy document setting out the background and context of the grievance raised. In essence the claimant's complaints is that Mr Wright was not seeking to support the claimant's career progression as an ANA but to remove him from the department and that he did this by way of what he believes to be a fraudulent and illegal transfer and a unilateral variation of his contract of employment. The grievance also contains numerous references to Trust and NHS policies, the relevance of which is not readily apparent. At B581, the claimant sets out what he is asking for:

"1. The parties involved, Mr Wright, CH and DG make available the documents, policies, and any advice on which they relied.
2. Mr Wright to demonstrate that the removal of my role has benefited the organisation as per policy of Managing Organisational Change
3. For Mr. Wright to evidence that he communicated that I would be permanently transferred from my, given that I had indicated in my PDR I wanted to develop in my role 4. For Mr. Wright to evidence what other training I could have taken that would have improved on the service I was providing as CSW
5. For the trust to provide evidence that it is non discriminatory in providing opportunities for advancement – I believe this to be an example of discrimination and denial of opportunity to progress in my role.
6. Ms Hill and Mr Wright to provide evidence that supports a transfer was warranted, if she could indicate where that would be supported in the Practice Assessment Document.
7. Per the Disability policy and Occupational Health recommendations the rationale for my deployment to a ward where being physically able to move and handle patients is required.
8. What authority as per, policies and job description Mr Wright had in altering employment contract. (these documents I require pursuant the outcome of the internal review, I will be seeking legal advice)
9. To return to my role as CSW, on nights."

80. On 30 July 2020, Mr Wright sent an email to the claimant (unaware that the claimant had already lodged his grievance). This is at B554-555. Mr Wright apologise for the delay in responding to the claimant's email, expressed his concern about the pain that the claimant was currently experiencing and acknowledged that he was receiving advice and support from OH and liaising with CH and VS. He then responded to the points outlined in the claimant's email dated 10 July 2020:

"In regards to your question below, I wonder if i outline the steps that led to your redeployment from my understanding to check that we are on the same page:

- you were successful in your application for your apprenticeship. You chose to apply for this role.

- a pre-requisite of you being able to fulfil the requirements of this training position was for you to work in an area where mentoring could be offered and your previous role in the Clinical site team was not suitable for this due to nature of the role. You were offered a choice of areas you could be redeployed into by the team who facilitate nursing apprenticeships and you chose Lampton Ward. This was facilitated as a permanent internal transfer resulting from you accepting the apprentice role and that you agreed with the
arrangement.

Could I check whether the above reflects your understanding of what happened as well? Please do let me know if you think there are any discrepancies and I can clarify. You make a request for policies you would like to review. My apologies but based on the below I am not clear which policies you have in mind. It will be easier to understand I think once we can establish if the above is an accurate reflection of what happened. Please note that all Trust policies are available on the Trust Internet for your review at any me as well.

I also note your reference to you making a complaint against me for 'bullying, abuse of power and fraud' which I take very seriously as it has never been my intention to make anybody feel this way. Please let me know if would like to discuss what made you feel this was with me directly so we can clarify and resolve. Alternatively, please do follow the grievance policy as appropriate so this can be clarified."

81. In response later that morning, the claimant advised Mr Wright that he had already lodged his complaints and that he did not believe that talking now would be helpful. His email continued (at B555):

"I believe you have had ample opportunity to engage me, you have not. If you have acted appropriately your be vindicated and I will allow faces (sic) consequences of my actions.

I'm not saying I will not talk to you. It just (sic) that I am not in a position to trust you. I find it suspicious you responding today, the very day I have filed my complaint. You have known I have a problem with my hip since 2018. In March I made it known I was struggling could have spoken to me then.

The policies in place do not support your position, it is on you to prove me wrong. Neither does the Practice Assessment Document. When Cathy first approached me she implied I do not have to change what I was doing only after talking to you did she change, I didn't know better and I trusted you.

We are all subjects under the law. I place my trust in the law, social due. Let's live it (sic) to judgement. I suggest any further communication go through Ms Sloane."

82. The claimant forwarded Mr Wright's email to VS who advised him not to respond as it was received prior to receiving his grievance (at B555 & 556). The claimant replied to Ms Sloane advising her that he had already responded (at B556). His email continued as follows:

"I told him I don't want to talk to him directly unless it's facilitated by you. I told him I don't trust him in that capacity. Also told him I had filed a grievance already. I will try and forward you my exact email. I had copied you in the response. But I don't know if you received it or not.

I just want my job. I know I have been treated unfairly and I can prove it. The simple fact that they didn't communicate this shows they had the intention to remove me without due process.

They cannot provide the signed Internal Transfer Form. If I had signed this I would have no reason to file a complaint. And if they had communicated that it was a permanent transfer I would have had the opportunity to ask why.

I don't know of anyone on the course who this happened to. That is why it's so unfair and why I say it is bullying."

83. Mr Turton, Head of Site Operations, was appointed as the Grievance Investigator. He has some experience of involvement in multiple informal grievance during his career and had shared one of a formal grievance.

84. Mr Turton emailed the Claimant on 17 August 2020 (at B599-600) to acknowledge receipt of his grievance , advise of his involvement in the matter and to confirm his availability within the following 2 weeks to attend a grievance meeting via Zoom. He also asked the claimant if he could summarise his concerns into 5 bullet points so as to provide a focus to begin their discussion.

85. In response that same day (at B600), the claimant replied stating that he could not do so and objected to a Zoom meeting, suggesting that it would *"reinforce the notion of discrimination"*. We did not understand what the claimant meant by this. At this time, given the impact of the Covid-19 pandemic, the majority, if not all, of the respondent's meetings were being held via Zoom.

86. There was some to-ing and fro-ing between the two sides in finding convenient dates and in addition Mr Turton wrote to the claimant advising him of the necessity for the meeting to take place via Zoom.

87. On 21 August 2020 (at B605-606), the claimant wrote to Mr Turton confirming his availability to attend a meeting on 2 September 2020. He also asked if Mr Turton was involved in the decision to eliminate his role in removing him from the department, as he felt it would give rise to a conflict of interest. He also set out the number of points for discussion: disregard of Trust policies, guidelines and values; disregard of the NHS Code of Conduct; misrepresentation of facts; fraudulent/deceitful behaviour; abuse of power and bullying; discrimination; breach of employment contract; and a number of policies and procedural/guidelines. In a reply that same day (a B606-607), AA, a Senior Employee Relations Advisor, responded to the claimant advising that Mr Turton had been appointed as an impartial manager to the situations in raised.

88. On 26 August 2020, Mr Turton wrote to the Claimant formally inviting him to a grievance hearing (at B617), in error stating that it would be held on 2 August but in fact it was scheduled for 2 September.

89. On 26 August 2020, the Claimant's Ward Manager at Lampton, EC, was sent an OH report regarding the claimant. This is at B618-620. The OH function is an internal function within the respondent Trust. The report was as a result of a telephone consultation with the claimant on 19 August 2020. It is written in general terms but states that the claimant does not feel able to return to his substantive post or alternative duties at present.

90. The grievance hearing took place on 2 September 2020. It was conducted by Mr Turton and the claimant attended with a representative of his trade union, DM. The minutes of the meeting are at B623-628.

91. At the meeting, the claimant states in his first witness statement that he asked Mr Turton for evidence of the restructuring that had been mentioned by DG, CH and VS. Mr Turton said there had been no such restructuring. In his first witness statement, the claimant asserts that in doing so, Mr Turton had without realising it called them "liars".

92. We note that on several occasions now the claimant has used pejorative or inappropriate language and does come across as intemperate in his communications with the respondent.

93. The claimant's evidence continues that Mr Turton tried to discuss a solution, he refused and told Mr Turton to investigate his complaint at the end of which either he (the claimant) or Mr Wright would be the subject of the Disciplinary Policy.

94. In his witness statement, Mr Turton states the following. He asked the claimant to outline his concerns. The claimant responded that he had applied for the ANA role in order to develop his role as CSW. He initially believed he could continue to work as a CSW whilst undertaking the training but was informed by CH (after she had reportedly spoken to Mr Wright) that the Site Team could not support him in carrying out the course or providing the necessary supervision. After commencing the course, the claimant started to experience an exacerbation of his hip condition and as a result he suspended his course and requested to return to his role as CSW. However, he was informed of the role was no longer available. The claimant felt that Mr Wright had attempted to remove him from the Site Team because complaints had been received about him.

95. Mr Turton's evidence continues, that the focus of the claimant's concerns related to Mr Wright and his inability to move back to his CSW role on a permanent basis.

96. Mr Turton's further evidence is that his aim during the meeting was to discuss ways in which the respondent could support the claimant move forward. The claimant had made it clear to him that he wanted to return to this Site Team as CSW. Mr Turton offered the claimant a number of options: to remain on Lampton, his current role where he could receive the necessary support; to return to his previous role in the CST; or to move to a CSW role in the Discharge team (which had little or no manual handling as well as the freedom to manage the pace and duration of walking).

97. Mr Turton's written evidence continues, that he wanted to be as transparent as possible with the claimant and so he explained that there was an impending restructure that could affect the CSW roles within the CST and this was a reason why there had been a pause on recruitment of CSWs. He explained to the claimant that the consultation paper had, at the time of the meeting, not been written and therefore the consultation had not begun. In response, the claimant stated that he would still prefer to return to the role of

CSW in the CST, despite the potential organisational change. Mr Turton's evidence is that they agreed mediation would be arranged between the claimant and Mr Wright. He proposed to meet with the claimant again to discuss the next steps.

98. There was a further meeting on 22 September 2020. There are no minutes of this meeting. The claimant's written evidence is that he agreed to mediation but told Mr Turton it was imperative that he investigate both himself and Mr Wright and that whilst he agreed to mediation he insisted on the investigation going ahead. Mr Turton's evidence is that it was agreed that the claimant would be assessed by OH before returning to the CST and that mediation would be arranged with Mr Wright via the respondent's HR department It does seem to us that the claimant's insistence on an investigation would have the effect of undermining the purpose of mediation.

99. On 25 September 2020, the claimant sent an email to Mr Turton (at B630) confirming his decision to return to his CSW role and asking to be advised when *"we can have that meeting with Nick and when I can get back to work"*. This email supports Mr Turton's evidence and does not reflect the claimant's own evidence of what occurred at that meeting.

100. On balance of probability, we accept the respondent's evidence. The claimant was told in clear terms that there was a restructuring about to start that could affect the CSW role in the CST, that there was no consultation paper at that time because the consultation had not begun, the claimant insisted on returning to his CSW post notwithstanding this clear indication, and he agreed to mediation. Further, we find that there is no proviso, at least at this time, as to an investigation also being conducted. Indeed, it makes no sense and must go without saying that whilst the mediation was in progress it would not be appropriate to conduct an investigation.

101. On 29 September 2020 (at B631), the claimant sent an email to Mr Turton with regard to his return to work in his previous role as CSW on nights, asking that this information be conveyed to Early Conciliation, the Ward Manager for Lampton and RA, from Employee Relations. He also stated that AMM (the Head of OH) would like to know what his role entailed so as to ascertain if adjustments would need to be made. The claimant also expressed his confidence that he will be able to carry out his duties as CSW and, as he had previously mentioned, had resumed walking on distances. He also stated that he was looking forward to returning to work and asked when he would be able to do so.

102. On 12 October 2020 (at B632), EC sent an email to Mr Turton and Mr Wright 12 October 2020 regarding the claimant's return to work and that she needed to inform HR and to complete a change of circumstances form.

103. On 14 October 2020 (at B633), the claimant sent an email to Mr Turton as to delay in arranging his return to work.

104. On 21 October 2020 (at B647-648), the claimant's trade union representative, DM, sent an email to Mr Turton with regard to his the delay in providing the claimant's return to work date and also as to the mediation arrangements.

An email in similar terms was sent to the Employee Relations Team that same day (at B649).

105. On 21 October 2020 (at B646), Mr Turton sent an email to the claimant apologising for the delay and confirming their telephone conversation regarding a return to work meeting scheduled for 22 October 2020.

106. On 22 October 2020, the return to work meeting took place between Mr Turton and the claimant, with AMM.

107. On 27 October 2020 (at B658-661), Mr Turton sent a letter to the claimant regarding the outcome of meeting to discuss formal concerns. Mr Turton stated in the letter that on advice he was advised to separate out the claimant's grievance concerns and his impending return to work. The letter enclosed a summary of their discussions and actions.

108. An updated copy of this letter was sent to the claimant on 28 October 2020 at B669 & 671-673, following the above meeting. This is in effect the grievance outcome letter. In essence it contains three elements: as to the claimant's return to his CSW role, the impending restructuring and that whilst offering the underlying documentation, if it exists, the claimant did not require it; to look into where to place the claimant if he decides in the future to resume the ANA programme; and as to the grievance against Mr Wright, which the claimant agreed would be dealt with by mediation and not by formal investigation. The claimant was given the right of appeal. The claimant did not appeal.

109. On 28 October 2020 (at B674), Mr Turton sent an email to the claimant regarding his return to work. This erroneously refers to his return to work date as 29 November but in fact it is 29 October 2020. This is stated to be a phased return to begin with, that a manual handling assessment would be completed at the earliest opportunity and that until then it is expected that the claimant should refrain from undertaking any patient manual handling.

110. On 29 October 2020, the claimant returned to work in his CSW role.

111. On 3 November 2020, Mr Turton spoke with the claimant as to how his return to work was going. Mr Turton's written evidence is that the claimant said that he experienced some pain but felt this was within usual levels and manageable. His further evidence is that they agreed that the claimant carry out three half shifts the coming week and then two full shifts following two weeks and that they would review the rota thereafter. Mr Turton's further evidence is that he also explained that once a full manual handling assessment had been carried out, they could undertake workplace assessment and in the interim reminded the claimant not to undertake any patient moving and handling CPR.

112. Mr Turton prepared an email to the claimant confirming their discussion on 3 November 2020. However, he only realised on 6 November that it had been stuck in his outbox and so he re-sent it that day (at B690-692). This email made it clear that the claimant was not to undertake patient moving and handling or CPR pending workplace assessment. The email also indicates

that during their discussion on 3 November, the claimant expressed concern regarding the grievance outcome letter.

113. In the email Mr Turton states that he had further clarified the discussion that day and assured the claimant that the grievance has not been investigated because during the discussion with him and his union representative he agreed that mediation would be an appropriate and hopeful solution. The email states that at this point, Mr Turton explained to the claimant that if he did not feel this is appropriate then he would have to defer any formal investigation to a more independent investigator, although this was something that at the time claimant did not feel necessary. He asked the claimant to let him know is decision as to how he felt the grievance was best resolved and whether he still feels that mediation is appropriate at the moment.

114. On 6 November 2020 (at B693), the claimant sent an email to Mr Turton indicating that he was going to forward his complaints to "freedom to speak" because whilst he agreed to a dialogue, the grievance policy mandates an investigation, which was something which both Mr Turton and Employee Relations had failed to do, causing more harm to the parties involved. He expressly states:

"how am I to work with my Manager 5 cannot trust the system to do what it says it will do? It makes for a toxic working relationship. As I said, if no one's been done, you will be absolved. I am also waiting for the contact details of the named person for escalating my grievance".

115. On 20 November 2020 (at B702), the claimant sent an email to Mr Turton asking whether he will be working for the remainder of the month. Mr Turton responded by email the same day asking when it would be convenient to clarify the rota which took into account his childcare commitments as well as shifts that were manageable to him.

116. They then spoke on 24 November and discussed how the claimant had been finding working at night. The claimant explained that he had not taken any breaks during his first shift which resulted in some pain but he had managed to take short breaks in subsequent shifts, which had worked well. He said he was hopeful he would be able to lose some weight which he felt would help with the pain and Mr Turton reminded him of various services that could be accessed via OH for support. It was agreed that the claimant would continue to work two nights shifts per week for the following two weeks and they would meet again on 1 December to review the position. Mr Turton confirmed their discussion by email that same day (at B705- 706).

117. On 25 November 2020 (at B694), LG, an HR Business Partner, sent an email to the claimant asking whether he wanted his grievance to proceed to Stage 2 rather than proceeding with mediation given his emails to Mr Turton.

118. On 30 November 2020, there was an incident on the claimant's ward. The claimant advised Mr Turton on 1 December that he was unable to finish his shift that day due to the level of pain he experienced in re-positioning a patient during an MET call. He requested to take annual leave the coming week and Mr Turton told him that this should be sick leave. Mr Turton reminded the claimant that he needed to complete a Datix form (a record of the incident).

119. On 7 December 2020 (at B695), the claimant responded to LG's email of 25 November. He stated that he did not believe that the grievance process would be fair as it had not been so far, that he had filed a complaint with ACAS and intended to pursue the matter via the Employment Tribunal. He added that the system is biased and that he had been selected for redundancy after making a complaint about bullying and that the person who did the bullying had not been investigated or disciplined. His email closed with the following:

> *"I told my manager and I will tell you, we are all employees of the trust, and we are all subject under the law. You should have done your job, been impartial employment. That's what is in policy."*

120. LG responded by way of reassurance that his points of grievance had been taken seriously but a further stage 2 meeting would be required in order to investigate them further (at B714).

121. On 8 December 2020 (at B713), Mr Turton emailed the claimant to ask how we was feeling following the pain he had experienced on shift at work. He asked whether there was a time that was better for him to discuss the matter.

122. On 8 December 2020 (at B712), the claimant emailed Mr Turton, in essence advising that he had initiated Employment Tribunal proceedings and did not want to be contacted further. It appears that the claimant sent a further email that morning to Mr Turton (at B713) asking him to provide a rota *"up until my final day of employment in accordance with the policy"* and advising that he already registered with NHS Jobs and was currently looking for employment within the Trust as well as outside. He further advised that he would make his own referral to OH, and, as to the reorganisation, that he had initiated legal proceedings against the Trust and that the delay as to the outcome of the consultation will have no bearing on his challenge, which he can pursue separately as unfair dismissal.

123. We deal with the issue of reorganisation/consultation later on in our judgment.

124. On 9 December 2020 (at B724), the claimant sent an email to Mr Turton in which he stated that Mr Turton was central to his complaint, which is going to pursue through the Employment Tribunal and that his failure to investigate the grievance and initiating the restructuring of the Department is the reason why. His email ended by stating that Mr Turton was obliged to allocate him with shifts and to honour his contract but he would prefer not to discuss the restructuring or his initial grievance further.

125. Later on 9 December 2020 (at B719), Mr Turton sent an email to the claimant confirming their discussion on 1 December, having had no response from him regarding the type of leave he had decided to take. He also stated that in view of the difficulties that the claimant described, it seemed appropriate to arrange a further consultation with OH upon his return to work.

126. On 11 December 2020 (at B720), the Claimant replied to Mr Turton's email in which he stated that he was not sure what had aggravated his hip and

could not say that it was resulting from repositioning a patient. He reiterated that he was able to work and requested a copy of his rota.

127. Mr Turton said in his written evidence that he was concerned about the situation because he did not feel it appropriate for the claimant to be in work given the risks to his health and well-being. He further stated that he therefore emailed MC, an HR Business Partner and LR for advice as it was an extremely busy time for the hospital due to the challenges responding to the second wave of the Covid-19.

128. On 17 December 2020 (at B739), Mr Turton wrote to the claimant notifying him that an appointment had been made with OH for the following day.

129. On 18 December 2020, the claimant had a video consultation with OH. The meeting was recorded at the claimant's request. At that meeting, AMM advised the claimant that the respondent needed to ensure that it was not placing him in a situation where he could injure himself and suggested that he be reviewed by an OH Consultant to look at all safety options. Mr Turton said in evidence that it was clear that the claimant was still struggling and he explained that as an organisation they could not put him that position as it was not sustainable. He expressed concern about the ability to support the claimant at night given the limited number of staff on site. AMM asked whether there was a temporary role that the claimant could carry out for a few weeks pending an OH consultation. Mr Turton explained that the respondent could place the Claimant in an administrative role where he would have the support of a full team.

130. On 26 April 2017, there had been a serious incident within the respondent Trust involving a patient death. Following investigation a serious incident report was published on 27 July 2017 (at B395-428). This identified the need to implement a 24/7 Critical Care Outreach Team ("CCOT") (at B421 & 427) and to have an additional Band 7 Clinical Site Nurse Manager at night until this team was put in place.

131. In addition, the respondent set up a 24/7 Hospital Programme Board of which Ms La Rocque was a member. The aim of this Board was to review current practice and recommend change so as to benefit quality and performance of inpatient care, whilst providing efficiency alongside patient staff experience.

132. Ms La Rocque goes into some detail as to the work of this Board in her witness statement. The essence of it for our purposes is as follows.

133. On 13 July 2018, the Board identified that there was a risk that the role of CSW may need to be removed as a result of new ways of working. It had been previously recommended to increase CCOT to 24/7 and to increase qualified escalation responders including site managers. Mitigating steps were taken to reduce the immediate risk by uplifting the Band 3 CSWs at Chelsea & Westminster and one per night at the West Mid, with the option to use bank staff if required. The 3 CSWs were recruited and joined the CST at the West Mid in July 2017.

134. In October 2017, following this temporary structure, a business case was approved for the CCOT 24/17. This noted that once the new service was established, the aim was to review the Band 3 CSW roles. Implementation was delayed by winter pressures and sickness absence but subsequently took place in May 2018 followed by a period of recruitment. It was originally intended that the CCOT role would be a hybrid one, performing some aspects of the CSM role. However, it proved very difficult to recruit and retain staff and ultimately lead to the need to consider a restructure of the CST.

135. In March 2019, 2 of the CSWs resigned. Further recruitment of CSWs was put on hold due to ongoing discussions following implementation of CCOT 24/7. There were also financial implications from the CCOT business plan and monies from the CSW posts was used to offset the second site manager at the West Mid.

136. In or around July 2020, Ms La Rocque was asked by Mr Turton to prepare a paper regarding consultation on Changes to the Workforce Structure of the Clinical Site Team. This had been delayed due to a number of factors including Covid-19.

137. In July 2020, Ms La Rocque was working from home following shoulder surgery and had focused time to dedicate preparing the paper. The consultation paper was finalised on 16 October 2020 (at B637-645). This set out 3 main points the consultation:

"a. To remove the current Clinical Support Workers (band 3) roles from the structure and redeploy the current post holders into alternative suitable roles within the Trust;

b. To create 6 full time band 7 registered nurses – Senior Site Sister/Charge Nurse posts to work nights and weekends; and

c. To change the working hours to reflect the service needs better and include breaks and create parity of shift patters between the two sites for the Clinical Site Managers."

138. Ms La Rocque sets out some detail as to the consultation paper at paragraphs 16 to 38 of her witness statement as does Mr Turton at paragraphs 27 to 31 of his own statement.

139. We felt that much of this detail is not relevant to the claimant's case and whilst he suggests (both in evidence and it a number of emails which we will come onto) that this process has somehow been manufactured to engineer his redundancy given his grievance, he has not provided any evidence of this and frankly the history of this matter and the arrival at the consultation paper is not open to challenge. Indeed, the matter arose because of the tragedy of a patient death and the need to review services.

140. In essence the following matters are relevant.

141. Consultation was launched with the affected staff on 22 October 2020. The proposed structure affected 5 CSW in total all of whom would be placed at risk if the proposal proceeded. The claimant was the only CSW based at West Mid, the other four were at Chelsea and Westminster.

142. The affected employees including the claimant were emailed on 16 October 2020 inviting them to a meeting to discuss the proposed consultation on 22 October 2020 (at B652). This meeting went ahead its purpose was to introduce to proposals and explained the process.

143. On 22 October 2020, the claimant sent an email to Mr Turton advising that he had been unable to attend the meeting believing it to be happening at a future date and asked if it could be rearranged (at B651).

144. Mr Turton replied to the claimant explaining that the meeting at already taken place could offer to meet with him and explain the consultation process and how it could affect his role (at B653). In a separate email, the claimant asked Mr Turton why he did not give him a *"heads up"* when they spoke earlier that day (at B653). In his reply Mr Turton reminded the claimant that he had told him about the meeting and that he was included in the invite sent by Ms Larocque.

145. On 26 October 2020, the claimant sent an email to Mr Turton (at B654) raising his concerns about the timing of the organisational change paper. He sent a further email to Mr Turton on 27 October 2020 (at B662) and raised an allegation that the reorganisation was an attempt to disguise victimisation for bullying that he had brought up.

146. Mr Turton invited the claimant to telephone him to discuss the matter. The claimant called him on the evening of 27 October 2020. Mr Turton explained the reasons for the restructuring proposal and the purpose of the consultation process. The claimant suggested that the same outcome could be achieved by merging the CST and the Cute Assessment Unit nursing team at night. Mr Turton asked the claimant to put his proposal in writing so that he could consider it further. Mr Turton confirmed the discussion by email dated 28 October 2020 and asked the claimant if he would like to arrange a one-to-one meeting or telephone call (at B667).

147. On 30 October 2020, the claimant sent an email to Mr Turton and a number of other people regarding the proposed restructuring (at B678). In the email, the claimant clearly expresses frustration at process and conflates the issues that he has with Mr Turton and the restructuring exercise/consultation. It is fair to say that the email is somewhat intemperate, as we have noted the claimant is inclined to be from previous correspondence. His underlying concern appears to be that the latter has been engineered to defeat the former. In his email he states that he will be posting his counter-proposal on Facebook and that he would be filing a disability discrimination case with the Employment Tribunal. In addition, he indicates that this is his last communication on the matter and he will not be participating in the process further because it *"lacks credibility"*.

148. On 16 November 2020, the claimant circulated a counter-proposal to Ms La Rocque which he copied to a large number of staff within the Trust, including Mr Turton (at B684-685). Mr Turton responded by email on 24 November 2020 in which he indicated that they would review his counter-proposal as part of the consultation outcome (at B688-689).

149. Mr Turton invited the claimant to a one-to-one consultation meeting on 25 November 2020 (at B704). This was in accordance with paragraph 12 of the Organisational Change Policy (at B195). Mr Turton's evidence is that he does not recall whether the claimant attended the meeting. The claimant did not deal with this in evidence.

150. The consultation period was extended as a result the outcome was delayed initially to 18 December 2020 but later pushback to 27 January 2021. Further time would been required to ensure that all feedback was considered fully, to submit the Band 7 job description for consideration as part of the consultation process and due to the demands of responding to the second wave of Covid-19.

151. On 20 January 2021, the claimant sent an email to MC enquiring when they would be notified of the consultation outcome and for information relating to his redundancy as previously requested (at B776). MC replied the same day reminding the claimant that he has not been served with notice of redundancy because the Trust believes that it will be possible to secure him alternative suitable employment and as such a redundancy quote for him is not available. The email continued that should it arise in the future there will be a 12 week notice period and he will then be provided with a quote as to his entitlement. The email referred him to the redundancy section in the NHS National terms and conditions. This email is also at B776.

152. The outcome of the consultation report was issued in January 2021 (at B765-772) and a formal consultation outcome meeting was held on 27 January 2021 (at B786-787). In essence, the decision was made to disestablish the CSW positions and introduce new qualified clinical role at Band 7, the redeployment process was outlined with confirmation that the team are not being served with redundancy but are being formally placed on the redeployment register for a period of 12 weeks from the outcome being confirmed. The claimant was present at the meeting and raised a number of matters.

153. On 28 January 2021, Mr Turton met with the claimant to discuss the latest OH report which we understand to be the one dated 15 January 2021 from KA, the Consultant Occupational Physician, at B 764.

154. At the meeting, they considered the advice and adjustments that had been recommended in the report. Mr Turton stated that operationally he did not feel that the Trust would be able to guarantee that the claimant would not be placed at risk of exacerbating his condition in his current role. In particular, he was concerned about the requirement to attend cardiac arrests and medical emergencies that could result in manual handling activities, the unpredictability of patients, which could put him in a position where manual handling was required, and difficulties in carrying out his role without having the ability to push beds, trolleys and wheelchairs, plus the amount of time required walking between areas.

155. The claimant told Mr Turton that he had misinterpreted the OH advice and that the letter did not reflect the conversation he had the OH Consultant. Mr

Turton suggested that the claimant raise these concerns with OH and if necessary the OH letter could be amended.

156. Mr Turton told the claimant that in the meantime he was offering him the position of Band 3 Administrator role in the Discharge Team, which he felt that the claimant would be able to carry out in accordance with the OH advice.

157. In his written evidence, Mr Turton explained that the idea of offering the claimant this role was that he would be in control of when he was sitting down and standing up and there was no risk of him being required to do manual handling.

158. Mr Turton also discussed changing the claimant's started finishing times, given that his current role involved working solely at night. Mr Turton explained that whilst the role was initially temporary in nature it could be made permanent.

159. In response claimant simply requested to take annual leave.

160. Mr Turton confirmed their discussion by letter that same date (at B788-789). His letter set out the claimant's outstanding annual leave and bank holiday entitlement for the financial year.

161. We were referred to the Job Description for the Band 3 Discharge Administrator (at B790-797). We were unclear whether this was actually given to the claimant at the time. It states that it is a permanent job but Mr Turton said in evidence that it was temporary but could have been made permanent. He also said in evidence that he confirmed the job offer to the claimant in the letter at B788 but that is what looks like a draft letter (although it is referred to as an email at B799).

162. On 1 February 2021 (at B799-800), the claimant sent an email to Mr Turton, amongst other things, advising that he was withdrawing his annual leave request which he stated he had made *"under duress"* (although it was unclear in what way), that he would see out the remainder of his contract to the date that he is notified of the termination of his employment and would not be seeking further employment with the Trust. He said that as he was contracted to work as a CSW at night he would only continue to work in that capacity.

163. Indeed, it is fair to say that the claimant contacted the respondent on multiple occasions before and after this date seeking details of his redundancy entitlement and stating that he would not consider redeployment and would continue to work for his notice period (at B776, 798, 802, 803-803, 814, 830 and 831-832).

164. In reply he was informed on a number of occasions that he had not been served notice of redundancy because the respondent believed it would be able to find him suitable alternative employment and that if this was not possible within the 12 week redeployment. period, he would receive details of redundancy pay at that time (at B776, 798, 801, 803, 829 and 831).

165. On 2 February 2021 (at B799), Mr Turton replied to the claimant's email of 1 February advising him, amongst other things, that they will be seeking further clarification from OH as to whether he is able to return to the full duties of his HCA role and reminded him that he had identified a temporary role in the discharge team that the claimant could undertake. The email continued, that as it is clear that the claimant is not happy to attend work in that role and is unwilling to take annual leave during that time, Mr Turton had no option but to record the leave as unpaid. He asked the claimant to contact him again urgently if he would like to discuss his return to work and how the Trust can facilitate this. The email ended by stating that there had never been any discussion in regards to termination of employment and that as part of the sickness process Mr Turton's role was to safely ensure that the Trust supported the claimant back to work taking into account any reasonable adjustments.

166. On 5 February 2021, Mr Turton sent an email to the claimant attaching an invitation to the formal consultation close meeting (at B818 & 820). In response, the claimant agreed to meet on 19 February 2021 (at B819).

167. We were referred to an exchange of emails at B833 to 840, the upshot of which was that the claimant stated he would not attend the meeting on 19 February 2021.

168. On 5 February 2021 (at B805), the claimant sent an email to Mr Turton timed at 00:18. It would be an understatement to say that this email is intemperate and uses pejorative terms. We set this out in full:

"How was your plan to protect Nick working for you? I guess it's not going according to plan so your resorting to threats. Go ahead don't pay me! Go ahead my friend!

As (MC) said, I am still employed in the capacity of Clinical Support Worker. Keep your administration post, I am not interested. I am available to work, and it's your decision not to allocate me any work. You think threatening not to pay me will work?

Go ahead! Do it! Make it easier for me. Until the end of my contract, me, you and Nick are going to breathe the same air. Get used to it! I am not going anywhere.

You wanted me to leave? Go ahead and send that notice for termination of employment. You won't do it though will you? Since you won't, I will also disregard the restructuring process.

So send me my rotor send me the paperwork. I did not trigger the sickness policy and you have not followed policy. You are basing your decisions on your feelings, don't feel you can support me?

Good luck my friend."

169. On 8 February 2021 (at B805), Mr Turton replied. This is very clear statement of the position and we set out in full:

"Further to your email, I would like to clarify some points in relations (sic) to the offer of temporary redeployment into the discharge team.

You are aware we have received a report from OH recommending that there are adjustments required in the work place due to your condition. Unfortunately, it is not possible to accommodate these adjustments in your substantive position as the role may require you to carry out manual handing when assisting patients and dealing with any emergency situations. As a result, I identified a temporary role within the discharge team that would allow you to work safely until a permanent solution is reached.

As you have chosen not to accept the temporary role in the discharge team, without a sound reason and have withdrawn your request to use annual leave for this time, I would be left with little choice but to record this period as unauthorised unpaid leave.

Should you wish to take up either of these options, please let me know by 5pm on Tuesday 9th February, otherwise this period will (be) recorded as unauthorised and be unpaid.

Many thanks"

170. On 4 March 2021 (at B848-852), Mr Turton sent an email to the claimant attaching a letter setting out the points that he had hoped to discuss at their meeting on 19 February 2021 which the claimant had declined to attend.

171. This contains a reference to the claimant putting himself forward for the position of ED Technician. We note from the letter that the feedback from that department was that whilst the claimant skills-matched the essential criteria for that role and that he would have been offered a trial period had it been possible to accommodate the adjustment he raised with them to not conduct manual handling, it was mutually concluded that the role was not appropriate due to the claimant's current health and the adjustments required. It continues, that the department considered the adjustments but concluded they were not able to put them in place to ensure their duty of care to the claimant, to other staff and to the patients. This is confirmed in the feedback that the claimant requested and received from the department at B862-864. On balance of probability, we accept the respondent's evidence.

172. We would add that it is also confirmed as part of the subsequent investigation into the claimant's allegations conducted by an independent consultant dated 29 July 2021 (at B1015-1100 at B1047).

173. On 17 March 2021 (at B871-872), the claimant responded to Mr Turton's email which he stated that he had valid reasons not to seek further employment and also stated:

"…I don't feel safe continuing to work under a management structure that protects a bully, because of the colour of his skin."

174. Mr Turton said in evidence that he was taken aback by this comment because at no point have his actions been racially motivated.

175. The respondent sent the claimant weekly vacancies by emails dated 12 January (at B755), 3 February (at B808), 10 February (at B823), 17 February (at B841), 3 March (at B847), 10 March (at B854), 24 March (at B 879) and 30 one March 2020 one (at B888) in which they highlighted non-clinical roles.

176. On 24 March 2021 (at B878), Mr Turton wrote to the claimant inviting him to a meeting to be held on 31 March 2021 to provide him with formal notice of termination of his employment by virtue of redundancy. This meeting took place by Zoom and was attended by the claimant, MC and Mr Turton.

177. Mr Turton explained that, in line with the claimant's request, he would be given formal notice of termination of employment due to redundancy with effect from 31 March 2021, his notice period being 4 weeks and that his last air service would be 28 April 2021. The claimant confirmed that he did not wish to engage in the redeployment process or pursue further employment

with the respondent. Mr Turton reiterated that any redundancy payment would be made on the premise that the claimant had appropriately engaged in the redeployment process and not unjustly refused a reasonable offer alternative employment.

178. Mr Turton confirmed their discussion by letter that same day and advised the claimant had the right of appeal within 10 working days (at B901-902).

179. The claimant did not exercise his right of appeal.

180. One of the claimant's complaints is that he is entitled to damages for breach of contract in respect of the loss of unsocial hours. The claimant gave no evidence in support of this complaint. The only evidence that we did hear was in Mr Turton's witness statement at paragraphs 81 to 82. However, any event, the claimant indicated during our hearing on 24 January 2023 that the issue was rectified and he was no longer pursuing this complaint. We therefore record it in our judgment as dismissed on withdrawal.

181. As we have indicated above, there was an external investigation by an independent consultant into the claimant's allegations, amongst other things, of systemic racism. Her report is dated 29 July 2021 (and is at B1015-1052 with appendices at B1053-1100). Whilst the report found that there was no evidence of institutional or systemic racism and did not agreed with the substantive allegations raised by the claimant in his grievance, it does make a number of recommendations which are set out at B1052. One of these is that a formal apology should be made to the claimant in relation to the permanent nature of his move (of roles) without his knowledge (on commencing the ANA course). The remaining recommendations are more by way of changes to intended improve various of the Trust's policies.

182. One of the allegations that the claimant has made is that Mr Wright was recruiting CSWs at the point that the claimant first sought to return to his original role as CSW. In particular, the claimant referred to the position of a Ms K who he believed was employed in the CST in March or July 2021. The respondent's position was that she was not working there at that time, was based at the Chelsea and Westminster and temporarily moved over to the CST for a few months as a member bank staff and then left again prior to the claimant asking to return to the Team. The respondent's further position was that Mr Wright did not recruit anyone else to the West Mid.

183. On balance of probability and particularly given the process of interim restructuring and the other evidence that was before us, we find that Ms K was not working where the claimant believed she was at that particular time and that Mr Wright was not recruiting any CSWs.

Submissions

184. Whilst Mr Jones did not refer to it, we nevertheless considered it.

185. We heard oral submissions from the respondent and then the claimant. We do not propose to set them out in our judgment but would assure the parties that we fully considered what they said in reaching our findings and

conclusions. We will only refer to the submissions if it is appropriate to do so. We also considered Mr Jones' Opening Skeleton Argument which contained a useful summary of the relevant law and case authorities.

Relevant law

186. Section 13 of the Equality Act 2010:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

187. Sections 20 of the Equality Act 2010:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"

188. Section 21 Equality Act 2010:

"1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…"

189. Section 139 of the Employment Rights Act 1996:

"(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) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(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.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them)…

(4) Where—

(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and

(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason."

Conclusions

Equality Act 2010 - time limits

190. There are time limit issues in respect of some of the allegations, although at the preliminary hearing, EJ Norris did rule that some of the matters relied upon in the claimant's discrimination complaints formed part of a continuous course of conduct. However, we heard no evidence or submissions as to time limits and so we do not propose to make any determination on this on this issue unless it becomes appropriate to do so.

Equality Act 2010 - burden of proof

191. Under section 136 of the Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

192. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be "something more". There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

193. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

194. We have also taken into account the guidance from the, then, House of Lords, in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL. The House of Lords considered the classic Tribunal approach to discrimination cases, which is to first assess whether there has been less favourable treatment, and if so, consider if the treatment was on grounds of the relevant prohibited conduct and stated that it may be more convenient in some cases to treat both questions together, or to look at the reason why issue before the less favourable treatment issue.

195. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Disability

196. The respondent accepts that the claimant has a disability as defined within section 6 of the Equality Act 2010 by reason of the impairment Femeroacetabular Impingement at the relevant times and that it had requisite knowledge from 19 August 2020.

Direct disability discrimination

197. Under section 13 of the Equality Act 2010, it is unlawful to treat a worker less favourably because of a protected characteristic, in this case disability, by reference to an actual or hypothetical comparator in the same or similar circumstances.

198. The complaints of direct sex discrimination are set out at paragraph 3.1 of the agreed list of issues.

199. We are asked to determine whether the respondent did the things set out in three sub-paragraphs. Dealing with each in turn (references are to the paragraphs within the agreed list of issues).

200. Sub-paragraph 3.1.1: moving the claimant from his CSW position in October 2020 without discussion.

201. From our findings, this does not reflect what happened. The claimant was not a moved from his position in October 2020 without discussion. There clearly was a discussion around him moving back to that position. Further, there was discussion about his future employment. So this allegation is incorrect. Even if we were to stretch the wording his removal was not because of his disability but because his return work had worked out.

202. Sub-paragraph 3.1.2: refusing to allow the claimant to return to work in the CSW role from February 2020 even though the position was there.

203. From our findings, the role was still there but the funding had been removed (and given to the Band 7 role) as Ms La Rocque sets out at paragraphs 10 and 11 of her witness statement and Mr Wright at paragraph 17 of his. There was no refusal to allow him to return to work in his role.

204. In any event, there is nothing to suggest that there is any link to the claimant's disability or that the respondent acted in a way connected to his disability. Even if the claimant was treated differently to a hypothetic comparator there is nothing to ground this differential treatment due to disability.

205. Sub-paragraph 3.1.3: refusing to allow the claimant work in November 2020.

206. The claimant was not refused to work he was doing the phased return to work that he agreed to. Even if one were to stretch the wording, the reason that the claimant was not allowed to return to his CSW role was that the respondent was awaiting outcome of the OH advice and subsequently received the OH advice at B764 which was, as Mr Jones put it, extremely conservative as to what the claimant could do and not enough the role could be accommodated.

207. We therefore conclude that the complaints of direct disability discrimination is not well-founded and is dismissed.

Reasonable adjustments

208. Under sections 20 and 21 of the Equality Act 2010, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

209. The adjustment has to be reasonable. In considering whether an employer has met the duty to make reasonable adjustments, the Tribunal must apply an objective test. Although we should look closely at the employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

210. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

211. The claimant's complaint of failure to make reasonable adjustments is set out at paragraph 4 of the agreed list of issues. Sub-paragraph 4.1.1 sets out the PCP that is relied upon. Namely, the requirement that the claimant did manual handling from November 2020.

212. From our findings, the difficulty for the claimant with this is that the respondent did not have such a PCP and no such PCP was ever applied to him. In fact, the respondent made it very clear that he should not undertake manual handling. The evidence from Mr Turton and the emails at the time were very clear (particularly at B690 and 691).

213. We therefore conclude that this complaint is not well-founded and it is dismissed.

<u>Race discrimination</u>

Direct race discrimination

214. The claimant's complaint of direct race discrimination is set out at paragraph 5 of the agreed list of issues.

215. He relies on to matters at sub- paragraph 5.2. Dealing with each in turn.

216. At sub-paragraph 5.2.1, the claimant alleges that Mr Turton failed to investigate an allegation made against the white male (Nick White) on 31 July 2020.

217. From our findings we have determined that Mr Turton did not fail to investigate such an allegation. In any event, we take Mr Jones point that the claimant's grievance against Mr White did not raise issues of race discrimination at least not at this point).

218. What happened was that it was agreed between Mr Turton and the claimant that his allegations against Mr White would be dealt with by way of mediation. The claimant alleges at some stage that he wanted an investigation as well as mediation. However, as we observed, the former would have been inappropriate to the latter. But the contemporaneous emails support the view that the claimant at one stage unconditionally agreed to mediation although later on he states otherwise. And at a later stage, LG asks the claimant if he does not wish to pursue mediation then does he wish the matter to proceed to a stage 2 grievance investigation and his response is that the matter was in the hands of ACAS and he intends to go to an Employment Tribunal. In any event, the respondent did proceed with an external investigation into the grievance and the wider issues that the claimant subsequently raised.

219. We therefore conclude that the respondent did not to do this thing as alleged.

220. At sub-paragraph 5.2.2, the claimant alleges that Mr Wright, Mr Turton, Ms La Rocque, CH, VS and DG created a redundancy situation on 22 October 2020.

221. From our above findings this is clearly not the case. It is simply not supported by the evidence we heard. We therefore conclude that the respondent did not do this thing as alleged.

222. Even if the claimant is right, there is nothing to indicate that this was done on grounds of race. There were solid reasons why the respondent determined to review the provision of its service resulting from a patient death and to suggest that the resultant removal of the CSW roles was somehow manufactured by way of race discrimination is unsustainable.

<u>Breach of contract</u>

223. Under the Employment Tribunal's Extension of Jurisdiction (England & Wales) Order 1995, we have jurisdiction to deal with claims in respect of damages for breach of contract arising or outstanding on termination of employment.

224. At paragraph 7.2 of the agreed list of issues, the claimant brought a complaint with regard to damages in respect of unsocial hours worked without his agreement. However, on the second day of our hearing he indicated that he was no longer pursuing this complaint. We therefore recorded as dismissed.

Statutory Redundancy Pay

225. Paragraph 8 of the agreed list of issues sets out the claimant's complaints in respect of his entitlement to a statutory redundancy payment.

226. We are asked to determine two matters. Firstly, at sub-paragraph 8.1, was the reason for the claimant's dismissal redundancy? Secondly, at sub-paragraph 8.2, is the claimant entitled to a statutory redundancy payment? In particular, did the claimant unreasonably refuse an offer of suitable alternative employment (the respondent asserts that the claimant was offered the position of Band 3 Administrator on the Discharge Team but turned it down).

227. Section 135 of the Employment Rights Act 1996, sets out the right to a statutory redundancy payment:

> *(1) An employer shall pay a redundancy payment to any employee of his if the employee—*
> *(a) is dismissed by the employer by reason of redundancy, or*
> *(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.*
> *(2) Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144, 149 to 152, 155 to 161 and 164).*

228. Section 141 of the Employment Rights Act 1996 states as follows:

> *"(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment—*
>
> *(a) to renew his contract of employment, or*
> *(b) to re-engage him under a new contract of employment, with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.*
>
> *(2) Where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.*
>
> *(3) This subsection is satisfied where—*
> *(a) the provisions of the contract as renewed, or of the new contract, as to—*
> *(i) the capacity and place in which the employee would be employed,*
> *and*
> *(ii) the other terms and conditions of his employment, would not differ from the corresponding provisions of the previous contract, or*
> *(b) those provisions of the contract as renewed, or of the new contract, would differ from the corresponding provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee."*

229. In summary, the statutory redundancy pay scheme operates as follows:

    a. The employee must be given notice of dismissal because of redundancy and the employer must make an offer of re-employment before the old employment ends;

b. This may be an offer of the employee's old job back again — where, for example, work has picked up after notice of redundancy has been given — or, more commonly, it may be an offer of a different job;

c. The new job must start, or be due to start, either immediately after the old job comes to an end or after an interval of not more than four weeks (give or take a weekend);

d. If the employee accepts the offer, he is treated as not having been dismissed and the question of a redundancy payment will not arise. This is subject to the employee's statutory right to a trial period of four weeks where the job is different from the one that the employee previously carried out, or where it is the same job but the terms and conditions are different;

e. If the employee decides against the job and leaves during the trial period, he is treated as having been dismissed when the old job came to an end and as having refused an offer of new employment;

f. If the employee refuses an offer of new employment, he will lose the right to a redundancy payment if the offer constituted an offer of suitable employment and the refusal was unreasonable. He will still, however, be regarded as having been dismissed by reason of redundancy;

g. If the offer was for unsuitable employment, or if it was suitable but the employee's refusal of it was reasonable, then he or she will be entitled to a redundancy payment.

230. The offer of alternative employment must be made before the previous employment ends and the new job must start immediately or within four weeks of the end of that employment.

231. The offer need not be in writing, but it will be for the employer to prove that a suitable offer was made (Kitching v Ward [1967] ITR 464; (1967) 3 KIR 322, DC).

232. If the employee says he is not interested in receiving any alternative offer and the employer therefore does not make one, the employee will not be taken to have unreasonably refused a suitable offer and will be entitled to a redundancy payment Simpson v Dickinson [1972] ICR 474, NIRC).

233. The offer must set out the main terms of the new job in enough detail to show how it differs from the old one (Havenhand v Thomas Black Ltd [1968] 2 All ER 1037; [1968] ITR 271, DC) and the starting date should be clear. If the employee accepts the offer, he is treated for redundancy purposes as never having been dismissed.

234. We were not persuaded by Mr Jones' submission (within his Open Skeleton Argument at paragraph 24) that the old authorities arising under the Redundancy Payments Act 1965 were not still of relevance to the regime under the Employment Rights Act 1996 notwithstanding the removal of the requirement that an offer of alternative employment need not be in writing.

235. Applying this to our findings. The claimant was not given notice of redundancy, he was offered redeployment and put on the redeployment register for 12 weeks. He was offered the temporary role as Administrator in the Discharge Team because he could not be returned to his post as CSW for health reasons. The role was in any event was being made redundant. He refused the position on the basis that he wished to return to his original job and he withdrew from redeployment because he did not want to work for the respondent any longer. We refer to his email of 17 March 2020 in particular (at B871). Thereafter because he wanted to return to his old job and the respondent could not accommodate him and he would not take annual leave, he was for the respondent's purposes on unauthorised unpaid leave. The respondent then issued him with a formal notice of redundancy in which they repeated the offer of temporary work and encouraged him to take advantage of redeployment opportunities and said they were happy to extend his notice period to allow him to secure an alternative role. The clock then runs down without the claimant responding to this letter (at B901).

236. We therefore conclude that whilst a tentative offer of alternative employment in a temporary role was made to the claimant (with a suggestion that it could be made permanent), it was not made in sufficiently clear terms, we could not determine from the evidence provided whether the job description had in fact been given to the claimant and no specific terms of employment or even an actual start date were discussed.

237. We are therefore satisfied that there this was not an offer of alternative employment falling within section 141 of the Employment Rights Act 1996 such as to extinguish the claimant's entitlement to a statutory redundancy payment. We therefore conclude that this compliant is well-founded.

238. The parties are requested to seek to agree the amount of the claimant's entitlement to a statutory redundancy payment by 4 August 2023 and if that is not possible, to notify the Tribunal, so that the matter will be listed before us for a half day remedy hearing.

Appendix: Agreed List of Issues

Employment Judge Tsamados
Date: 24 May 2023