EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Neeta Masih	v	Bedfordshire Hospitals NHS Foundation Trust

Heard at: Cambridge Employment Tribunal

On: 19 June 2023 - 23 June 2023

Before: Employment Judge S King

Members: Mrs C Smith
Mr A Haines

Appearances:
For the Claimant: In person
For the Respondent: Miss Pattison (Counsel)

JUDGMENT having been sent to the parties on 21 July 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided. There has been a delay in providing this due to judicial absence and judicial resources for typing but oral reasons were given in full on the day:

REASONS

1. The Claimant was unrepresented and attended in person with some family members for support. The Respondent was represented by Miss Pattison of Counsel. We heard evidence from the Claimant and Dr Harvey, Miss Eldridge, Mr Reid and Miss McDonald on behalf of the Respondent.

2. Mr Reid and Dr Harvey gave evidence via CVP as the matter was listed as a hybrid hearing but all other witnesses and the parties representatives were in attendance in the Tribunal. The full panel attended in person.

3. In addition, the Respondent relied on two witness statements, Miss Hall, formal Grievance Investigator and Mr Vaughan, Grievance Appeal Officer who did not attend the hearing to give evidence but for whom we had the two written statements.

4. The Claimant and Respondent, having exchanged Witness Statements in

advance, had prepared an agreed bundle of documents which ran to 884 pages. We had consideration to the pages the parties referred to in evidence.

The Issues

5. At the outset it was identified that the Respondent had redacted some paragraphs of the Claimant's Witness Statement that referred to 'without prejudice discussions' and the Claimant took issue with this.

6. Whilst the Tribunal was reading on the first day, the parties were able to consider this further and dealt with the matter by consent. It was agreed that the redacted paragraph 103 of the Claimant's Witness Statement would be unredacted. The Panel noted this evidence by hand as the hard copy witness bundle only contained redacted evidence.

7. At the Preliminary Hearing on 2 December 2020, Employment Judge Gumbiti-Zimuto identified the claims as unfair dismissal, race discrimination and statutory redundancy payment and as set out in paragraph 6 of the Case Management Summary and a list of issues was identified. The Case Management Order confirmed that the Claimant did not pursue a claim for contractual redundancy payment but this was instead, relevant to the issue of losses and the computation in terms of remedy.

8. At the outset we confirmed we would deal with liability only at this stage and issues as to liability were clarified at the outset of the hearing, having been set out in the Preliminary Hearing on 2 December 2020 as follows:

<u>Jurisdiction - discrimination</u>

9. For each allegation of discrimination, was the claim issued within the correct time limits, taking into account any applicable extension of time under the ACAS Early Conciliation ('EC') procedure?

   The Claimant contacted ACAS on 23 April 2020 and received the ACAS certificate on the same date. Any alleged acts of discrimination occurring more than three months prior to 23 April 2020, i.e. before 24 January 2020, are prima facie out of time.

10. Was there conduct extending over a period of time within the meaning of section 123 of the Equality Act 2010?

11. Would it be just and equitable to extend the time limit for the presentation of complaints in this case?

<u>Jurisdiction – contractual redundancy payment</u>

12. Does the Tribunal have jurisdiction to consider the claim for contractual redundancy pay in view of the following factors:

    A At all times the Claimant's contract incorporated the national terms and conditions as detailed by the NHS Terms and Conditions of Service ("Agenda for Change") Handbook (as amended from time to time);

B Section 16.26 of Agenda for Change states that claims for redundancy payment must be submitted within six months of the date of the termination of employment, and before payment is made the employee will certify that they had not obtained, been offered or unreasonably refused to accept suitable alternative health service employment within four weeks of the termination date;

C Does Article 3(b) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 therefore mean that the Tribunal does not have jurisdiction to hear the claim for contractual redundancy pay as the effect of the above provision in Agenda for Change is that the claim was not outstanding on termination of employment.

The Respondent respectfully draws the Claimant and Tribunal's attention to the case of Pritchard v Bexley Care Trust (1100945/11).

Unfair dismissal

13. What was the sole or principal reason for the Claimant's dismissal and is it a potentially fair reason within section 98(1)(b)&(2) of the Employment Rights Act 1996? The Respondent relies on some other substantial reason, namely (a) the Claimant's refusal to engage with the Respondent to discuss returning to her role and her sickness absence; and (b) that there was no reasonable prospect of the position changing.

14. Could the reasons justify the dismissal of the Claimant?

15. Was the decision to dismiss reasonable in all the circumstances?

16. Was the dismissal procedurally fair within the meaning of section 98(4) of the Employment Rights Act 1996?

17. If the Claimant's dismissal was procedurally unfair, would she have been dismissed from her employment in any event?

18. If the Claimant's dismissal was unfair, should compensation be reduced on account of the Claimant's contributory fault? The Respondent relies on the Claimant's non engagement with Respondent processes and correspondence from the Respondent, and her refusal to undertake the role which the Respondent says was the same role she had been undertaking prior to the consultation.

19. Has the Claimant unreasonably failed to mitigate her losses?

20. To what basic award is the Claimant entitled under section 199 of the Employment Rights Act 1996?

21. What compensatory award would be just and equitable in all the circumstances under section 123 of the Employment Rights Act 1996?

22. The Claimant does not pursue a claim for a contractual redundancy payment but claims losses on the basis that the true reason for her dismissal was redundancy and, as part of that compensation, she will seek an appropriate

sum which shall include consideration of her eligibility for a contractual redundancy payment. The Claimant says that as she was misled as to the true reason for her dismissal, she could not have sought a contractual redundancy payment at the time. For this reason, the Claimant seeks this payment as compensation rather than as a standalone claim.

23. Is the Claimant entitled to such an award in addition to or instead of compensation for loss of earnings?

24. Should the compensatory award be increased by up to 25% in accordance with TULR(C)A 1992, s 207A(5) for the Respondent's unreasonable failure to comply with the ACAS Code of Practice? The Claimant asserts that the Respondent unreasonably failed to follow the ACAS Code of Practice in that it a) did not follow any redundancy procedure with the Claimant and b) failed to investigate her grievance adequately.

Direct race discrimination

25. Did the Respondent treat the Claimant less favourably than it treated others? The Claimant says she was subject to the following less favourable treatment:

A She was not placed on the PRINCE2 training course by Dr Rory Harvey, her line manager, throughout her employment and right up to her dismissal but in particular in July 2019 when she specifically requested the course;

B The Respondent rejected the Claimant's informal and formal grievances regarding the allegation that the Claimant had been subjected to discrimination in not being selected to undertake the PRINCE2 training and/or did not investigate it properly between the end of September 2019 and April 2020.

26. In considering whether the treatment was less favourable, to whom does the Claimant compare herself?

a. For the alleged less favourable treatment set out in paragraph 25.a, the Claimant relies on "NG", a Band 4 Administrator for the Cancer Alliance East of England, who was put on the PRINCE2 training around February 2019 some 7 months after joining the team as an actual comparator or, in the alternative, if that person is not a suitable comparator then the Claimant relies on a hypothetical comparator.
b. For the alleged less favourable treatment set out in paragraph 25.b, the Claimant relies on a hypothetical comparator only.

27. Was the Claimant subjected to the less favourable treatment because of her race?

28. If so, what compensation is due to the Claimant?

Redundancy payment

29. Was the real reason for the Claimant's dismissal because the Claimant's role was redundant within the definition of redundancy set out in section 139(1) of

the Employment Rights Act 1996?

30. If so, what is the value of statutory redundancy payment the Claimant is entitled to?

31. Having reviewed the list of issues at the outset of the hearing we agreed we were not dealing with Remedy so it was agreed at the outset we would not consider issues 19-23 under unfair dismissal on the list of issues above and 28 under the race discrimination and 30 under the redundancy payment claims as these will be determined at the remedy stage. As such we would not decide issues of remedy such as the contractual redundancy payment until a decision on liability was taken.

The Law

32. In terms of unfair dismissal, dismissal under section 95 of the Employment Rights Act 1996 was not in dispute and the Claimant had sufficient service not to be unfairly dismissed by the Respondent under Section 94 of the Employment Rights Act 1996.

33. Section 98 of the Employment Rights Act 1996 states that:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

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

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

34 Depending on the reason for dismissal, the ACAS Code of Practice on Discipline and Grievance (COP1), may be relevant and that an uplift may be relevant accordingly in accordance with s207A TULCRA.

35 In terms of the other types of claims, Counsel referred the panel to a number of authorities contained within her written submissions which are not recited for the oral judgment but to which the panel had regard and in addition, the Judge raised with the parties, the case of Phoenix House Ltd v Mrs Tatiana Stockman: UKEAT/0058/18/OO.

36 In relation to the race discrimination complaint, the Claimant brings a direct discrimination complaint which falls within section 13 of the Equality Act 2010, which states that:

(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.

(2) ..…

37 We must also have regard to section 39 Equality Act 2010 which states:

"(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(3) …

(4) …

(5) ….A duty to make reasonable adjustments applies to an employer.

(6) …

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms."

38 In relation to the redundancy payment claim, the relevant law is set out under section 135 Employment Rights Act which sets out as follows:

(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) ……..

39 The circumstances in which a dismissal is said to be for reasons of redundancy are set out in s139 Employment Rights Act 1996 as follows:

(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).

(3) ……...

(4) ……..

(5) ……

(6) ……...

40 Under section 141 of the Employment Rights Act if an employee refuses all suitable alternative employment then they lose the right to redundancy payment as this states:

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

(a) to renew his contract of employment, or

(b) to re-engage him under a new contract of employment,

with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.

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

(3) This subsection is satisfied where—

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

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

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

would not differ from the corresponding provisions of the previous contract, or

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

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

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

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

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

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

41 We also noted the need to refer to the redundancy payment provisions contained in sections 162-164 of the Employment Rights Act, in particular with references to an Employment Tribunal under section 163 which states that:

(1) Any question arising under this Part as to—

(a) the right of an employee to a redundancy payment, or

(b) the amount of a redundancy payment,

shall be referred to and determined by an employment tribunal

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

Findings of Fact

42. The Claimant was employed by the Respondents (and since changed its name) on 3 July 2017, as a Business Coordinator on a fixed term contract, initially for one year.

43. The Claimant started her NHS career in approximately 2011, holding a series of other roles within other Trusts, which were temporary or fixed term in nature. This included a previous hosting arrangement which we will cover in more detail below.

44. The Claimant was interviewed by Dr Harvey who was Chair of the East of England Cancer Alliance and appointed the Band 6 Business Coordinator Role, reporting to Dr Harvey. Dr Harvey also held a clinical role at Bedford Hospitals as a Consultant Gastroenterologist.

45. The Cancer Alliance was incepted in 2016. Dr Harevy was the Clinical Chair, part time on two days a week. The Claimant was one of the first recruited into the Cancer Alliance. She was employed by the Respondent which hosted her for the Cancer Alliance.

46. The NHS England Cancer Alliances were projects funded by NHS England and were not legal entities in their own right. We accept that there were some difficulties around employing people within the Cancer Alliances.

47. NHS England had overall oversight of the Cancer Alliances and employed staff directly to work on the Cancer Alliance projects.

48. There was a hosting arrangement in place between Respondent and the East of England Clinical Network which later became the East of England Cancer Alliance. Under this hosting agreement, the Trust agreed to employ staff for the benefit of Cancer Alliance. Both the Claimant, when she joined on 3 July 2017 and Dr Harvey were employed by the Trust under such an arrangement.

49. Mary Emurla's role was created in approximately December 2017. Initially the Claimant and Dr Harvey worked closely together. They had previously known each other for some time. The Claimant managed his diary and supported him with meetings such as minute taking etc. Dr Harvey did not view himself as her line manager but the Claimant considered him to be so. Dr Harvey also had a clinical PA who managed his clinical practice and diary etc., and he did not line manage that PA either.

50. When the Claimant first started, by email on 5 July 2017, the Claimant emailed Dr Harvey with objectives and ideas and things to do. They worked together to set up the Cancer Alliance which grew and evolved over time. The Claimant was involved in recruitment initially. She never had a formal PDR with Mary Emurla or Dr Harvey. In addition to Mary Emurla's appointment, Tracy Yarrow was appointed as Business Coordinator for Band 6 and there was a Senior Administrator on Band 5, an additional resource, MG and a Band 4. All of these individuals were expressly employed by NHS England, not the

Respondent. The Claimant was in a more unique situation in what we call a matrix structure, within the course of these proceedings.

51. The Claimant's first fixed term contract was for 3 July 2017 to 2 July 2018. This contract included a provision within her job description that expressly stated she report to the Chair (Dr Harvey at the time). Her key responsibilities were varied and included the term "manage and supervise staff as required". Further, under the 'personal specification', under the qualification section, there was a part that became relevant in these proceedings which stated, "further training or significant experience in project management, financial management or support and change management processes, which was marked with a D for desirable.

52. On 18 April 2018, the Claimant made a flexible working request to Lana Haslam of HR. She varied her hours from 5 days a week to 3 days a week with effect from 2 July 2018.

53. On 3 July 2018 the Claimant met with Lana Haslam, HR and Mary Emurla to discuss the flexible working request. By letter dated 9 July 2018 the flexible working application was granted and Mary had discussed with Dr Harvey, the arrangement.

54. A further change occurred in that Mary Emurla asked the Claimant to be based at Fulbourn and the Claimant agreed as it was closer to her home and meant that she could be alongside Dr Harvey when he was in Fulbourne also.

55. On 25 October 2018 she received confirmation of an extension of her contract. It gave no end date but confirmed existing terms and conditions apply and stated as follows:

"You have reduced your working hours from 37.5 hours per week to 24 hours per week (8 hours per day) on a fixed term contract as of 1 August 2018. You will be based at Fulbourn with effect from 1 October 2018, and your salary is £17,952.00.

The other terms and conditions in your contract at present will still apply. The original terms and conditions will also apply to the variation made. Please accept this letter as an amendment to your contract of employment"

56. On 20 September 2019 the Claimant's contract was extended on another fixed term contract from 30 September 2019 to 31 March 2020. Again, this stated that all other terms and conditions in the contract at present will still apply. The funding for the Claimant's post was awarded on an annual basis which is why she was offered annual fixed term contracts.

57. In September 2018 there was a review of her Business Administrator function. Tracy Yarrow set out roles and responsibilities and an organisation chart. This document made reference to Dr Harvey being her Line Manager and the Claimant had no issue with this at the time.

58. There was a service level agreement (SLA) in place between the Respondent and the Cancer Alliance. This one had a number of obligations to the Cancer Alliance, including: "*Should any postholder leave or become absent for more than one month, ensuring the post is filled within a reasonable time period".*

The Claimant was unaware of the SLA obligations prior to her dismissal.

59. In 2019 NHS England and NHS Improvements decided to divide the Cancer Alliance into two geographical areas due to its size, creating two separate Cancer Alliances, the Eastern England Cancer Alliance North, was to cover Norfolk, Cambridgeshire and Suffolk and the South was to cover Bedfordshire, Hertfordshire and Essex.

60. A Consultation exercise commenced in July 2019 with all Cancer Alliance Staff. The Claimant was included at the outset of this consultation but the Claimant did not in fact get consulted with as this was for NHS England staff and she was an employee of the Respondent.

61. On 23 July 2019, Dr Harvey forwarded the Claimant an email he had received from the Director of Learning, Paul King, of the Respondent under the heading, 'Applications from the Stepping Up Programme, the BAME and aspiring leaders in Band 5-7 now open' and a comment was included in an email from Dr Harvey to the Claimant:

"*This is of interest?".*

62. The course originated from the NHS Learning Academy rather than the Respondent and was fully funded by the Academy at no cost to the Respondent unless the participants withdrew and it had a cost of £970 for a Band 5 or 6 employee. The Claimant did not apply, instead she took exception to being sent the information by Dr Harvey. We refer to this as the "training email". She replied the same day:

"*Thanks for Rory, very kind of you and appreciate you thought of me. Not sure how to say this and it is no disrespect to you, I just find this programme very wrong and discriminative. I know you have known me for long enough, I work like a British person, I hope. I have my weaknesses and strengths just like everybody else. I have gone to school and worked with British people and never had a problem with getting a job and I have also been in leadership roles in the past, not just NHS. This programme sounds like it alienates someone and personally I don't want to be part of this. I believe in diversity and hardworking people, not because of their background but because of their merit. I hope you see the way you work with me, not a group but a team. Incidentally I have asked to do Prince2 on a few occasions during my time in the NHS and nobody seemed to be interested. However, recently our Band 4 was offered it and done it". There seems to be some unfairness somewhere. I hope there won't be need for this in the future".*

63. The Claimant was very upset by this email and it was still clearly upsetting for her when giving her evidence.

64. Dr Harvey's evidence was that he could not remember the detail of what the training involved but when he first saw it he thought of the Claimant as she worked in Band 6. He thought she was very capable and therefore felt that this would be an opportunity that would be of interest to her to support her in progressing her career. Given her response, Dr Harvey's evidence was that he thought it best not to discuss it further but that he did forward it to her with the very best of intentions to offer her an opportunity and because he thought of her so highly.

65. Dr Harvey did not reply to the email, he felt he had overstepped a line and the Claimant was clearly upset and as he valued working with her and did not mention it again.

66. Dr Harvey spoke very highly of the Claimant, her ability and what she had assisted with him in achieving and in cross-examination he said he felt he had sent it on because he valued her, not because he judged her ethnicity. He also gave evidence that the Cancer Alliance had looked at any way it could to provide the service and he thought it was an opportunity that the Cancer Alliance and the Claimant could benefit from.

67. The Claimant expressed that she was the only BAME employee in her function and felt singled out by receiving an email and she felt that Dr Harvey saw her as a person of colour and the Claimant had clear aspirations for some time to complete the Prince2 course. In 2015 when she was in a project and programme support role with a different Respondent but still within the NHS, the Claimant was told that at an appropriate point, the employer would pay for her to attend the relevant Prince2 courses. This was confirmed by letter dated 24 February 2015, but the Claimant left her employer to elsewhere. The Claimant had not however forgotten about this and wrongly believed that this should also apply to this Respondent some years later.

68. In 2018, the Claimant was also sent details of Finances and Skills Development, FSD courses, so she could access them. The Claimant replied in January 2018, asking to be kept informed, should courses relating to any "project management elements" come up and to let her know. She indicated that she would run it by Rory as part of her development programme and he was happy to support her.

69. Dr Harvey indicated in evidence that he would always be happy to support the Claimant but would have directed her towards her line manager for guidance in respect of specific training. The Claimant accepts she never expressly asked this Respondent to complete a Prince2 training course.

70. The only other reference to Prince 2 is in the 23 July 2019 email. Prince2 was not an essential requirement for the Claimant's role. We heard evidence from the Respondent, which we accept, that by October 2019, the Trust no longer offered funding for Prince2 training courses due to the huge reduction in the training budget it was no longer offered. Further, that there was a formal non-medical CPD funding request procedure and that set out restrictions the Trust had in the overall function in funding CPD courses for all non-medical staff. It is not in dispute the Claimant did not formally make an application for such a training course.

71. Mary Emurla recorded in the meeting of 11 December 2019 that earlier that year there had been a discussion about the Claimant's objectives and Prince2. She said that a conversation had taken place about Prince 2, that it wasn't an essential requirement for the Claimant's role and what she suggested to her at the time, was that she went back to the Respondent as her employer to look at what was available through the Trust in relation to project management courses and training and that was the same approach she had taken for all members of the Team and didn't believe the Claimant ever came back to her.

72. In addition, during the same meeting, Miss Eldridge highlighted that year's ago there used to be a training budget, lots of training, lots of development but over the years it has become one of those things that have been heavily reduced. Things that were not role essential, such as personal development but that were not a requirement of the role will not be seen as a necessity. She set out that this is the only way they can manage the budget, not everyone gets what they want to do but that is what would normally happen if a person had been turned down for a discussion with their line manager. She also confirmed that they don't offer Prince2 here and that in fact it was no longer called that as it was an external course for 5 days, which is normally residential and has quite a cost to it. (We heard evidence before us, this was approximately £4000.00). The only people that would normally be put on that course were those to whom it was essential to their role. That is the only time they will go through it and the times of having departmental budgets were no longer there.

73. The subject of Prince2 was raised again as part of the Claimant's grievance, which we will deal with below.

74. In September 2019, NHS England informed the Trust that those that worked at the Cancer Alliance and employed by the Trust would be out of scope for the consultation and NHS England staff would be appointed first. Cancer Alliance's position was that if they still require the additional hosting staff, they continue in the same situation. However, at the outcome of the consultation resulting in Cancer Alliance wanting to cease or amend the service level agreement with the Trust and further discussions would take place at that point. This was confirmed by email dated 26 September 2019.

75. On 28 August 2019 the proposed structures for the new alliances were released and the Claimant attended a meeting to discuss this further.

76. On 1 October 2019 the Claimant met with HR and her Union Representative to discuss her concerns about how employment status, work pressure and line management in light of the current transition of NHS England and NHS Improvements and the Cancer Alliance.

77. On 2 October 2019 the Claimant emailed Dr Harvey (page reference 358) to say,

"*We discussed line management and I was concerned its not clear who had been my line manager for the last two years, whether it was yourself or Mary*"

and further

''With the transition of the new alliance going forward on 1 October, you said Alison or Mary would manage all Cancer Alliance staff, could you confirm the following:

- *If that would be both line-managing me, or one person?*
- *Would I be entitled to have a formal consultation meeting for this also?*
- *What is my role going forward? Do I manage your day to day business?*

- *As Bedford staff had been confirmed, they are secure in structure – can you tell me which structure I sit in, North or South?*

- *Are there any other options?*

78. On 15 October 2019 the Claimant emailed Lana Haslam to request a meeting about her role in the Alliance. In that email the Claimant said,

"Mary has met with me today and giving me my outcome verbally that my equivalent, Tracy Yarrow (B6 Business Coordinator) would be going to the North, I will have to go to the South."

"Mary also mentions today that she will be coming the meeting as my current line manager. I challenge this as I already expressed to you and that the line management has been very blurry and also brought up this with Mary today. I have emailed Rory asking him to confirm line management and never got a response. I said that nothing was put in writing. However, Mary says she remembers saying this to me six months ago, although I feel I did not have any proper consultation".

79. On 22 October 2019, Wayne Bartlett-Syree wrote to the Claimant:

"*Staff that currently work for Cancer Alliance but are hosted at Bedford Hospital NHS Trust have been considered out of scope for the joint working programme. As such you have been required to wait until the Cancer Alliance staff employed by NHS England and NHS Improvements have received confirmation of their final status. This, in many cases, has required staff to express their geographical preference for working in either the new North or South Cancer Alliance. This has now been completed and staff and I have received confirmation of their final status.*

There is no other change to the role other than a change of geographical alignment into either the new North or South Cancer Alliance. I am now able to confirm your final status with the new alliances whilst remaining hosted at Bedford Hospital."

The Claimant's job title and Band remained unchanged.

80. On 29 October 2019 the Claimant went with Lana Haslam and the Directors, Alison Gilbert and Mary Emurla to discuss the changes. Following that meeting an email was sent to the Claimant which contained a number of matters.

81. There are no formal minutes of the meeting and so the closest record we have of what was discussed at that meeting comes from that email. Mary Emurla confirmed to the Claimant that the role is not fundamentally different simply assigned to a specific South region. She outlined that the line management had already changed and that the Claimant continued to work for Dr Harvey but be line managed by Mary as would be common practice in a matrix arrangement. Mary Emurla confirmed the Claimant could continue to work three days a week and invited the Claimant to get involved in the initial team discussions. She outlined that they were sorry that the Claimant felt disadvantaged in the process but assured her that she was a valued member of staff who would make an important contribution to the new structure.

82. On 30 October 2019 the Claimant went off sick and did not return to work before her employment ended.

83. On 5 November the Claimant met HR Lana Haslam to discuss the structure and the options. She sought a severance package, redundancy/severance, which was not agreed. The Claimant asked this to be escalated but did not hear back by 8 November 2019.

84. On 10 November the Claimant submitted a grievance with a accompanying letter which stated that:

"As an employee of Bedford Hospital Trust, I feel I have been unfairly treated throughout the NHS England/NHSI transition process due to my Bedford Hospital contract being poorly devised. I would also like to bring to your attention of the way I have been discriminated on the basis of my colour and the mismanagement by senior staff. Furthermore, I am reluctant to go forward into the new structure, which is the Cancer Alliance South until this has been resolved".

In terms of resolution, she stated she was looking *"to be treated fairly as she did not want to be treated as a person of colour but treated impartially on her merit in healthy competition".*

85. On 25 November the Claimant received a letter from Ann Buck, following her grievance.

"*We are aware that, following consultation undertaken by Cancer Alliance but from which you and other Bedford Hospital colleagues were excluded, you have been offered the role of Business Coordinator with the East of England Region, Strategy and Transformation Cancer Alliance South. This does not involve any change to your current terms and conditions, pay, hours of work or base, which remain in Fulbourn, as outlined to you in a letter from Wayne Bartlett- Syree, Director of Strategic Transformation/Locality Director at NHSE/I, dated 22 October 2019".*

"*I have spoken to Lana Haslam about the conversations she has had with you, she tells me that you are unhappy, not just with the fact that you were excluded from the Cancer Alliance-wide consultation but also the fact your line manager was changed from Rory Harvey to Mary Emurla without proper consultation and nothing was put in writing. You raised this during the meeting on 29th October 2019 with Lana, Mary, Alison and Mike. You also said you were unhappy being allocated to the Cancer Alliance South as you felt that though the base was the same, the areas you would be covering would make your role more difficult geographically. You said you would have chosen to work for Cancer Alliance North but this post has been allocated to someone else. At a subsequent meeting with Lana you said you would ideally like to leave your role at the end of your fixed term contract but prefer not to work your notice period because of the difficult situation at work".*

86. On 29 November 2019 the Claimant received a letter from Jackie Eldridge which had very similar content and expressed the same points.

87. On 3 December 2019 the Claimant was invited to a meeting with Jackie Eldridge and Mary Emurla on 11 December 2019.

88. On 5 December 2019 the Claimant queried why Mary Emurla was there and Jackie Eldridge set out in her email on 9 December, the reasons for this.

89. On 6 December 2019 the Claimant was written to by Mary Emurla who signed this letter off as her line manager. This letter again outlined the new structures with effect from 1 January 2020 and outlined that the Claimant's line

manager would be Amanda Pleavin and that her new line manager and Mary Emurla would arrange a meeting to hand over line management to ensure that the Claimant felt supported.

90. On 11 December 2019 the Claimant attended the meeting with Mary Emurla and Jackie Eldridge, accompanied by her Union Representative. The Tribunal Panel had the benefit of the minutes of this meeting and a number of salient points were raised within that meeting as follows:

The Claimant said:

"I came to speak to Lana on 5 November and gave her some pointers of why I feel I cannot work under this Management. I've tried and I would like an exit package. I know my contract ends at the end of March"

Jackie Eldridge asked her *"what can we do to try and sort this out then".*

The Claimant replied:

"I cannot work in there, after all that has happened I do not trust it".

91. Again, the Claimant was asked by Jackie Eldridge, does she not feel that bridges can be built back up again? The Claimant said "*no*", the Claimant said "*not under that, not there, no. People would know about this*".

92. Mary Emurla said to the Claimant that:

"what we are offering here is ongoing employment, beyond the end of the fixed term contract"

And the Claimant replied:

"*I think through this contract and other people getting better opportunities, I cannot see myself thriving this environment. Not the way it's been handled*".

93. Jackie Eldridge again reiterated she would "*really really like to find a solution to this if we can, because I don't think all is lost. There is a new boss that's come in and it's about building up that trust."* She asked the Claimant whether she would be prepared to give it a months' trial.

The Claimant was reluctant and said that:

"if I had a new Manager and it would turn out really bad. I've given it my all ok and I just think, I'm happy to have another meeting with you personally, with Bedford Hospital about probably ending in March agreement"

94. Again, the union asked about the trial period in this meeting and the union representative asked whether the Claimant would have an opportunity to revisit and say this actually wasn't for her and Jackie Eldridge confirmed that that was the case. Jackie Eldridge also confirmed the Claimant would need to start the trial from January so she would be able to exit the contract in March if she felt it wasn't for her and that she had been offered a chance of continuous employment, that the line management is different but essentially the roles are the same and the Claimant was again informed her Manager

would be Amanda Pleavin. The Claimant replied that she used to sit behind me so I have met her but not necessarily sure I would want to work with her.

95. At the end Jackie Eldridge confirmed:

"You have got an opportunity now, with a new manager starting and for new start at the beginning of January. Mary said we can't go back on the consultation now NHSE have said that it's done, I can't change that decision making. It's a different organisation. What we have to do is manage this now within the policy and how we find a resolution for this. Whether you want to give it a try or if want to leave, that decision is yours".

96. On 11 December 2019 when Jackie Eldridge proposed another meeting on 19 December, the Claimant replied.

"Apologies I am not able to make this meeting as I don't feel it is appropriate to hold this meeting before my occupational health appointment."

97. The same day the Claimant was asked to meet Fiona Macdonald to discuss her formal grievances. Fiona Macdonald replied on 17 December 2019, saying it is currently progressing with Jackie Eldridge and Mary Emurla.

98. Also on 16 December 2019 the Claimant said:

"A*s you know I am under stress from work and not in the right frame of mind to have a meeting yet until I have been seen by occupational health. I would hope you understand and I will get in touch with you soon".*

99. On 19 December 2019 the Claimant was assessed by Occupational Health at a face to face meeting.

100. On 20 December 2019 the Claimant was sent the outcome of the informal grievance, which was detailed and included a number of headings dealing with change of line management, being disadvantaged as a Bedford Hospital employee, not being included in the Cancer Alliance Network restructure consultation process, being treated as a person of colour and refusal of project management training. The letter further confirmed that:

"You have been aligned to a role as the Business Coordinator covering the Cancer Alliance South of the region which was deemed to be suitable alternative employment. You explained that you did not want to accept the role as you believed the relationship had broken down with Management, you had lost trust in the Cancer Alliance and Bedford Hospital Trust as you felt you had not been supported by either organisation.

I informed you that in line with Bedford Hospital's Management of Organisational Change Policy, you were entitled to a four-week trial period and advised you that it was in your interest to trial the post. You informed me that how you were currently feeling you did not want to trial the post and were looking to leave the organization. I advised you that if you did not accept the post then you would be resigning.

You advised me that you had spoken to Lana Haslam on 5 November 2019 and advised her that you do not feel you could work under this new structure/management and you were looking for an exit package."

Part of the letter is redacted but it goes on to explain that:

"Mary Emurla advised in the meeting that Amanda Plevin, new Managing Director for Cancer Alliance (South), would be taking over as your line manager, I asked that with that in mind, you may want to reconsider the option of a four week trial. I suggested that you consider meeting with Amanda to discuss her expectations of the Business Coordinator and your expectations of the role."

With regards to line management, it was confirmed that

''It is normal practice as the service develops and the team grows, responsibilities often change and that whilst there is no requirement for formal consultation, it is good practice to communicate any changes either verbally or in writing. Mary Emurla has since informed me that she did discuss the change in line management with you at the time".

101. The Claimant was given until 24 December 2019 to confirm if she was accepting the trial as the new structure came into effect on 2 January 2020.

102. On 23 December 2019 the Claimant wrote to Jackie Eldridge, setting out her concerns :

"At the moment I am on sick leave due to work related stress, I hope that you will respect that I do not want to rush any decision until I have met properly and understand all the terms and conditions of taking the trial or had a discussion about the option in an informal meeting about an exit package".

103. On 24 December 2019, the deadline, the Claimant emailed Jackie Eldridge, asking,

"so that I can understand a bit more about it before a decision is made, what are the full terms of the trial, who will make the decision and what happens at the end of the trial?"

104. By the same day, Fiona Macdonald emailed the Claimant stating

''I am aware that Jackie Eldridge is in correspondence with you, she is available to meet you as soon as possible and eager to take matters forward to reach a resolution for you without delay. You stated you would be in contact with Jackie after Christmas and New Year break, in the circumstances the best course is for you to meet Jackie as planned, during which you can discuss the matters you have stated as the issues raised in your grievance, the reason why I feel the alliance role is not suitable and the options to resolve this going forward''

105. By email dated 30 December 2019, Jackie Eldridge emailed the Claimant setting out the details of the trial period as follows:

"The trial will be offered under the Trust's Managing Organisational Change Policy, the Cancer Alliance Network have gone through a restructure and you have been slotted into a job which they believe constitutes suitable employment as it is undertaking same/similar duties you were undertaking prior to the restructure.

As you were unhappy and have voiced your concerns around the role you have been

slotted into, you have the opportunity to trial the post for a period of 4 weeks, this will enable you to make an informed decision at the end of the trial.

The terms of the trial are no different to your current terms and conditions, you are required to either accept the position and start the post on the 2nd January or have the trial. The trial period will take place without a break from your previous employment and will be confirmed in writing. Such trial periods will not affect any subsequent rights to claim redundancy payment, unless the new post is refused unreasonably.

As I stated at our meeting, I would suggest you meet with Amanda Plavin to discuss a programme of supervision, induction and orientation to the service and to established what she sees as work priorities during the trial period.

A thorough review of the success of the trial period must be undertaken by Amanda at the end of the trial period with you (and your representative should you wish to be accompanied). A final decision will be made by her in conjunction with HR, as to whether the employment has proved to be a suitable alternative to your current post.

Where, in the opinion of management, an offer of suitable alternative employment has been made and unreasonably rejected, you may forfeit your entitlement to redundancy benefit.

Give me a call to discuss this further."

106. In January 2020, Dr Harvey stepped down from the Cancer Alliance but did not cease all work until September 2020. Whilst the Respondent was trying to helpfully resolve the stalemate with the four week period, it was not helpful for the email of 30 December 2019 to make reference to redundancy in redundancy payments when the Respondent assessed it was not a redundancy situation.

107. On 2 January 2020 the Claimant wrote to Jackie Eldridge and raised three points; she requested a copy of the contract, she asked what would happen at the end of the four week trial if it wasn't suitable and stated that she had raised issues in a formal grievance that need to be discussed formally. She subsequently accepted in evidence that she had had the contract at that time but misfiled it.

108. On 24 January 2020, Jackie Eldridge chased the Claimant for an update in her decision making. (Page 434).

"*Due to long term sickness, I would like to meet with you and Amanda Plevin to explore with you if there is anything we can do to return you to work or discuss any additional support you may require".*

109. On 27 January 2020 the Claimant emailed Jackie Eldridge to ask which role she was returning to. On the same day Jackie Eldridge replied to say that the role is the Band 6 Business Coordinator, Cancer Alliance South region and that she was awaiting Amanda's availability and when she had had confirmation she would send a letter with a date and time.

110. On 30 January 2020 the Claimant was sent an invite to attend an informal sickness absence meeting, stage 1, which would take place on 12 February 2020 with Jackie Eldridge and Amanda Pleavin.

111. By email of the same day the Claimant replied to inform Jackie Eldridge, to say that:

"I will await a response from Fiona to that letter. Please note while I am on sick leave from my Doctor, I will not be able to meet and am awaiting for my hospital appointment".

112. By letter dated 30 January 2020, the Claimant wrote to Fiona Macdonald to request a formal grievance meeting with someone who had not been involved as she felt she was not getting a clear answer to her informal complaint so she wanted to put it onto a formal stage.

113. On 31 January 2020, Jackie Eldridge met with Mr Reid to discuss matters and the situation with the Claimant.

114. On 3 February 2020, Fiona Macdonald replied to the Claimant by email to say that a formal grievance meeting would be held and Helen Smith of HR would be in contact to make arrangements for the formal grievance hearing.

115. On 4 February 2020, Jackie Eldridge emailed the Claimant to advise her:

"As you have stated you are unhappy with the Cancer Alliance consultation process, the Trust has agreed to go outside of the process stated in its Management of Organisational Change Policy on "slotting in" process and allow you a 4 week trial in the Band 6 Business Coordinator role, South Alliance, this is the same role you were undertaking prior to consultation with the only difference being the geographical area you will cover i.e. only the South rather than the entire region. If you choose not to participate in the trial period then it would be deemed that you no longer wish to work for the Trust and your fixed term contact will end on 31 March 2020."

116. On 7 February 2020, the Claimant replied to that email stating:

"It would be very helpful if you do not send me any further threatening letter or responses."

117. On 12 February 2020, Miss Hall wrote to the Claimant to inform her that she was investigating her grievance and invited to attend a meeting on 25 February 2020 with her.

118. During the Respondent's process, the Claimant maintained the role was different and it was a redundancy, the key difference being line management, both in terms of who she reported to and then also whether the Claimant was responsible for line management. During cross examination we got to the heart of the issue in that the Claimant was dissatisfied in her current role with the lack of progression and being on a fixed term contract without long term stability. She did not approve of her line manager in the new structure but what she really wanted was a better role within NHS England on a permanent contract, with better career development prospects. If the Respondent could not give this then the reality was that the Claimant was not going to accept it. The Claimant was in a difficult situation surrounded by colleagues employed by a different entity from the Respondent, getting better security and development in her opinion and she felt that was unfair.

119. On 14 February 2020, Mr Reid wrote to the Claimant to terminate her employment. He did not meet with her and there were some areas contained within his letter which were factually incorrect which was unhelpful and he accepted subsequently that he had not met with her. The reasons given were as follows:-

"You have made it clear in both our meetings and in several emails that you do not wish to undertake the and 6 Coordinator role.

You have refused to meet with me (should be Jackie Eldridge) and your line manager, Amanda Pleavin, to discuss the role and any support you may need to undertake your duties and have refused to engage with us to discuss the reason for your sickness absence which would have allowed us to explore any additional support that may be required to enable you to commence the role which you are impeccably suited.

Under the terms of the MoU with The Alliance, the Trust is required to ensure that, if its employee leaves or is absent for more than one month, the post is filled within a reasonable time. Therefore, as you are unwilling to meet to discuss your position, in line with your contract of employment with the Trust and the notice of termination inherent within it, I am writing to inform you that your contract will be terminated on the grounds of some other substantial reason on 10 April 2020 and this will be your last day of employment.

You have the right of appeal against this decision, the appeal should be made in writing to the Deputy Director of HR within 7 calendar days of the letter confirming dismissal and confirm the reason for making the appeal

In the meantime, if you are able to return to work, both the Trust and Cancer Alliance would welcome you into your role or would support your application for any suitable vacancies".

120. On 20 February 2020 the Claimant appealed against her dismissal saying that the decision had been made without consulting her, that she felt it was an incorrect decision on the basis that she should not be dismissed when a formal grievance was outstanding and that it felt like they had already made the decision before hearing from her. Further that it seemed very unfair and that if her employment was terminated, she doesn't feel the correct redundancy process had been followed as she had more than two years service with service with the Respondent.

121. On 25 February 2020, the Claimant was invited to an appeal hearing. This was subsequently rescheduled to 16 March 2020.

122. On 27 February 2020 the Claimant attended the Grievance Investigation meeting. She was not accompanied by the Trade Union on this occasion.

123. On 16 March 2020 the Claimant attended the appeal against the dismissal meeting and was not accompanied by her Trade Union on that occasion. We were provided with minutes of the meeting with the Claimant and Linda McGranahan. Both Fiona Macdonald and Jackie Eldridge were present as well as the Claimant and Mr Reid. During the meeting the Claimant did not express a positive desire to take the role at any stage.

124. On 31 March 2020 but for the termination letter giving the later date (stating

her fixed term contract came to an end on 10 April) her fixed term contract would have come to an end on this date instead.

125. On 7 April 2020 the Claimant received an outcome of her appeal in writing and the decision to dismiss was upheld. There was no further right of appeal.

126. On 7 April 2020 the Claimant also received an investigation report into her formal grievance, written by Miss Hall.

127. On 10 April 2020, the Claimant's employment terminated.

128. On 17 April 2020, the Claimant attended a formal grievance meeting via video link and decided not to continue with her grievance.

129. On 23 April 2020, the Claimant commenced ACAS early conciliation and the certificate was issued the same day.

130. On 10 June 2020, the Claimant submitted her claim.

Conclusions

Unfair dismissal

131. We have taken the issues on unfair dismissal in turn:

What was the sole or principal reason for the Claimant's dismissal? Is it a potentially fair reason within Section 98(1)(b) and (2) of the Employment Rights Act 1996? The Respondent relies on some other substantial reason, namely (a) the Claimant's refusal to engage with the Respondent to discuss returning to her role after sickness absence; and (b) that there was no reasonable prospects of the position changing.

132. The Claimant believes that she was redundant and she claims a redundancy payment. The reason given to the Claimant at the time was some other substantial reason as set out in a letter dated 14 February 2020.

133. In order to be a redundancy, we have considered the definition set out in s139 of the Employment Rights Act 1996. We do not consider that the work the Claimant did has ceased or was diminished or that it was expecting to cease or diminish. She accepted in cross examination the role offered was the same role she had been doing and her work was still there.

134. There was a reorganisation in the way the work was done, with a geographical split between North and South. However, there was no reduction in the number of staff.

135. The dismissal did not take effect until 10 April 2020 but notice was issued on 14 February 2020 by letter. It subsequently transpired that erroneous notice had been issued as had notice not been given then, the fixed term would have expired on 31 March 2020 in any event. The Claimant made it clear she did not want the role and would not have accepted a further fixed term contract, dismissal would have been for expiry on a fixed term contact.

136. We are satisfied that the reason the Respondent gives for dismissal is the reason why the Claimant was dismissed namely some other substantial reason there was a reorganisation and then then Claimant made it clear she did not want to return from sickness absence and take the role.

137. We have also considered whether capability i.e. sickness absence was the reason or principle reason and are content that this is not the case.

138. The Claimant's absence was a factor but not the principle reason which was her refusal to take both the role and secondly, engage with the Respondent to take matters forward and find a resolution.

139. Occupational Health considers she was fit for work although we recognised her GP signed her off as unfit for work. We therefore find that the dismissal was for some other substantial reason.

140. Some other substantial reason is a potentially fair reason is a potentially fair reason within s98(1) and (2) of the Employment Rights Act.

Could the reasons justify the dismissal for the Claimant?
Was the decision to dismiss reasonable in the circumstances?

141. Some other substantial reason is a potentially fair reason to dismiss and so could justify the dismissal of the Claimant. We consider there to be an overlap between these two issues concerning whether the reasons justified the dismissal for the Claimant and whether the decision to dismiss was reasonable in all the circumstances.

142. The Claimant's role existed in the new structure so she had a role to go to. She made it quite clear in her evidence she did not want that but a better role with more stability i.e. permanent and not on a fixed term contract and it was clear to us that she would not have taken the role without it being a "better role" as she saw it.

143. It was quite clear from the meetings up to 11 December 2019, (as we set out above in our findings of fact) that she did not want to take the role and would not accept it. She wanted an exit package instead. Ideally, she would have preferred a permanent contract with NHS England but this was not an option so instead the focus was on an exit package.

144. At the time the Claimant had indicated the role was different (albeit she now accepts this is not the case) and so the Respondent made several attempts to reassure her in this regard and offered a chance to meet Amanda Pleavin to discuss further, offered a trial of the role for her to see for herself and it held several meetings to try and resolve the matter.

145. As set out above, the email of 30 December was not well written by HR and may have caused some short term confusion by referring to redundancy. Given that the Respondent felt that there was no redundancy and legally there was no redundancy situation in this case within the meaning of s139 Employment Rights Act 1996. In trying to be helpful to resolve the stalemate, this may have added to the confusion at that time but this was certainly

clarified by the 4 February 2020 email referred to above. It was quite clear at the time that if the Claimant didn't take the role she would she would deemed to have expressed her wish to no longer work for the Trust.

146. The Claimant refused to attend some meetings but not others whilst signed off. We do not accept that the Claimant being signed off is a reason not to attend the stage 1 sickness absence meeting. The whole point of the meeting was to explore support and steps to return to work. If an employer could not meet with their employee at all during the sickness absence, there would be little point in any employer having a sickness absence process or policy.

147. We find that the Claimant did not attend meetings between 11 December and the dismissal letter being issued, as at that time she decided she did not want the role only an exit package, she only wanted to discuss her grievance and not any ongoing employment. In particular, the Amanda Pleavin and Jackie Eldridge meeting offers were perfect opportunities to answer any queries she may have had about the role an clear up any uncertainties she may have genuinely had. She did ask questions over this period but they were not questions that progressed matters and were at times repetitive. She wanted to delay matters before making a decision and she didn't want to be rushed but the Respondent, of course, had its service level agreement obligations that it was failing to meet albeit at that time the Claimant would have been unaware of them.

148. The Respondent also invited her to a sickness absence meeting to see if there was anything else to be done to try and get her back to work. We remind ourselves that it is important that as a Panel, we do not substitute our decision but we need to judge the Respondent's actions within a band of reasonable responses test.

149. We did have some concerns over the Respondent's failure to deal with the grievance before dismissal took effect and certainly it should have done so before the appeal. We spent some time considering the grievance but concluded, overall, the outcome would not have changed the dismissal and this did not make the dismissal unfair. However, the grievance was outstanding for a number of months and the Respondent certainly had time to hear this before the appeal against dismissal and should have done so in our view. As stated, this would not have changed the outcome and does not make the dismissal unfair but is certainly an area for criticism for the Respondent in terms of its approach.

150. Some employers may have given longer for the Claimant to engage, some may have had a sickness absence process in motion, some may have heard the grievance first and others may have written to the Claimant to invite her to a meeting. However, we cannot say that no reasonable employer would dismiss in these circumstances. By the time the Claimant was dismissed, it was clear the parties had reached an impasse and something needed to be done. It is quite clear she didn't want to take the role as outlined above, and we find that had the Respondent not dismissed with notice on 14 February, taking effect on 10 April 2020, her contract would have ended in any event on 31 March, as it was a fixed term contract and an offer of a further fixed term contract in the same role would not have been accepted.

Was the dismissal procedurally fair within the meaning of Section 98(4) of the Employment Rights Act 1996?

151. We have regard to the case highlighted by the Judge to the parties in submissions, *Phoenix House Ltd v Mrs Tatiana Stockman: UKEAT/0058/18/OO*. Given we found that the reason for dismissal was some other substantial other substantial reason (SOSR), then the ACAS Code of Practice does not apply to the SOSR, but we consider fairness in accordance with Section 98(4) and a general fair procedure that should be followed.

152. The Respondent is a large employer. The Respondent issued the letter on 14 February 2020 without meeting the Claimant to discuss the matter. It would not be fair to say that this was issued without warning as the email from Jackie Eldridge made it clear that if she did not take the role her employment would end as it was deemed that she would be resigned and no longer wanted to work for the Trust and the Claimant still did not take the role.

153. Mr Reid's letter contained errors because it was a dismissal letter drafted by HR so contained numerous errors such as references to refusing to meet Mr Reid which was not correct. It was sloppy. We considered that Mr Reid ought to have invited her to a meeting, telling the Claimant that the consequence could have been her dismissal if she failed to attend. However, given that circumstances highlighted above, we do not think the Claimant would have attended so that this would not have made any difference to the outcome.

154. The Claimant was given the right of appeal which she exercised and at that time she did attend the appeal meeting as outlined above. The letter from Mr Reid did also highlight at the conclusion, that if the Claimant was able to return to work at the Trust, the Cancer Alliance would welcome her in the role and support her application for other roles. The Claimant did not take the Respondent up on this offer.

155. The Claimant had attended many earlier meetings to resolve concerns she had over the role but the reality was that she didn't want it and she didn't apply for anything else in the circumstances. She wanted a better improved role or an exit package and in the circumstances where neither were on offer she did not want to return to her role and did not even want to have a trial of the role that was offered to her.

156. On balance, considering all of the circumstances and the substantial merits of the case in accordance with s98(4) Employment Rights Act we find the dismissal to be procedurally fair and to be substantially fair in accordance with s98(4).

If the Claimant's dismissal was procedurally unfair, would she have been dismissed from her employment in any event?

122. For completeness, we have gone onto consider whether if the Claimant's dismissal was procedurally unfair, would she have been is being dismissed from her employment in the event, the *Polkey* argument. If we are wrong about the failure to invite the Claimant to a meeting or any of the other issues rendering the dismissal unfair under s98(4) Employment Rights Act 1996, we consider it was 100% likely that her fixed term contract would have ended without renewal such that the 31 March was the end of her employment.

123. However, in the alternative, it was 100% likely that even if the Respondent had offered a meeting with the Claimant she either would not have attended, because she made no efforts to take the Respondent up on the last paragraph of that letter and further, even if there had been a meeting it was 100% likely that she would have still been dismissed. She did not want the role and at no point, after receiving the letter or indeed in the appeal, did she expressly say with positive affirmation, that she wanted to return to that role and that there had been some misunderstanding with her intentions.

<u>If the dismissal was unfair, should compensation be reduced on account of the Claimant's contributory fault?</u>

124. In light of our findings in relation to the fairness of dismissal and indeed our *Polkey* findings, that she would have been dismissed in the event, we have not gone on to consider contributory fault or any of the other issues as to remedy in the list of issues. We do however also note that on the issue of whether the compensation award should be increased (or indeed decreased) by any unreasonable failures to follow the ACAS Code of Practice, that given the reasons for dismissal, ACAS Code of Practice is not relevant and there can be no uplift/reduction accordingly in any event.

Redundancy payment

<u>Was the real reason for the Claimant's dismissal because the Claimant's role was redundant within the meaning of redundancy set out in s139(1) Employment Rights Act? If so the Claimant would be entitled to a redundancy payment as set out in s135 Employment Rights Act 1996?</u>

125. Given our findings above that the Claimant's role was not redundant, she was not entitled to a statutory redundancy payment. The presumption is that the dismissal was for reason of redundancy unless the contrary is proven in accordance with s163(2) Employment Rights Act 1996. We are satisfied that the contrary has been shown given our conclusions and as such the reason for dismissal is not redundancy and no redundancy payment is due.

126. We also note that if a statutory redundancy payment had been due the refusal to accept suitable alternative employment could entitle the Respondent not to pay it. In our view the role was the same just reorganised a different way but it was also suitable alternative employment if this had been found to be a redundancy situation.

Direct race discrimination

127. The Claimant makes two allegations as to direct race discrimination. We take issue 25A first.

Did the Respondent treat the Claimant less favourably than it treats others? The Claimant relies on the following allegation. She was not placed on the PRINCE2 training course by Dr Rory Harvey, her line manager, throughout her employment and right up until her dismissal, but in particular in July 2019 when she specifically requested the course.

128. As a matter of fact it was agreed that the Claimant was not placed on the PRINCE2 course by the Respondent. Dr Harvey was not her line manager by the time of July 2019. The Claimant accepted that she had not specifically requested the course in July 2019 but of course she did reference it in her reply to the email of 23 July 2019.

129. It is accepted that the Claimant was never placed on the course but the Respondent asserted this related to funding and only provided if it was seen as essential clinical training. We accept that evidence. The Claimant was employed by a different entity to some of the employees who were offered training if it was essential to the role. We accepted the Respondent's evidence on the budgetary constraints and that although it was something discussed as desirable historically for the Claimant and she had expressed an interest there was a reduction in the training budget.

130. On the way the case is pleaded, the Claimant has not established less favourable treatment, particularly when one has regard to the comparator upon whom she relies. The comparator NG was not a true comparator. In order to be a comparator for Equality Act purposes NG must be materially in the same circumstances but for race as the Claimant. NG was not employed by the Respondent and cannot be a comparator for the race claim as her circumstances were materially different. They may work in the same team but are funded from different Respondents.

131. The Claimant considered it was unfair that others got the training she wanted and she did not, and whilst we have some sympathy for the Claimant on this issue, NG cannot be her legal comparator if she is employed by a different Respondent. Different Respondents will have different reasons for providing training, different budgets and different requirements.

132. The Claimant felt NG was a comparator as she would go through Mary Emurla for authority which, in turn, would have to be granted by Dr Harvey but in the same way that she had to seek authority from the Respondent, i.e. her employer, NG would have had to seek authority from NG's employer, which was not the Cancer Alliance. The Cancer Alliance did not employ staff directly, the other staff were employed by NHS England and they were the relevant employer. The Claimant was instead employed by this Respondent. We therefore consider that NG is not an appropriate comparator.

133. Considering the hypothetical comparator, at no point did the Claimant apply for training. We recognise that historically, an employer (also an NHS employer but not this Respondent) told her she could, in time, have this training but this

was not this Respondent and times had changed. It was some years ago.

Was the Claimant treated less favourably because of her race?

134. We accept the Respondent's evidence over funding pressures and that it had a policy to only allocate training if that was essential for the role.

135. In relation to whether the matter is related to race, she had not requested the course from the Respondent but it is clear that she wanted to do it but was the reason it was not offered related to race? The rationale for rejecting training that was not essential for the role was funding related which we accept, so even if she had expressly requested it (which she did not during her employment with this Respondent), the funding request would have been rejected as the course was not essential to the Claimant's role, given the findings we have made above.

136. We do not feel that we can conclude this matter without giving some consideration to the "training email" as this was a matter of upset for the Claimant. The Claimant relied on the July email "the training email" that she felt was evidence that she was seen as a person of colour. The email itself was not relied upon as an express act of direct discrimination but we have considered that the Claimant sought to rely on this in order to shift the burden of proof to establish discrimination. In discrimination cases, it is for the Claimant to establish the burden of proof.

137. As a matter of fact, it is not in dispute the Claimant was sent the email about the training on 23 July 2019 "the training email". The Respondent did not dispute the assertion that she was the only one within the function that was "of colour" as the Claimant described it and the Respondent also did not dispute that "training email" was only sent to the Claimant and not others by Dr Harvey. We recognise the Claimant was upset by the email as she did not consider herself as BAME which the "training email" was said to be aimed at.

138. It is, however, apparent that Dr Harvey thought very highly of the Claimant and her work. She was clearly an ambitious individual and it would have been apparent to anybody working with her that she was keen to secure training in career progression. The email related to initiative that Dr Harvey felt could have assisted her in progressing her career. It had specific criteria for having a place on the training, that the Claimant did meet. It was clear that Dr Harvey had well intended reasons for sending it to the Claimant, he felt it could have been of benefit to the Claimant and he thought highly of her and saw it as an opportunity to benefit from free training.

139. The email related to an NHS leadership academy initiative rather than the Respondent's initiative. Whether the criteria should have been in place or was itself discriminatory, Dr Harvey was simply forwarding on something he has been sent. The terminology BAME has been discontinued and we recognised that the Claimant was deeply upset by the email. The lack of response from Dr Harvey to her clear unhappiness added to the Claimant's upset at the time.

140. Dr Harvey, before us, was sincere in his apology for having caused that offence and it was not intended and this was his clear evidence at this Tribunal. Had this been given at the time, perhaps this would have alleviated

some of the Claimant's upset in relation to being how she felt about being singled out. Dr Harvey did not do so as his evidence was that he felt that he had overstepped the mark and upset her so instead did not raise it again. With the benefit of hindsight given the Claimant's strength of feelings on the subject this was not the right approach. The Claimant did not escalate it further at the time either.

141. In our view in respect of the PRINCE2 training the Claimant has not shown that in the way the case is pleaded she has not suffered less favourable treatment and if she had then this would not have been for reasons of race given our conclusions above. The Claimant has not provided the something more required to shift the burden of proof, given our consideration of the "training email". Even if that "training email" did shift the burden of proof, there was a non-discriminatory reason as to why the Claimant was never offered the PRINCE2 training and that related to the funding of this Respondent at this time and we accept that.

Did the Respondent treat the Claimant less favourably than it treated others? The Respondent rejected the Claimant's informal and formal grievances regarding the allegation that the Claimant be subjected to discrimination in not being selected to undertake the PRINCE2 training and/or did not investigate it properly between the end of September 2019 and April 2020.

142. There are several parts to this allegation. There is the failure to investigate the informal grievance firstly. We do not find the Respondent failed to investigate the matter properly between the end of September 2019 and April 2020, in fact, this must only relate to the November 2019 grievance.

143. As set out above, the informal outcome meeting letter is detailed given the informal nature of the process. All concerns are addressed over three pages of the letter. It is detailed and as a matter of fact we do not find that the Respondent failed to investigate the matter properly as alleged.

144. Turning not to the formal stage of that grievance, which is the second part of the allegation, an investigation was conducted. The Respondent prepared an entire report on the subject and we consider that Miss Hall cannot be criticised for not having investigated the formal grievance properly. The report was detailed and thorough in our view. It did take some time but it cannot be said as a matter of fact that it was not investigated properly.

145. The second part of this allegation relates to both the rejection of the informal grievance and the rejection of the formal grievance. Of course, the rejection of the informal grievance happened as a matter of fact so we will go onto consider the reason for this below. However, the formal grievance was actually withdrawn so we cannot say that it was expressly rejected. There is a written outcome setting out the history and given that the Claimant had withdrawn the grievance, there was no formal outcome. This letter is dated 24 April 2020 so as a matter of fact we do not agree the formal grievance was rejected. The Claimant withdrew it so cannot maintain a case that it was formally rejected because of race as such a claim is misconceived.

Was the Claimant subjected to the less favourable treatment because of her race?

146. The Claimant's main criticism here of the Respondent was in relation to the "training email" and how it made her feel. We have dealt with this in the first allegation of race discrimination above and whether this older email was enough to shift the burden of proof in respect of the reason and adopt those conclusions when considering this for the informal grievance being rejected.

147. There were criticisms of the process that could be made (as we do find that the formal grievance should have been resolved before the Claimant's dismissal when it was subsequently withdrawn) and that she felt it was not being handled properly but that is different to saying it was discriminatory. The Claimant has only relied on the failure to investigate the informal and formal grievances and their rejection of the grievances in respect of her race claim and not that there were delays in the process itself. We have found that there both were investigated properly.

148. The burden of proof is on the Claimant to establish there was a prima facie case in order to shift the burden of proof to the Respondent to explain. We have considered the "training email" but this was considered at the informal stage by those investigating the grievance. There is no evidence that a person with a different racial profile to the Claimant would have their informal grievance upheld when the Claimant's was rejected.

149. We also turn to consider the contents of her grievance and a big aspect of her grievance is the refusal to offer her training which we dealt with above in the other allegation for race discrimination so we rely on the conclusions already drawn here that there is no case for race discrimination in not upholding the informal grievance in respect of that idea.

150. This case was complicated by the matrix working arrangement that the Claimant was employed by one Respondent then working within the Cancer Alliance around others employed by other organisations. The Claimant felt injustice that she was not treated the same as these colleagues in terms of training and being offered a fixed term contract. The feelings were abundantly clear during the hearing.

151. Some of the Claimant's complaints related to the nature of the matrix arrangement, which she had been working on for some time and was unconnected to her race. This arrangement left her feeling that way. There is no evidence to support a race discrimination complaint but an entirely unconnected reason for her feeling the way she did. 70% of her complaints at the grievance stage related to the matrix arrangements and the way she felt this disadvantaged her but there is no evidence that links the offering of the matrix arrangement to that of race. Indeed, we are told, and we did accept, that fixed term contracts were issued because of the funding arrangement and were unrelated to race.

Jurisdiction

152. Given our conclusions, we have not gone onto consider the time aspects of the case for discrimination within the list of issues or indeed the contractual redundancy payment and whether we had jurisdiction to hear the claims as we

have not upheld any aspect of the Claimant's claims. The contractual redundancy payment claim was said to be a head of loss for the unfair dismissal claim and one for remedy rather than a freestanding claim that we needed to expressly consider in the conclusions. Given however that we have found that this was not a redundancy situation any contractual redundancy payment claim had it been brought as a free standing complaint would not have been successful in any event.

153. In summary, we have therefore considered all aspects of the Claimant's claim, as pleaded, and her claims fort direct discrimination, unfair dismissal and a redundancy payment are not well founded and are dismissed.

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Employment Judge S King

Date: ……19.12.23…….

Judgment sent to the parties on

11/1/2024

For the Tribunal office

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