



EMPLOYMENT TRIBUNALS

Claimant: Mr L Robinson

Respondent: Guy's and St Thomas' NHS Foundation Trust

Heard at: Croydon (by video) **On:** 23, 24, 25 and 26 January 2024

Before: Employment Judge Leith

Representation

Claimant: Ms Step-Marsden (Counsel)

Respondent: Mr Price (Counsel)

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The claimant claims a statutory redundancy payment.
2. It was common ground that the claimant was dismissed by reason of redundancy. The parties also agreed the calculation of the redundancy payment. It was therefore agreed by the parties that there were two issues for the Tribunal to consider:
 - 2.1. Was the role of EHR Programme Manager suitable alternative employment for the claimant?
 - 2.2. If so, did the claimant unreasonably refuse the offer?

Procedure, documents and evidence heard

3. I heard evidence on behalf of the respondent from:
 - 3.1. Jon Findlay, Chief Operating Officer
 - 3.2. Robert Stevens, HR Business Partner (at the relevant times)
4. I also heard evidence from the claimant.
5. I had before me an electronic bundle of 1,010 pages.

6. At the end of the evidence, I heard submissions from Ms Step-Marsen and Mr Price (supplemented in both cases by helpful skeleton arguments).

Fact findings

7. I make the following findings on balance of probabilities. I have not dealt with every area canvassed before me; rather, I have focused on those necessary to reach a conclusion on the issues in the claim.
8. I use the word “secondment” at various points during this judgment because it is the word the parties use to describe the claimant’s working arrangements. I express no decided view on whether the various “secondments” referred to during the chronology were, in fact, effective secondments. Mr Findlay used the phrase “one-way secondment” in his evidence. That might, at least at first blush, be thought to be something of a contradiction in terms (see, for example, the decision of the EAT in *Fitton v City of Edinburgh Council* UKEAT/0010/07). But I do not need to decide the point; I merely adopt the word “secondment” for linguistic ease.
9. The respondent is an NHS Trust in South London.
10. Non-medical staff within the NHS are employed on a nationally agreed set of terms and conditions and grading structure called “Agenda for Change”. Roles are evaluated and placed into the appropriate band. Band 9 is the highest band within Agenda for Change. Band 8 is divided into four parts, 8a, 8b, 8c and 8d (with 8d being the highest of those).
11. The respondent had what was described as an “Interim Organisational Change Policy” in force at the relevant times. The policy dealt with organisational change, including redundancy situations. Section 20 of the policy dealt with Suitable Alternative Employment. Of particular relevance was the following extract:

“20.3 Suitable alternative employment is work within the Trust that is 70% similar terms, provides similar earnings, have similar status, it is within the same range of skills required as the current employment where the individual meets the essential criteria of the person specification (or could do so with a reasonable period of training) and does not involve unreasonable additional inconvenience. It is acknowledged that quantifying similarity can be ambiguous, therefore this measure of 70% similarity is only indicative. Staff at risk will be given prior consideration for suitable posts in line with their skills, experience and capabilities and where appropriate will receive protection of pay.

20.4 A post may be considered as suitable alternative employment if it is banded on the same band as the staff member’s current post, or the next lower band. A post may also be considered suitable

alternative employment where a fixed term contract of 12 months and over is being offered.”

12. The policy also provided for pay protection where an employee was moved to another post as a result of organisational change. In respect of an employee with four or more years service, the policy provide that pay protection would last for three years.
13. The claimant commenced employment with the respondent on 20 June 2011, in the role of General Manager for Surgery. The role was graded at Agenda for Change Band 8c. The role of General Manager is an operational role.
14. In April 2013, the claimant was seconded into the role of Programme Manager – Informatics Transformation. That role was graded at Agenda for Change Band 8d. Ms Pritchard, Chief Operating Officer, was to be the claimant’s line manager. The Chief Operating Officer was a member of the respondent’s Board.
15. Ms Pritchard wrote to the claimant on 9 April 2013 confirming the secondment offer. The secondment was to last for 18 months. In that letter, she said this:

“In accepting the secondment you have agreed to relinquish your substantive post of General Manager, Surgery. Three months before the end of the secondment suitable alternative posts will be identified for you at your substantive band 8c. Any offer of a suitable alternative position will be discussed with you in the first instance. Where a suitable alternative post is identified and offered to you the Trust has a reasonable expectation that you will accept it unless there are valid reasons for not doing so.”

16. Following further discussions, Ms Pritchard wrote to the claimant again on 15 April 2013. Regarding alternative posts at the end of the secondment period, she said this:

“You expressed concern that only posts at band 8c level would be considered suitable alternative roles for you in the lead up to the conclusion of the secondment. You believe that you should be considered for band 8d posts as after an 18 month period of undertaking a role at this level and having gained the requisite experience you should have a reasonable expectation of being offered a post at band 8d. I am considerate of the point that you make and am willing to agree that towards the end of the secondment suitable band 8d posts will be offered to you.

I intend that the principle set out in the Trust’s organisational change procedure should be followed. Specifically that suitable alternative employment should be considered at band 8d and one band below, i.e. 8c. As I previously set out the Trust has a reasonable expectation

that you would accept a suitable alternative post offered to you. Where such a post were to be at band 8c pay protection would apply in accordance with Trust policy current at that time.”

17. Regarding the duration of the secondment, she said this:

“You expressed concern about the duration of the secondment being for 18 months, particularly in the context of your relinquishing your substantive post. I can understand your concern and, whilst the current assumption is that the Informatics Transformation Programme will be able to be delivered within 18 months, as with all projects there are factors that can influence its progression. I propose that we review the situation after the first 12 months of the contract and determine what objectives have been achieved and what are outstanding. Where elements of the project remain outstanding we can discuss an extension as necessary.”

18. In the event, it is common ground that the claimant’s secondment was extended on a number of occasions.

19. The claimant’s evidence was that Heather O’Brien was a peer in the IT department at that time (that is, her role was not senior to his). I accept his evidence in that regard.

20. The claimant’s job description was slightly amended in 2017, and as a result was reviewed by the respondent’s Job Evaluation team. The Job Evaluation team advised that there was no change to the banding of the role, but that to ensure consistency with other roles at the same level across the respondent the title should be changed to “Programme Director”.

21. In the role of Programme Director, the claimant reported to the Chief Financial Officer, who was also a member of the respondent’s Board.

22. The Informatics Transformation Programme was due to close in June 2018. Conversations took place between the claimant and Mr Findlay about what that would mean for the claimant.

23. The claimant indicated that he considered that he was at risk of redundancy, given that he had no substantive role to return to. Mr Findlay’s evidence was that, at that time, he considered that the claimant’s substantive role remained that of General Manager. His evidence was that he told the claimant that he was not redundant as there were available vacancies at band 8c and 8d, and that the respondent was also willing to support him to transition into a substantive Programme Manager role, either in the respondent or elsewhere in the NHS.

24. On 26 June 2018, the claimant emailed Mr Findlay to explain that he had been exploring secondments in Southampton and the South-West. The claimant was then living in Winchester. He explained that he had been offered a Programme Director role at University Hospitals Southampton

(UHS), part of the Solent Acute Alliance, but only on a part-time basis. He asked Mr Findlay if he could be seconded into the role and topped-up to full time with work for the respondent.

25. On 30 July 2018 Mr Findlay wrote to the claimant. He agreed that the claimant would be seconded to work with Solent Acute Alliance for 15 hours per week for one year, and that he could spend the remainder of his working time continuing to work on the Informatics Transformation Programme. He noted that there was a possibility that the claimant would move to a full time secondment to Solent Acute Alliance once the Informatics Programme was concluded in November 2018. He noted that he considered that a General Manager position would be suitable alternative employment for the claimant, and that in the absence of any other available role then the claimant would be placed in an available General Manager position.
26. On 1 August 2018, the claimant emailed Mr Findlay regarding the secondment. He noted that if there was no opportunity in Hampshire at the end of his secondment, he would be happy to return to the respondent, preferably in a programme leadership role. He explained that he did not consider an operational general manager role to be suitable alternative employment. He referred to (unspecified) personal circumstances. His evidence to the Tribunal was that he was by that time having counselling for anxiety, and he could not cope with the stress of an operational General Manager role.
27. From 6 August 2018 to 30 November 2018, the claimant was seconded to Solent Acute Alliance for 15 hours per week. The remainder of his time was spent continuing to work on Phase 2 of the Informatics Transformation Programme.
28. The claimant met with Mr Findlay on 1 October 2018. He followed up the meeting in an email dated 3 October 2018. He noted that he considered his role of Informatics Transformation Programme Director to be redundant, and did not consider an operational General Manager role to be suitable alternative employment. He noted also that, unless the situation changed, he considered that he would be leaving the respondent's employment on 30 November 2018 with a contractual redundancy payment.
29. On 4 October 2018, the respondent obtained a redundancy estimate in respect of the claimant.
30. On 9 October 2018, Mr Findlay emailed the claimant. He set out the respondent's position, which was that the claimant's substantive role remained as a General Manager. He indicated that the respondent did not consider there was a redundancy situation.
31. Discussions continued to take place with Solent Acute Alliance, which resulted in the claimant's secondment being extended on a full-time basis as a Band 9d Programme Director. That secondment took effect from 3 December 2018, and was due to last until 31 December 2019.

32. On 3 December 2018, the claimant wrote to Mr Findlay as follows:

“Thank you for supporting me to pursue a secondment at University Hospital Southampton. The opportunity is a great fit with my career aspiration to become a Chief Information Officer - and allows me to continue to lead technology-enabled transformation in the NHS. The role is a great opportunity to enable me to build on my recent experience at GSTT leading the Informatics Transformation programme and will mean that I am working within the emerging STP partnerships on digital transformation projects that I hope will bring real change to provision of healthcare in Hampshire.

As discussed, it is my intention to use the opportunity to seek permanent employment at UHS, and within the developing Hampshire and Isle of Wight Integrated Care System, during the placement. I therefore do not expect to return to Guys and St Thomas' and plan to resign my position at the trust before the end of the secondment period on 31 Dec 2019.

Many thanks for your support, over the past few months in particular, to help set up this opportunity.”

33. The claimant's evidence was that he was told that if he did not write to the respondent in those terms, the secondment would not have been supported.

34. The secondment was subsequently extended to 31 March 2020, and then further extended by agreement to 31 March 2021. The claimant was then seconded to the Isle of White NHS Trust in the role of Programme Director for the Digital Transformation Programme (graded once again at Agenda for Change band 8d). That secondment was initially to last until 31 December 2021, but it was extended to 31 March 2022. At that point, the claimant believed that the Isle of White NHS Trust would be recruiting a substantive Programme Director role, for which he intended to apply. The claimant's evidence, which I accept, was that at the Isle of White he had responsibility for a £25M budget, and managed a team of staff.

35. In the interim, towards the end of 2019 the claimant had moved to Lymington in Hampshire.

36. On 6 January 2021, the claimant contacted Mr Findlay and Mr Stevens to indicate that the Isle of White NHS Trust would not be recruiting a substantive Programme Director role, and that his secondment would end on 31 March 2022. He asked for a meeting to discuss what roles might be open to him at the respondent.

37. Mr Findlay met with the claimant on 25 January 2022. They discussed the vacant role of Incubation Director, which was a Band 9 role. Mr Findlay told

the claimant that he would have to apply for any role above band 8d. No formal redundancy consultation started at that point.

38. Mr Findlay subsequently contacted the claimant about a Programme Director role at A4C band 9. The claimant applied for the Programme Director role. On 21 February 2022 he was informed that he had been unsuccessful in his application for that role.
39. On 1 March 2022, the claimant met with Mr Findlay and Mr Stevens. He was informed that there were no band 8c or 8d roles available, so the respondent would commence redundancy consultation. The claimant indicated at that stage that he would prefer to have an early exit from the respondent.
40. On 2 March 2022, the claimant was sent a consultation paper regarding his potential redundancy. The consultation was to last for 30 days.
41. On 8 March 2022, Mr Findlay emailed senior colleagues at the respondent asking if there were any roles that may be suitable for the claimant either currently available or likely to come up within three months. He indicated that the claimant was eligible to be considered for “any fixed term or substantive 8c or 8d role that could be considered as suitable alternative employment and where he meets the essential criteria”.
42. On 10 March 2022, the claimant asked Mr Findlay to bring the consultation to an immediate close as he was happy that he had been consulted with regarding the position. He indicated that he would be happy to consider a reduced notice period, to give him time to pursue alternative career options as NHS employment was not available. The claimant’s evidence was that by that point, he had seen no vacancies within the respondent or neighboring organisations, so he had concluded that he needed to make plans for employment outside of the NHS.
43. On 18 March 2022, the claimant incorporated a limited company, which was to act as a vehicle for him to work as a consultant. There was no documentary evidence before me of work done by the claimant as a consultant. His evidence, albeit given for the first time in cross examination, was that by the end of May 2022 he had secured one contract which equated to 10 days work, but he did not get his next piece of work until July 2022.
44. Mr Findlay agreed to bring forward the end of the consultation. He arranged an end of consultation meeting for 23 March 2022.
45. In the interim, on 21 March 2022, the claimant emailed the respondent’s redeployment team to request a discussion about registering for the redeployment register. On 22 March 2022, the claimant completed the respondent’s redeployment form. In the form for “band of redeployment roles (in line with protection policy)” he wrote “8d/8c”. His evidence was that he felt compelled to do that because of the terms of the policy. Given the

reference on the form to the box having to be completed in line with the protection policy, I accept his evidence in that regard.

46. The effect of having registered for the redeployment register was that the respondent's redeployment team would seek to match him to suitable roles before they were released for general competition. There was limited evidence before the Tribunal about how that process operated in practice. Mr Stevens' evidence, albeit given for the first time in cross examination, was that the redeployment service would first look for any professional registrations required for a role. They would then look at a high level at the banding of the role. They would then look at the redeployment application form alongside the job description, in conversation with colleagues from the recruiting department, to consider whether the role might be suitable. His evidence that they would not consider a percentage match (in the way the policy set out). His evidence was that as an HR Business Partner, he would not be involved in that process. His evidence was that he would expect there would be emails between the resourcing team, the service, and the employee on the redeployment register about potentially suitable posts. There were no such emails in evidence before me in respect of the claimant.
47. The claimant met with Mr Findlay on 23 March 2022. Mr Stevens was also present. The outcome of the meeting was that the claimant was given 12 weeks' notice of dismissal.
48. Mr Findlay wrote to the claimant on 25 March 2022, confirming that he was being given 12 weeks' notice of redundancy. His last date of employment was to be 15 June 2022. Mr Findlay noted that the claimant was expected to participate fully in the search for suitable alternative employment, and that he may not be entitled to a redundancy payment if he unreasonably refused to accept, apply or participate in the selection process for suitable alternative employment with the respondent or another NHS employer.
49. From 1 April 2022 the claimant was due to return to work for respondent (his secondment having expired). He reported to Nicky Felix, Director of Operations, working on the Administration Safety Programme. He emailed Ms Felix on 30 March 2022 about the role. He noted that it had been agreed that he would work on a flexible "monthly hours" basis. He noted also that he planned to use the time he was not working for the respondent to pursue other part-time work outside the NHS (although he indicated that he had not, at that point, secured any contracts to do so). This was a reference to his consulting business.
50. In early May 2022, Ms Felix had approval to recruit for various roles in the Patient Admin team, including a Band 8c Programme Manager (described before me as the "Admin Safety role". There was some disagreement about the claimant's involvement in the creation of those roles. The claimant's evidence was that he had lobbied for a project team to be created but had not been involved in creating the eventual structure. I do not need to resolve that issue. Of relevance, however, Ms Felix emailed various members of her team on 6 May 2022 identifying the individuals who would shortlist and

interview for those roles. She forwarded that email to the claimant on the same day.

51. The claimant was not matched to the Admin Safety role by the respondent's redeployment service. He was not offered it or encouraged to apply for it, and it was not suggested to me that he ought to have done so. Mr Findlay's evidence was that the role may not have been suitable because the claimant had a poor relationship with Ms Felix, in whose area the role sat. His evidence was also that the Admin Safety role was not in the claimant's particular area of interest.

52. Mr Stevens' evidence was that if the Admin Safety role had been put onto the respondent's "Trac" system, he would have anticipated the claimant would have been matched to it. There was, however, no evidence about why the claimant was not matched to that role by the redeployment service.

53. On 17 May 2022, the claimant met with Mr Findlay and Mr Stevens. At that point, there was no further role identified for the claimant,

54. On 18 May 2022, MS Felix emailed the claimant as follows:

"As mentioned on the phone, it would be good for you to connect with Heather [O'Brien] over the programme manager role she has coming up in Apollo as a possible role for you. Copying in Rob so he is aware of the next step."

55. The role Ms Felix was referring to was the role of EHR Programme Manager (Band 8c). That role was approved via the respondent's DT&I Workforce Matters Group on 31 March 2022, and final sign-off was provided by the Chief Digital and Information Officer on 4 April 2022.

56. The claimant did not make any effort to make contact with Ms O'Brien. His evidence was that this was because he did not think it was a role that would be suitable for him, as it was described as a Programme Manager role. In his witness statement, he said that he had previously confirmed to Ms Felix that he did not believe band 8c jobs to be suitable. In the course of cross-examination, he explained that that was a reference specifically to band 8c Programme Manager roles, rather than band 8c roles generally.

57. On 25 May 2022, the claimant was interviewed for a role with the Health Innovation Network. He had apparently been matched to this role via the redeployment process – he had not applied directly for the role himself. He was unsuccessful at interview. He was asked by Mr Stevens for feedback about why he had been unsuccessful. He explained that his understanding was that it was because he did not have an MBA, which was an essential requirement for the role, and did not have exposure to the world of tech start-ups and accelerators.

58. Mr Stevens sought further feedback from the interviewing manager. The feedback he was received as follows:

“A major aspect of this role is leading a programme of work that supports innovative small digital health businesses helping them scale in the NHS. The programme also needs to source new sponsors and develop new fee-earning programmes of work. In the interview process, we started with a presentation about opportunities for the programme 2023 and beyond. Whilst he had prepared a description on the programme, he did not demonstrate any passion or excitement about the opportunity only commenting that the programme was ‘already comprehensive’ and he would do ‘more of the same’. He was not able to give examples of a track record of ‘creating and developing business and service delivery strategy’, as he would need to in this role. This did not give me confidence he would be ‘sell’ the offer to commercial parties - either sponsors or the next cohort of innovative digital health companies to join the programme.

When asked about the ‘biggest challenge’ ‘if successful in getting this role’ he said he had ‘no experience of the start-up sector’ and so would have to ‘learn from colleagues’ and ‘read a book’. This did not demonstrate to me that he would quickly get to grips with a new area of business.

I had hoped from his CV that he might have been able to show ‘a demonstrable knowledge and/or experience of the digital health economy’ and its participants, but he spoke about his experience as a general manager and implementing large data systems (ClickView) at GSTT and a ‘data centre’ on the Isle of Wight. He did not give any examples of working with smaller innovative digital health companies in any of his data centre or general management experience. He was not able to give any examples how he supported getting a ‘digital health innovation implemented’ as the example he gave of ‘ClickView implementation’ is a data/informatics dashboard so was not a relevant example.

This programme is funded by ERDF money, and as such is subject to an extensive metrics, evidence and audit requirements. We asked for projects which have been ‘closely performance monitored and measured’ and he said he had ‘no experience of external monitoring of his capital bids’, suggesting that recent projects as the Dorset data centre was ‘peer accountability rather than external management’.

I hope that adds some colour to why despite being a strong and credible NHS manager with experience of data system implementation, he did not demonstrate experience of supporting innovators in the NHS or elsewhere, implementing digital health innovations or entrepreneurial understanding.”

59. The claimant was taken to that email in the course of cross-examination.

His evidence was that he had been excited by the role, although not

passionate about it. His evidence, which I accept, was that the role was focused on supporting small business to secure funding and sell services to the NHS, which is something that he had had no exposure to within his career.

60. On 25 May 2022, Mr Stevens the claimant. Within the email, he said this:

“In the meantime, I believe Nicky Felix has spoken to you about a Programme Manager (8c) role within Apollo that Heather O'Brien has available

Heather [O'Brien] is very keen to speak to you about the role as soon as possible”

61. The claimant did not make contact with Ms O'Brien following that email. Nor did Ms O'Brien make contact with the claimant.

62. Mr Stevens emailed Ms O'Brien and Ms Felix on 26 May 2022 saying this:

“Thank you again so much for recommending this role for Luke Robinson. If we are to offer this position to him then it would be good to set out the basic responsibilities

Could you bullet point the key responsibilities (3 to 5) - if you have a view on why he is a good match then so much the better

I will liaise with Jon on this and contact Luke recommending this role and require him make contact with you but these headlines will be helpful for Jon and I to help articulate the synergies with Luke's skills”

63. There was no evidence before me that Ms O'Brien ever did as Mr Stevens had asked in terms, beyond the email of 30 May (which I deal with below).

64. Mr Stevens emailed the claimant again on 27 May 2022. Regarding the Apollo programme role, he said this:

“In the meantime, can I press upon you to speak to Heather O'Brien about the Programme Manager role. On paper it looks like potentially Suitable Alternative Employment and we have to explore it. I would be glad to speak if it helps”

65. The claimant responded on the same day, saying this:

“I haven't had any contact from Heather or the redeployment service about the potential role. Is there a copy of the job description that you could share?

As you know I have been actively looking for suitable alternative employment opportunities (and interviewing again this week, albeit unsuccessfully). The redeployment service haven't matched my

profile with any other programme manager roles to date - presumably because such a different role would represent a significant loss of responsibility, autonomy and status in comparison with my Programme

Director role, and the organisational change policy requires alternative roles to be of 'similar status'.

I look forward to hearing from you”

66. Mr Stevens responded the same day saying that he had invited Ms O'Brien to get in touch.

67. Ms O'Brien attempted to send the job description for the role to the claimant that day, but used the wrong email address. She re-sent the email on 30 May 2022 to the correct address. In that email, she said this:

“I attach for your information a copy of the Job Description for a Programme Manager role that I think you might be interested in. I also attach the Apollo organisation chart. The role itself is new (and not shown on the chart yet) - and works alongside the Outpatients Programme Manager Emma TeBraake - the workload in this team is significant and therefore we have agreed to fund a second Programme Manager who will focus on the Radiant (Radiology), Cupid (Cardiology) and Lumens (Endoscopy) modules. The Radiant module in particular needs a lot of focus.

The role will report into Donna Coveney who is my Head of Programmes (Outpatients) and this role will be an addition to my team of 7 Programme Managers. As you can see from the chart there are two Head of Programmes who in turn report to me. I meet the Programme Manager weekly to monitor progress against plans and build, and they meet with their HoPs regularly too. You will direct manage Application leads and work closely with the supplier Epic.

This role will be challenging, exciting and very rewarding I think.

I am looking for an excellent Programme Manager who can build relationships, find the right person, clinical lead, operational lead and get the build done by the worker bees.

We think we have a great team in Deployment and we all work very well together. If you would like to discuss further and meet with Donna, please get in touch. I can also provide you with more information.”

68. Attached to the email was a copy of the Job Description for the post of EHR Programme Manager.

69. Although the Job Description said that the role was permanent, it was common ground that it was in fact available on an 18 month fixed term contract.

70. The claimant's evidence was that the Job Description was essentially a template or generic job description for a Programme Manager role, with some modifications. The two modifications he specifically referred to were:

70.1. Within the section entitled "Job Summary", there were three generic paragraphs then an additional paragraph which said this:

"The EHR Programme Manager will assist the Head of Programmes to shape the structure of the Programme to support new methods of project / programme delivery, and budget management. The post-holder will co-ordinate and produce all reporting requirements as to the Programme's progress and present them to the Head of Programmes, Deployment Director and the EHR Programme Executive as appropriate."

70.2. The information under the heading "key working relationships" was tailored to the role.

71. His evidence was that he was familiar with the template Job Description, and the role of a Programme Manager, because as a Programme Director he had managed Programme Managers. I accept his evidence in that regard.

72. Under the heading "Staff Management", the Job Description provided that the role would have full line management responsibilities for the allocated team. There was no evidence before me regarding the size of the team that the role would line-manage, save for the comment in Ms O'Brien's email about "directly managing application leads".

73. Under the heading "Financial Management", the Job Description provided (amongst other things) that the role would be "accountable for the production and maintenance of the Programme level budget" and "Act as an authorizing signatory for capital and revenue budgets within limits agreed with the team".

74. It was common ground before me that the overall budget for the Apollo programme was £400M, although the role of EHR Programme Manager would not have responsibility for that budget. There was no evidence before me about what (if any) proportion of that overall budget the role would have responsibility for.

75. The "Person Specification" section of the job description set out the essential and desirable criteria for the role. Some of the criteria were set out in the alternative – for example, "PRINCE2 Practitioner, MSP Practitioner or Certificate in PPM; or APM Certified Project Manager; or PMI Project (PMP) or PMI Programme Professional (PgMP). The claimant accepted that he met at least one limb of the essential qualifications for the role.

76. Mr Findlay's evidence, with which the claimant did not disagree, was that the Apollo programme was of an unprecedented scale; it affected over 45,000 people and was to be the largest electronic records system the supplier had ever rolled out. It was significantly larger in scale than any programme the claimant had ever been involved in previously.
77. The claimant's evidence is that he did not respond to Ms O'Brien as he did not consider the role to be suitable alternative employment.
78. The claimant was not matched to the role of EHR Programme Manager by the respondent's Redeployment Service. Mr Findlay suggested in cross-examination that this may have been because the redeployment service were not aware of the role, although he accepted that that was speculation on his part.
79. On 8 June 2022 the claimant was invited to what was described as a "skills matching interview" the next day, with Ms O'Brien. The claimant was on annual leave on the day that the invitation was sent, so the respondent then rescheduled the interview for 2pm on Monday 13 June 2022.
80. Mr Stevens' evidence in cross-examination was that he believed that he had followed up with the claimant and with Ms O'Brien between Ms O'Brien sending the claimant the job description on 30 May 2022, and the interview invitation on 8 June 2022. His evidence was that there must have been something in between, as the two emails did not correlate. But there was no evidence before me of any correspondence between those two dates. The respondent would, of course, have been under a duty to disclose such correspondence if it existed. I find that there was no further correspondence during that period.
81. At 12:54 on 13 June 2022, the claimant emailed Ms Felix as follows (copied to Mr Findlay and Mr Stevens, but not Ms O'Brien):

"Hi Nicky

I just tried your mobile, sorry I missed you. I'm afraid I'm feeling unwell and need to take the rest of the day as sick leave.

I hope to be to be back in time for my last day, which for sake of clarity, I wish to remain as Wednesday 15 June."

82. Ms Felix responded:

"Thanks for letting me know, I don't have a missed call from you. Can you contact me on my number below tomorrow please to advise if we are able to do the handover on admin safety please and return your laptop etc
Hope you feel better later"

83. That same afternoon, Mr Findlay wrote to claimant offering him the role of EHR Programme Manager (Band 8c) on a fixed term contact until 31 December 2023. He did this notwithstanding the fact that the claimant had not attended the skills matching interview. Within the letter, he confirmed that pay protection arrangements would apply. He indicated that the role was offered as suitable alternative employment, and he asked the claimant to report to Ms O'Brien at 9am on Thursday (16 June 2022).
84. The letter was sent to the claimant by registered post, and also by email to his two NHS email addresses. The claimant's evidence was that he had stopped checking his Isle of White email address when he stopped working there, and that he was not checking his Guy's and St Thomas' email address while off sick (although his evidence on the point was somewhat confused, as he referred also to having email alerts come up on his personal iPad). His evidence was that he and his wife have a practice of rejecting any unsolicited or unexpected registered post, as they had previously been the victim of a scam. His evidence was that he was aware that his wife had rejected registered deliveries on both 13 and 14 June 2022.
85. The claimant's evidence, albeit given for the first time in cross-examination, was that he travelled to London on 14 June 2022, with the intention being that he would attend a pre-planned exit interview with Mr Findlay on 15 June 2022. In the event, his evidence was that he was not well enough to attend the meeting with Mr Findlay.
86. On 16 June 2022, the claimant wrote to Mr Findlay asking for clarification of his final redundancy sum and the date on which it would be paid. Mr Findlay responded that the claimant had been offered the role of EHR Programme Manager within the Appollo programme, so from the respondent's perspective he had been offered suitable alternative employment.
87. On 20 June 2022, the claimant emailed Mr Findlay. He indicated that he had not received the offer of the EHR Programme Manager role prior to his employment terminating on 15 June 2022. He noted that he had been on sick leave since 13 June 2022 "with stress and anxiety caused by the way the Trust has conducted the redundancy process". He indicated that he expected that his redundancy payment would be made after the normal 28 day period.
88. On 22 June 2022, Mr Findlay wrote to the claimant. He indicated that he was not aware of the claimant's anxiety about the consultation or redeployment processes, or any concern about the role of EHR Programme Manager as offered. He asked the claimant for any documentation relating to his illness. He gave the claimant until Friday 24 June to engage in meaningful discussion about the suitability of the role or accept it as offered. He indicated that, if the claimant did not do so, he would consider that the claimant had refused the offer of suitable alternative employment and "reluctantly agree to [the claimant's] request that his employment be considered as ended on 15 June 2022". He explained that that would mean that the claimant would not receive a redundancy payment.

89. The claimant responded to that letter on 23 June 2022. He again took the point that he had not been offered the role before his employment terminated. He also indicated that he considered that the role of EHR Programme Manager may have been created to try to avoid having to pay him his redundancy payment. He asked for copies of all correspondence sent to him within the last two weeks of his employment. He queried how he could have been offered the role without consultation, given that the matching interview had not taken place.
90. The claimant accepted in cross-examination that, having subsequently seen the documents disclosed in the proceedings, he no longer considered that the role of EHR Programme Manager was created to avoid paying him his redundancy payment.
91. There was in evidence before me a copy of the claimant's CV. The claimant could not recall when that CV had been produced, but his evidence was that it must have been prior to March 2022 as it showed him as still being in his seconded role at Isle of Wight NHS Trust. The introductory paragraph described the claimant as follows:

Dynamic, impactful healthcare leader and digital programme director with two decades experience delivering technology-enabled, transformational change - including 15 years working within the NHS. Expert in leading technology, programme and operational teams to turn around challenged programmes and transform healthcare services. Innovative and systematic transformation practitioner with deep understanding of care pathways and opportunities for digital-first integrated healthcare, and experience of working with partnerships and wider care systems. Committed to continuing professional development and prize-winning graduate of the NHS Digital Academy. Empowering, developmental coaching approach to working with teams; accredited and award-winning coach for the London Leadership Academy.

92. Under the heading "skills", it said this:

"Transformation programme leadership. Strategy development. Business case development. Benefits identification and delivery. Process and performance improvement. Structure and governance. Risk management. Programme evaluation. Team capability development. Commercial management."

93. Mr Findlay's evidence to the Tribunal was that he considered the role of EHR Programme Manager to be suitable alternative employment for the claimant. In cross-examination he suggested that he had been guided by Ms O'Brien in terms of the technical aspects of the role. It was put to him that he had not conducted an analysis of whether the role was 70% similar to the claimant's previous role, for the purposes of the respondent's policy.

His evidence was that he had not scored it in that way, in terms of a percentage.

94. Mr Stevens' evidence was that it was not normal practice for the respondent to consider whether a role was a 70% match. His evidence was that they would consider whether the role was "more likely than not" at match. When it was put to him that that suggested what was being considered was a 51% match rather than a 70% match, he appeared to accept that "more likely than not" meant 51%, but went on to say that talking in percentages wouldn't help the situation. His evidence was that the respondent would not be dogmatic, and would seek a shared understanding with the employee involved.
95. The claimant's evidence was that he did not consider the role to be suitable. His evidence was that he was concerned about the autonomy of the role, compared to the level of autonomy he had enjoyed as a Programme Director. His evidence was that as a Programme Director, he had significant ability to make decisions about the programme, and was responsible for the entire programme organisation beneath him. He contrasted that with the EHR Programme Manager role, where he would be one of eight Programme Managers reporting to a Head of Programmes, who reported to a Delivery Director who then reported to the Programme Director.
96. The claimant's evidence in cross-examination was that he was open in general terms to the possibility that a band 8c role could be suitable alternative employment, but that he could not think of any band 8c role he had come across in his time in the NHS which he would have considered to be suitable for him.
97. Mr Findlay's evidence in cross-examination was that he had discussed the claimant's concerns about suitability, autonomy, status and responsibility with him previously. He had not given that evidence in his witness statement. His evidence about when he had had those discussions was somewhat vague. No such discussions were minuted or captured in any of the correspondence from Mr Findlay to the claimant.
98. The claimant's evidence, albeit given for the first time in cross-examination, was that on the afternoon of 13 June 2022 he contacted his GP and was prescribed anti-anxiety medication. That evidence was not in his witness statement, and there were no GP records in evidence before me. In submissions, the claimant's counsel asked me to take judicial notice of the fact that he would not have been issued with a fit note for a short-term absence. In principle, of course, I accept that that is evidently correct – he would not have required a FIT note on 13 June 2022 given that he was permitted to self-certify for up to 7 days, and his employment was only due to last for a further three days (including 13 June itself). But if the claimant had contacted his GP, and been prescribed medication, one would expect his GP to hold a record of that encounter. The claimant has been professionally represented throughout the proceedings. There was no

suggestion that he had sought disclosure of his GP records. Given that the evidence was advanced for the first time in the course of cross-examination, nor had there been any opportunity for the respondent to ask him to do so. In the circumstances, I do not accept his evidence that he had a GP's appointment on 13 June 2022, or that he was prescribed medication on that date.

99. There was in evidence before a letter from a Mona Chase, who described herself as the claimant's psychotherapist. The letter was dated 4 August 2022. It said this:

"This letter is to confirm that Luke Robinson has been my client in private psychotherapy practice, attending weekly and now fortnightly sessions over a number of years.

We have been working successfully on the management of stress and anxiety over this period of time.

However, the financial uncertainty of the redundancy process at Guy's and St Thomas' NHS Foundation Trust, and recent bullying behaviour by senior colleagues, has raised Luke's anxiety levels. This was exacerbated further in his final week of employment by short-notice invitations from the Trust to interview for a lower status job, which caused him great distress and led to him being off sick with overwhelming anxiety.

I write to you and out of concern for my client, and in the expectation that the current difficulties will be resolved quickly."

100. I bear in mind, of course, that Ms Chase's letter was not written for these proceedings – it was written pursuant to Mr Findlay's request for medical evidence. Ms Chase did not give evidence before me. Her letter was not endorsed with an expert's statement of truth. It is not expert evidence. That necessarily limits the weight I can give to it in its own terms, as anything more than a broadly contemporaneous record of what the Claimant had told Ms Chase at the relevant times.

101. The claimant notified ACAS under the early conciliation process of a potential claim on 6 December 2022 and the ACAS Early Conciliation Certificate was issued on 13 December 2022. The claim was presented on the same date.

Law

102. Section 135 of the Employment Rights Act 1996 provides for the right to a redundancy payment.

103. Section 136 defines the circumstances in which an employee is treated as dismissed.

104. Section 139 contains the definition of redundancy, for the purposes of the 1996 Act.

105. Section 141 provides as follows:

“141.— Renewal of contract or re-engagement.

(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.”

106. In circumstances where an offer of alternative employment has been made before employment has terminated, section 141 therefore prescribes a two-limb test. The Tribunal must first consider whether the alternative job offered was objectively suitable. If so, the Tribunal will then go on to consider whether the employee acted subjectively reasonably in rejecting it.

Factors may be common to both limbs of the test; and the more suitable the

offer, the easier it may be for the employer to show that the employee's refusal was unreasonable (*Commission for Healthcare Audit and Inspection v Ward* EAT 0579/07).

107. The EAT in *Bird v Stoke on Trent Primary Care Trust* quoted with approval the following passage from *Harvey on Industrial Relations and Employment Law* regarding suitability:

“Under ‘suitability’ you must consider the nature of the employment offered. It is for the tribunal to make an objective assessment of the job offered (*Carron Co v Robertson* (1967) 2 ITR 484, Ct of Sess). It is not, however, an entirely objective test, in that the question is not whether the employment is suitable in relation to that sort of employee, but whether it is suitable in relation to that particular employee. It comes really to asking whether the job matches the person: does it suit his skills, aptitudes and experience? The whole of the job must be considered, not only the tasks to be performed, but the terms of employment, especially wages and hours, and the responsibility and status involved. The location may also be relevant, because ‘commuting is not generally regarded as a joy’ (*Laing v Thistle Hotels Plc* [2003] SLT 37, Ct of Sess, per Lord Ordinary Eassie). No single factor is decisive; all must be considered as a package. Was it, in all the circumstances, a reasonable offer for that employer to suggest that job to that employee? And the sole criterion by which that is to be judged is ‘suitability’.”

108. In the same case, the EAT went on to say this;

“There has been talk in some of the cases that the new post should be “substantially” or “broadly” equivalent to the existing one (see, for example, Lord Parker CJ in *Taylor v Kent County Council* [1969] 2 QB 560 at p 566B and Lord Eassie in *Laing*), but that was doubted – correctly, we think – by Bridge J (as he then was) in *Collier v Smith’s Dock Co Ltd* (1969) 4 ITR 338 on the basis that it puts an unwarranted gloss on the statutory language. In other words, the fact that the post which is being offered is different from the employee’s existing post does not necessarily mean that it is unsuitable for that employee, but by analogy with the approach in *Ward*, the more different the posts are, the more difficult it may be for the employer to show that the post which is being offered is suitable for the employee.”

109. In considering whether the employee acted subjectively reasonably in rejecting a role, the employee’s decision must be judged from their point of view, but subject to the state of affairs not only as they appeared to them, but as they ought reasonable to have appeared (*Hudson v George Harrison Ltd* EAT/01571/02)

110. The burden of showing both that the job offered was suitable and that the employee’s refusal of it was unreasonable is in the employer (*Jones and anor v Aston Cabinet Co Ltd* [1973] ICR 292).

111. The questions of both suitability and reasonableness of rejection are fact-sensitive. The higher courts have previously found the following factors to be potentially relevant ones:

111.1. A drop in status may make a role unsuitable, even if earnings are maintained by way of pay protection (*Taylor v Kent County Council* [1969] 2 QB 560, which involved a long-serving headmaster being offered a role as a teacher). It may also be possible for an employee to reasonably refuse an objectively suitable offer on the ground of his personal perception of the employment offered (*Cambridge and District Co-operative Ltd v Ruse* [1993] IRLR 156).

111.2. Any significant drop in earnings is likely to make a job unsuitable, taking into account the whole package on offer including the opportunity to earn overtime and bonuses (*Kennedy v Werneth Ring Mills Ltd* [1977] ICR 206).

111.3. The fact that a role is temporary may make it unsuitable. However the NIRC in *Morganite Crucible Ltd v Street* [1972] ICR 110 described an offer of work that was expected to last for 12 to 18 months as an offer of “regular” rather than “temporary” re-employment, and held that the employee’s refusal of it was unreasonable.

111.4. The fact that an offer was made at a very late stage was held by the EAT in the case of *Thomas Wragge and Sons Ltd v Wood* [1976] ICR 313 to be a relevant, although not decisive factor in terms of whether the employee acted reasonably in rejecting it. In *Tavistock and Summerhill School and anor v Richards and ors* EAT 0244/13, the EAT held that the claimants had acted reasonably in refusing an offer made shortly before the termination date. In that case, by the time the offers were made, five of the claimants had found other work, and the sixth had made plans for retirement.

111.5. The fact that a reason relied upon by a claimant for turning down the role offered was not raised prior to dismissal does not mean that it can be wholly disregarded in deciding the question of whether the claimant acted unreasonably in turning down the offer (*Dunne v Colin and Avril Ltd (t/a Card Outlet* UKEAT/0293/16).

111.6. Conversely, failure to respond to an offer by the employer in the absence of a proper explanation may amount to an unreasonable refusal (*Lincoln & Louth NHS Trust v Cowan* EAT/895/99)

111.7. The employee’s intentions and career path may be relevant to the question of whether it was subjectively reasonable for them to turn down a role (*Devon Primary Care Trust v Readman* [2013] EWCA Civ 1110)

Conclusions

112. I was taken during the course of the evidence to documents which suggested that the claimant took the point that the offer of the EHR role had not been communicated to him prior to the termination of this employment. Counsel for the claimant confirmed that the claimant accepted within the

litigation that the offer was made to him prior to the end of his employment, for the purposes of section 141(1). Therefore, I do not need to say anything further about that.

113. Having regard to the agreed list of issues, I turn then first to the question of whether the role of EHR Programme Manager was suitable alternative employment for the Claimant.

114. Ms Step-Marsden's first submission was that the respondent's evidence as to how they assessed whether the role was suitable alternative employment for the claimant was vague, inconsistent, and did not accord with their own policy. Her submission was that that alone should be fatal to their case that the role was suitable alternative employment.

115. Mr Stevens' evidence was in effect that the respondent did not apply its own policy in considering the suitability of alternative employment. More than that, his evidence suggested that the test in his mind was whether it was "more likely than not" that the roles matched. That is not the test in the respondent's policy. While I can see some force in Mr Stevens' evidence that (in essence) it is hard to quantitatively measure roles in percentage terms, that is nonetheless what the respondent's policy requires them to do (albeit that the policy does recognise that quantifying similarity can be "ambiguous"). The real issue with Mr Stevens' evidence was not so much about whether the similarity could be rendered into a precise percentage. Rather, it was about whether in broad terms the respondent was looking for something in the region of a 51% match, or something in the region of a 70% match. Even allowing for the difficulty in rendering the similarity between two job roles into a precise percentage, those are conceptually quite different.

116. Looking at the respondent's evidence as a whole, I find that they did not apply the Interim Organisational Change Policy with any real rigour in coming to the conclusion that the role was a suitable alternative one for the claimant.

117. However, while I do see the force in Ms Step-Marsden's submission, that is not the right test for me to apply. I am not assessing the reasonableness of the respondent's view. Rather, at the first stage I must come to my own decision on whether the role was objectively suitable alternative employment.

118. In that regard:

118.1. The role being offered was on a fixed term contact for 18 months. The claimant did not suggest that that was a factor which rendered it unsuitable. The nature of the career path he had chosen, of project-based work, was one which in my judgment would inevitably lead to limited-term assignments. That was consistent with the claimant's own career history. In the circumstances, I do not

consider that the fixed-term nature of the contract was one which had a bearing on its suitability for the claimant.

118.2. When the claimant was considering the role, he was living in Lymington, on the south coast. That is some distance from where the respondent is based, in south London. But the respondent had not relocated; it was the claimant who had chosen to move further away from his (substantive) place of work. So again, the distance from the claimant's home is not a factor which had any bearing on the suitability of the role for the claimant.

118.3. The role was one band lower than the claimant's previous role. A reduction in salary can, of course, be a relevant factor. But the claimant was entitled to pay protection, and the pay protection on offer was longer than the length of the fixed-term contract he had been offered. I do not therefore consider that the reduction in pay could be said to have any effect on its suitability.

118.4. Of course, banding is about more than simply pay. In an organization with a heavily regimented pay structure, it is inevitably also an indicator of status within the organization. At the point that the claimant was offered the EHR Programme Manager role, he had been working in band 8d roles for nine years. The step down from 8d to 8c would inevitably have had some significance.

118.5. Hand-in-hand with the banding of the role sits its place in the organization. The last role the claimant had held within the respondent had been a Programme Director role, in which he reported directly to a member of the Board. He had held that role for over five years. By contrast, he was being offered a role where he would have three further layers of management between him and the Board – that is, he would report to a Head of Programmes (Donna Coveney), who would report to the Deployment Director (Ms O'Brien), who would report to the Apollo Programme Director, who would report to the Chief Digital and Information Officer (a Board member). That was, on any analysis, a considerable step down in terms of his place in the hierarchy.

118.6. I do not consider it is a complete answer in that context to say, as Mr Findlay did, that the role was within a much larger project than the claimant had experienced previously. That argument may have had more force if the claimant was moving from a smaller organisation to a larger one; but he was not.

118.7. Also related to the role's place in the structure is the degree of autonomy. The claimant had enjoyed significant autonomy as a Programme Director. Inevitably, as one of a group of eight Programme Managers reporting to a Head of Programmes, who was even then two steps below the ultimate Programme Director, the claimant would inevitably have enjoyed considerably less autonomy

than he had in his previous roles. Once again, in my judgment the relative size of the programme is not a complete answer to that, in terms of the objective suitability of the role.

118.8. There was no evidence before me about the level of financial responsibility that the claimant would have, and also how many (if any) staff he would manage. The (generic) job description provided for the possibility of budgetary responsibility and line management responsibility; but there was no evidence before me about whether and to what extent the claimant would have either of those in practice (beyond a comment from Ms O'Brien about managing application leads). The claimant had managed a budget of £25M in his previous secondment to the Isle of White, and had line managed staff. The burden is of course on the respondent to show that the role is objectively suitable, and evidence about the level of budgetary and line management responsibility ought to have been within the respondent's gift to give; it is striking then that there was no direct evidence on either point.

119. Set against that:

119.1. The claimant had, since 2013, chosen to move his career in the direction of programme/project management. Setting aside the questions of autonomy and responsibility, the role was clearly doing broadly the same category of work the claimant had specialized in since 2013. It was not, for example, a return to operational management.

119.2. The role was one for which Ms O'Brien considered that the claimant had the necessary skills. The claimant did not suggest otherwise. While it was operating at below the level he had been operating at, it was not suggested that it was a role for which he was ill equipped.

119.3. The role concerned digital transformation management, which was broadly what the claimant had been working on both in his previous role with the respondent and during his secondments. The claimant accepted in evidence that the role was in a department to which he could sensibly have been assigned.

119.4. While much was made of the fact that the claimant had not been offered the Admin Safety Programme Manager role, I do not consider that that is relevant to the question of whether the EHR role was suitable for the claimant. Once again, I must form my own view on suitability, not simply review the respondent's decision.

120. Taking a step back, and considering the situation in the round, I consider that the role was not objectively suitable for the claimant. While it was a role for which he clearly had the necessary skills and experience to succeed, the same could by extension be said about any number of more

junior positions. The extract from *Harvey* approved in *Bird* makes it clear that status and responsibility must be considered alongside skills and experience. The respondents' policy required the claimant to consider roles at band 8c; but neither that nor the letter from Amanda Pritchard in 2013 could be determinative of the question of whether a specific band 8c role would be objectively suitable for the claimant. Weighing up the factors identified, I consider that the role was not objectively suitable alternative employment for the claimant. The loss of status, autonomy and responsibility was simply too great to render the role objectively suitable in the circumstances.

121. Because the point has been argued before me, I should say that even if I had concluded that the role was objectively suitable, I would nonetheless have considered that the claimant acted subjectively reasonably in rejecting it. I reached that conclusion for the following reasons.

122. Both parties, to some degree, suggested that the other did not act in good faith. The claimant suggested in contemporaneous correspondence that the respondent had created the role in order to avoid making a redundancy payment (although he accepted in cross-examination that, having seen the respondent's disclosure, he accepted that was not the case). The respondent took issue with the genuineness of the claimant's sickness absence, and took the view that the claimant was closed-minded to any role as he only wished to receive his redundancy payment. I observe that it is entirely unsurprising that the claimant wished to ensure that he would receive his redundancy payment entitlement if he had not been offered any role he regarded as suitable.

123. In respect of the suggestion that the claimant acted unreasonably in the way he engaged with the EHR Programme Manager role:

123.1. The statutory language talks about an "offer". No offer was made by the respondent until 13 June 2022 – some two days before the claimant's employment was due to terminate.

123.2. The role was first drawn to the claimant's attention by Ms Felix on 17 May 2022. I accept that he told Ms Felix that he did not consider that a band 8c Programme Manager role would be suitable. I consider that he was well placed to make that comment, given that he had previously managed Programme Managers in his role as a Programme Director.

123.3. Thereafter, Mr Stevens told the claimant that Ms O'Brien was "keen to speak to him". The Claimant did not make contact with Ms O'Brien, but nor did Ms O'Brien make contact with him.

123.4. Mr Stevens asked Ms O'Brien to set out some bullet points about the responsibilities of the role and why it would be a good match for the claimant. She did not do so.

123.5. The claimant then emailed Mr Stevens asking for a copy of the Job Description for the role, and raising concerns about responsibility, autonomy and status. The claimant was sent a copy of the Job Description, but no real attempt appeared to be made to

engage with him about the question of responsibility, autonomy or status. In particular, I was not persuaded by Mr Findlay's evidence that he had discussed those points with the claimant previously, because:

123.5.1. His evidence on the point was vague, and was not supported by the contemporaneous documents; and

123.5.2. In any event, such discussions could not have been through the lens of the EHR Programme Manager role, as his suggestion was that those discussions had taken place sometime earlier.

123.6. The claimant was then, somewhat out of the blue, invited to a matching interview, which was to take place two days before his employment was due to terminate.

123.7. The claimant went off sick, and remained off work by reason of ill health until his employment terminated on 15 June 2022. Although I have not accepted his evidence about speaking to his GP and being prescribed medication on 13 June 2022, I accept, on the evidence before me, that he was genuinely unwell during that period.

123.8. The claimant was consequently absent from work by reason of ill health for all of the period after the offer was made.

123.9. While it could reasonably be said that the claimant could have been more proactive in the period before the offer was made to him, the same could be said about the respondent. The respondent's correspondence was vague; no concrete steps were taken to engage with the claimant regarding the role until he was invited to the matching interview on 13 June. And that must all be seen in the context that:

123.9.1. The claimant had expressed in writing his concerns about the suitability of the role (albeit without having seen the JD);

123.9.2. Those concerns had not been addressed;

123.9.3. The claimant was entitled to be somewhat suspicious about the EHR role, given that he had not been matched by the matching service to another band 8c Programme Manager role.

124. So I do not consider it could be said that the claimant acted unreasonably in the way he engaged with the respondent about the role.

125. I conclude that the claimant was not closed-minded to the idea of a band 8c role. He was open to one in principle, although dubious about whether a suitable role would exist at that band. There is in my judgment no better evidence of the claimant's open-mindedness than the fact that he asked to see a copy of the EHR Programme Manager role, so as to test his own underlying assumption that such a role would be unsuitable. If he was entirely closed-minded, I consider that he would not have done so.

126. I bear in mind also that the offer was made very late in the day; some five months after the claimant had first made the respondent aware that his secondment at the Isle of White would come to an end and only two days

before his employment was due to terminate. The respondent was aware that the claimant was already taking steps to provide for a career outside the NHS by setting up as a consultant and had allowed him to do so alongside his existing work.

127. In my judgment, the factors I have already set out regarding loss of status, autonomy and responsibility would also be relevant to the question of subjective reasonableness. In essence, the choice the claimant was being asked to make was to take a lower-ranked role within a very large project; to become a smaller cog in a very large wheel. Some individuals in the claimant's position may have chosen to take that trade off, in order to be able to say that they had worked on a project the size of the Apollo Programme. But the claimant was, in my judgment, entitled to prefer not to do so. He did not act unreasonably by refusing to take that trade-off.
128. So for all of those reasons, I would in any event have concluded that the claimant acted subjectively reasonably in rejecting the role of EHR Programme Manager.
129. It follows that the claim succeeds. I award the claimant the agreed sum of £6,566.50 by way of statutory redundancy payment.

Employment Judge Leith
Date: 22 February 2024