Case Number: 2301230/2023, 2301443/2023 & 2301623/2023

EMPLOYMENT TRIBUNALS

Claimant: (1) Miss E Kalasauskaite
(2) Mrs. S Appleby

Respondent: Mitie Limited

Heard at: **London South in person** **On:** **19-24/4/24**

Before: **Employment Judge McLaren**

Representation
Claimants: In Person
Respondent: Mr. Price Rowlands, Counsel

JUDGMENT having been sent to the parties on 26 April 2024 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

Background

1. Miss Kalasauskaite and Mrs Appleby worked for the company as Service Managers at St George's Hospital in Tooting and were dismissed on 31 March 2023 following a redundancy exercise.

2. Miss Kalasauskaite had brought a claim in 2022 (2302436/2022) over a dispute after her contractual terms. It was her position that she was entitled to certain enhanced terms based on the NHS agenda for change terms. This claim had been settled through ACAS shortly before the redundancy process began. On her redundancy she was not paid the enhanced redundancy sum she believes she was entitled to. This is the only term that is the subject of these proceedings.

3. Mrs Appleby had also had a dispute with the company, having been dismissed on performance grounds in 2022 and then reinstated on appeal. She joined the company in 2005 and her position is that she was also employed on Agenda for Change terms, but she also says that this was not reflected in her redundancy payment.

4. Both claimants say that as a result of these disputes they were bullied or undermined by their line manager, Mr Daniel George. Hence, both of them say that they were selected for redundancy either:

a) because of these disputes at work,

b) the subsequent bullying or disagreements with Mr George,

c) because of their enhanced terms and conditions or, finally,

d) because they were both union members, or that they had recently made use of trade union support in the course of those disputes.

5. I heard evidence from both of the claimants and from John Inokoba, GMB representative for the claimants. I heard evidence from Daniel George, Account Director, Mari Taylor People Business Partner and Andrew Sharpe, Account Director for the respondents. I was provided with a bundle of 1079 pages.

6. The findings of fact set out below were reached on a balance of probabilities, having considered all the evidence given by witnesses during the hearing, including the documents referred to by them, the documents in the bundle provided by the respondent and taking into account the tribunal's assessment of the witness evidence.

Claims and Issues

7. Each claimant brings the following complaints:

a) unfair dismissal under section 98 Employment Rights Act 1996

b) automatically unfair dismissal under section 152 **or** 153 Trade Union & Labour Relations (Consolidation) Act 1992 for being a member of an independent trade union or using union services.

c) breach of contract in relation to her redundancy pay.

d) failure to provide a written statement of her terms and conditions.

8. The issues had been agreed at a preliminary hearing and at the outset of this full merits hearing I took time to get the parties to confirm they agreed that the issues list as included in the bundle and set out below were the agreed issues. Both parties understood that these are the matters of fact and law I would determine.

Unfair dismissal

9. What was the reason for their dismissal? The company says that it was on grounds of redundancy in each case, but the claimants suggest it was either because of

    a) the disputes at work,

    b) the subsequent bullying or disagreements with Mr George,

    c) because of their enhanced terms and conditions or, finally,

    d) because they were both union members, or that they had recently made use of trade union support in the course of those disputes

10. If it was a redundancy, did the company act reasonably in all the circumstances in treating that as a sufficient reason to dismiss each claimant. The tribunal will usually decide, in particular, whether

    a) the company adequately warned and consulted the claimant's

    b) the company adopted a reasonable selection decision, including its approach to a selection pool and

    c) the company took reasonable steps to find the claimant's suitable alternative employment.

Automatically unfair dismissal

11. For section 152, was the reason for the dismissal (or if more than one reason, the principal reason) for the dismissal that the claimants were (a) union members or

    (b) had made use of union services?

    NB, if so, it was not a redundancy and neither claimant is entitled to an enhanced redundancy payment.

12. For section 153, was there a redundancy situation affecting the claimants and others who held similar positions?

13. If so, was the reason for the claimant(s) selection for dismissal (or if more

than one reason, the principal reason) that the claimants were (a) union members or (b) had made use of union services.

NB, if so, it was a redundancy, and the tribunal will need to go on to consider their contractual entitlement to redundancy pay.

Breach of contract (redundancy pay)

14. Was either claimant entitled under the terms of their contract to enhanced redundancy terms? If so, what?

Statement of employment particulars

15. When these proceedings were begun, was the company in breach of its duty to give either claimant a written statement of employment particulars or of a change to those particulars?

16. If so, absent exceptional circumstances, the tribunal must award two weeks' pay and may award four weeks' pay.

Remedies

17. If either claimant wins her claim for unfair dismissal she may be entitled to a) reinstatement or re-engagement b) compensation for loss of earnings and/or c) an uplift in respect of any failure to follow the ACAS Code in relation to her dismissal.

Additional disclosure

18. On the second day of the hearing, it became clear to me that the respondent's witnesses were relying on what they said were terms set out in a commercial document entered into between the respondent and St George's Hospital NHS trust. It appeared that this document contained the information as to the terms of staff employment and how much of the agenda for change terms were in operation. After some discussion it appeared that the respondent could obtain this document. I was persuaded by the respondent' s submission that this was a critical document and I accept that it would be harder for me to make a decision on the AFC terms in its absence. The claimants objected to the extremely late delivery of such a document.

19. I have every sympathy with their position. They have meticulously prepared their case and as unrepresented litigants having to address such a document may build in delay or mean they have to rethink and re-prepare some of their

questions. I also sympathise with their position that the respondent has had many months to produce this document and it should have understood its importance.

20. Nonetheless, I ordered that the respondent provide this document provided that it was with me and the claimants by no later than 9 AM on the third day of the hearing. I made it clear that if it was delivered any later than that I would not allow its inclusion. I also indicated to the respondent's representative that if I concluded that the inclusion of the document meant that there was delay in the tribunal proceedings, or that we had wasted time so far that I would consider making a wasted costs order.

21. The respondent's representative told me that they had now found a copy of the second claimant's contract and applied to add this to the bundle. Again, as some of the issues in this case are what are the terms of employment, this is a critical document. I reminded the respondent of the ongoing duty of disclosure. For the same reasons, I have, while sensible of the claimants 'objections to such very late disclosure, permitted the respondent to produce it as it is within the overriding objective to do so. The document is clearly relevant.

22. On day 3, the respondent produced what it said were the second claimant's terms conditions, but this is a document that was already in the bundle. I was also sent a document that was said to be the relevant contract. The respondent's counsel took instructions from Mr George and it transpired that the document that had been provided was not the correct one. The respondent's counsel indicated the respondent did not seek to have it added to the bundle. The respondent's counsel also accepted that it was too late at this stage to locate the correct contract and that the case would continue without it.

Finding of Facts

AFC terms (breach of contract claim)

23. A large part of the factual dispute turns on what the AFC terms are and who is entitled to them. I understand that this refers to the Agenda for Change terms which apply to all staff who are directly engaged by the NHS (subject to some exceptions depending on seniority). There was debate and confusion as to whether the claimants are talking about AFC terms, or whether it was AFC broadly comparable terms. Both claimants accepted that they were employed by the respondent and not by AFC and not by the national health. Their contention was that as a result of contractual promises by the respondent to

provide broadly comparable AFC terms they were entitled to a wide range, if not all, of AFC terms although the only issue in this case relates to the redundancy terms.

24. I was provided with a copy of the AFC handbook. In particular both claimants say that they were entitled to the benefit of AFC terms for HCAS, over time, sick pay, holiday pay, maternity pay and redundancy. Their entitlement to this arises, they say in different ways. The first claimant said that she is entitled to it as it applied to all hourly paid workers when she started work with the respondent and she continued on these terms. The second claimant said that she had the benefit of AFC terms at a previous employment, and these were transferred to the respondent by virtue of TUPE. In addition both rely on a letter to staff issued in 2009 agreeing to provide terms broadly comparable with AFC. This applied directly to the second claimant and the first claimant said that it reflected the practice that had been applied to directly engaged staff at that time.

25. The respondent's evidence given by all three witnesses on what if any AFC terms applied was confused. None of the witnesses dealt with this point in their witness statements, although it was clearly key to the factual issues in dispute. All agreed that some AFC terms were applied to some staff who worked on the contract with St George's. All agreed that there was little or no communication with the staff about these terms and they were not provided with any written documentation that would tell them which enhanced terms applied them and in what way. Indeed, Ms Taylor confirmed that AFC enhancements were not referred to in any contract provided to staff, even where they undoubtedly applied so that the documentation that staff had was inaccurate on key terms. I find that the respondent has a positive policy of not providing written details to staff of their key terms when that includes some AFC enhancements. That was the respondent's evidence on this point.

26. All three of the respondent's witnesses gave the same account. Such staff as had the benefit of the AFC enhancement did so as a matter of the contract between the respondent and St George's NHS healthcare trust. It applied to hourly paid workers only. The contractual document that was cited that apparently set out the limit of the AFC enhancements and their application to salaried workers only was one that had not been disclosed and could not be located. It appears that this document had not been seen by either Mr Sharpe or Ms Taylor and they are relying for their account of it on understandings that been given to them by someone else. Their evidence on this point is therefore effectively hearsay and it is only Mr George who held himself out as having first-hand knowledge of this contract.

27. Mr George gave contradictory accounts and initially appeared uncertain as to when these contractual terms applied from. He originally believed it applied in 2015, but then concluded based on other evidence in the bundle that it applied from 2009. I accept that he has only been employed by the respondent for the last three years therefore some considerable time after the contract was signed either in 2009 or in 2015. I find, however, that in the end he agreed that this agreement was reached in 2009.

28. Mr George also told me that these enhanced terms applied only to staff who were engaged at that date and not those who joined thereafter, but that is not consistent with the way in which the first claimant was treated as it was ultimately accepted by the respondent that she was entitled to AFC enhancements and she joined in 2015. I was also told these enhancements applied only to hourly paid staff. That is not consistent with the way the second claimant, who was salaried, was treated. I find that this uncertainty as to the date from which it applied and the type of staff to which it applied means that Mr George is not entirely familiar with the terms on which he seeks to rely and his evidence is not reliable on this point .For this reason I prefer the evidence of the claimants supported by the documentation.

29. I therefore find that AFC enhanced terms did apply to some staff who were directly engaged by the respondent from 2009 onwards. I also find that some AFC enhanced terms applied to staff who transferred into the respondent's employment. I find therefore that the second claimant had an entitlement to enhanced terms based on a transfer of her previous terms, the first claimant had an entitlement based on her original contract.

30. As to what terms, again while Mr Sharpe and Ms Taylor gave the same evidence as Mr George on this point, he was the only individual apparently doing this from first-hand knowledge. It was his evidence that that the AFC terms and conditions that were incorporated and therefore would have applied to the first claimant were limited to HCAS, pay, overtime pay and holiday pay. He explained that it was in his view not possible for anyone other than the NHS to provide full AFC contractual terms. For example the NHS pension could not be replicated.

31. I asked Mr George whether there was any reason that he was aware of that would prevent an organisation working with the NHS from giving its staff other parts of the AFC terms beyond the four Mr George thinks that this respondent included or indeed had been compelled to do so as a matter of commercial negotiation. I also asked him whether there was any reason that would prevent an organisation being required by an NHS trust to incorporate, for example the AFC enhanced redundancy terms, as part of the contract for

those who worked on the NHS account. He was unable to comment. He did say that in his experience at a previous company some staff did have AFC enhanced terms related to pay. He also said that the way in which they were incorporated at St George's was unique to the respondent's business. The second claimant disputed this and said that from her previous and current work for businesses that work on NHS accounts it is common for AFC terms to be included. On the balance of probabilities, I find it unlikely that St George's placed a unique requirement on this respondent.

32. The respondent was not able to produce any evidence that it provided limited AFC terms to some staff, rather the respondent had not disclosed the document it said would have identified and clarified this point for the first claimant. The respondent did not produce any evidence as to the second claimant's original contract and therefore what terms it had to honour.

Which AFC terms applied to the first claimant?

33. While during her employment the first claimant's entitlement to AFC terms was challenged by the respondent it was ultimately accepted by the respondent that throughout her employment, until the date on which it was ended, the claimant retained her entitlement to at least some AFC terms. In 2022 (2302436/2022) the first claimant issued proceedings over this dispute about her contractual terms. In February 2020 the respondent entered into a binding settlement of this pay dispute.

34. The wording of the agreement specified that the claimant would return to her original terms and conditions which would include "HCAS payments, company sick pay and holiday entitlement in line with the claimant's original terms and conditions". While the wording specifies some particular terms, and it does not expressly include redundancy, it also does not reference maternity pay which had been given to the claimant previously at the AFC level. It does not expressly say "only " these terms.

35. I find therefore that the wording of the agreement does not exclude an entitlement to redundancy pay, nor does it limit the claims of AFC enhancement only to those matters specified. It expressly states the claimant returns to her original terms and conditions. I find that is potentially wider than the list of items given. The question remains what terms were in the original contract.

36. Both Mr Sharpe and Ms Taylor echoed Mr George's evidence that the AFC terms and conditions that were incorporated were limited to pay, overtime pay and holiday pay, that is to the specific terms called out in the settlement agreement. The claimant disagreed and stated that she was entitled to all of

the AFC Terms and Conditions as set out in the in AFC Handbook at page 195 because she was entitled to AFC comparable terms including redundancy. The handbook makes no reference to pension terms and the claimants do not seek to suggest they were entitled to an NHS pension by virtue of their position that they were entitled to the terms of the AFC service handbook.

37. As the respondent has agreed that it did not provide the claimant with any written terms setting out her contractual entitlement and which parts of AFC it said she benefited from, the claimant cannot point to a written contract that specifies this. Instead, in addition to the wording of the settlement agreement, the claimant relied on a number of other documents and actions that occurred during her employment to evidence her position.

38. I was referred to a letter of 1 June 2017 at page 567 which dealt with high cost living allowance (HCAS) and overtime. That letter references the AFC Handbook and quotes some parts of it. The claimant considered that this was evidence that the handbook as a whole was effectively part of her terms. It would been opened the respondent to write the letter making it clear that only these parts of the AFC applied, but it did not do so.

39. The first claimant also referred me to a letter of 4 January 2019 at page 569 which set out the agenda for change policy changes pay uplifts that applied to her. The opening sentence referred to all employees subject to AFC comparable terms and conditions. It did not limit it in the description to employees subject to the pay part of the AFC terms and conditions.

40. The first claimant referred me to page 1067 which showed that she was paid an adjustment which related to overtime payments as part of the AFC terms. I was also taken to a document dated 24th of January 2023 which is at page 953 which was part of correspondence about the first claimant's grievance. In that the Operations Director, Healthcare asked the trade union representative to explain the claimant would not be entitled to AFC redundancy and said that had been discussed at length back in 2019 during major staff consultations carried out at that time and none of the employees at that time were paid AFC redundancy. These 2019 documents were not included in the bundle nor were they referred to in any of the respondent's witness statements. I find that simply because some staff in 2019 were not entitled to AFC redundancy does not on its face mean that the claimant was not. It is possible that in accordance with the respondent's practice staff who were originally on AFC terms had been moved onto the respondent's own terms following change in job roles or promotions.

41. The claimant also explained that during her maternity leave she was paid

enhanced maternity pay in line with AFC benefits. The respondent did not dispute this. I find therefore that the respondent's own actions did not limit the claimant's enhancements under her original contract to the matters that they have listed. At the least it also included maternity pay.

42. Further, it was open to the respondent to provide documentary evidence to confirm its position that the AFC enhancements were limited. It appears that the first time these limitations were put in evidence was in answer to cross examination questions during this tribunal hearing. They were not raised at any point during the grievances raised by either of the claimants about their terms. On the balance of probabilities, I find that had the terms been set out in the contractual document as Mr George has stated, that would have been raised at a much earlier stage with the claimant while she remained employed as it would appear to be, on the respondent's evidence, a complete defence to the contract claim brought here. I find therefore that there is no such contractual limitation and that would be consistent with the respondent having paid the first claimant enhanced maternity pay.

43. I find therefore that the first claimant, while she was employed on a contract which did not make reference to an enhanced terms, was in fact from the start of her employment entitled to broadly comparable AFC terms and that these are not limited as the respondent has said. This may also explain the respondent's practice of moving staff from these terms whenever it could. On the balance of probabilities I find it included redundancy terms.

<u>The contractual position for Mrs Appleby (the second claimant)</u>

44. Again in the absence of an express contract for the second claimant she has referred me to a number of different documents and events in support of her contention that she has a contractual entitlement comparable to the terms of the AFC Handbook.

45. It was not disputed that the second claimant was transferred to the respondents employment in 2009 having previously been employed by ISS Mediclean. The respondent's HR records for the second claimant were very limited and included only some parts of her starter form when she transferred across to the respondent. It does not include any statement of terms. That starter form notes that she is not on the respondent's terms but is a TUPE transfer. It notes specifically that her sick pay and holiday are different from the respondent's standard. It does not specify on the form any other enhanced terms but there is no obvious place on the form for this.

46. Mr George contested that the second claimant was entitled to AFC

comparable terms. He did confirm that he accepted her contract from her previous employer had transferred across to the respondent. He also accepted that he had never seen a copy of the second claimant's original contract and nor did the respondent have any such copy so it was unclear where his knowledge came from.

47. The second claimant referred me to a letter 27 April 2009 at page 556 which stated that the respondent would provide terms and conditions "broadly comparable with AFC terms and conditions" to those staff working on the contract to provide domestic services to St George's NHS trust. The respondent had specified in the letter that they would honour this.

48. Mr Sharpe was asked to explain what "broadly comparable" terms were and was unable to do so. Ms Taylor was also unable to give any explanation as to what therefore was covered. Mr George similarly was not able to explain what this meant. I find that there is no express limitation on which terms will not be honoured but, to the contrary, the second claimant had been told in writing that her terms and conditions would be broadly comparable with AFC terms and conditions.

49. Despite this letter, Mr George was adamant that the second claimant's original contract could not contain broadly comparable AFC terms because she was a manager. He also disputed that she could ever have been entitled to actual AFC terms as she had no NHS service. The claimants do not say that they were entitled to AFC, but to broadly comparable AFC terms. That is consistent with a letter of 27 April 2009 which, as I have said, specifies that her terms and conditions will be broadly comparable with AFC terms and conditions. That letter did not put any limitations on those terms. Mr George's evidence is also not consistent with the starter form information recorded by the respondent for the second claimant which notes some terms which are AFC enhancements. His position is also not consistent with what happened to the second claimant in practice when she was paid AFC sick pay.

50. I find that managers could have AFC terms, as indeed this respondent ultimately accepted as the second claimant had such terms, at least in relation to holiday and sick pay. I also find that, on the balance of probabilities, there is nothing to prevent an employer providing services to the NHS for mirroring NHS terms where it can do so, which could include enhanced redundancy pay.

51. In support of her position the second claimant referred me to paragraph 12.1 of the AFC Handbook which states that "*an employee's continuous previous service with any NHS employer counts as reckonable service in respect of NHS agreements on redundancy, maternity, sick pay and annual leave."*

52. The claimant accepted that she was not an NHS employee, and it was the evidence of Ms Taylor that this handbook clearly referred to service with NHS employers. I find on its face this is talking about continuity of service for the calculation of certain benefits. This clause is intended to ensure that all NHS service counts towards the calculation of certain benefits. I don't find that it is incorporating these terms for those who have not worked in the NHS.

53. I was also directed to an email from the Deputy Director of Estates and facilities written on 15 August 2022 in answer to queries about the second claimant's terms and conditions. That email suggested that one off payments an increase in hourly rate and sickness and leave did not apply to management. That is not consistent with the letter sent to the second claimant or the terms noted on her joining form. The email went on to say that teams were advised that AFC terms and conditions would be included in the tendering exercise for 2009 contract. It does not say that only some of the AFC terms and conditions would be included. The email goes on to say that the writer's understanding is that ISS Mediclean managers went on to respondent's contract in 2009 and ISS staff were put on comparable terms and conditions for AFC. That confirms that some staff were put on comparable terms and conditions. I find that this was in fact the second claimant's position, despite the fact she was a manager for ISS Mediclean as that is consistent with the documentation, such as it is, the respondent provided her with and with the respondent's ultimate decision to pay her sick pay.

54. I am satisfied that the second claimant was employed on terms and conditions broadly comparable with AFC terms and conditions. That is what the letter written to her by the respondent specified at the time she was engaged. That is not limited as the respondent suggests and on the balance of probabilities I find it included redundancy terms.

<u>The provision of written statement of terms</u>

55. It is common ground that for both claimants there is very little contractual documentation retained by the respondent or issued by it. The first claimant started working with the respondent on 22nd of June 2015 and was issued with a starter pack.

56. Ms Taylor confirmed that she understood the documents be produced as part of the starter pack to be a "statement of terms of employment". I was not provided with a copy of any other contractual document that applied to the first claimant at this time and I find that this document was issued by the respondent to comply with obligations under section 1 of the Employment

Rights Act 1996 as it applied in 2015. The claimant was never issued with any further documentation that she accepted during her employment and it was agreed that this statement of terms was the only one ever issued to her.

57. As referred to previously, Ms Taylor confirmed that the respondent does not issue any documentation to staff who are entitled to AFC enhanced terms or details of what these are. She accepted that the terms and conditions given to staff such as the first claimant, who on the respondent's own case are entitled to enhanced holiday and sickness benefits, are not given accurate information about this. The statement and terms issued by the respondent does not on its own case, set out some of the statutory required details.

58. In submissions the respondent suggested that concessions of enhancements were made during the first claimant's employment and therefore that the respondent complied with its obligation to provide written particulars of employment when the claimant started. This was not Ms Taylor's evidence. The terms of the settlement are also clear. These are said to be her original terms and conditions and I find therefore that the enhancements applied from the beginning and there was always a default.

59. For the second claimant there is even less contractual documentation provided. It appears that the second claimant was issued with a starter pack similar to that of the first claimant but the respondent has been unable to produce a full copy of it, nor has it been able to produce any statement of terms that went with it. There was a clear undertaking that the second claimant would be engaged on terms and conditions broadly comparable with AFC terms and conditions. She was never given accurate information about these. She was not provided with a statement which included the very least accurate information on her sick pay.

60. On the respondent's best case its practice is that the contractual documentation given to staff to whom AFC enhancements applied does not properly reflect the position on key terms such as pay, overtime rates, holidays, and sick pay. For the first claimant I find that her statement did not reflect key terms from the beginning of her employment. For the second claimant I find that she was not given any terms of employment at all.

<u>The former disputes/allegations of bullying</u>

<u>The first claimant</u>

61. The first claimant started work as a part-time hostess. Sometime in 2017 she became full-time and at the end of 2017 she was offered a catering supervisor's role. Although this role was salaried, it was confirmed by her then

line manager that she would remain on the same terms and conditions. She therefore continued to enjoy the AFC terms that applied to her hourly paid contract.

62. In April 2020 it appears that the claimant was sent a contract by HR dated 16 April, backdated to 20 February with a go live date of 3 March. It was agreed by Ms Taylor that this contract reflected the responden'ts non-enhanced terms of employment and removed any AFC enhancements. The claimant did not sign any such contract and was not consulted on it. After conversations on this point the claimant was told that she would remain on her original contract and that once she returned from maternity leave that would be reviewed.

63. The claimant did return from her maternity leave on a full-time basis, although with adjusted hours so that she started early one day a week finishing therefore one hour earlier although carrying out the same number of hours. This was to accommodate her childcare needs.

64. At this point Daniel George became her line manager. The first claimant told him that her contract had been changed without her consent during her pregnancy but was reinstated and therefore asked if he could investigate and provide her with a copy of the contract. As no progress had been made, on 15 December 2021 the claimant sent an email to Mr George regarding the contract issues she felt that she was facing. At the same time, she joined the GMB union to have their support as she was concerned that she might have to take some legal action.

65. This was the beginning of what became the contract dispute. Mr George and the first claimant met on 9 February 2022 and it was Mr George's evidence that this meeting was to clarify that the claimant was on a service manager contract with respondent's terms and conditions and was not on an AFC contract. In his witness statement he made reference to investigations with HR but no evidence as to the nature of these investigations was produced.

66. Considering the notes of the meeting which were at pages 71 – 727 of the bundle I find that it was Mr George who presented the claimant with the options either to return to her role as a service coordinator if she wished to stay on what he called at some point in the meeting enhanced respondent terms and conditions and at other times an enhanced hybrid contract, or to accept the respondent's terms conditions which went with the salaried position. These did not include the AFC terms. As the claimant pointed out she had been doing the job since at least April 2020 on those terms and conditions.

67. In answer to cross examination questions Mr George presented his actions

as being to provide the first claimant with reassurance and clarity to make her comfortable with her contractual position. I find that the intention of the meeting as clearly set out in the notes and the correspondence around it was to require the claimant to drop her AFC terms. Taking into account Ms Taylor's evidence about the respondent providing new terms and conditions whenever there is a substantive change which removes the enhanced terms I find that that it is the respondent's practice to seek to remove AFC terms whenever they can and that is what they were doing in the first claimant's case. This was not to support the claimant.

68. On 16 March 2022 the first claimant appealed to Mr George's manager (Jacinto Jesus) about this decision number 27th of April an appeal hearing was heard. In that appeal outcome letter (763 – 764 of the bundle) Mr Jesus explained that the respondent had a clear process so that when there was any change to job roles or promotions there would be a selection process opportunity to discuss terms and conditions and changes we made on that basis. He concluded that as this had not been the situation there were only two options that he could offer. The claimant either had to step down to a service coordinator's role in which she could keep her AFC terms, or remain as a service manager and sign a contract which would remove them. There was no acknowledgement that the claimant had successfully carried out the role for quite a while with no issues. I find that this is consistent with the respondent's practice of seeking to remove AFC terms and suggests there is value in them.

69. The first claimant decided that she had to contact ACAS and log her case ultimately with the employment tribunal. This led to her claim in 2022 (2302436/2022) which was settled through ACAS shortly before the redundancy process began. During this process the claimant was represented by the GMB trade union representative as a GMB union member.

70. The claimant relies on this history to suggest that Mr George was keen to remove her as she was a problem both because of the dispute over her contract retaining enhanced terms and because she had involved the GMB union representative and was clearly a GMB member. Mr George denies this.

<u>The second claimant</u>

71. Mrs Appleby had also had a dispute with the company. In 2021 she was investigated by Andrew Sharpe and Daniel George was the decision-maker. He interviewed the second claimant in a disciplinary hearing on 28 June 2021 and concluded that she be dismissed. However, she was reinstated on appeal.

72. It was the second claimant's evidence set out in her witness statement that she always felt the relationship with Mr George was strained and damaged because he felt that her conduct was wrong, although it had been proved otherwise. He was always trying to find faults with her, despite positive feedback from clients and staff.

73. The second claimant also attributed her period of absence on mental health concerns because she was not supported by Mr George. Page 788 – 797 are notes of a welfare meeting which took place on 6 July with the second claimant and Mr George. It was the second claimant's position that this meeting was difficult to arrange as Mr George did not want to organise one after she had to rearrange the first one due to the sudden death of her brother. He did not refer her to occupational health. During this welfare meeting, Mr George persistently changed the scope of the meeting, aiming to focus it on her actions and trying to make it into an investigation, rather than hearing why she was on long term sick and how he could try and support her.

74. After this meeting an email was sent breaking down what was said during the meeting (p 798-799). Unrelated to the welfare meeting or her well-being Mr George asked whether she was planning on raising a grievance against him. The second claimant responded in emails that she meant what she had said when she had a meeting with him on his arrival to St George's Hospital that she wanted a clean slate and did not harbour any malice towards him.

75. During this time the second claimant reports that Mr George also began to ignore her emails and neglect her welfare. This led her to seek help from her GP. Upon her return to work, the second claimant also believes that Mr George began to exclude her from meetings which hurt her mental health more and increased her emotional stress. From this the second claimant raised a grievance and this meeting was held by Jacinto Jesus on 9th September 2022.

76. Within this meeting she raised how she felt there had been a lack of support from Daniel George and how major failings within the business were occurring, for example how her annual review was not followed up and uploaded regardless despite her not signing and agreeing to the discussions. The grievance was not upheld.

77. Mr George explained that he did not have any grudge against the second claimant. He believed that they had worked well together. He explained that during the welfare meeting it became clear to him that the second claimant was suggesting that he might be the cause of her low mood. He spoke to HR and concluded that if he might be the problem it would not be right for him to deal with the welfare issues or make the occupational health referral. It was

for this reason that he pressed to find out whether or not the claimant did have a grievance to raise against him to ensure that she had every opportunity to deal with matters. He accepted that it was eight weeks from the first claimant's absence until her welfare meeting. He also accepted that there was no referral to occupational health which is something that is generally provided to support an employee. However, he was aware that the second claimant had made use of the employee assistance program, but he was not aware of that until after she had been absent for eight weeks.

78. The claimant felt that she was targeted for redundancy because Mr George had a grudge against her and because of her GMB membership and because she was supported by the GMB in the welfare process.

Trade union issues in general

79. The first claimant set out in her witness statement that after she had received a response to her grievance and outcome letter which was on 18 May 2022, Mr George walked into her office sat down and started a conversation about how once that was sorted he did not expect her to bring in a supervisor as her union representative and he wanted a full commitment.

80. The first claimant also gave evidence that during a welfare meeting which took place on 28th of June 2022 when she continued to be accompanied by her trade union representative, Mr George interrupted him, spoke over him and would not allow him to speak on her behalf, even though that was what she had asked him to do. It was her view that these two incidents showed Mr George had a negative attitude towards those who are GMB members or who made use of GMB services. The fact these two incidents occurred was not challenged by the respondent. On the balance of probabilities I find that Mr George did act as the claimant said but this was because of the involvement with a junior staff member and not trade union affiliation.

81. In 2022 the GMB protested against the respondent at St George's Hospital. Mr George's recollection was that the strike was related to a proposed change in pay date for staff but, during discussions between the trade union and the trust management, issues relating to harmonisation of terms was also raised. Both claimants were absent from work supporting the strike and they say from this, as well as their being represented by the trade union at meeting with Mr George that he was aware of their trade union membership.

82. The claimants also suggest that Mr George had difficulty with trade union membership because of his actions with "Kerry". Mr George accepted that Kerry, one of the trade union representatives was suspended by him because during the strike because he took part in a team's call about trade union

matters during what Mr George believed to be his working hours. I find this was because Mr George considered he was addressing a conduct issue and which was connected with trade unionism, but that was not the reason for taking the individual to task.

83. The claimants also questioned Mr George's attitude to trade union membership by considering Kerry's promotion. On 30 June 2023 it appears that Kerry resigned as GMB rep which is said to be for personal circumstances. Kerry is then appointed as night manager and that is announced with effect from 1 July 2023. The claimants suggest that it was a condition of getting a job in the new structure that the individual gave up their trade union position. Mr George said that he had not raised this or applied any such condition. He is in a position to give this evidence as it would have relied on a conversation that he had. The conditionality of the new job is speculation behalf of the claimants and I accept Mr George's evidence that this did not happen.

84. When Mr George asked about his attitude to trade unions, he explained that he himself was a member of a union. He respected every individuals right to be in a trade union and believed that they were a helpful tool for those who needed assistance.

85. Mr Inokoba told me that after the industrial action he had a conversation with Jacinto Jesus. He reported that the comment was made that after the industrial action they would separate management from the supervisors. The respondent did not challenge that this statement was made. The point was not put to the witnesses who were present and Jacinto Jesus had not been called to give evidence. I therefore find that Jacinto Jesus did make this comment. The issue of trade union membership and AFC comparable terms was therefore in the minds of a senior management member in considering the redundancy.

86. Mr George was clear that the business restructure was his idea. While he accepted that he would have run it past his manager, Jacinto Jesus, he confirmed that it was his decision and that he was the sole decision maker on this restructure. I accept Mr. George's evidence on this point and therefore find that Mr Jesus' potential attitude to those who retained AFC comparable terms or who were trade union members did not influence the process. This comment did not therefore play any part in the selection of the claimants for redundancy.

<u>Were the claimants targeted because of their previous allegations, retention of AFC terms and/or because their connection with the trade union?</u>

87. I have set out in some detail the basis for each of the claimant's allegations. On the balance of probabilities I find that this was not the case for the reasons I have given above and for those I set out below.

88. I accept the submissions made by the respondent that it is not unusual in a large employer or an NHS environment to have staff who are trade union members. It is also not uncommon for such members to have their trade union colleague accompany them at formal meetings. I also accept Mr George's unchallenged evidence that he is a trade union member.

89. I have found that the respondent did take steps whenever it could to remove enhanced AFC conditions from staff. On the balance of probabilities, I think it likely that Mr George was irritated by the processes in relation to the terms and conditions for both claimants, and I find on the balance of probabilities that his motivation for any actions was not connected to an issue with trade union membership.

90. While I understand the second claimant's complaints as to what happened to her during the welfare process and I find that it could have been done better particularly with the referral to occupational health, I also find it is not unreasonable for a manager who believe that they may be the cause of someone's absence to seek to find out if they are going to be the subject of a grievance and then not to deal with the matter until that is resolved. As the second claimant and Mr George worked together for some considerable time after her reinstatement and she was not placed on any performance process , nor is any other action taken against I do not accept that Mr George bore a grudge against her for having been reinstated. He could have taken action much earlier had that been the case.

<u>The Business Restructure</u>

91. Mr George explained that once had been in post at St George's for a few months he came to see that the contract could be run more efficiently. Instead of having both catering and cleaning services supervised on a wing by wing basis, it would be more efficient to have a point of contact for catering a separate one for cleaning responsible across all the wings together.

92. He therefore came up with a proposal which removed roles based on dual responsibility for specific geographical areas to replace them with the structure of single roles for a wider area, together with the removal of one position.

93. I was taken to the management structure as it was at the time and the proposed new management structure. The following roles were put at risk.

Patient catering manager (held by Sheridan), service manager for outside areas (held by John), service manager for Atkinson Morley wing (held by Anthony) service manager for as TJ wing, (held by the second claimant), service manager for Lanesborough wing, (held by the first claimant), weekend duty manager (held by Tavis) and patient liaison lead (held by Zoltan).

94. Mr George said that he had put together this proposal towards the end of 2022 and it was announced in January 2023. Employees whose jobs were at risk were invited to a business briefing on 9 January 2023 when they were briefed on the proposed restructure. There were seven employees put at risk and this included both claimants. As both were not present on site on the day of the announcement, they were emailed to invite them to consultation meeting to take place on 10 January. The process would be complete and concluded by 10 February with the new structure implemented on 13 February.

95. The process that had been created was that individuals would be asked about their wishes in respect of the new vacant post created and potentially any other opportunities within the consultation process. Those who wished to apply for the newly created roles would do so. There would be an interview which would be chaired by Mr George and another senior colleague. A points-based marking system would be applied to all candidates who applied for roles. Those who met an appropriate minimum standard would be offered a vacancy. Those who did not meet that standard would not be offered any of the new roles, but instead would be invited to look for redeployment opportunities elsewhere within the respondent.

Consultation with the first claimant

96. It was agreed that an in-person meeting was held with the first claimant on 16 January. This was put back so that her trade union representative could attend. He duly accompanied her at the meeting. At that meeting Mr George let her know that her options were to apply for cleaning manager, manager's assistant, night manager, senior administrator, patient catering manager and patient catering manager's assistant. However it was her evidence that he told that the required times of work would be till 8 PM and would be 5/7 days, this was not compatible with her childcare circumstances. Mr George confirmed that he did require these hours for all the new posts.

97. It was the claimant's recollection that she was also told that if she chose any of these options her contract would change, although the questions and answer document issued with the redundancy pack stating that would be change in benefits. I find that on the balance of probabilities the respondent did intend to offer new terms and conditions without the AFC enhancements

in exchange for these new roles as that is compatible with what I have found to be their practice. That is not inconsistent with benefits being retained as those generally mean things such as pension and like matters, not terms of employment such as sick pay and holidays.

98. The claimant's recollection which is supported by entries from the spreadsheet is that she also asked if there were other vacancies throughout the business such as hostess and domestic roles and why those were not on offer. The first claimant was keen to understand exactly what the roles and salaries were for these vacant roles to allow her to decide whether she wished to apply although, based on her personal commitments, none of the opportunities being offered were possible because of the change in hours.

99. Following the meeting on 19 January Mr George emailed the first claimant with job descriptions of the roles she had expressed an interest in during the consultation interview and asked her to let him know what she wanted to interview for. She then requested further information regarding salary which is sent to her by an email 23 January 2023. The first claimant was also sent a copy of her redundancy pay calculation as an illustration as she had requested.

100. The first claimant states that she was, however, sent only four instead of six of the job descriptions and salaries and rota were also missing. She was not sent details of the domestic or hostess roles. She was also shocked to receive what she believed to be incorrect redundancy calculations which did not reflect the AFC terms she believed she was entitled to. She therefore decided to raise a grievance and on 24 January 2023 sent that to Ms Taylor, Mr George and Jacinto Jesus. The first claimant said this grievance was never dealt with. Ms Taylor explained that it was not something she would deal with as that was a matter for the employment relations HR team. Mr George said that he did not deal with it as he raised a ticket and it was to be dealt with by HR. He then did tell the first claimant that HR would deal with it but in fact their response was that it needed to be addressed during consultation so it was not addressed.

101. In this same email, having raised a grievance, the first claimant set out that she could no longer work in a company on the following grounds, breach of trust, breach of the agreement signed out of court settlement and breach of contract. She insisted her redundancy was calculated correctly. She concluded that she wanted this done so that she could leave. She did not at any time retract this email or indicate that she did intend to stay. She explained that she was distressed following a course of conduct but in her view continued to be part of the redundancy process and therefore there was

still an obligation for the respondent to provide her with alternatives for roles that she might be able to do based on her hours, such as the hostess roles or general redeployment.

102. It is accepted by the respondent that the claimant was not sent these details but instead she was called to a final consultation meeting on 16 March 2023 and following that her employment was ended by reason of redundancy. That was set out a letter of 27 March 2023.

103. Mr George gave evidence that, having received this letter he understood that she did not want to interview for the new roles and wanted to accept redundancy payment. While she attended the redundancy meetings he considered that she had decided to end the process and leave us redundant. It was for this reason that she was not given information about any other opportunities.

104. While I appreciate the claimant was upset and had been on long-term sick, I find that it was reasonable of the respondent to view this letter as a decision not to pursue alternative employment. It follows that it was reasonable of the employer not to send out any further details of redeployment opportunities or to offer any alternative arrangements that would have retained the claimant within the respondent's business that might have arisen.

Consultation with the second claimant

105. The second claimant attended a first consultation meeting on 10 January 2023. Again at that meeting she was advised of potential roles that she could apply for. She interviewed for four roles and was told that she was not successful in any.

106. The interview process was the same for all candidates. They attended an interview which was chaired by Mr George and another colleague and their performance and interview was marked against scoring matrix. That scoring matrix was not included in the bundle. There was only one interview regardless of the number of roles applied for.

107. Mr George explained that it was only if you reached a certain standard that you were potentially offered a role. He therefore carried some vacancies at the end of the process because those who had interviewed did not meet the required standard for these new roles. In the second claimant's case while he accepted that she had a lot of experience he considered that she performed poorly at interview and this was the feedback that she was given. He felt that

she had given brief and vague answers to the situational questions that were posed as part of the interview process. As she had not met the relevant criteria the second claimant was not offered any of the vacant roles.

108. It was accepted that the same process applied to all who interviewed. While the second claimant did not accept that she had performed less well at interview than colleagues, and of course the comparative marking criteria has not been disclosed, on the balance of probabilities I find that this was the case. The second claimant agreed she had not interviewed for a role for a substantial number of years. There were two managers who carried out the process and it was not therefore just a decision of Mr George. I accept the respondent's evidence that on an objective basis the second claimant did not score sufficiently well compared to her colleagues.

109. The second claimant was subsequently sent an email by Mr George giving her a link to a place where all of the vacant roles across the entire respondent's business nationally could be found. He also provided her with a curated selection of those roles that were geographically local to her. These were all in fact at the hospital where she would report to the other manager who had been part of the interview panel.

110. The second claimant did not pursue any of these opportunities but instead accepted the redundancy payment. Both believe that they were treated differently from the others in the pool and that the reality was the new structure was not put in place, nor were hours changed. It is their position that even if the process appears on its face to be run fairly, its motive was to remove them because of the complaints they had raised, the contractual dispute and their trade union involvement and this is illustrated by what actually happened to other people. While I have dealt with and made findings on the matters that the claimants' said supported their view that this was the motivation for what happened to them up to the restructure, I have gone on to make findings about the restructure.

<u>The outcome of the new structure</u>

111. Mr George confirmed that at the end of the consultation process the new procedure was implemented. Staff did not require training to take up these new positions and it was therefore possible to conclude the whole process within four weeks. In fact a number of the roles remained vacant. Of the seven put at risk of redundancy Mr George said that three individuals left as redundant, the two claimants and Tony, two accepted supervisory rather than management roles, in effect a demotion, and two were successful in their application for redeployment to the new management roles. A number of roles remained unfilled following the redundancy and redeployment exercise, that

included the cleaning manager, night manager, senior administrator, and assistant patient catering manager.

112. The claimants challenged this and suggested that there was no redundancy for some people. They pointed in particular to Sheridan, Anthony, Tavis and Zoltan.

113. Mr George agreed that Sheridan was retained. He accepted that on the organisational charts he had provided as part of the redundancy pack it appeared that there was no change to the role at all. He explained that he had forgotten to add onto the organisational chart that it was also responsible for all of the hosts or hostesses. It was therefore a different job. It was his position this was a genuine redundancy and redeployment.

114. The claimants' position is that they could have been retained instead of Anthony, but they were not given this opportunity. They believe the reason for that difference in treatment is that he is neither a trade union member nor on AFC terms. Mr George explained that Anthony was not retained. Mr George said that Anthony was also redundant but some six weeks after he left was re-engaged by the respondent through an agency to provide cover. This was not, however, as a service manager but as a supervisor. Mr Inokoba who continues to work at the hospital told me that Anthony did not leave during any period and was carrying out a service manager role. The respondent did not provide any paperwork to evidence this.

115. Mr George's attention was directed to a letter written by this individual on 15 August 2023 when his clearly investigating an informal disciplinary issue and he signs himself as Service Manager. Mr George said that this was an error and did not reflect the individual's actual role. He was using an old template that had not been updated. On the balance of probabilities I accept that is the likely explanation.

116. Mr George gave evidence that Zoltan was not continuing with his role as he had accepted a lower position as a supervisor. Mr Inokoba said that from his observations, Zoltan was doing the same role and was now running Atkinson Morley wing which is just what a service manager would have done

117. Mr George said that Tavis had also stepped down to supervisor role and was getting to work the same shifts at the weekend and that was therefore not redundancy. Mr Inokoba told me that believed that in his role as auditor weekend duty manager Tavis is in effect carrying out the same role as before. He also told me that staff who had been retained were not working at weekends, nor were they working until 8 PM. It was his perception that the restructure had not been implemented fully to this date and that the changes

that have been suggested to working patterns were not in place.

118. The claimants, having left employment are not in a position to understand the nature of roles being carried out or indeed to have details of the time and date on which work is done. Mr Inokoba, as he continues to be employed would have some insight into this. I find, however, that this would be based on his observations of what he saw being done in the hospital at the times he was there.

119. I therefore prefer the evidence of Mr George on the question of what duties staff were carrying out and on what rota pattern as he has direct knowledge as he is responsible for these matters. I find therefore that as Mr George said, three individuals left as redundant, the two claimants and Tony, two accepted supervisory rather than management roles, in effect a demotion, and two were successful in their application for redeployment to the new management roles. I also find that the new roles worked on a different shift pattern.

120. The first claimant had not elected to apply for any of the four vacant roles at manager level because of the hours that applied to them. Mr George was taken to the advert and job details for the role of Night Manager which was posted after the role remained unfilled after the redundancy process. He accepted this showed shorter hours and weekday working. Mr George said this was a mistake and did not reflect the required hours and also confirmed that all staff in the new structure were working on a rotating basis to cover these longer hours. This does appear to be respondent whose paperwork and HR systems are neither fast nor particularly responsive. On the balance of probabilities I find it likely that there was an error in the job advert that did not reflect the actual time is required.

121. I find therefore that the new structure was implemented, successful candidates working in different roles on different hours. A number of mistakes were made in terms of paperwork which give a different impression that I'm satisfied that those are mistakes and do not reflect the position. It follows from this finding of facts that there is therefore no evidence that what happened to other people was different from the treatment given to the two claimants and therefore it cannot support their view as to the motivation behind their redundancy.

Relevant Law and submissions

Redundancy

122. Redundancy is defined in S.139(1) ERA The statutory words are:

> ‘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.’

123. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

124. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

> "... 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.

125. In Williams and Ors v Compair Maxam Ltd 1982 ICR 156, EAT,(which is only guidance, not rules set in stone) the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These are

> a) whether the selection criteria were objectively chosen and fairly applied
> b) whether employees were warned and consulted about the redundancy
> c) whether, if there was a union, the union’s view was sought, and
> d) whether any alternative work was available

126. The same position applies to redundancy dismissals as to all dismissal under s 98ERA . In Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23

tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer.

Dismissal on trade union grounds

127. The right not to be dismissed on trade union grounds is contained in S.152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A). This provision states that a dismissal will be automatically unfair if the principal reason for it is that the employee:

a. was, or proposed to become, a member of an independent trade union

b. had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time

c. had made use, or proposed to make use, of trade union services at an appropriate time

d. had failed to accept an offer made in contravention of S.145A or S.145B(unlawful inducements relating to trade union membership or activities or collective bargaining), or

e. was not a member of any trade union, or of a particular union, or of one of a number of particular unions, or had refused, or proposed to refuse, to join or remain in a union.

128. In contrast to 'ordinary' unfair dismissal cases the question of whether the employer was reasonable in dismissing does not arise. Once the reason (or principal reason) for dismissal is shown to be one of those specified in S.152(1) TULR(C)A, the dismissal is deemed to be automatically unfair.

Failure to provide written statement of particulars

129. Section 38 EA 2002 states that a tribunal must award compensation to a worker where, on a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA — Ss.38(1)–(3). An award under S.38 is not dependent on a claim having been brought under S.11 ERA for a breach of S.1. It is sufficient that the tribunal make a finding at the hearing that the employer was in breach of S.1 at the time the main proceedings were begun.

130. Where the tribunal finds that the employer breached its duty to provide full and accurate employment particulars, it must award the 'minimum amount' of two weeks' pay (subject to exceptional circumstances which would make an award or increase unjust or inequitable), and may, if it considers it just and

equitable in the circumstances, award the 'higher amount' of four weeks' pay — S.38(2)-(5).

131. In Costco Wholesale UK v Newfield EAT 0617/12 the Appeal Tribunal held that the tribunal had not erred by awarding the maximum of four weeks' pay for the employer's failure to provide a S.1 statement. The tribunal had taken into account the fact that CW UK was a large employer that had no excuse for failing to provide employees with clear documentation setting out the matters required by S.1. It had also noted that the employer's failure had led to difficulty in establishing what contractual arrangements existed concerning what hours N was required to work.

Breach of contract

132. The contractual jurisdiction of employment tribunals is governed by S.3 ETA, together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 . Under S.3(2) ETA and Article 3 of the Order, for a tribunal to be able to hear a contractual claim brought by an employee, that claim must arise or be outstanding on the termination of the employee's employment, and must seek one of the following:

- damages for breach of a contract of employment or any other contract connected with employment
- the recovery of a sum due under such a contract, or
- the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

Conclusion

133. Having made findings of fact and set out what I believe to be the relevant law I now must apply that to these findings. Considering the issues list my conclusions are as follows.

Unfair dismissal

134. I'm satisfied from my findings of fact that that the business case presented by Mr George was a legitimate one and a reflection of his thoughts on how to make the service more efficient. I'm satisfied that it required a significant change in job roles as well as the reduction in one position and I conclude therefore that dismissal in connection with the reorganisation is, on its face, dismissal for a fair reason, namely redundancy. It meets the statutory definition.

135. In considering the procedure adopted I must consider only whether the employer acted reasonably in carrying out that redundancy and not substitute my view for that of the employer. I must particularly consider certain aspects,

the selection process, whether employees were warned or consulted and whether any alternative work was available.

136. I conclude that there is a clear objective logic in selecting the roles that were to form the pool. I have accepted Mr. George's explanation that he wished to combine both cleaning and catering and move away from a geographic structure which separated those functions. I conclude that the pool is therefore a reasonable one for an employer to select.

137. The process itself was a business announcement to all staff followed by with individual consultation meetings supported by HR, the opportunity to attend with a trade union representative and the opportunity to raise questions. There is no trade union recognition agreement and therefore collective consultation was not required as the potential pool of those redundant was less than 20 people. Again I conclude that the process was objectively fair and reasonable. It is within the reasonable range of responses for an employer to seek to conclude a process within four weeks.

138. I conclude therefore that employees were warned and consulted about the redundancy and that the selection of those in the pool was fairly applied. It was not contested that there was then a second selection criteria applied to those in the pool. Those who chose to interview for the newly created vacant roles were subject to a marking criteria. As referred to above, I have found that the same criteria was applied to all who interviewed accepted the respondent's evidence of the second claimant contact comparative performance. I therefore conclude that this selection criteria was objectively chosen and fairly applied.

139. On its face therefore, I conclude that the respondent had a genuine redundancy situation, the process it followed was a fair and reasonable one in all circumstances. I have found that there was a new structure, it was put in place and that hours of work and days were changed. I have found that those who remained were not carrying out the same roles.

140. I've also found that that the redundancy of the claimants was not due to any grudge or alternative motivation that Mr. George held against either or both of them because of those disputes at work. There was a genuine redundancy. The second claimant did not succeed at interview. It was reasonable for the respondent to understand the first claimant's email to indicate that she was not interested in remaining with the company and therefore no alternative roles need to be offered to her.

141. The claim of unfair dismissal under section 98 Employment Rights Act 1996 therefore does not succeed for these reasons for either claimant.

Automatically Unfair Dismissal

142. The claimants have suggested that underlying the business case and the reason for the selection of the pool and the reason that they were not

offered the same options of alternative employment as the others was because of an ulterior motive on behalf of Mr. George. I have dealt with this in my findings of fact and briefly above. I set out my conclusions again in this section focusing specifically on the trade union aspect.

143. While the claimants have produced some evidence in support of their view that the respondent did not want to have trade union membership amongst the management population I have found that Mr. George was not motivated by this in his creation of the business case or the way in which it was rolled out. As I have found that this was a legitimate redundancy and implemented on a fair and objective basis I conclude that the two claimants were not dismissed either because they were union members or had made use of union services. They were not selected for dismissal because they were union members or had made use of union services. The first claimant was selected for dismissal because she did not apply for any other roles having sent an email to the respondent which I have found it was reasonable for them to understand as being her opting out of the process. The second claimant was made redundant because she did not succeed in the roles that she applied for and did not apply for any others.

144. The claims of automatically unfair dismissal under section 152 and under 153 of TU&LR (Consolidation Act) do not succeed for either claimant.

Breach of contract.

145. I have set out very detailed findings of fact as to whether either one or both of the claimants were entitled to broadly comparable AFC terms and if so did this include the enhanced redundancy. On the facts that I have set them out I have found that they did. I conclude therefore that the was a breach of contract and the respondent failed to pay the claimant's their contractual redundancy pay.

146. The claims for breach of contract therefore succeed for both claimant's.

Statement of employment particulars

147. As the respondent's counsel conceded in submissions, based on the respondent's own evidence there was a failure provide some of the required information that must be within a statement of written particulars. On my findings of fact I have found that the respondent did not comply with its obligations to provide full particulars from the start of each claimant's employment.

148. The claims for failure to provide a statement employment particulars therefore succeed.

Remedy

149. Having reached these conclusions I then addressed remedy with the parties. The starting point for a breach of a failure to provide written

particulars as a minimum two weeks' pay and I may award up to 4 weeks' pay for believe it is just and equitable to do so. On the facts of this case I determined that an award of four weeks' pay was appropriate. I have made such an award for both claimants. These calculations were agreed between the parties.

150. In reaching this decision I took into account that this is a very large employer with adequate HR resources. I also took into account the fact that they understand their obligation to issue terms under section 1, Ms Taylor had confirmed that the document they have provided to the first claimant was intended to be a compliant document.

151. For the first claimant I also took into account my finding that the respondent had a policy of not providing accurate terms to those members of staff who enjoy the benefit of enhanced AFC terms. The second claimant I took into account that she had not been provided with any documentation at all. I also took into account the fact that both claimants had raised the question the contract status during their employment and the respondent had therefore had opportunities to rectify the matter but had not done so. Had they done so much of this litigation could have been avoided.

152. Given my finding that both claimants were entitled to AFC redundancy pay the way in which that is calculated is set out clearly in the AFC Handbook. Essentially the claimants are entitled to a month's pay for every complete year of service capped at a maximum of 24 months. The way in which a week's pay is calculated is also set out and the parties agreed the calculation between them. For the first claimant the figures were agreed as £18,115.48. The second claimant it was agreed as £33,873.45. As this exceeds the maximum compensation that I can award for breach of contract in this jurisdiction I therefore reduce the amount to £25,000.

153. The first claimant suggested to me that she also had a claim for breach of contract for holiday pay. I reviewed the issues list and note that while the issue is headed breach of contract it is identified as redundancy pay and the specific question I was asked to consider related to redundancy terms. I took the view therefore that there was no claim before the tribunal in relation to any other financial award that might arise from the finding that the claimants are entitled to AFC terms.

Case Number: 2301230/2023, 2301443/2023 & 2301623/2023

Employment Judge McLaren
Date 03 May 2024

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