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EMPLOYMENT TRIBUNALS

Claimant: Ms C Connell

Respondent: Mid Essex Hospitals Services NHS Trust

Heard at: East London Hearing Centre

On: 11-13 July & 6 August 2018

Before: Employment Judge Brown (sitting alone)

Representation

Claimant: Ms T Barsam (Counsel)

Respondent: Ms S Keogh (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

- (1) The Respondent constructively dismissed the Claimant.
- (2) The reason or principal reason for dismissal was redundancy.
- (3) The Claimant is entitled to a redundancy payment because none of the posts she was offered constituted suitable alternative employment.
- (4) The Respondent dismissed the Claimant unfairly.

REASONS

Preliminary

1 The Claimant brings claims for constructive unfair dismissal and a statutory redundancy payment. The parties agreed a list of issues for determination by the Tribunal. They were:-

1. Did the acts and/or omissions of the Respondent, its employees, or its agents constitute a fundamental breach of the Claimant's contract of employment amounting to a repudiation of that contract? The Claimant relies on a repudiatory breach by reason of redundancy, alternatively a breach of the implied term of trust and confidence and/or a breach of the Respondent's Change Policy. The alleged acts upon which the Claimant relies as constituting such breaches (individually or cumulatively) are [paragraph 47 of the Particulars of Claim]:

- a) The deletion of the Claimant's substantive post and the removal of her duties;
- b) An inadequate and unfair consultation process, including:
 - (i) Failure to consider the Claimant's full role and duties when developing the new structure;
 - (ii) Failure to comply with the Change Policy in giving other employees a right to give expressions of interest but not giving the Claimant that opportunity;
 - (iii) Failing to provide sufficient notice and adequate information in respect of posts purported to be suitable offers of alternative employment.
- c) Failure to carry out an adequate matching exercise;
- d) Failure to put the Claimant at risk of redundancy at the earliest possible opportunity;
- e) Failure to respond to the Claimant either at all or in a timely manner or to provide full and complete information to the Claimant;
- f) Removing the Claimant's duties from her.
- g) Communicating with the Claimant in a misleading way as follows:-
 - (i) Regarding the extent to which Managing Director Lisa Hunt was consulted with in advance of the consultation commencing;
 - (ii) Bernard Scully telling the Claimant that she would be offered her role, to remain for a 12 month period, after which her employment would terminate;
 - (iii) Lisa Hunt telling the Claimant that her role had been taken "out of scope";
 - (iv) Bernard Scully and Lisa Hunt telling the Claimant that there

was not suitable alternative employment;

- (v) On 13 June Jennifer Opare-Aryee telling the Claimant that the matching template had been signed off and would be used by the panel in the matching exercise;
- (vi) Jennifer Opare-Aryee telling the Claimant that her job had been deleted but that she was not at risk.

Communicating with the Claimant in a dishonest way limited to the letter of 3 August 2017

- h) The Respondent writing to the Claimant on 14 August 2017 despite having been informed by her GP that it should refrain from all work-related communication;

2. If the Respondent did commit a fundamental breach of the Claimant's contract of employment amounting to a repudiation of that contract, did the Claimant resign in response to such breach?

3. If so, did the Claimant nevertheless delay in resigning and thereby affirm her contract of employment?

4. If the Claimant was constructively dismissed, what was the reason or principal reason for her dismissal and is it a potentially fair reason within section 98(1)(b) & (2) of the Employment Rights Act 1996 ('ERA')?

5. Was any such dismissal fair within the meaning of ERA, s.98(4)?

Redundancy – entitlement to redundancy payment under Section 164 Employment Rights Act 1996

6. If the Claimant was dismissed and the reason for dismissal is redundancy, is she entitled to a redundancy payment?

7. Was the Claimant offered the following posts:-

- (a) Programme Director, a Band 8D post (job description at pages 476e-478l of bundle);
- (b) Remain in current post with mutual agreement to minor changes to duties;
- (c) Director of Operations based at Basildon Hospital (job description at pages 621-647 of bundle);
- (d) Director of Operations based at Southend Hospital (job description at pages 732-738 of bundle); and
- (e) Programme Director for Tele-Tracking based at Mid-Essex.

8. If so, do any of the posts set out above constitute suitable alternative employment?
9. If so, did she unreasonably refuse any such posts?

Remedy

10. If the Claimant was unfairly dismissed:
 - (a) to what basic award is she entitled under ERA, s119; and
 - (b) what compensatory award would be just and equitable in all the circumstances having regard to the loss sustained by the Claimant under ERA, s123?
11. In particular:
 - (a) has the Claimant reasonably mitigated her losses; and
 - (b) should any compensatory award be reduced to take account of the chance that the Claimant would have been dismissed in any event.
12. If the Claimant is entitled to a statutory redundancy payment, what is the amount of that payment?

2 The Tribunal heard evidence from the Claimant. It heard evidence from Catriona Stevenson, formerly Head of Human Resources at the Respondent; and Bernard Scully, former Director of Human Resources at the Respondent. Both gave evidence for the Claimant. For the Respondent, the Tribunal heard evidence from Samantha Neville, Clinical Informatics Lead Nurse and member of the job matching panel; Danny Hariram, Group Director of People Strategy and Organisational Development for the Mid Essex, Southend and Basildon Institute; and Thomas Abell, Chief Transformation Officer and Deputy Chief Executive of the Mid Essex, Southend and Basildon Institute (“MSB Institute”).

3 There was a bundle of documents in two volumes.

4 I timetabled the case at the outset and the evidence was completed within the days allocated. The parties were not both able to attend at a further date within a reasonable time to make closing submissions, so both parties submitted written submissions and written replies to the other’s submissions.

5 I reserved my decision and set down a provisional Remedy Hearing for 15 and 16 November 2018. I gave directions for preparation for that hearing as follows:-

- 1) By **4pm on 17 October 2018**, the parties shall disclose all documents in their possession and control, relevant to remedy.
- 2) By **4pm on 31 October 2018**, the Claimant shall serve an

updated schedule of loss on the Respondent, calculated to the last day of the Remedy Hearing.

- 3) By **4pm on 7 November 2018**, the parties shall exchange any further witness statements, relevant to remedy.
- 4) By **4pm on 7 November 2018**, the Respondent shall serve a counter schedule of loss on the Claimant, calculated to the last day of the remedy hearing.

Findings of Fact

6 The Claimant commenced NHS employment in 1981. She was employed by the Respondent from 1 December 2014. The Claimant was initially employed as Transformation Manager and became Associate Director of Quality Improvement on 1 April 2015. Both posts were Band 9 posts in the NHS pay band structure.

7 The Claimant had a written contract of employment (pgs.125-130) and this, together with her appointment letter (p.124a) and the Agenda for Change NHS Terms and Conditions of Service Handbook (pgs.142-148) formed the Claimant's employment contract with the Respondent.

8 The Respondent is an NHS Trust. It had undergone a Care Quality Commission (CQC) hospital inspection between November 2014 and March 2015 and had received a poor inspection report with conditions applied to its registration. The Claimant told the Tribunal, and I accepted, that she was specifically recruited to lead the Respondent in developing its quality and service improvement plan and strategy following this poor inspection. The CQC is the independent statutory regulator of health and adult social care in England. The Claimant told me, and I accepted, that her role at the Trust involved both monitoring and overseeing CQC compliance and improvement activities and ensuring that the Trust was compliant with all regulatory requirements.

9 The Claimant had a job description for her post as Associate Director – Quality Improvement (pgs.131-141). In its preamble, "Overview of Responsibilities", the Claimant's job description said:

"The post holder will be responsible for both leading and governing major programmes of work across the organisation with the aim of ensuring clinically sustainable and financially viable services...

They will have a key role in driving innovation and ideas generation within the Trust taking an active role in developing solutions with the Trust's Transformation Group and working in partnership with Operations Directorates to implement them ...

Day to day responsibilities will include the planning, facilitation and implementation of specific projects ...

- Be accountable for and provide support to the operational and clinical teams in service and performance improvement by

implementing and facilitating sustainable change...

- Design and plan change programmes and projects in collaboration with the Transformation Programme Board and Directorates ...
- Develop effective working relationships with key external stakeholders where appropriate (including ... CQC ... NHS collaborative & other improvement agencies);
- Development of the Trust quality improvement strategy that supports the development of capacity and capability across the organisation ..." (pgs.131-132).

10 Specific responsibilities in the job description included:

- "Provide relevant data analysis and benchmarking from external organisations to assist with setting appropriate trajectories and targets.
- Provide quality improvement leadership and support to the Trusts CIP programme that ensures sustainable change management and delivery ...
- To develop expert knowledge and training in investigation into adverse performance and emerging risks and utilise this expert knowledge to analyse highly complex facts or situations relating to both individual services and the Trust as a whole ...

Corporate and Management Responsibilities

- Oversee improvement activities that contribute to the trusts compliance with CQC regulatory requirements ...
- Identify opportunities to develop new roles in support of quality improvement and service delivery ...

Communication

- Lead and/or support/contribute to the design and development of written policies, guidelines, procedures or publications in relation to the improvement agenda;
- Communicate with external agencies to ensure the trust is compliant with all reporting requirements ..." (pgs.132-133).

Under the heading: "Other Information", the job description said that the post holder:

- may be required to carry out other relevant duties as required ..."

The job description said that the post holder would be required to participate in the on-call Directors rota. It also said:

“This job profile is not a definitive or exhaustive list of responsibilities but identifies the key responsibilities and tasks of the post holder. The specific objectives of the post holder will be subject to review as part of the Appraisal and Development Plan process.” (p.134)

11 The Claimant told me, and I accepted, that approximately 50% of her pre-restructure role involved improvement activities related to CQC compliance. The Claimant took responsibility for monitoring and overseeing CQC compliance and improvement activities, as part of the CQC inspection regime. She carried out investigations, designed improvement plans and ensured actions were taken according to those plans. The Claimant’s role was designated a “Director Equivalent Role” under the Trust’s Fit and Proper Person policy (p.152). The Claimant was a senior manager and a member of the Trust’s Site Directors team.

12 The Claimant had line management responsibility for around 8 individuals in the Project Support Office and Quality Improvement Team, including quality improvement facilitators. However, she did not have a team in place and was not line managing any member of staff at the time of the Respondent’s 2017 restructure. That restructure is the context for these proceedings.

13 The Claimant acknowledged, in evidence, that her pre-restructure role required flexibility, so that she worked on different tasks as required. She also acknowledged that the very significant portion of her time which she devoted to CQC activities, as required by the Respondent, would not have been apparent from her job description, which simply listed her CQC activities as part of a long list of other responsibilities.

14 The Person Specification for the Claimant’s Associate Director – Quality Improvement role required that the individual holding the post be educated to Doctorate level or equivalent experience and have extensive knowledge of quality improvement techniques and methodology acquired through post graduate diploma or equivalent experience. The Claimant did not have a PhD, but did have relevant equivalent experience. She had gained 11 years of experience at General Manager/Associate Director level and a further 10 years of quality improvement experience.

15 The Respondent Trust worked alongside Southend University Hospital NHS Foundation Trust and Basildon and Thurrock University Hospitals NHS Foundation Trust. In February 2017, the Mid Essex, Southend and Basildon Institute (“MSB Institute”) was established, with the aim of delivering a consistent approach across all three Trusts. An engagement and co-design event was run across the three Trusts in February 2017 (pgs.172-174). The event was described as being for the purpose of “sharing current thinking regarding the purpose, principles and key priority work areas of the Institute.” It was envisaged that this would inform the future structure of the Institute (p.174). It was also envisaged that, in the future, there was likely to be organisational change across the three Trusts and consequent consultation on restructuring with employees.

16 Following this engagement and co-design event, senior management of the

MSB Institute proposed restructuring the management and services of the Institute. The Claimant was not told about the proposed restructure until 6 April 2017, when she was asked for the names of Band 8A staff who would be affected by a consultation starting on 10 April 2017.

17 On Friday 7 April 2017, the Claimant, amongst other managers, was invited to a pre-consultation meeting to be held on Monday 10 April, to discuss the launch of consultation for the restructure of three teams: the Project, Programme and Portfolio Governance and Delivery team; the Improvement and Change Management team; and the Essex Success Regime Trusts team (p.206). The Claimant was away from work on annual leave and did not pick up the invitation until after the meeting had already taken place on 10 April.

18 On 11 April 2017, the Respondent sent the Claimant and others a consultation paper on the formation of the MSB Institute and restructure of the three teams discussed on 10 April (p.207). The consultation document included a chart of the current establishment (p.211), as well as a chart showing the contrast between current staff roles and proposed new roles (p.214). That latter table recorded that there were currently two Band 9 staff in the existing establishment, but no Band 9 roles proposed in the new structure, so that two Band 9 roles would disappear.

19 It seems that the Claimant's role was identified in the current establishment wrongly as "Director of Nursing". New job descriptions were circulated on 12 April 2017 (p.232). The consultation document said that 4 Band 8D posts were proposed in the new structure – an increase of 3 band 8D roles.

20 A Programme Director Band 8D job description was circulated, encompassing 3 different 8D posts: Clinical Redesign and Reconfiguration Programme Director, Corporate Clinical Support Programme Director, and Compliance Performance Improvement and CIPS Programme Director.

21 The Clinical Redesign and Reconfiguration Programme Director was described as being responsible for leading a significant major change programme across the three sites, including the design and implementation of standardised pathways within each site and designing and planning and implementing service and pathway change between sites as part of consolidation activities. The Corporate Clinical Support Programme Director was described as being responsible for leading a significant major change programme across the three sites, including the redesign and transformation of Corporate and Clinical Support Services. The Compliance Performance Improvement and CIPS Programme Director was described as being responsible for leading "business as usual" improvement and change management activities across three sites.

22 On 18 April 2017 the Claimant attended a meeting, held by Mr Tom Abell, for staff affected by the consultation. Mr Abell sent the Claimant a document entitled, "Priorities and Process to Deliver Change in 2017/18," which had been published on March 2017 (p.291b). On 19 April 2017 he apologised for not having sent the document to her previously.

23 The Claimant attended a first individual consultation meeting on 20 April 2017.

At the meeting, Mr Abell said that he had discussed the Claimant's role and responsibilities relating to CQC compliance and clinical outcomes with Diana Sarkar, Group Chief Nursing Officer. Mr Abell said that those responsibilities would not be included in the revised MSB Institute structure, but that Ms Sarkar would be retaining CQC responsibilities within the nursing structures. Mr Abell said that he had not been aware that these matters had sat within the Claimant's responsibilities. The Claimant said that she felt that her post had been made redundant because there would be significant changes in her job content, role and responsibilities; the new posts in the proposed restructure were substantially different to her current role. The Claimant asked for confirmation in writing that her role had been made redundant. Both Mr Abell and Jennifer Opare-Aryee said that, until the consultation was completed and the outcome known, the Claimant was only potentially at risk of redundancy.

24 The Claimant asked to see Bernard Scully, Trust Director of Human Resources, after the meeting on 20 April 2017. She told him about discussions with Mr Abell and about her existing role and the new proposed roles in the reorganised Institute structure. Mr Scully told the Claimant that, in his view, the Band 8D Programme Director roles were not suitable alternative employment for the Claimant in terms of their pay, status, and job role content, knowledge and experience.

25 A revised consultation document was sent to affected employees on 26 April 2017 (p.301 to 322). When the revised consultation document was sent to staff, they were told that the consultation period had been extended by 12 days (p.301).

26 On 21 April 2017, Jennifer Opare-Aryee requested information about the Claimant's grade, job title, job description, service and contract.

27 In early May Mr Abell discussed the Claimant with Lisa Hunt, the Claimant's line manager. Ms Hunt canvassed the possibility of keeping the Claimant in her role "as is" and removing the Claimant from the scope of the consultation. Mr Abell asked Ms Hunt to have a conversation with the Claimant about this. Lisa Hunt invited the Claimant to a meeting on 10 May 2017, during which Ms Hunt told the Claimant that her job would remain "as is" and that the Claimant would be "out of scope". Ms Hunt also told the Claimant that Ms Hunt herself had not been aware of the consultation and that Mr Abell had not been aware of the Claimant's roles and responsibilities until Ms Hunt had enlightened him. The Claimant said that she did not understand what "out of scope" meant; if the plan was to continue with the proposed structure, then the Claimant believed that aspects of her current job had been carved out and included in responsibilities of new proposed 8D and 8C banded posts. Those aspects included the Claimant's responsibilities for service and clinical redesign, training and development and the transformation steering group. The Claimant said that, on the other hand, if those responsibilities were to remain with the Claimant and the Respondent was to be managed independently of the new MSB Institute structure, then potentially the Claimant would be sitting in a position of isolation and/or potential conflict. Ms Hunt was unable to clarify how Mr Abell saw the new structure operating.

28 The Claimant attended a further one-to-one meeting on 11 May 2017 (pgs.498f to g). She was represented at this meeting. Her representative asked whether the Claimant's job description had been reviewed prior to the consultation commencing. Mr Abell confirmed that it had not been. The representative said that the key difference

between the Claimant's old role and the new roles related to CQC duties and clinical outcomes; the Claimant felt that 50% of her current job role was being lost in the proposed restructure.

29 It did not appear, from the notes of the meeting on 11 May 2011, that Mr Abell explained to the Claimant what would happen with the Claimant's CQC duties.

30 I noted that, later, on 20 May 2017, the Claimant wrote to Mr Abell saying:

"It has been confirmed that regulatory compliance related to CQC and clinical outcomes responsibilities do not form part of this role therefore it is unclear what compliance is included" (p.353).

31 I decided that Mr Abell did not tell the Claimant what was envisaged with regard to her CQC responsibilities. I also concluded, from the notes of the 11 May meeting, and having heard Mr Abell and the Claimant's evidence, that, during this consultation meeting, Mr Abell did not raise the possibility of the Claimant staying in her current role.

32 The Claimant sent a written response to consultation to the Respondent on 20 May 2017 (p.352). She set out a number of questions with regard to the new Band 8D Programme Director roles.

33 On 7 June 2017, Jennifer Opare-Aryee sent the final proposed single structure for the MSB Institute to affected individuals, along with revised job descriptions. She said that these job descriptions still needed to be formally "banded". Ms Opare-Aryee sent out "expression of interest" forms, for the affected employees to complete. She said that these needed to be submitted by 15 June 2016. Ms Opare-Aryee said the matching and selection process would start on 19 June and that the Respondent was intending to implement the new structure by 3 July 2017. The new structure included 4 Programme Director posts; Programme Director responsible for Clinical Redesign and Reconfiguration and one site team; Programme Director with cross-Trust responsibility for Quality, Performance and Cost Improvement Programmes and one site team; a Programme Director responsible for Corporate Support Programme and one site team and a Programme Director responsible for Transformation Strategic Projects Unit and Clinical Support. This did not have responsibility for a site team (p.369). The Claimant's Band 9 post was not included in the new structure.

34 On 13 June 2017 the Claimant attended a consultation outcome meeting. Ms Opare-Aryee told the Claimant at this meeting that the Claimant's job had been deleted. Mr Abell told the Tribunal that he apologised to the Claimant and tried to correct what Ms Opare-Aryee had said. However, this did not appear in the notes of the meeting – whether in the Respondent's notes or the Claimant's own notes. I noted that, when the Claimant wrote to Mr Abell on 16 June 2017 following the meeting (p.484), she recorded Ms Opare-Aryee's statement, "your job has been deleted", Mr Abell did not respond to the Claimant, saying that the Claimant's job had not been deleted. I therefore did not accept Mr Abell's evidence that he corrected or clarified Ms Opare-Aryee's statement.

35 At the 13 June meeting Ms Opare-Aryee told the Claimant that the Respondent

was confident that the Claimant would match one of the 8D posts. She said that the Claimant's "at risk" status could not be confirmed until the matching process to those posts had been completed. The Claimant asked for a copy of the weighted matching criteria. Ms Opare-Aryee initially responded that that information was currently confidential, but then agreed to send the Claimant the criteria which had been shared with the Respondent's senior team and executives. The Claimant commented, during the meeting, that it was unreasonable to expect staff to submit expressions of interest in advance of banding and matching, because staff might express interest in posts for which they were not eligible. Mr Abell agreed that "expressions of interest" would be deferred until after the banding process had been carried out. Ms Opare-Aryee confirmed, in an email on 15 June 2017, that the Claimant would not have to submit an expression of interest at that stage (p.483).

36 On 16 June 2017 the Claimant wrote to the Respondent, setting out her concerns and asking for confirmation of her at risk status within seven days (p.484 to 485). The Respondent did not reply to that letter.

37 The Respondent's Organisational Change Policy was part of the Claimant's terms and conditions of employment (p.55). It provided:

"9 Appointment/matching to posts in the new structure

- Where the outcome of the consultation means that there will be changes in roles/positions in the structure, it will be necessary to identify clearly the posts that are the same or substantially the same and those that are new. It can then be determined where employees can be matched to posts and what staff will be classified as 'At Risk'." (Bundle page 67)

38 The policy also stated that posts will be categorised as, either,
"Old posts" - posts which are no longer required in the new structure and may therefore be declared redundant; or
"similar posts" - posts which substantially remain the same as old posts "i.e. 65% or more of the same in terms of job content, responsibility and accountability, grade status and requirement for skill, knowledge and experience ..."; or
"new posts" - posts which are substantially different from old posts in terms of job content, responsibility and accountability, grade and so on.

39 The policy provided that, in order to categorise the post appropriately, ".. the following steps need to be taken:-

- (i) Job descriptions and person specifications will be drawn up for all new posts, and for similar posts which require amended job descriptions. These will be matched or evaluated in accordance with the Trusts job evaluation processes.
- (ii) The Trust will go through a matching process to determine the "fit" between an employee's existing post and the vacant position and determine whether it is suitable alternative employment ("similar post").

- (iii) “A matching exercise compares the pay, status, and hours of work, location, working environment, areas of work, skills, knowledge and levels of responsibility/accountability of the current and new role(s).”
- (iv) Employees cannot be placed in a more advantageous position as a result of matching, so that employees cannot be offered suitable alternative work of a higher pay band.
- (v) Automatic matching will occur when the new post is substantially similar to the job being made redundant.
- (vi) Where the pool of affected employees exceeds the number of posts available for matching the Respondent, will determine the method by which staff are be selected for redeployment / redundancy in consultation with unions” (pgs.67 to 68).

40 On 20 June 2017, Catriona Stevenson, Samantha Neville and Andrea Diable carried out a matching exercise for the Claimant’s old and new posts under the Respondent’s Organisational Change Policy. Neither Ms Neville nor Ms Stevenson had undertaken training on carrying out matching processes under the Organisational Change Policy. They had undergone training regarding carrying out Job Evaluation exercises. The matching panel were not provided with guidance as to how to carry out matching under the Organisational Change Policy. Both Ms Neville and Ms Stevenson raised concerns about the absence of a template on which to record their findings.

41 On the evidence before the Tribunal, it appeared that the panel carried out the matching exercise by identifying how many of the parts of the generic Programme Director job description appeared in the Associate Director – Quality Improvement job description. The panel agreed that more than 65% of the new job description appeared in the Claimant’s old Associate Director job description, but that the job did not match in terms of pay band, or education and qualifications required.

42 However, having heard the evidence of Ms Neville and Ms Stevenson, I decided that the panel did not compare the Associate Director – Quality Improvement role with the Programme Director Job Description (pp476e to 476l), to identify how many of the Associate Director duties also appeared in the Programme Director job description. Ms Stevenson told the Tribunal: “We didn’t look both ways. We did look at the whole but when we were looking for a percentage match we looked to see whether the new role existed in the old role.”

43 Ms Neville was cross-examined in some detail about duties in the Associate Director – Quality Improvement job description, and whether they were reflected in the Programme Director job description. She agreed that many did not.

44 Initially in cross-examination, Ms Neville said that she remembered ticking off the old job description parts which were covered but, then, when asked whether large parts of the job description were not “ticked off”, she said that she could not comment. Ms Neville agreed that “leading and governing major programmes of work cross the organisation with the aim of ensuring clinically sustainable and financially viable services” was not in the new job description. “Having a key role in driving innovation

and ideas generation within the Trust, taking an active role and developing solutions with the Trust's transformation group" was not in the new job description. She agreed that being "...accountable for sustainable change", as opposed to, "acting as a leader for change", was not in the new job description. She agreed that "designing and planning change programmes and project in collaboration with the transformation programme board and directorates" was not in the new job description, insofar as it related to transformation boards. She agreed that "being responsible for Trust Quality Improvement Strategies" was not in the new job description, nor was specific responsibility for Data Analysis and benchmarking from external organisations. She agreed that "developing expert knowledge and training in investigation into adverse performance and emerging risks" was not in the new job description, nor was participation in the Trust Safety and Quality Ward, nor Department Inspection Programmes. Also missing was "overseeing improvement activities which contributed to the Trust compliance with CQC regulatory requirements", as opposed to simply "supporting" these. She agreed that "leading and/or supporting or contributing to the design and development of written policies guidelines, procedures or publications in relation to the Trust improvement agenda" did not appear in the new job description. She agreed that being part of the Director "On call" Rota was not in the new job description.

45 Ms Neville accepted that the pay band for the new role was significantly lower than that of the old role and that there was a difference in the hierarchy between the old and new roles. She agreed that, at the time, the panel had considered that there was no match regarding education and qualifications required for the roles. Ms Neville agreed that the panel did not discuss levels of responsibility or accountability.

46 Ms Neville agreed that the template which was used for the matching process was not "fit for purpose".

47 Ms Neville was cross-examined about the difference between the Programme Director and Associate Director role. It was put to her that the essential nature of the Programme Director role was for project management, planning and delivery of programmes. By contrast, the essential nature of the Associate Director – Quality Improvement role was to identify the opportunity for programmes at a higher level of responsibility, for example, driving innovation and redesigning services. Ms Neville said that she did not know both roles well enough to comment on that.

48 At the end of the cross-examination, it was put to Ms Neville that there was a very significant difference between the Associate Director and Programme Director roles. Ms Neville concluded her evidence by saying, "At face value, yes." In other words, she agreed that there was a very significant difference between the roles.

49 In cross-examination Ms Neville also confirmed that, contrary to the policy, the panel had not considered the comparable responsibility and/or accountability requirements for the roles. The panel also failed to consider hours of work, location or working environment. Ms Neville accepted that, while she had said, in an email on 23 June 2017, that the roles were comparable in status because they were, "still Board positions," this was incorrect.

50 On 23 June 2017, Ms Stevenson, who had also been on the panel, emailed

Jennifer Opare-Aryee and Ms Neville (pgs.507 to 508). She said that, regarding the matching exercise she had carried out comparing the Associate Director - Quality Improvement role against the Programme Director role, she remained concerned that the panel was matching a job without having sufficient evidence to do so. She said that, even if the job contents matched with regard to work skills, knowledge, levels of responsibility and accountability, if there were significant variations between the old and new job in terms of pay, status, hours of work, location and working environment, that might be sufficient to negate the initial matching of the posts.

51 Mr Scully emailed Jennifer Opare-Aryee on 27 June 2017, saying that he had discussed the job matching panel outcome with Ms Stevenson and that they had agreed that, in relation to section 9 of the policy, in terms of content, responsibility and accountability, because at least 15 of the 20 main duties matched with the current job description, there was a match of at least 65% (p.518a).

52 In evidence to the Tribunal, Mr Scully said that he would not have made that statement if he had realised that the panel had failed to carry out the correct process.

53 The Claimant did not submit an “expression of interest” for the any of the new posts.

54 On 28 June 2017 Mr Abell told the Claimant that her role had been matched to the Programme Director Quality Performance and Cost Improvement Programmes post (p.522). In cross-examination, Mr Abell accepted that the Claimant should have been asked for an “expression of interest” in advance. He also agreed that he had received expressions of interest from the other employees who were in scope for the Programme Director posts.

55 Mr Abell’s letter to the Claimant, telling her of the outcome of job matching (p.522) simply said:

“The matching panel consisting of HR and staff side considered that there is a match between your substantive Band 9 and the Band 8D posts in the new structure. The matching exercise compared the current pay, status, and hours of work, location, working environment, areas of work, skills, knowledge and levels of responsibility/accountability of your current post against the new Band 8D roles. In particular, the panel felt that 15 of the 20 main duties in the new job description (Band 8D) matched the job description of your current role.

Therefore, in accordance with section 9 of the Organisational Change policy, your current role has been directly assimilated to Programme Director for Quality, Performance and Cost Improvement Programmes. Your base location and line management remains unchanged but you will be accountable to me.”

56 Having heard Ms Neville’s evidence about the panel’s process, Mr Abell agreed in cross-examination that the information he provided about the matching process in the letter of 28 June 2017 was wrong.

57 Mr Abell gave the Claimant until 1 July 2017 to give detailed reasons in writing why she did not agree with the outcome, if she did not. His letter had, however,

provided very little detail about the panel's factual conclusions for the Claimant to comment on.

58 On 2 July 2017 the Claimant requested information regarding the matching exercise, including a copy of the criteria which were applied; details of the 15 out of 20 main duties in the new job which matched the Associate Director role; details of how many of the duties contained in Associate Director role and person specification matched the new Programme Director for Quality, Performance and Cost Improvement post; and details of the matching outcome for pay, status, hours of work, location, working environment, areas of work, skills, knowledge and levels of responsibility/accountability.

59 On 6 July 2017 the Respondent announced appointments for two of the other Programme Director roles to which the Associate Director role had been matched (p.550).

60 Mr Abell responded to the Claimant's request for information on 17 July 2017, attaching a blank matching template (p.564g). That matching template had not, in fact, been applied by the matching panel. Mr Abell did not respond to the Claimant's question about the number of Associate Director duties which matched the Programme Director role. He agreed, in cross-examination, that the assessment of hours, location, work environment, knowledge, skill and responsibility, described out in his letter to the Claimant, had been made by Ms Opare-Aryee and not the panel.

61 On 17 July 2017 the Claimant wrote again to Mr Abell, saying that she did not accept that the new Band 8D Programme Director for Quality Performance and Cost Improvement Programmes post amounted to an offer of suitable alternative employment, when objectively compared to her Band 9 Associate Director - Quality Improvement post. Nevertheless, the Claimant stated that she would work under protest within her Band 8D role, in order to mitigate her losses, whilst reserving a right to bring a claim for breach of contract, unfair dismissal and contractual redundancy payment. She asked for confirmation about when she would commence in the Band 8D Programme Director post and said that, given that contractual terms for that post differed from her Associate Director - Quality Improvement Band 9 contractual terms, she asserted her right to a trial period. She asked for confirmation as to when that trial period would commence (p.569b). Mr Abell did not respond to the letter; he was on holiday at the time.

62 The Claimant wrote once more to Mr Abell on 25 July, repeating her assertion that there was no match between her current 9 post and the new Band 8D post and saying that she would work a trial period in the new post, while reserving her right to bring a claim for breach of contract, unfair dismissal and redundancy payment (p.582). The Claimant asked for a completed matching sheet.

63 On 25 July 2017 Mr Scully called Mr Danny Hariram to discuss the Claimant. Mr Scully told Mr Hariram that Mr Scully believed that the Claimant was entitled to a redundancy payment as the Programme Director role was not suitable alternative employment for her. He warned that the Respondent was at risk of having to pay a contractual redundancy payment and that it could also face a constructive unfair dismissal claim. Mr Scully suggested that the best way forward would be to offer the

Claimant a Band 9 role.

64 Mr Hariram invited the Claimant to attend a without prejudice meeting on 2 August 2017.

65 The Claimant attended the without prejudice meeting on 2 August 2017 with Mr Hariram (p.608). Mr Hariram told her that he wanted to have a “without prejudice” conversation. Mr Hariram said that the corporate functions across all three Trusts were going through a restructure, but there was still a need for the Claimant to do her current role in Mid Essex, albeit that there would be variation to the role. He said that the Claimant was a very valued member of staff, who had a unique set of skills. Mr Hariram told the Claimant that there would be a potential role as Director of Operations, Band 9, at Basildon and Southend and that her skills would meet the requirements of the role. He acknowledged, however, that travel would be an issue for the Claimant. He also said that Tele Tracking was changing quickly and that there would be a need for a Programme Director to manage that project. The Claimant asked whether her role at Mid Essex would include Compliance. Mr Hariram said that Diana Sarkar was restructuring corporate nursing and that she would not have problems with the Claimant looking after Compliance.

66 During the meeting, Ms Opare-Aryee confirmed that the Claimant had not received the completed matching template because it had not been completed. Mr Hariram agreed, in evidence, that he was shocked and disappointed to hear this.

67 There was a dispute of fact between the parties as to whether Mr Hariram said, in the meeting, that he would facilitate a trial period in the Programme Director role. The Respondent’s notes of the meeting recorded that Mr Hariram expressed that he was willing “to go to a trial period for 28 days” (p.608). The Claimant’s handwritten notes of the meeting did not record this.

68 In his witness statement, Mr Hariram had originally said that he explained that he would happy to facilitate a trial period in any of the listed roles. He amended his statement, before he gave his evidence, to saying that he told the Claimant that he would be happy to facilitate a trail period regarding the Programme Director 8D role. Mr Hariram was somewhat confused in his oral evidence, initially saying he offered to facilitate a trial period in all roles and then correcting it to the 8D role.

69 I agreed with the Claimant’s submissions that it was clear from Mr Hariram’s evidence that his focus was on the new roles he was offering, and not the Programme Director 8D role which both Mr Scully and the Claimant had already criticised.

70 The Claimant was adamant, in evidence, that Mr Hariram had not said that he would facilitate a trial period and that she was shocked to receive a letter after the meeting dated 3 August 2017 (p.618) which said:

“Following due consideration, I stated at the meeting that I am happy to facilitate your request.”

71 While Mr Hariram was a congenial witness who, I considered, set out to be honest in his evidence, I decided that the Claimant’s recollection of the meeting was

clearer than Mr Hariram's. Mr Hariram was somewhat vague at points in his evidence about what was said. I preferred the Claimant's evidence that Mr Hariram had not offered a trial period during the meeting on 2 August.

72 On 3 August 2017, Mr Hariram wrote to the Claimant, providing an outcome of the meeting on 2 August 2017. He said that there had been some miscommunication around the information which the Claimant had requested and received regarding the matching process. Mr Hariram said that he had asked Jennifer Opere-Aryee to investigate and that she would respond to the Claimant in due course. Mr Hariram also said that he had been assured that a full and thorough process had been undertaken, which included both Human Resources and staff side representatives. He asserted that he had already said that he was willing, and that he continued to be willing, to facilitate the Claimant undertaking a trial period in the Band D Programme Director's post. Mr Hariram stated that the Claimant had valuable and unique experience and skills, which the group would like to retain. Nevertheless, Mr Hariram said that they had both acknowledged that there would be changes in structures and job roles. Mr Hariram said that he had discussed four job opportunities:

- (1) Remain "as is" in the Claimant's current position;
- (2) Director of Operations based at Basildon Hospital Band 9;
- (3) Director of Operations based at Southend Hospital Band 9;
- (4) Programme Director for Tele Tracking Band 9.

73 Mr Hariram said that option (1), giving the Claimant the opportunity to remain "as is," would involve directly reporting to Lisa Hunt. He said that there would be some variation to the Claimant's job description which would ensure that the Respondent could progress with overall models and structures. He said that executive lines of responsibility had changed and that Compliance, which formed a part of the Claimant's current role, fell under the remit of the group Chief Nurse, Diana Sarkar. Thus, the Respondent would be happy for the Claimant to continue being the responsible officer for Compliance, with a reporting line to the Chief Nurse in undertaking that aspect of her job role.

74 Mr Hariram said that the Claimant and he had agreed to meet on 9 August to discuss the other questions the Claimant had raised at the meeting. He continued:

"Whilst there may be some variations and adjustment to the job role, I believe that these fall within your knowledge, skills and experience and do not exceed the expectations of the role you currently undertake under your contract of employment."

75 Following the 2 August meeting, Ms Opere-Aryee asked Samantha Neville and Catriona Stevenson to complete the matching template retrospectively (p.643). Ms Stevenson refused, on the basis that the criteria had not been discussed by the panel in the meeting in June 2017. Ms Neville completed the template on 23 August 2017 without discussing it with Ms Stevenson.

76 On 9 August 2017, the Claimant wrote to Lisa Hunt, saying that she had been signed off work by her GP until 22 August due to work related stress. The Claimant said that her GP would be writing to the Director of Human Resources, recommending

that the Claimant and the Trust refrain from all work-related communication during the period, to enable the Claimant to recover (p.645).

77 On 14 August 2017 Jennifer Opore-Aryee emailed the Claimant saying that Mr Hariram had asked her to send an attached letter. The letter said that Mr Hariram had been informed by Lisa Hunt that the Claimant had been medically signed off sick from work by her GP and Occupational Health. He said that he would not schedule any further meetings and that minutes of the meeting of 2 August would not be sent unless the Claimant advised otherwise. Mr Hariram asked the Claimant to contact him on her return from sick leave, so they could rearrange their meeting.

78 On 10 August 2017 the Claimant's GP had written to Mr Scully saying that the Claimant had presented with high level anxiety and emotional distress. She said that the Claimant had a history of cardiac disease and that the high level stress had been triggering some of the symptoms. The GP said that she had advised the Claimant to take a period of time totally away from work, in order to recuperate (p.649).

79 The Claimant was distressed to receive Mr Hariram's letter despite her request that the Respondent did not contact her during her sick leave.

80 Mr Hariram told the Tribunal that he deliberated "quite a lot" about whether to send a letter. As an HR professional, he wanted to acknowledge the Claimant's sickness. He was trying to establish a relationship of credibility with the Claimant, to create an opportunity for resolution. He said that he felt the Respondent should acknowledge the Claimant's absence and that he wanted to build a rapport with the Claimant. He denied he was seeking to assert his control by contacting her.

81 Mr Abell told the Tribunal that the new Programme Director roles would be 70-80% based at one site and that measures would be put in place to reduce travel required, including video conferencing. The Claimant does not drive. She considered that a requirement to travel to other sites would affect her particularly badly, because it would take her much longer to travel from one site to another.

82 The Respondent highlighted that, on 25 May 2017, Ms Sarkar had produced a proposed structure for the Institute under the Chief Nursing Officer. This included Group Director of Risk and Compliance and Clinical Safety, a new post (p.526). The proposed new structure was copied to the Claimant on 30 May 2017 (p 524). Pay grades were not assigned to the roles in the proposed new structure.

83 The Claimant resigned on 1 September 2017. She said that the manner in which she had been treated with regard to her position being made redundant had been completely inappropriate and outside the Trust's organisational change policy. She said that this had impacted on her mental and physical health (p.665). At the root of her dismissal and her decision to resign was "the fact that my role has been made redundant and in spite of that I have not been offered suitable alternative employment." (p.662)

Relevant Law

84 *s 94 Employment Rights Act 1996* states that an employee has the right not to

be unfairly dismissed by his employer. In order to bring a claim of unfair dismissal, the employee must have been dismissed.

85 By s95(1)(c) ERA 1996, an employee is dismissed by his employer if the employee terminates the contract under which he is employed in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is known as constructive dismissal.

86 In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following:

- a) The employer has committed a repudiatory breach of contract.
- b) The employee has left because of the breach, *Walker v Josiah Wedgwood & Sons Ltd* [1978] ICR 744;
- c) The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

87 The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate that: first, the Respondent has committed a repudiatory breach of his contract; second, that he had left because of that breach; and third, that he has not waived that breach.

88 Every breach of the implied term of trust and confidence is a repudiatory breach, *Morrow v Safeway Stores* [2002] IRLR 9.

89 In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, *Baldwin v Brighton and Hove City Council* [2007] ICR 680 and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

90 The question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by the range of reasonable responses test. The test is an objective one, a breach occurs when the proscribed conduct takes place.

91 To reach a finding that the employer has breached the implied term of trust and confidence requires a significant breach of contract, demonstrating that the employer's intention is to abandon or refuse to perform the employment contract, Maurice Kay LJ in *Tullett Prebon v BGC* [2011] IRLR 420, CA, para 20.

92 The giving of lawful notice to terminate a contract, coupled with an offer of immediate re-engagement on new terms, will not of itself constitute a breach of the implied term in circumstances where an employee resigns before expiry of the notice

given, *Kerry Foods Ltd v Lynch* [2005] IRLR 680.

93 An employee may resign in response to a "last straw". The last straw need not, of itself, be a breach of the implied term. It may not be blameworthy or unreasonable. It simply has to contribute something to the breach of the implied term of trust and confidence, even if relatively insignificant, *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481

94 In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ. 978 the Court of Appeal endorsed the *Omilaju* "last straw" principle. Lord Justice Underhill said that, in a case of constructive dismissal, tribunals should ask themselves the following questions:-

- (i) What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation?
- (ii) Has he or she affirmed the contract since the act?
- (iii) If not, was that act or omission by itself a repudiatory breach of contract?
- (iv) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach of the *Mallick* term?
- (v) Did the employee resign in response or partly in response to that breach?

95 Once a repudiatory breach has occurred, it is not capable of being remedied so as to preclude acceptance. The wronged party has a choice of whether to treat the breach as terminal. However, the wronged party cannot ordinarily expect to continue with the contract for very long without being considered to have affirmed the breach, *Buckland* per Sedley LJ, at paragraph [44].

96 In *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703, CA the Court of Appeal held that what was necessary was that the employee resigned in response, at least in part, to the fundamental breach by the employer; as Keene LJ put it:

"The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."

97 In *Wright v North Ayrshire Council* [2014] IRLR 4, EAT, Langstaff P said that once a repudiatory breach of the employment contract by the employer has been established in relation to a constructive dismissal claim, the correct approach, where there was more than one reason why an employee left a job, was to examine whether

any of them was a response to the breach. If the breach played a part in the resignation, then the employee has been constructively dismissed. However, Langstaff P also said that where, there is a variety of reasons for a resignation, but only one of them is a response to repudiatory conduct, a tribunal may wish to evaluate whether, in any event, the Claimant would have left employment and adjust an award accordingly.

Reasonableness

98 If the Claimant establishes that he has been dismissed, the ET goes on to consider whether the Respondent has shown a potentially fair reason for the dismissal and, if so whether the dismissal was in fact fair under s98(4) ERA 1996. Both redundancy and “some other substantial reason” are potentially fair reasons for dismissal. In considering s98(4) the ET applies a neutral burden of proof.

Redundancy

99 s139 *Employment Rights Act 1996* provides the statutory definition of redundancy,

“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 - ..

- (c) the fact that the requirements of that business –
- (d) (i) for employees to carry out work of a particular kind, or
- (e) (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.

100 A reorganisation of the workforce may, or may not, result in a redundancy situation. In each case the Tribunal will need to consider whether the requirement for employees to carry out work of a particular kind has diminished, *Shawkat v Nottingham City Hospital NHS Trust* No. 2 [2001] IRLR 555.

101 An employee who has been dismissed by reason of redundancy loses her right to a redundancy payment if she unreasonably refuses an offer of suitable alternative employment, s141 *Employment Rights Act*.

102 It is for the employer to show both that the employment offered was suitable for the employee and that their refusal was unreasonable *Ward v Commission for Health Care Audit and Inspection* UKEAT/0579/07.

103 While there is no requirement that the offer be put in writing it must be reasonably precise in its terms if it is to be capable of acceptance. The question of suitability of an offer of alternative employment is an objective matter. The reasonableness of the employee’s refusal is a subjective matter, which is to be considered from the employee’s point of view.

104 By s138 ERA 1996, where an employee’s contract of employment is renewed or he is re-engaged under a new contract of employment in pursuance of an offer, whether in writing or not, made before the end of his employment under the previous contract and the renewal or re-engagement takes effect either immediately on or after

an interval of not more than four weeks after the end of that employment, the employee shall not be regarded as dismissed by the employer.

105 For the purposes of s138 ERA, the new contract does not have to be deemed suitable alternative employment. That question arises only in the context of a redundancy payment and entitlement to it.

Discussion and Decision

Constructive Dismissal

106 On my findings of fact, I concluded that the Respondent did act, without reasonable or proper cause, in such a way as was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and Respondent, by its actions during the consultation and restructure process.

107 I decided that the Respondent failed, at the outset of the restructure and consultation process, to establish the Claimant's existing job duties and responsibilities. Mr Abell was not aware that the Claimant had responsibility for CQC matters when, on my findings, this responsibility encompassed about 50% of the Associate Director – Quality Improvement job the Claimant was undertaking before the restructure.

108 Mr Abell's lack of knowledge, when subsequently revealed in the 20 April 2017 consultation meeting, was bound to have alarmed the Claimant and shaken her confidence in the Respondent. At that stage, she had already seen that her Band 9 post (Associate Director - Quality Improvement) was proposed to be deleted and that new Band 8D posts were proposed to be created. Having discovered that the Respondent was unaware of a very significant component of the Claimant's job, the Claimant would inevitably have little confidence that any replacement role offered to her would accurately reflect the job that she had previously been undertaking.

109 Ms Opare-Aryee told the Claimant that her job had been deleted in the 13 June 2017 consultation outcome meeting. The Claimant had not been matched to any new role at that point.

110 Seeing that the Claimant's post was deleted, there was a reduction in the Respondent's need for employees to carry out work of that particular kind. The Respondent said that the Claimant would be matched to suitable alternative employment. Nevertheless, the Respondent failed to carry out any adequate matching exercise. On my detailed findings of fact, the Respondent failed to implement the matching exercise set out in its policy. The panel were untrained and received no guidance. They failed to consider most of the factors they were required to consider under the policy. The factors which they did consider, including job content, were considered unreasonably. The matching panel looked only at whether the new job responsibilities were contained in the Claimant's existing role and not whether the Claimant's existing role was reflected as a 65% match to the new role. In cross-examination, Ms Neville agreed that there were significant differences between the old and the new roles. She conceded, in cross examination, that many responsibilities in the Associate Director role were missing from the Programme Director role.

111 I agreed with the Claimant's contention that, on a proper analysis of the roles, the new Programme Director role was responsible for implementing programmes for change, whereas the Claimant's previous role as Associate Director of Quality Improvement was responsible for identifying innovation and change required and, consequently, identifying the programmes to be implemented in order to achieve this. The Claimant's former role was therefore a higher strategic role than the Programme Director role. I agreed with the Claimant that many of the matters which were missing from the Programme Director role constituted significant high level strategic responsibilities.

112 The Respondent accepted that the Claimant should have been given an opportunity to express interest in the available roles in the new structure, but was not given that opportunity. Other employees had been given the opportunity.

113 The Respondent told the Claimant that a matching template had been used, when it had not.

114 Ms Opare-Aryee and Mr Abell continually asserted that the Programme Director roles were suitable alternative employment for the Claimant. However, I concluded that the job responsibilities were different and that the status of the roles was very significantly different: The Programme Director role was Band 8D and the Claimant's previous role was Band 9. The Band 8D roles had a correspondingly significantly lower salary.

115 I considered that no reasonable employer would, in those circumstances, have said that the Band 8D roles were suitable alternative employment. In reality, they were very different.

116 Mr Hariram's letter of 3 August 2017 set out roles which were proposed to constitute suitable alternative employment. The roles set out were simply job titles – the letter did not specify, in any detail, what those jobs would entail.

117 The Claimant had already asked Lisa Hunt about the "as is" role. She and Ms Hunt had agreed that there could be tension between the integration of the three hospitals and the Claimant's freestanding role, if it continued to exist.

118 Mr Hariram said in his meeting on 2 August and also in his letter of 3 August that there would be changes to the Claimant's "as is" role, but he did not specify what they would be.

119 I considered that the Respondent failed to provide adequate information in respect of the posts which purported to be suitable offers of alternative employment, for any meaningful assessment of whether they were, indeed, suitable alternative employment. There was very little detail given in evidence at the Employment Tribunal about the content of those roles.

120 While Hariram's statement, in his 3 August letter, that he had already agreed a trial period, may have been a mistake, I decided that it added to the Claimant's lack of trust and confidence in the Respondent.

121 I did not consider that Mr Hariram's letter of 14 August was inappropriate. Essentially, Mr Hariram was simply acknowledging and agreeing to what the Claimant had already requested. It did not amount to any new substantive correspondence.

122 Nevertheless, I concluded that Mr Hariram's letter of 3 August did form part of a series of acts or omission which, together, constituted a breach of the duty of trust and confidence. As set out in the List of Issues, the Respondent told the Claimant that her substantive post had been deleted, failed to consider the Claimant's full role and duties when developing the new structure, failed to comply with its Change Policy by not giving the Claimant an opportunity to give an "expression of interest," failed to provide adequate information in respect of posts which were said to constitute suitable offers of alternative employment and failed to carry out an adequate matching exercise. It misled the Claimant regarding the matching exercise which had been carried out and Mr Abell failed to respond to a number of the Claimant's letters requesting information on the matching exercise. Together, these matters amounted to a breach of the duty of trust and confidence.

123 I considered that the Claimant was entitled to resign in response to the Respondent's breach of the duty of trust and confidence on 1 September 2017. The Claimant was off sick at the time and had been advised not to engage at all with her employer for the majority of the period from 3 August 2017 until 1 September 2017. Furthermore, on 17 and 25 July 2017 the Claimant had expressly stated that she was working under protest and had reserved her right to bring claims of breach of contract and unfair dismissal, pp 569b and 583. I decided that, objectively, the Claimant did not affirm her contract by failing to resign earlier than she did.

124 The Claimant was constructively dismissed by the Respondent.

125 I considered whether the Respondent had shown the reason for dismissal and whether it was a potentially fair reason. On the facts, I decided that the Claimant was dismissed by reason of redundancy; her post had been deleted and she was not offered suitable alternative employment.

126 I also concluded that the Respondent did not act fairly in constructively dismissing the Claimant. It misled the Claimant during the consultation period and failed to follow its own matching procedure, so that the matching process was fundamentally flawed. The failings in the process themselves constituted a breach of the duty of trust and confidence and the procedure adopted was outside the band of reasonable responses of a reasonable employer.

127 On these facts, I have concluded that the Band 8D Programme Director roles did not constitute suitable alternative employment for the Claimant. Mr Hariram proposed 4 alternative Band 9 roles to the Claimant in their 2 August 2017 meeting. However, he provided very scant detail regarding these roles. Two of the roles were based at other hospitals and the Claimant did not drive a car. The change of location alone, given the very substantial increase in travelling time, indicated that those roles were not suitable alternative employment. Mr Hariram could not elucidate regarding what would change in the Claimant's "as is" role, although he acknowledged that there would be changes. Put simply, the alternative roles proposed were so lacking in detail

that there was little evidence that they could constitute suitable alternative employment for the Claimant.

128 The Claimant did not unreasonably refuse these roles, which were offered to her in extremely vague terms.

129 The Claimant's claims of unfair dismissal and for a statutory redundancy payment succeed. The remedy hearing will proceed.

Employment Judge Brown

30 October 2018