EMPLOYMENT TRIBUNALS

Claimant: Mrs Anita Carter

Respondent: Liverpool Community Health NHS Trust

HELD AT: Liverpool **ON:** 23 February 2018
9 March 2018
(in Chambers)

BEFORE: Employment Judge Buzzard

REPRESENTATION:

Claimant: Mrs J Eli-Eli (Daughter)
Respondent: Mr Jenkins, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim that the respondent acted in breach of contract when calculating the claimant's enhanced redundancy payment is not well-founded and is dismissed.

REASONS

The Claim

1. The claimant has identified the claim on her ET1 as a claim for a redundancy payment. The claimant concedes that she received a redundancy payment in excess of her statutory redundancy entitlement. The claim actually relates to her entitlement to a contractual enhancement of the statutory redundancy payment. Accordingly, the claimant's claim is actually one of breach of contract.

The Issues

2. The claimant's claim relates to a redundancy payment. There is no dispute that the claimant was entitled to a redundancy payment. The claimant was contractually entitled to a significantly enhanced redundancy payment. The calculation of this enhanced payment was based on service, defined in the contract as '*reckonable service'*. The claimant's claim was solely based on a contention that the respondent had not correctly calculated her reckonable service because they had treated a two year period she spent studying and working as a bank nurse as a break in service.

3. The claimant also sought to argue that the respondent had failed to adhere fully to the ACAS Code of Practice governing grievance procedures when dealing with a grievance in relation to the amount of her redundancy payment. The claimant sought a potential uplift to any compensation for her breach of contract claim. Given the claimant's breach of contract claim failed; issues of remedy and any potential uplift were not relevant and accordingly not determined.

Agreed Background

4. The majority of the facts relevant to the claimant's claims are agreed between the parties. The agreed facts are as follows:

- The claimant commenced employment in early January 1981 with the National Health Service.

- The claimant's continuous employment with the National Health Service continued until at least August 1996.

- Between September 1996 and September 1998, the claimant was on, quoting her claim form, an "*employment break*". During this period she was studying full-time to obtain a qualification as a health visitor. Alongside her studies the claimant worked as a bank nurse, engaged by the British Nursing Association and providing shifts to Southport and Ormskirk District General Hospital, an NHS hospital.

- In September 1998, the claimant successfully applied for an "*internal secondment*". Accordingly, she commenced working as a health visitor for the Southport and Formby Primary Care Trust, part of the NHS. The claimant's employment by the NHS from March 2004 until June 2017, when her redundancy took effect, was continuous employment for the NHS.

- When made redundant in June 2017 the claimant was paid a redundancy payment. This redundancy payment was enhanced in line with the terms and conditions of her then employment with the respondent. There was no dispute over the terms of enhancement. The enhancement entitled the claimant to one month's full pay for each year of "reckonable" service with the NHS up to a maximum of 24 months' pay.

- The claimant argues that her reckonable service commenced in 1981. Accordingly, she would be entitled to an enhancement redundancy payment on the basis of the 24 month maximum permitted. The respondent did not treat the period from September 1996 to September 1998, when the claimant was studying full-time and working as a bank nurse, as reckonable service. Further, the respondent treated this as a break in service and therefore did not count any service prior to September 1998 as part of her reckonable service. This meant that the claimant's enhanced redundancy payment calculation was based on her having 18 years of reckonable service.

Basis of Claimant's Claims

5. The claimant submitted a number of alternative arguments in support of her claim as follows:

- **Her employment was continuous as a matter of law:** during the period from September 1996 to September 1998 the claimant claims she was a bank nurse employed with the NHS, meaning that there was no break in her continuous or reckonable service.

- **There was an express agreement that her employment would be treated as continuous:** alternatively, the claimant argues that it was expressly agreed at the time of the study break that it would not break the continuity of her employment.

- **The respondent has policies that if applied automatically mean her study break would be reckonable service:** pursuant to a contractual scheme of the respondent regarding reckonable service, the period when the claimant was on study leave and working as a bank nurse should count as reckonable service.

- **The respondent has a discretion to count her study break as reckonable service:** in the event that the period from September 1996 to September 1998 is not found to automatically count as reckonable service under the relevant scheme, the respondent had discretion to treat the service as reckonable in any event. Further, the respondent is required to apply that discretion in a "*fair and transparent*" manner, as described in the respondent's policy documentation.

6. The submissions and arguments made by the claimant as summarised above are considered separately in these reasons.

Evidence

7. The Tribunal had the benefit of hearing evidence from the claimant on her own behalf. Evidence was given by one witness, Donna Jones, on behalf of the respondent, who had no first hand knowledge of any of the disputed events, but was able to give evidence generally about the respondent and in relation to various documents. In addition, the Tribunal had the benefit of sight of a substantial bundle of documentation.

8. The relevant findings of fact in relation to each element of the claimant's arguments are set out in the respective sections below.

9. The claimant's employment was continuous as a matter of law.

Relevant Facts & Submissions

9.1. It was the claimant's evidence that she had resigned from her employment with the NHS and taken an employment break from September 1996 until September 1998. This was to allow her to undertake full-time training to be a health visitor.

9.2. It was the claimant's further evidence that during this period she had undertaken shifts as a bank nurse for the Ormskirk and District General Hospital. The claimant stated that this was in accordance with an agreement reached with her NHS employers prior to her resignation in September 1996.

9.3. The respondent's evidence was that they had been unable to identify any documentary evidence that confirmed the extent of any work the claimant did as a bank nurse. This was apparently at least in part due to a reorganisation within the NHS; during which all relevant records regarding the claimant's employment during the contested period were lost. The respondent's witness had no firsthand knowledge of the claimant's employment status at this time but was familiar with the "*cottage hospital*" regime within which the claimant would have been working at that time. This "*cottage hospital*" regime no longer exists.

9.4. The claimant agreed in cross-examination that she had resigned from her employment at Ormskirk and District General Hospital to undertake full-time study. Whilst giving oral evidence the claimant agreed that her full-time studies had ceased around June 1998. The claimant did not return from her study break until September 1998, joining Southport and Formby Primary Care Trust. The claimant conceded that in the period between June 1998 and September 1998 she was not in full-time study.

9.5. The claimant gave evidence that between 1996 and 1998 she had worked as a bank nurse for the respondent. It is the claimant's case and evidence that this was part of an agreement designed to ensure that she could flexibly work during her studies. The claimant referred the Tribunal to documents submitted to support her contention that she worked as a bank nurse. In particular the claimant produced copy documents that showed the following dates:

- The claimant left West Lancashire NHS Trust (to commence her study break) on 20 September 1996;
- The claimant ceased working as a bank nurse on 18 June 1998, as shown on her P45.

9.6. The claimant's P45, issued when she ceased bank nurse work, is redacted. Her total pay in the year of cessation (1998-1999) from working as a bank nurse was blanked out. This figure would have been of potential assistance in determining the volume of bank work undertaken, at least in the last few months of that work prior to June 1998. The claimant was asked to estimate the number of bank work shifts she did, on average. The claimant's recollection was that she would average in the region of one shift per week, but this fluctuated according to the demands of her studies.

9.7. The claimant conceded under cross-examination that between 18 June 1998 and 20 September 1998 she undertook no bank nurse work at all.

9.8. The claimant further accepted, under cross-examination, both that she was not obliged to undertake bank nurse shifts and that she could choose to do so as and when it suited her.

9.9. The claimant presented evidence to show that after her study leave she secured employment with the respondent through an internal secondment process. This commenced in September 1998. The claimant produced a copy of the advert for the internal secondment vacancy, which clearly states that applicants must be *"currently employed within the Trust*". In addition, the claimant produced evidence from former colleagues who worked with her around the time of the internal secondment. This evidence was in the form of statements produced on behalf of the claimant during discussions with the respondent about her redundancy in 2017. These statements supported the claimant's contention that only persons employed by the Trust would be entitled to apply for an internal secondment. The claimant submitted that the fact she successfully applied for the secondment shows that she must have been considered an employee at the time.

9.10. The respondent presented no specific evidence to counter this assertion, instead relying on submissions. It was the respondent's submission that the words "*employed by the Trust*" did not relate exclusively to the status of '*employee*', but also that of a '*worker*'. This is consistent with language used by Parliament at the time, for example in the Working Time Regulations. The statements provided by the claimant's former colleagues did not suggest that those who made the statements had any particular knowledge of employment law or the rules governing employment status. What they stated would be an obvious conclusion of a person without such knowledge who read the internal secondment advert. The respondent accepted that the claimant had done work within the NHS during this two year period so would be a worker, albeit the volume and frequency of that work is contested

Relevant Law

9.11. For the claimant to have had continuous service pursuant to the Employment Rights Act 1996 during the period from September 1996 to September 1998 she would need to have been an employee of the respondent throughout that period.

9.12. To be an employee it is well established in case law that three minimum criteria must be met, namely:

- There must be mutual obligation between the parties; and
- The purported employer must control the way the purported employee works; and
- The relationship as a whole must be characteristic of an employee/employee relationship.

9.13. The first two of these criteria are often referred to as the *irreducible minimum*. This means that if either is absent an individual is not an employee. This would not preclude that individual having the status of 'worker'.

Conclusion

9.14. On the claimant's own evidence she was not obliged to take any shifts as a bank nurse. Further, for the period from June 1998 to September 1998 the claimant did no bank shifts whatsoever. During the same period the claimant was not studying, having completed her academic study.

9.15. The evidence presented does not demonstrate that only persons with the status of employee were entitled to seek an internal secondment. On this basis the fact that the claimant sought and was successful in obtaining an internal secondment is not persuasive evidence that she had the status of '*employee'*.

9.16. Accordingly, the evidence presented does not support a finding that the claimant was an employee. This is certain for at least during the period between June 1998 to September 1998. During this time the claimant did no work at all, nor did she study. It is probable, based on the evidence, that the claimant was not an employee for the entire duration of the study break, given she could choose when to work and had no right to, or guarantee of, work

9.17. For these reasons the Tribunal finds that the claimant was not an employee of the respondent in the period prior to September 1998. Therefore, she does not have continuous employment prior to that date under the provisions of the Employment Rights Act 1996.

10. **The claimant and respondent reached an express agreement that her employment would be treated as continuous**.

Relevant Facts & Submissions

10.1. There was a general paucity of evidence regarding any potential express agreement about the impact of the claimant's period of study leave from September 1996 to September 1998 on her continuity of employment.

10.2. It was the claimant's evidence that she had agreed the break on the basis that it would not affect her rights as an employee.

10.3. The respondent's witness gave evidence that, although she had no knowledge of any express agreement as alluded to by the claimant, it would certainly not have been the norm for the employer at that time. The respondent's witness did concede that such an agreement was possible.

10.4. Within the bundle of documents provided to the Tribunal were a number of the claimant's contracts of employment and statements of terms of employment. These included a statement of terms and conditions issued by North Sefton and West Lancashire Community NHS Trust in January 2000, identifying the date of commencement of the claimant's continuous employment as 14 September 1998. This statement was signed by the claimant.

10.5. In addition there was a letter headed "*Sponsorship for training*" dated 14 August 1998, signed as accepted by the claimant on 21 August 1998, which stated:

> *"For the purpose of the Employment Rights Act 1996 the start of your period of continuous service is 14 September 1998."*

10.6. Both of these documents appear to indicate that, at or around the time of the claimant's return from her study break, she expressly signed her agreement to a written statement confirming her continuous service would commence from September 1998.

Relevant Law

10.7. Pursuant to section 212 of the Employment Rights Act 1996:

> *"Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.*
>
> *(3)(c) …Any week during the whole or part of which an employee is (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, counts in computing the employee's period of employment."*

10.8. Accordingly, under this provision it is possible for an employer to agree that a period of absence does not break continuity, either expressly or by custom. It is a matter of fact, to be determined on the evidence, if such an agreement or custom existed.

10.9. In considering the evidence in relation to this, it is correct, as submitted by the parties, that the claimant bears the burden of proof. She must establish on the balance of probabilities that such an agreement exists.

Conclusion

10.10. The claimant's evidence, that it was agreed her study break would not have any adverse impact on her employment rights, is not consistent with what she signed agreement to at the end of that break. Whilst accepting that the claimant's evidence represented her best recollection of events, these events were many years previous. The claimant's evidence on this point is noted to be lacking in specifics, suggesting only a very general, oral, agreement about her rights being protected. The claimant did indicate that her rights as an employee were important to her at the time, suggesting that she would not have taken the break if there was no agreement they were protected.

10.11. The evidence from the respondent's witness, that a two year study break that did not impact continuity would be unusual, is of limited assistance. She had no direct knowledge of what agreements had, or had not, been reached. It remains for the claimant to prove the agreement existed.

10.12. The evidence that the claimant in 1998, and again in the 2000, signed documents stating that her continuous employment commenced in September 1998 is persuasive. This is not consistent with her being particularly concerned with this employment rights at the time of her study break. The claimant could not produce any documentary evidence of the agreement she relies on, despite her evidence about its importance to her. Irrespective of the loss of the respondent's records from that time, there was no evidence that there was ever any written agreement as claimed.

10.13. Considering all the evidence presented, the Tribunal finds that the claimant has not established that there was an express agreement that her continuity of employment would be unaffected by her study break. There is no documentary evidence of the agreement, and there is contemporaneous documentary evidence signed by the claimant which contradicts the relevant term of the claimed agreement regarding continuity.

11. **The respondent has policies that automatically mean her study break would be reckonable service**

Relevant Facts & Submissions

11.1. The claimant argues that the calculation of her redundancy payment was done pursuant to a document known as the '*Agenda for Change'*. A copy of this document was included in the Tribunal bundle. It identifies "*reckonable service*" as the relevant period of service, either continuous or deemed to be continuous, that should be utilised when calculating an enhanced redundancy payment. It is noted that this document was not created until some years after the claimant's employment break. However, the parties were agreed it could have retrospective effect.

11.2. Under the Agenda for Change '*reckonable service'* for the purposes of an NHS redundancy payment (paragraph 16.5) is '*continuous full-time or part-*

time employment with the present or any previous NHS employer'. Further, at paragraph 14.5 of the Agenda Change it sets out the test for continuous employment as requiring that '*there must not have been a break of more than a week (measured Sunday to Saturday) between employments'*.

11.3. Of particular relevance is section 36 headed "*Employment Break Scheme*" ("the Scheme"). Although written after the employment break at issue in the claimant's claim, the respondent accepted that the scheme was intended to have retrospective effect.

11.4. It is clear from paragraph 36.6 that the scheme is intended to cover reasons for an employment break such as study leave. This was the reason for the claimant's employment break.

11.5. Under paragraph 36.17 any period of break under the Scheme does not break continuity of employment. Accordingly, the question is whether the claimant's study break is covered by the Scheme.

11.6. Paragraph 36.15 of the Scheme sets out a number of things which should have been agreed between the claimant and her employers before her study break began for it to be covered by the Scheme. These include agreement regarding:

- the impact of the break on length of service;
- her return after the break, including salary and role;
- her keeping in touch during any break;
- the notice required for her to return from her study break early or extension of the break, if required.

11.7. No evidence was presented to show that any specific discussions or agreements were entered into regarding the terms that would apply to the claimant's study break. The claimant gave evidence that it was agreed she could work flexibly as a bank nurse during the break, and her employment rights would be protected.

11.8. In addition, paragraph 36.16 makes it clear that an employment break under the Scheme should not involve resignation from employment, albeit there may be changes to an employee's contract upon return. The evidence from the claimant herself regarding her employment break is that she resigned.

11.9. Finally, paragraph 36.9 makes it clear that the details of employment breaks covered by the Scheme should be set out in writing. There was no documentation regarding the claimant's employment break before the Tribunal. This may have been due to the loss of documents given the substantial lapse of time since the break occurred. It is noted, however, that the claimant did not present in her evidence copies of any written agreement which had been reached.

Relevant Law

11.10. It is a question of fact if the claimant's study break is covered by the Scheme. The claimant bears the burden of proof in establishing that the Scheme did cover her break.

Conclusion

11.11. The claimant's employment break predated the drafting of the Agenda for Change and, therefore, the Scheme by some years. As a result, it would not be surprising if the circumstances of her break displayed some minor deviations from the technical requirements of the Scheme, as it was not in existence to follow at the time. On the evidence, however, the claimant's break does not come close to meeting Scheme requirements in multiple, significant and material ways.

11.12. Accordingly, the Tribunal finds that, unless a discretion is available and used to the contrary, the break in the claimant's employment does not come within the scope of the Scheme.

12. **The respondent has a discretion to count her study break as reckonable service**

Relevant Facts & Submissions

12.1. Regardless of the strict detail of the Scheme, paragraph 12.2 of the Agenda for Change relating to '*reckonable service'* states:

> *"Employers have discretion to take into account any period or periods of employment with employers outside the NHS, where these are judged to be relevant to NHS employment."*

12.2. It is the claimant's case that the respondent had not properly considered and exercised this discretion.

12.3. In support of this the claimant refers to Part III section 12 of the Agenda for Change document, appearing to be part of amendment number 38 issued in January 2017, which states:

> *"The exercise of discretion in paragraph 12.2 is a local matter. However, it is important that any discretion is made in a fair, transparent and non discriminatory way."*

12.4. It is the claimant's contention that in her case the discretion was not exercised in a fair and transparent manner. She does not suggest that it was exercised in a discriminatory way.

12.5. The claimant presented detailed evidence of a number of meetings which took place in the lead up to her redundancy. It was the claimant's case that

at these meetings, specifically at a meeting on 2 February 2017, it was "*actually agreed*" that the discretion would be exercised in her favour if she produced "*any piece of evidence whatsoever*" to support her contention that the Agenda for Change policy applied to make her break part of reckonable service. The claimant specifically states that she was *"promised"* that if she produced "any" evidence the discretion would be exercised in her favour.

12.6. The respondent submitted that the person hosting that meeting did not have the authority to agree to the exercise of the discretion in any event. Further, the respondent's evidence was that no such promise had ever been made. The respondent did accept that the claimant was asked if she could produce evidence that supported her argument. The respondent further submitted that such a promise could not constitute a contractual agreement in any event, lacking the formal requirements necessary to amount to a contract, specifically the intention to create legal relations.

12.7. The claimant produced a handwritten note, attached to her witness statement, which she testified had been made during the relevant meeting. Whilst it is clear that this note does refer to obtaining witness evidence from colleagues at the time, there is nothing in that which would suggest that the respondent "*promised*", as alleged by the claimant, that "*any*" evidence would suffice to ensure the discretion was exercised in her favour. Accordingly, the note is consistent with the arguments of both parties and, therefore, of little assistance in determining matters.

12.8. The respondent submitted that it would not be logical and was not credible that the respondent would undertake to exercise a discretion in favour of the claimant, on receipt of evidence, regardless of the relevance, quality or validity of that evidence.

12.9. The Tribunal was referred to a sequence of emails between the claimant and a Miss Brittles from the respondent, sent during March and April 2017. These emails referred to the fact that there were no records of employment available in relation to the claimant's work as a bank nurse during her break.

12.10. In these emails the claimant refers to the evidence produced by her former colleagues from the time of the break. This evidence was in the form of witness statements submitted to the respondent. Miss Brittles responded to the claimant that once the witness statements had been verified, and confirmed, the claimant would be contacted with a final decision. The claimant contends that the implication of this comment is that the respondent's discretion would be exercised in her favour if the statements were confirmed as having come from the individuals identified as having written them.

12.11. In the event, on 6 April 2017 the claimant was contacted to state that, in the absence of documentation from the hospital where she worked at as a bank nurse being available, she needed to provide other evidence, such as payslips or bank statements, to confirm her employment status.

12.12. The claimant produced further taxation documentation in response to the email from Laura Brittles seeking to evidence her employment status. However, this documentation goes no further than identifying that the claimant earned money as a bank nurse during the disputed break in employment. That does not show that the claimant was an employee.

12.13. The claimant referred the Tribunal to a chain of emails, disclosed by the respondent, which the claimant argues demonstrate that the cost of exercising the discretion in the claimant's favour was a decisive factor in the respondent's eventual decision not to do so. It is the claimant's case that the respondent initially believed that the claimant's additional redundancy payment, if the discretion were exercised in her favour, would be in the region of £2,000. The email chain referred to shows that the respondent realised in early May 2017 that this was an error and the additional redundancy payment would actually be in the region of £20,000. The claimant in particular refers to an email from Danny Jones of 7 May 2017, which refers to the correction in the calculations as a "*massive difference*".

12.14. It is the claimant's case that the amount due to the claimant should have had no part in the determination of the exercise of the discretion.

12.15. No evidence was presented of any other employees for whom the discretion had been exercised in relation to a study break, as in the claimant's case. Donna Jones on behalf of the respondent gave evidence regarding two other employees for whom discretion had been applied. However, from the information presented they appeared to be in substantively different circumstances. One related to a period of employment outside the NHS in a private GP Practice and the other related to a period of employment with other organisations directly linked to the NHS. Neither related to periods of full-time study or flexible shifts as a bank nurse. The information presented did not suggest any of them had had a period of months without either study or employment, as the claimant had from June to September 1998.

12.16. The claimant filed an internal grievance because the respondent had not exercised their discretion in her favour. The evidence was that there were significant delays in dealing with that grievance. The claimant submitted that the respondent delayed unduly in dealing with the grievance procedure and failed to hold all the appropriate meetings, which was not fair. The evidence presented, however, clearly suggests that the consideration of the claimant's grievance was substantially complicated by the age of the matters being referred to, the difficulty in obtaining relevant evidence and the exceptionally unusual overall circumstances.

12.17. The claimant initially also argued that the discretion had not been exercised in a transparent manner and that this was a further breach of contract. It is clear from the evidence presented that the respondent's reasons for exercising the discretion were not, at least initially, fully disclosed to the claimant. The claimant's claim is, however, one of breach of contract. If the lack of transparency relates to initially revealing the true reasons for the decision, it is difficult to see how such a failure actually impacted the decision outcome. Having considered this, during submissions, the claimant's

representative did not pursue her claim on the basis of a lack of transparency.

Relevant Law

12.18. To establish that the failure to exercise a discretion in her favour was a breach of contract, the claimant must show

- that there was a discretion; and
- the exercise of their discretion was not in accordance with a contractual term.

12.19. It is not disputed by the respondent that there was a discretion.

12.20. The claimant referred to an express statement in an Agenda for Change guidance document, that the discretion must be exercised "*fairly*". The claimant did not seek to argue that there was discrimination, and at the hearing chose not to pursue claims based on a lack of transparency; which were the other two requirements referred to in the Agenda for Change guidance.

12.21. The respondent submitted that the guidance was not itself contractual. Whilst this may be the case, if the respondent has relied on and applied the published guidance it is probable that it has become an implied term that the guidance will be followed.

12.22. The claimant bears the burden of proof to establish, on the balance of probability, that there has been a breach of contract, namely that the application of the discretion was not fair. The guidance does not give any detail as to what factors would be fair. Accordingly, it is a matter of fact to be determined on the basis of evidence and submissions, on the balance of probability, if the actions of the respondent was, in fact, fair.

Conclusions

12.23. The Tribunal does not find, on the balance of the evidence, that a blanket promise to exercise their discretion in favour of the claimant was made by the respondent.

12.24. Firstly, it stretches plausibility to suggest that the respondent would enter into a blanket promise to exercise a discretion in favour of the claimant if she produced evidence, regardless of what that evidence said or contained. This is especially true in a large organisation with detailed policies and processes to follow. The respondent's submission that the promise could not have gone beyond stating that if adequate evidence, rather than if any evidence, was provided by the claimant then the discretion would be exercised in her favour is logical and credible.

12.25. Secondly, there is nothing in writing, including the claimant's own note of the meeting, where she claims this promise was made, or any subsequent emails, which supports the claimant's assertions rather than the respondent's assertions over the detail of the claimed promise.

12.26. Finally, the claimant accepts that the discretion was not exercised in her favour at the meeting. It was clearly conditional on the evidence the claimant provided. As a matter of logic, that conditionality must, to some extent, go to the content and quality of that evidence. To assert otherwise would imply that a statement from anyone however credible or relevant, would suffice.

12.27. Accordingly, the Tribunal finds that the claimant was promised no more than, if she produced adequate evidence that she was an employee, or at least a constant and regular worker in the NHS throughout the break, then the discretion would be exercised in her favour.

12.28. The claimant produced P45s, which were redacted and in any event do not evidence employment status. In addition, she produced statements from former colleagues which confirm that the claimant secured work as an internal secondee. These statements are used to draw a conclusion that she would not have been eligible to apply for an internal secondment had she not been an employee. This conclusion is not consistent with the documentary evidence, including the advert for the internal secondment, which on any reasonable reading would allow those with the status of worker to apply. There is nothing in the statements which suggests that the authors were either aware of, or considered, the differences between those with the status of worker and those with the status of employee.

12.29. The respondent concluded that the claimant had not produced evidence to establish that she was employed as a bank nurse throughout her study break, which was what she was supposed to provide evidence to show. The claimant was given further opportunities to provide evidence, and in addition the respondent sought, unsuccessfully, to find relevant records for the period in question. The respondent was entitled to conclude, on the basis of what evidence was available, that the claimant had not established evidence to their satisfaction of her status and work for the duration of her study break.

12.30. Evidence was not presented which showed that the discretion has been applied to the claimant in a way which is inconsistent with the manner in which it was applied to any other employee of the respondent.

12.31. The respondent's conduct of the claimant's related grievance, albeit that it could have been more proactive at times, did not amount to an unfair failure to adhere to the ACAS Code of Practice regarding the handling of grievances. The code is not a fixed rule, and was not specifically designed for dealing fairly with historic matters, as were relevant here. In the circumstances it was both fair and appropriate that the respondent took the time necessary to seek to secure relevant information and evidence as part of the process.

12.32. The claimant argued that the respondent was not permitted to take into account, as part of its decision whether to exercise the discretion, the economic implications to the respondent of exercising the discretion. This cannot be correct. The claimant was unable to point to any authority to support her assertion that the economic impact of the exercise of discretion could not form part of a fair consideration of a discretion. There is authority that makes it clear, subject to indirect discriminatory impacts, cost can be a relevant consideration in redundancy selection processes. The claimant made no claim of discrimination in this case, and in any event no evidence or submissions were made as to how the use or otherwise of the discretion based on cost would be indirectly discriminatory in these circumstances.

12.33. Any respondent when determining whether to exercise a discretion in favour of an employee is entitled to consider what the impact, financially, of the exercise of that discretion would be.

12.34. The respondent concluded that the discretion should not be exercised in favour of the claimant. In the circumstances this decision was clearly one that it was fair to reach. It is noted that, on the basis of the evidence presented to the Tribunal, the claimant was neither a worker nor employee with the NHS, or undertaking study, for the period from June to September 1998. This further evidence provides additional support to one of the main reasons given by the respondent for not exercising their discretion, namely that she could not show she was at least working on a regular basis as a bank nurse throughout her study break.

12.35. It is difficult to see how, even if the respondent had been given the benefit of the more detailed evidence before the Tribunal, they could be said to have reached an unfair conclusion in deciding not to exercise the discretion in the claimant's favour.

13. **Overall Conclusions**

13.1. The respondent exercised its discretion in accordance with the Agenda for Change policy and guidance.

13.2. The claimant was not an employee of the respondent from 1996 to September 1998 as there was no mutuality of obligation, and for the period from June 1998 to September 1998 the claimant was not undertaking study or work for the respondent or any connected organisation. On this basis the claimant's continuous service was clearly broken at least during the period from June until September 1998, if not for the entire period from 1996 to 1998.

13.3. Under the definition of '*reckonable service*' set out in the Agenda for Change, the period from 1996 to 1998 was not '*reckonable service'*. In particular, the requirements necessary for an employment break to count as '*reckonable service*' were substantially and materially not met.

13.4. The only way the claimant could have her service prior to September 1998 counted as '*reckonable service*' would be if she had been able to persuade the respondent to exercise their discretion on the point in her favour. The respondent applied their minds to their discretion, and elected not to exercise it in the claimant's favour. The reasons for this were clearly set out in evidence to the Tribunal, and are credible. The claimant's contention that the respondent made binding promises to exercise their discretion, which it then failed to keep, were not supported by the balance of the evidence presented. They are disputed by the respondent and inconsistent with the documentary evidence available and with the decision of the respondent.

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Employment Judge Buzzard

Date___8 April 2018 _____

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

11 April 2018

FOR THE TRIBUNAL OFFICE