EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Lofthouse**

Respondent: **NHS Leeds Clinical Commissioning Group**

Heard at: **Leeds** **on** **14 and 15 January 2019**

Before: Employment Judge Bright (sitting alone)

Appearances
For the claimant: Mr Gidney (Counsel)
For the respondent: Ms Connolly (Counsel)

JUDGMENT

The claimant is entitled to a statutory redundancy payment and damages for breach of contract, totalling £22,822.03.

REASONS

The claims

1. The claimant brought a claim for a statutory redundancy payment and damages for breach of contract in respect of an enhanced contractual redundancy payment. The parties were agreed that, if the claims succeeded, the remedy would be a total payment of £22,822.03, inclusive of the amount of any statutory redundancy payment.

The issues

2. It was agreed that the issues were:

   2.1. Was the role offered to the claimant on her redundancy suitable alternative employment within the meaning of section 141 of the Employment Rights Act 1996 ("ERA")?
   2.2. If so, was the claimant's refusal of the role unreasonable?

2.3. Did the claimant's contractual terms require 'some flexibility' from the claimant, in addition to the requirement of reasonableness set out in section 141 ERA?

2.4. If so, did the claimant satisfy that contractual condition?

Submissions

3. Mr Gidney made both written and oral submissions on the claimant's behalf, which I have considered with care but do not rehearse here in full. In essence it was submitted that:

3.1. The Band 5 role offered was not a suitable offer of employment for the claimant because:

3.1.1. It represented a demotion from pay band 6 to pay band 5;

3.1.2. It attracted a lower salary and, while pay protection mitigated this for a limited period, the claimant would be denied pay rises and would ultimately take a pay reduction;

3.1.3. It was a less skilled role with reduced status, involving supporting rather than leading and was a backward step for the claimant in terms of her career progression;

3.1.4. There is uncontested evidence that three of the claimant's colleagues agreed that the role was not suitable for her;

3.2. Whether the Band 5 role was suitable or not, it was reasonable for the claimant to refuse it, because:

3.2.1. It was further away and would add 45 minutes to her commute each way, taking account of traffic conditions. The respondent's calculations at the time failed to take account of real traffic conditions;

3.2.2. Parking arrangements would make the commute longer;

3.2.3. Any reduction in hours to accommodate the travel time would have a negative impact on her finances;

3.2.4. Although Human Resources assured her she could work one day from home, the message from her managers was that this was conditional on information being capable of being anonymised, and it therefore could not be guaranteed;

3.2.5. The alternative working patterns suggested by the respondent would cause the claimant difficulties with childcare and/or finances and/or hospital visits with her child;

3.2.6. Her child's schooling would be disturbed, something she had been advised by the school to avoid;

3.2.7. When the reduced nature of the role is combined with the adverse domestic impact it was reasonable for the claimant to reject the role. The role offered would have diminished the claimant both professionally and personally.

3.3. The claimant showed flexibility in proposing an alternative working pattern which would work for her and in being prepared to do a trial period. This was sufficient to satisfy the contractual requirement for 'some flexibility' and also goes towards the question of reasonableness. The incremental combination of factors would require her to make sacrifices beyond that which the claimant could reasonably accommodate.

3.4. Although past authorities are of limited assistance, there are a number of domestic situation cases suggesting that the claimant's refusal would be reasonable on grounds of her children being at a critical stage, even if the job role were wholly suitable.

4. Ms Connolly made oral submissions for the respondent which I have considered with equal care but do not rehearse here in full. In essence, it was submitted that:

4.1. The claimant's Agenda for Change terms and conditions contain an additional requirement, for payment of the redundancy payment, that the employee show flexibility. Since that requirement does not form part of the statutory test, the prudent approach would be to regard it as a distinct contractual requirement.

4.2. The terms 'suitable' and 'reasonable' have their ordinary meanings and the case law, although illustrative, is of little assistance.

4.3. The views of colleagues, cited by the claimant, who may or may not have been apprised of all the details or be aware of the statutory constructs are of little assistance.

4.4. The test of suitability is whether a reasonable person would say that the job was suitable for this employee's skills, aptitude or experience.

4.5. The test of the reasonableness of the employee's refusal requires an assessment of whether an employee in the claimant's circumstances could reasonably have refused. It is necessary to identify what was operating on the claimant's mind at the time and assess whether it was reasonable.

4.6. Tribunals tend to look at the job when assessing suitability and the personal circumstances when assessing reasonableness, but there is no separation. It is important to look at the job overall, as a package.

4.7. Two important facts in this case, for both issues, are:

4.7.1. There was a mobility clause in the claimant's Band 6 contract, meaning she could be required to relocate to another area provided there was consultation. She was in the same situation as all the other employees at Thorpe Park, who moved to Wyra House as a result of a separate re-organisation;

4.7.2. The claimant's Band 6 role was a fixed term contract. The Band 5 role offered was a permanent contract terminable on notice. Job security is an important factor to consider when weighing the package overall.

4.8. In addition, the Band 5 role was suitable because:

4.8.1. The claimant's pay would be protected for a three year period and, although she would not progress with increments, these were never guaranteed in her previous role because she had been on an fixed term contract;

4.8.2. In terms of progression, in the new role she would be reporting to Band 8 managers, rather than Band 7, and progression is dictated by the access one has to influence others in the organisation;

4.8.3. The differences between the Band 6 fixed term role and the Band 5 permanent role were not of such a scale as to render the role unsuitable for her;

4.8.4. From the job descriptions of the two roles it is clear that they both required the job holder to lead, support and develop. The Band 6 role was in a small team on a small project. The Band 5 role was in a larger team,

doing a greater breadth of work, liaising with a wider range and seniority of individuals. Were it not for the claimant's objections to the travel, she would have found the Band 5 role suitable.

4.9. The tribunal needs to find as a fact what the increased travel would be and determine the impact on the claimant's childcare. The additional travel time was around 25 minutes, on the basis of Google maps, taking account of travel conditions. The different times on the maps reflected the different suggested start and finish times. There is no detailed evidence to support the claimant's estimate of 45 minutes. The respondent undertook to pay the increased mileage for four years. The respondent sought to alleviate the impact on her childcare by suggesting one day a week from home.

4.10. With Option 1, as set out in Ms Connor's witness statement, the claimant would work a 4 day working week, working one 9 hour day from home and three 6 hour days in the office. Although there would be a reduction in paid hours, the claimant would not be required to use childcare in the mornings, and her childcare costs would therefore be reduced. Just over twelve months previously the claimant had been asking to work 25 hours, against which backdrop and given the childcare savings, Option 1 was a suitable working pattern and it was not reasonable for her to reject it.

4.11. Option 2 was for 30 hours over five days, with one 9 hour day, working from home, and three 6 hour days and one 3 hour day in the office. There would therefore be no loss of paid hours and on the long day she would be permitted to work from home, while on her short days in the office she would not need childcare because she could deliver her children to school. There would be savings made from no longer requiring morning childcare. The claimant referred to 'other commitments' requiring her to work no more than a four day week, but did not identify those commitments. Her evidence regarding hospital appointments for her son is new and uncorroborated. Refusal on the basis of mere personal preference falls short of being a reasonable employee, even taking into account the claimant's personal circumstances, and it also falls short of the flexibility required under the contract.

4.12. Option 3 was for five days per week, working 6 hours each day, with one day worked at home. The start times would mean no morning childcare would be required.

4.13. These options should be seen against the backdrop of the mobility clause in her Band 6 role. Had her fixed term contract not ended for another six months, she could have been required to work from Wyra House on one of these patterns in any event.

4.14. Taking the Band 5 role as a whole package, against the backdrop of the fixed term contract and the mobility clause, even if it was not suitable alternative employment, the claimant's refusal was unreasonable and did not show flexibility.

Evidence

5. The respondent called:

5.1. Mrs G Connor, Associate Director of Primary Care.

5.2. Mrs J Davies, Deputy Chief Finance Officer.

6. The claimant gave evidence on her own behalf and called no further witnesses.

7. The parties presented an agreed bundle of documents of 272 pages, of which I read those documents to which I was directed. References to page numbers in these reasons are references to pages in the agreed bundle of documents.

Findings of fact

8. I have made the following findings of fact. Where there was a dispute of fact between the parties I have resolved in on the balance of probabilities on the evidence before me, in accordance with the findings set out below.

9. The claimant was dismissed for redundancy on 3 April 2018 and the respondent made an offer of alternative employment which the claimant ultimately rejected. The respondent treated the claimant's rejection of the offer as resignation and therefore did not pay her any statutory or contractual payment for redundancy.

10. The claimant's redundant role, as a band 6 Information Analyst ("**the Band 6 role"**), was a fixed term role working in a small team on a specific project, operating out of premises at Thorpe Park, in South East Leeds. The contract was due to run until 31 March 2018, but the claimant's continuity of employment with the NHS had commenced on 8 May 2006. It was not disputed that the claimant had previously left a permanent role graded at band 5 to take up the fixed term Band 6 role. Band 6 is higher on the Agenda for Change pay scale than band 5. The claimant initially sought to work 25 hours per week in the Band 6 role, but agreed to work 30 hours over four days per week (working 8.15am to 4.15pm, Tuesday to Friday). I accepted the claimant's undisputed evidence at paragraph 2 of her witness statement about her feelings of guilt and the effort required to try to balance her family and work life.

11. The claimant was notified of her impending redundancy at the expiry of her fixed term contract and discussions began between herself, her managers and human resources regarding possible suitable alternative employment. She attended a meeting with Ms Nichola Stephens, on 9 February 2018, regarding the offer of a band 5 Information Analyst role ("**the Band 5 role**"). She met with Mr Frank Wood (Chief Analyst) and Ms Gaynor Connor to further discuss that role on 23 March 2018.

12. The clauses of the claimant's Agenda for Change terms and conditions relating to redundancy provide that suitable alternative employment should be determined by reference to sections 138 and 141 ERA. The contract adds that, "*in considering whether a post is suitable alternative employment regard should be had to the personal circumstances of the employee. Employees will, however, be expected to show some flexibility*" (page 266).

13. Following the 23 March 2018 meeting, the claimant emailed Ms Connor (pages 201 – 202) explaining that the offer would only be acceptable if she could work four days per week with two days worked from home, which could be 'flexed' to any day with a week's notice. The claimant also proposed that she work longer hours when working from home, with the remaining 12 hours worked over two days from Wyra House. She proposed a trial period because of her concerns about the skill level of

the new role and was explicit that she needed that pattern to support her childcare arrangements and to maintain an appropriate work/life balance. The respondent rejected the claimant's proposal and confirmed its final offer by email dated 27 March 2018 (page 203). That offer consisted of three options, each of which could incorporate one guaranteed day working from home, but not two. The offers were:

13.1. Option 1: 1 x 9 hours + 3 x 6 hours = 27 hours over 4 days. This represented loss of three hours' work per week;
13.2. Option 2: 1 x 9 hours + 3 x 6 hours + 1 x 3 hours = 30 hours. This required a five day week, with four days in the office; or
13.3. Option 3: 5 x 6 hours = 30 hours, over 5 days, with four days in the office.

14. The claimant rejected the options and her employment therefore terminated. The claimant asked for her redundancy payment, but the respondent declined to pay on the basis that she had unreasonably rejected an offer of suitable alternative employment (page 215 – 219). The claimant appealed against the decision not to pay her a redundancy payment (page 220 – 221). Her appeal was heard and dismissed by Ms Davies by letter dated 13 April 2018 (page 255).

15. One of the claimant's reservations about the Band 5 role was its different substance and status, compared with her Band 6 role. I find that the difference between the roles was not as yawning as Mr Gidney submitted, nor was it as minimal as Ms Connolly suggested. It is accepted that the Band 5 role is in a lower financial banding and, as a matter of common sense, a lower banded job (in terms of pay) naturally denotes some reduction in status, by which I mean it's position within a perceived hierarchy of job roles. Status is clearly rewarded, under Agenda for Change, by the pay band of the role. While it was agreed that any reduction in pay for the claimant would be mitigated over 3 years by means of pay protection, that was not a long-term solution, and did not address the issue of status. I find that the Band 5 role was lower status. Further, it was not disputed that the claimant would lose out on potential pay increments which would have been accorded her had she continued in a Band 6 role. I find that the overall effect would be that, over time, her remuneration would be lower than in the Band 6 role.

16. The respondent submitted that, as the claimant's Band 6 role was fixed term, not permanent, she might not have continued to receive her existing rate of pay or increments in any event. That argument is somewhat circular, in my view. The claimant had 12 years' continuous employment with the respondent and was therefore entitled to be offered suitable alternative employment or a redundancy payment on expiry of her fixed term contract. There was never any question of her employment lawfully terminating at the end of her fixed term contract without one of those potential outcomes. Had her Band 6 role been permanent rather than fixed term, she would therefore have had the same entitlements when the redundancy situation arose. Whether or not a new role is suitable alternative employment in circumstances where the employee has more than two years' employment, should therefore be assessed in the same way, in my view, whether or not the employee's existing role was fixed term or permanent. What the respondent's argument boils down to is circular reasoning: a band 5 role was suitable because a band 5 role was suitable.

17. The respondent has also pointed to a lack of job security in the claimant's existing Band 6 role because it was for a fixed term. Although the Band 5 role offered was a permanent contract terminable on notice, rather than fixed term, and that is clearly a factor to consider when weighing the overall package being offered, I considered that it was not sufficient to counterbalance the difference in remuneration and status.

18. The claimant submitted that the Band 5 role required a lower skill set than the Band 6 role. I find there was insufficient evidence for me to make clear findings of fact on this. Without knowing more details of the roles or the nature of the work, it was difficult to discern the real differences between the roles, particularly given that the job descriptions were drawn up from different templates. There were references to 'leading' and 'supporting' in both but determining the relative balance of either was impossible without more context. The fact that the Band 5 role attracted band 5 grade rather than a higher grade suggested that it was a less skilled role.

19. It was accepted in general that the nature of the Band 5 role was broader, involving more contact with a wider range of parties. I was not persuaded by the respondent's submission that the lines of reporting were significant in assessing the status of the role. It was agreed that the Band 5 role reported to Band 8 managers and that the Band 6 role had reported to Band 7 managers. But if, as the respondent submitted, one's job status is determined in part by the access one has to influence others in an organisation, that would surely already have been taken into account in the process of grading the role under Agenda for Change. The fact that the claimants' previous role was part of a small team on a small project did not tell me anything useful about the status or substance of either role. The respondent also pointed to the fact that the claimant would have received career coaching in the Band 6 role, but I accepted the claimant's evidence that what was on offer went no further than the coaching she was already able to access. It seemed to me that these factors were not sufficient to put the Band 5 role, viewed as an overall package, on a par with the Band 6 role.

20. On balance, I agreed with the claimant's submission that, in relation to this claimant, a Band 5 role clearly had less status than her Band 6 role and would be something of a 'backwards' step.

21. Mr Gidney submitted that I should accept the claimant's unchallenged evidence that Ms Stevens and others made comments suggesting that they recognised that the Band 5 role was not suitable alternative employment for the claimant. Although I accepted that none of the respondent's evidence contradicted the claimant, and witnesses could have been called to contradict that evidence, I agreed with Ms Connolly's submissions that this evidence comprised a second hand account of the opinions of people who may or may not have been apprised of all the details or been aware of all the statutory constructs. While I do not doubt the claimant's evidence, therefore, I attach little weight to the managers' apparent concessions that the role offered was not suitable for the claimant.

22. The claimant's home is to the South East of Leeds. Mr Gidney submitted, and it is not disputed that, if she were to drive towards the city, one of the first

destinations she would arrive at is Thorpe House, her work location in the Band 6 role. To get to Wyra House, the proposed location of the Band 5 role, she would be required to drive through or round the city of Leeds, up to the North West side of the city.

23. There was much discussion at the hearing around distances, timing of journeys, traffic conditions, AA route finder and Google maps data. I find that, during the respondent's consultation with the claimant around suitable alternatives to redundancy, the only evidence on distance utilised was a chart showing a commuting difference of 11 miles and 18 minutes (page 257), although the claimant maintained that the time taken to drive the extra distance, would be significant. It was not clear to me from the respondent's witnesses evidence whether the respondent took account of the reality of the geography and, if not, why not. The point was made at the appeal that the respondent's calculation did not give any effect to either farm traffic or rush hour commuting traffic. It is not clear why the respondent continued to rely on those figures, when the claimant (as, I suspect, anyone living and working in or around Leeds would be very likely to do) questioned the figures shown on the grid, particularly in relation to rush hour traffic. I accepted the claimant's evidence at paragraph 3 of her witness statement that the Thorpe Park location was already at the limit of what she could manageably travel, given her childcare arrangements.

24. I am unable to make a definitive finding as to how much longer the claimant's commute would take to Wyra House. But I attach weight to the claimant's evidence of her experience of driving the route. The respondent's evidence was limited to an AA Route Finder estimate and the fact that other employees were able to make the switch. Other employees' circumstances or home locations are unknown to me however. The Google maps provided in the bundle at pages 269 – 272, take account of traffic, but do not enable a true comparison because they are for different times of day. The one estimating travel to Thorpe Park is for travel starting at 7.30am, while the one to Wyra House is for travel starting at 8.45am. Although that is because the discussion regarding the Band 5 post was mainly about the claimant attending work at 10am rather than 8am, it confuses the matter slightly. Nevertheless, the time take is significantly longer for Wyra House both ways, as one would expect given the geography. Common sense dictates that travelling a short distance in predominantly rural locations before rush hour will take relatively less time than travelling a longer distance through or around a major city during or even just after rush hour. I accepted the claimant's evidence that 45 minutes each way was a likely estimate of the average length of her commute to Wyra House. Further, the respondent did not dispute the claimant's assertion regarding parking problems at Wyra House. The claimant gave unchallenged evidence that she might have to walk for a further 15 – 20 minutes, on top of her drive.

25. The respondent submitted that the fact there was a mobility clause in the claimant's contract (page 82) was an important factor, in that she could have anyway been required to relocate to another area, provided there was prior consultation. The respondent suggested that she was in same situation as all the other employees at Thorpe Park who were required to move to Wyra House as result of a separate re-organisation. However, the respondent did not challenge

the claimant's evidence that she, in fact, spent much of her Band 6 role working from home and working from other locations. Had the mobility clause in her Band 6 contract been activated, there would have been consultation and, quite possibly, discussion of the alternative arrangements available to her for that role. I accepted the claimant's evidence in paragraph 3 of her witness statement that the Band 6 role had been offered to her on a flexible basis and included the option of working from home. Were this taken into account in any consultation around proposed activation of the mobility clause, the requirement to travel to Wyra House on three, four or five days per week (as was suggested for the Band 5 role) may not have materialised. Again, while the mobility clause is a factor which I take into account, therefore, I do not consider that there is sufficient evidence for me to conclude that it nullifies the claimant's concerns about the suitability of a role which would require such an increase in commuting time.

26. The respondent clearly tried to find alternative solutions which would make the Band 5 role acceptable to the claimant, but I accepted the claimant's evidence that, given the increased length of her commute, none of the options presented by the respondent was realistic. All of those options would have had some adverse impact on either or both childcare expenses, salary or her time spent with her children. I have considered in some depth the analysis presented in the respondent's submissions of the three options presented to the claimant. However, they are all premised, to some extent, on the journey time being shorter than, I find, it would have been in reality. With a journey time of 45 minutes each way, the respondent's proposals become less attractive and the impact on her childcare greater than the respondent submits.

27. The respondent's proposals were also premised on the claimant being assured of one day working from home each week. I agree that the respondent's human resources officers at the appeal confirmed that one day per week working from home would be guaranteed. However, I also accepted the claimant's evidence that the managers to whom she would be reporting had told her that home working was conditional on the data being anonymised. She therefore understood that, in reality, it might be difficult to achieve. She believed there was therefore a risk that working from home would not materialise.

28. In addition, I accepted that, for the reasons she sets out in her claim form, she was not prepared to work over five days because of her other commitments, namely medical appointments for her son. While that reason was not identified to the respondent during the process, I accept that it was nevertheless a reason for the claimant to refuse an offer which would require her to work over five days. I accepted that, by the time of her redundancy, despite having worked 25 hours per week previously, she was working 30 hours in her Band 6 role and did not want to lose more than two hours' pay per week.

29. Both of the respondent's witnesses agreed that the claimant showed some flexibility. She was prepared to take the Band 5 role on a trial period, provided she could do so without damaging her children's schooling or causing financial difficulties (as shown by her proposals on page 202). Having a personal preference, because of medical appointments and commitments for her children, to work four days rather than five does not, in my view, amount to a lack of flexibility.

The claimant was prepared to move her day off and had genuine childcare reasons for wanting one day per week free. I find she engaged in the negotiations in good faith and sought to find a solution.

The Law

30. Section 141 of the Employment Rights Act 1996 ("ERA") states (with my emphasis):

(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment:
   a) to renew his contract of employment, or
   b) to re-engage him under a new contract of employment,
   with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.

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

(3) This subsection is satisfied where
   a) The provisions of the contract, as renewed, or of the new contract, as to:
      i) the capacity and place in which the employee would be employed, and
      ii) the other terms and conditions of his employment,
   would not differ from the corresponding provisions of the previous contract, or
   b) those provisions of the contract as renewed, or of the new contract, would differ from the corresponding provisions of the previous contract but the offer constitutes **an offer of suitable employment in relation to the employee**.

31. The questions of whether a role is a suitable alternative and whether an employee's refusal of a role is reasonable are separate questions, to be determined separately.

32. The question of suitability of the role is largely objective (would a reasonable person say that this job is suitable for the employee), albeit that the role is assessed in its suitability for this particular employee's skills, aptitude, experience etc. The role must be considered as a package, with no single factor being decisive.

33. The question of the reasonableness of the employee's refusal is subjective in that it is a question of whether this particular employee acted reasonably in their particular set of personal circumstances at the time. The Tribunal must consider whether someone in the employee's particular circumstances could reasonably have taken the view of the alternative post offered that this employee took (**Bird v Stoke-On-Trent PCT** [2011] UKEAT/74/11.

34. The burden of proof rests on the employer to show both that the alternative employment offered was suitable and that the employee's refusal of that employment was unreasonable.

35. The cases are clear that past authorities, while they may provide guidance, are of limited assistance, owing to the fact sensitive nature of the enquiry.

Determination of the issues

Suitability of the Band 5 role

36. I find that, taking into account all the fact finding above, the respondent has not shown that a reasonable person would consider the Band 5 role (viewed as a package) to be suitable employment in relation to the claimant. The word 'suitable' has its ordinary English meaning in the statute and, as the representatives have been at pains to point out, suitability is assessed objectively by the tribunal, but with an element of subjectivity in that suitability of the job is assessed 'in relation to the employee' concerned.

37. The Band 5 role, while it offered a chance to work with a broader range of people and agencies and reported to higher level management, was at a lower band than the claimant's Band 6 role. The fact that the claimant's pay was preserved is not sufficient in itself to make the job suitable and, in any event, she would ultimately lose pay and increments. More significantly, I find that the respondent has not shown that a reasonable person would consider a Band 5 role to be equivalent to a Band 6 role. It was, by virtue of its grading under Agenda for Change, viewed by the organisation as being of lesser value. I find that the role offered was lower status than the claimant's fixed term role. While I was unable to reach any clear conclusions about the content of the role from the job descriptions presented to me, it is clear that there was a degree of difference and the Band 5 role was not the claimant's Band 6 role by another name. It may have been quite different in reality and the mere fact of its banding suggests a lower skill set would be required.

38. Given the other advantages of the Band 5 role, however, I find that the difference in status was not large. Had there been no issues of relocation on top of the changed nature and status of the role, it might have been suitable. While a mere change of workplace is unlikely to make a job unsuitable if the nature of the job itself is unchanged, in this case the nature of the job, it's status and it's location were all different. The fact that the claimant was prepared to give the role a trial, if the hours and home working could be agreed, may support the view that the role was not far from being suitable though, for obvious reasons, the willingness of an employee to undertake a trial period cannot be conclusive evidence that they consider a role to be suitable.

39. I find that, on balance, the respondent has failed to show that a reasonable person would view the Band 5 role as suitable for the claimant. A reasonable person, in my view, would view the difference in location, the effect that would have had on the claimant and the lower status and pay attached to the role as rendering it unsuitable for the claimant.

Reasonableness of refusal

40. Even if I am wrong, I find that the claimant's rejection of the role was reasonable in the circumstances. The reasonableness or unreasonableness of a rejection of alternative employment depends largely on factors personal to the employee and is assessed subjectively from her point of view at the time of the rejection of the offer.

41. In my view, even if the Band 5 role was suitable for the claimant, it was on the borderline and any rejection of it is therefore more likely to have been reasonable. The claimant's view was clearly that it was a 'backwards' step in terms of her career progression. She had worked up to the Band 6 role, leaving a permanent Band 5 role to take the fixed term contract at a higher band. She viewed the Band 5 role as having less status and substance and less suited to her particular skills. Whether or not it would have been a backward step in reality, she clearly viewed it that way and I find that she was entitled to view it as a demotion, despite the pay protection. A reasonable employee in the NHS would, in my view, consider a move from Band 6 to Band 5 as a demotion.

42. Furthermore, it was clear that the increased commute would have an impact on her work-life balance. I accepted the respondent's evidence that the claimant's colleagues at Thorpe Park mainly relocated and that she would not have remained there in any event because of other restructurings taking place at that time. However, a change of workplace may affect different employees differently and I accepted the claimant's evidence that she had had a large degree of flexibility in her Band 6 role, including working from home and other locations. What other employees were able or prepared to do was, in my view, not relevant.

43. The three options suggested by the respondent either resulted in less pay (3 hours lost) or a five day working week. The claimant's personal circumstances were such that she did not want a reduction in pay of 3 hours per week and did not feel she could accommodate a five day week because of the increased journey time and resulting cost of wrap-around care for her children and impact on her time spent with them. She also required a day each week on which to book hospital appointments. The fact that the latter reason did not appear in her claim form or other evidence and was not explicitly raised with the respondent prior to dismissal does not mean it is irrelevant to the consideration of whether her refusal was reasonable. The solution she suggested to minimise the impact on her children was two days per week working from home, but the respondent was not able to accommodate that. In addition, she had concerns about whether the respondent's guarantee of one day per week working from home was, in reality, achievable. The question of reasonableness is to be judged from a subjective rather than objective standpoint. It seems to me that the claimant's family, caring and cost considerations were key to her rejection of the respondent's offers. She had stretched her flexibility to the maximum to do the Band 6 role and the change of location and inability to work two days from home in the Band 5 role were a push too far. The fact that she was prepared to negotiate to try to find a mutual solution, was prepared to suggest alternatives and ultimately was prepared to embark on a trial period suggest that her approach to considering the respondent's proposals was reasonable.

44. In the circumstances, I find that the respondent has not shown that her decision to reject its options was unreasonable

Contractual flexibility

45. Section 141 ERA does not expressly require flexibility by the employee, although as can be seen from my reasoning above, whether or not the employee has shown some flexibility may be relevant to whether a rejection was reasonable. I am not convinced, looking at the wording of the contractual term in Agenda for Change that it was intended to go beyond the reasonableness required by the statute. No evidence was produced regarding the formation of that contractual term and I just have it in isolation. There appears to be nothing to suggest that it is more than merely a re-iteration of the 'reasonableness' requirement in the statute, interpreted so as to be understood by a non-legal person. However, I agree with Ms Connolly that the prudent approach, in the absence of more context and for the sake of argument, is to regard that term as a distinct contractual requirement for 'some flexibility'. For completeness therefore, I have considered whether the claimant did show sufficient flexibility to satisfy any additional requirement in Agenda for Change. This is to be judged objectively.

46. Both of the respondent's witnesses accepted that the claimant had shown some flexibility. There was no accusation at the time that the claimant had not shown sufficient flexibility. In the email at page 202 she shows considerable flexibility, suggesting that the two days worked from home could be 'flexed' with a week's notice and that she was prepared to embark on a trial period.

47. She was not prepared to give up her one day off per week, but that in itself is not inflexible in my view. It was not merely a matter of personal preference. She had a good reason for wanting one day off per week (her son's hospital appointments) and was prepared to be flexible about which day she took. I find that the objective bystander would consider that, in all the circumstances, the claimant showed some flexibility and had therefore complied with the contractual requirement to that effect.

Conclusion

48. I find that the claimant is therefore entitled to the payment of £22,822.03, which the parties have agreed and I accept is the appropriate level of statutory redundancy payment and damages for breach of contract combined.

Employment Judge Bright
Date: 26 March 2019