



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Yates

**Respondent:** Oxford University Hospitals NHS Foundation Trust

**Heard at:** Watford (BY CVP)

**On:** 16, 17 & 20 February 2023

**Before:** Employment Judge Skehan

## Appearances

**For the Claimant:** Ms Egan, Counsel

**For the Respondent:** Ms Stanley, Counsel

## JUDGMENT

1. The Claimant is entitled to a statutory redundancy payment in accordance with section 135 of the Employment Rights Act 1996.
2. The respondent must pay the agreed sum of £13,988 to the claimant within 14 days of the date of this Judgment.

## REASONS

1. Oral reasons were provided at the conclusion of the hearing. These written reasons are provided following a request by the claimant's representative.
2. Early conciliation was commenced on 19 January 2021 and concluded on 3 February 2021. The claimant issued proceedings on 25 February 2021. The claim was defended and the respondent's form ET3, submitted on 11 May 2021, was accepted by the tribunal.
3. The parties had prepared an agreed list of issues. At the commencement of the hearing Ms Stanley confirmed that it was common ground that the claimant was dismissed for reason of redundancy, therefore the only issues before the tribunal were:
  - a. Did the Respondent offer the Claimant suitable alternative employment under section 141(1)(b) and (3) ERA 1996 by offering the Claimant the following roles:

- i. Senior Specialist Nurse in Palliative Medicine, a Band 7 role, referred to as the 'alternative Band 7 role' or 'alternative nursing role' within this Judgment.
    - ii. Deputy Operational Services Manager for Gastroenterology, Endoscopy and SUWON (Surgery, Women's & Oncology Division) Theatres, a Band 8A role, referred to as the 'alternative Band 8 role' within this Judgment.
  - b. In answering the above question, the Tribunal will have regard to whether either offer of alternative employment was suitable for the Claimant, having regard to:
    - i. The Claimant's skills, aptitude and experience and whether they meet the requirements of the job on offer.
    - ii. The terms of the alternative job (for example, status, place of work, tasks to be performed, pay, hours and responsibility) and how they compare with the terms of the Claimant's previous role.
  - c. If yes in relation to either or both roles offered, did the Claimant unreasonably refuse offer(s) of suitable alternative employment under section 141(2) ERA 1996?
4. It is noted that this litigation related to a claim for a statutory redundancy payment only. There is no breach of contract claim within this litigation.

### **The Law**

5. There is no dispute between the parties in respect of the law. An employee is entitled to a redundancy payment if dismissed by reason of redundancy (section 135 of the Employment Rights Act 1996 ("the ERA")). An employee is not entitled to a redundancy payment if s/he unreasonably refuses an offer of suitable alternative employment (section 141(2) of the ERA).

### **The Facts**

6. As is not unusual in these cases, the parties have referred in evidence to a wider range of issues than I deal with in my findings. Where I fail to deal with any issue raised by a party, or deal with it in the detail in which I heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance in determining the issues. I only set out my principal findings of fact. I make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
7. All witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. I heard from Dr Miller on behalf of the claimant and the claimant on her own behalf. On behalf of the respondent, I heard from Ms Cornall who was at the relevant time Deputy Divisional Director & Divisional Nurse in the SUWON and Mr Carter who dealt with the claimant's subsequent unsuccessful appeal.

8. The claimant is a nurse whose service with the NHS began in September 1985. On 4 September 2017 the claimant commenced fixed term role as Clinical Programme Manager for End-of-Life Care, at Band 8A. This role was funded by Sobell House, it was subsequently extended and due to end on 30 September 2020. For ease of reference this role is referred to as 'the fixed term role' in this Judgment. This was a nursing leading and management role rather than a clinical role. It is common ground that the claimant had not worked clinically, in a patient facing role, for 13 years.
9. When applying for this fixed term role in 2017 the claimant asked the interviewing panel whether, if appointed, she would be employed as a nurse. The claimant explained that this was important to her as she was proud of being a nurse and wished to continue being employed as a nurse. In addition, the claimant believed that she had Special Class Status 'SCS' pension status that would allow her, if she so wished, to retire at 55 without financial penalty that would otherwise apply. The claimant was assured that should she accept the role she would be employed as a nurse. The claimant accepted the role on that basis. The claimant genuinely believed that she had retained her SCS status. The claimant considered the substantive role that she carried out during the fixed term role to genuinely qualify for SCS status. The claimant produced recent pension documentation recording her 'normal pension age' at 55 years, and the claimant believed that this documentation reflected the respondent's genuine understanding of her entitlement.
10. I was referred to internal respondent documentation by the respondent said to suggest that the respondent did not consider the claimant's fixed term role to be a nursing role. The knock-on implication would be that the fixed term role would not attract SCS. This documentation or the potential implication was not shared with the claimant. There was no suggestion by the respondent prior to the termination of the claimant's employment that her fixed term role would not attract SCS status.
11. Prior to undertaking the fixed term role, the claimant worked as a Deputy Matron/ Deputy Operational Service Manager ("OSM") for 6 years, at Band 8A. Within this role the Claimant estimated that 90% of was a Deputy Matron role and just 10% was Deputy OSM/ business management. The role was in palliative care, which is reactionary so there is no forward planning.
12. The claimant was placed at risk of redundancy on 7 April 2020 by reference to the expected expiry of her fixed term role. The consultation period was expected to start on 1 June 2020. At this point the claimant had identified a potentially suitable alternative role of deputy matron/service manager role and requested to be slotted into it. The claimant was informed that this was not possible because the claimant's at-risk status did not apply until the consultation process had started. This role was an obvious suitable alternative for the claimant as she had previously been employed within it for 6 years. The claimant did apply for this role but withdrew her application due to perceived lack of support on the respondent's part. In light of the respondent's position, the claimant considered that she was unwanted within the role and unlikely to secure it. There was also discussion between the parties in relation to potential alternative roles that were considered suitable by the claimant but did not come to fruition.

13. Looking at the roles said by the respondent to be suitable alternative employment, I first examine the alternative Band 7 nursing role. There was no discussion between the parties in relation to the potential suitability of this role prior to the claimant's receipt of a letter dated 16 September 2020, headed 'offer of suitable alternative employment'. The claimant had a detailed understanding of this role as she had previously managed this team and dealt with recruitment into such a role. It can be seen from the correspondence that the claimant engaged with the respondent and provided, through the RCN, a detailed request for further information on 23 September 2020 to allow her to properly consider this alternative role. This letter is a matter of record raising various ways in which the claimant did not meet either the essential criteria for key aspects of the job description. The two main issues were:
- a. the amount of retraining required. The claimant had not worked in a patient facing role for 13 years. This role was not only a clinical role but was a senior specialist clinical role. The claimant was aware that she would require substantial retraining to fulfil the requirements.
  - b. loss of status. Taking this role would result in the claimant becoming part of a team that she had previously managed for 6 years and worked closely with for the last 3 years. Further, because they had worked together, that team were fully aware of her lack of clinical specialist palliative care knowledge and experience. Although it would be intended that the claimant was employed at the Band 7 specialist nurse, she would in reality not have the necessary experience for a Band 6 role. The claimant would require significant mentoring from the existing Band 6 and Band 7 nurses and asks how the team would be supported through an extended transition.
14. During the course of giving evidence Miss Cornall acknowledged the claimant's lack of skills and explained that the gap in the claimant's ability to take up this Band 7 role would require:
- a. a substantial amount of retraining on the claimant's part. Miss Cornall had prepared but did not share with the claimant a proposed training plan. Miss Cornall estimated that it would take approximately one year for the claimant to become effective in her role and that the required training extended to 2 years, including a postgraduate qualification, to reach the required standard. Ms Cornall acknowledged that the claimant had not been provided with information in relation to the proposed training plan prior to the termination of her employment. The plan was only disclosed by the respondent shortly before this hearing. Ms Cornall said that the claimant should have accepted trial period within this role. Had she accepted the trial, the proposed required training would have been shared with her and the claimant could thereafter have, at the end of the trial period, considered whether the role was suitable alternative employment.
  - b. that role would need to be back filled. This means that another nurse who had the clinical skills required by the role would need to be recruited or allocated due to the claimant's lack of clinical skills, while the claimant effectively came up to speed. This information was not shared with the claimant prior to the termination of her employment or prior to the final hearing.

15. There was a considerable difference of opinion within the respondent organisation in relation to the claimant's suitability for the alternative nursing role. Dr Miller, although not the decision maker in this case, was a consultant within palliative care and had been the clinical lead for the Department of palliative care to September 2016. Prof Bee Wee was the clinical lead following Dr Miller. The nursing lead was Ms Walding, who was relatively new to the organisation. Dr Miller had experience of recruitment Band 7 specialist nurses, she managed the team of nurses, doctors OT's and pharmacists and worked alongside the team clinically. Dr Miller had also worked alongside the claimant and held the claimant in high regard. She considered that the claimant ran an excellent complex quality improvement project until the end of the fixed term role.
16. Both claimant and Dr Miller commented on the proposed training plan saying it was unlikely that the claimant would be operating at the required standard of the alternative Band 7 role within a year of employment. Their experience of the time taken for specialist nurses to reach the required level suggested that a substantially longer training process would be needed. Both also commented negatively upon the practical likelihood of the Band 7 role being backfilled while the claimant came up to speed. Both referred to the difficulties encountered in recruiting to that role and the general absence of suitable available candidates who could undertake such a senior specialist role.
17. Dr Miller expressed considerable concerns in relation to the proposal that the claimant undertake the alternative Band 7 role. I refer in particular to the email from Dr Miller to Ms Wallington and Professor Wee dated 22 September 2020. Dr Miller reiterates that she values the claimant skills however she states that the claimant does not have the clinical skills needed to undertake a specialist nurse role and that it would be unlikely that the claimant would be shortlisted for interview in usual circumstances. Dr Miller notes that they have a more junior team than usual at present and are facing challenges due to Covid. Dr Miller highlights that the appointment of the claimant would effectively create a 'vacancy' and considers that the plan constitutes a risk to patient care and to the well-being of the team. Ms Walding replies, 'absolutely- sorry, I was given very little information, no choice and little notice. I was very clear that this would not be ideal...'. It can be seen from the emails that follow that the concerns associated with the claimant's suitability for the clinical elements of the Band 7 role is shared within the respondent.
18. The internal respondent emails within the bundle dated the 29 September 2020 from Ms Cornall suggest even Ms Cornall did not consider the Band 7 nursing role was a suitable alternative for the claimant as she states, '...we will now have to accept that [the claimant] will be paid the redundancy tomorrow as we appear to have run out of options...'. Ms Cornall was asked about this chain of emails during cross examination and was given time to revisit the whole chain of emails. Her evidence on this point was muddled and inconsistent, reiterating that she did consider the alternative Band 7 role suitable.
19. Ms Cornall said that the claimant was a highly experienced and clinically skilled senior nurse who would have been successful in the role with the training and support. She stressed the claimant's background and significant experience in palliative care. The claimant would not be equivalent of a 'new' or

band 5 nurse. There was also a requirement within the NHS for nurses to be flexible and she stressed the genuine and proper interest in retaining the claimant's experience within the NHS. Ms Cornall notes that the alternative nursing position is a lower Band than the fixed term role and set out the respondent's policy when considering suitable alternative employment, suitable posts included ones "*one Band below the current Band of the post holder*". Further, the Claimant would receive long term pay protection for 12 months and the respondent would continue to allow preferential treatment should a Band 8A job become available during the pay protection period.

20. On being offered the Band 7 role the claimant discussed her suitability with Dr Miller and was aware of Dr Miller's reservations in respect of the appropriateness of this role for her.

21. It can be seen within the correspondence that the claimant through the RCN raised various questions relating to this role. Ms Cornall accepted that many of the claimant questions remained unanswered prior to the termination of her employment including in particular:

- a. reasonable queries on her clinical ability and the knock-on requirement for appropriate retraining went unanswered. The respondent's position is that this would have been shared with the claimant and become clear during the trial period.
- b. The respondent did not address the claimant's queries in respect of the potential loss of status. There was no real engagement with this concern. It was in some places conflated with a different concern in relation to the change in Band. The respondent's end position is that all parties can reasonably expect that the claimant would be treated with respect. This does not address the concerns in relation to her loss of status.
- c. It is also relevant that the respondent has addressed the loss of pay by offering pay protection for one year and applying its normal policy that the claimant would, if a Band 8 a role became available be considered for it. The respondent fails to address the inherent incompatibility between this proposal to protect pay by reference to finding a new role and requirement for the claimant to sign up to a substantial amount of specialist retraining.

22. Looking at the Band 8 role, the claimant raised various issues and I consider the two main ones in particular:

- a. the claimant was concerned that the alternative role would not attract SCS. It was the claimant's genuine belief up that her fixed term role attracted SCS. This genuine belief was built upon the reassurances she was given an interview for the fixed term role, her understanding of the role that she had held for a number of years and her subsequent pension documentation received from the respondent. At no point prior to the termination of her employment did the respondent question this position. It can be seen from the internal documentation that the respondent accepted the claimant's assertion that the fixed term role attracted SCS.
- b. Ms Cornall considered that the Band 8 vacancy would not, as originally advertised, attract SCS. However with a view to allowing the

claimant to retain her SCS status, Ms Cornall added wording to the proposed Band 8 job documentation. Ms Cornall used the wording contained within the documentation for the claimant's fixed term role. Ms Cornall added this wording with a view to retaining SCS benefit but without reference to any substantive requirement of the role itself. The claimant questioned whether this change in wording would be sufficient to retain her SCS benefit. It is common ground that whether or not the claimant is entitled to SCS is a determination that is made by NHS Business Services Authority ("NHSBSA"). No action was taken by the respondent to check whether the amended Band 8 role would attract SCS status with NHSBSA prior to the termination of the claimant's employment. Ms Cornall says in her witness statement, 'I explained that the Trust considered it unreasonable to have rejected the offer without having the outcome of the enquiry and that the Claimant could have trialed the role whilst awaiting the SCS decision, which did not have any immediate impact on the role....'. The respondent refused to extend the claimant's employment to allow for her query in relation to retention of SCS, or indeed any other query, to be answered.

- c. The claimant also questioned whether the reality of the role involved a clinical component. Her fixed term role incorporated nursing management and leadership skills throughout and this had been evident to the claimant throughout her time in the role. The claimant questioned whether Ms Cornall's addition of the statements to a business administration role make it a 'clinical' or a 'nursing' role. In addition to the loss of the SCS, the claimant wish to retain the nursing element of the role. This was important to the claimant as she had been a nurse for 35 years. The claimant was proud of being a nurse.

23. The claimant declined both the offer of the Band 7 nursing position and the Band 8 a role by letter dated 21 October 2020. Ms Cornall wrote to the claimant on 29 October 2020 reiterating the respondent's position and stating that she considers both alternative positions to be suitable alternative positions. The claimant's employment terminated on 21 October 2020 on the expiry of her extended fixed term role. Ms Cornall confirms that, 'my view is that your unreasonable refusal of the offer of suitable alternative employment means that you have forfeited any right to a statutory redundancy payment.....'.

24. Ms Cornall's letter of 21 October 2020 also states, 'as you are aware the trust has contacted NHSBSA to seek confirmation that the Band 8 role would attract SCS.'. The internal email chains shows that the respondent sought to check the SCS point with NHSBSA on 25 October 2020, following the termination of the claimant's employment. It sent details of both the proposed Band 8 role and the claimant's previous fixed term role to NHSBSA. The respondent received a response from NHSBSA on 17 November 2020. The email states that, '....it would appear from the job specification that both [the fixed term role] and the [alternative Band 8 role] that both roles can be undertaken by non-nursing staff and did not qualify for retention [SCS]. I note that the email appears to be 'an indication' that SCS status would not attach to either role rather than a final determination. I make no factual finding as to whether or not SCS status would or would not attach to either role.

25. The claimant appealed against the decision not to pay her statutory redundancy payment. This appeal was determined by Mr Carter who upholds Ms Cornall's decision. The appeal outcome letter as a matter of record and not repeated herein.
26. I note that both Ms Cornall and Mr Carter, along with considerable repeated comment within the internal documentation from the respondent, accepted that where an employee who had the benefit of SCS was offered any role that did not attract SCS, that alternative would not be considered a suitable alternative employment by the respondent. Indeed the Band 8 alternative role, without the amendments to the job documentation added by Ms Cornall to attract SCS, was deemed by the respondent to be unsuitable.
27. I note that the manner in which the respondent dealt with the consultation process, in relation to these potential alternative roles, was far from ideal and at times unreasonable. For example, the claimant was provided with unrealistic deadlines. These were extended following request by the RCN. While there was a meeting with the claimant, there was a failure on the respondent's part to engage with the RCN and provide the required information to allow the claimant to properly assess the alternative roles. The respondent has acknowledged that this caused the claimant considerable upset.

### **Findings & Determination**

28. In general terms I found the oral evidence provided by the claimant to be clear and consistent both within itself and with the available documentation. Dr Miller gave oral evidence that was consistent with her views expressed within her email correspondence. Her evidence was based upon her factual knowledge of the alternative nursing role and was clear and helpful to the tribunal. I do not consider that Dr Miller's evidence strays into expert evidence as suggested by Ms Stanley. Ms Cornall's evidence was at times muddled and inconsistent as set out above. Mr Carter's evidence was clear and consistent.
29. When looking at whether a role is a suitable alternative role, Ms Stanley submits that this should be assessed not on the basis of what the parties genuinely believed at the relevant time but on the basis of all of the information available to the tribunal. I do not consider that such an approach is what is envisaged by the statutory wording. It cannot be the intended meaning of the statutory wording to allow for a position whereby a role is said to be a suitable alternative employment, and the employee is denied a statutory redundancy payment, where neither party genuinely believed it to be suitable at the time of dismissal. If I am wrong in relation to this interpretation, I consider it reasonable for an employee to make their decision on the basis of what they genuinely believe to be the circumstances.
30. Ms Stanley submitted that the respondent did not concede that the absence of SCS (in circumstances where it was previously held) would be of such significance to render such a post not suitable alternative employment. This submission is hard to square with the respondent's own evidence, where the documentation shows the respondent to consider the absence of SCS status to render any alternative role unsuitable. I also note Ms Cornall's efforts to amend the paperwork to allow the Band 8 role to attract the SCS status, and her evidence relating to the relevance of the trial period. Mr Carter mirrors this



position. I conclude on the basis of all the available information that the benefit of SCS relating to pension entitlement is a benefit of such potential value to employees that loss of that benefit would take any alternative role outside what could be considered as suitable alternative employment. If I am wrong, the loss of this benefit would be something that could obviously reasonably be taken into account by an employee in considering such an offer of alternative employment and this was particularly so in the case of the claimant, considering her age. This would take the refusal of a position not offering SCS squarely into reasonable territory.

31. On a general point it is common ground that the claimant had substantial experience both generally and within palliative care built up throughout her career. There is no question that the respondent has a genuine and proper interest in retaining the claimant's experience within the NHS. Equally, the claimant is rightly proud of her nursing record and it can be seen that she actively and reasonably participated in the search for alternative employment. It would obviously have been reasonable for the claimant, should she so choose, to accept either of the roles or to accept either of the roles on a trial period. She could not be criticised for doing so. However, while I am at risk of stating the obvious, this does not by itself make the claimant's refusal of any alternative role unreasonable.
32. While the existence of a trial period is a relevant factor, I am looking at the suitability or otherwise of the employment offered to claimant on 21 October 2020 and whether that employment can be classed as suitable alternative employment. And if so, whether the refusal of that suitable alternative employment was reasonable. I have not been referred to any case law that suggests any obligation to take a trial period within a role that is not suitable alternative employment. It was open to the respondent to seek to extend the claimant's employment to be able to provide proper answers to the matters raised by the claimant relating to her clinical experience and requirement for training (amongst others) on the Band 7 and address the SCS entitlement (amongst others) on the Band 8 role. It was the respondent who refused to extend the claimant's employment to allow these matters to be addressed properly. With the benefit of hindsight this would appear to have been an obvious step for the respondent to have taken, given their desire to keep the claimant in the NHS.
33. I conclude that the claimant does not have the skills or experience for the Band 7 role nor did she meet the requirements of the job on offer due to the gap in clinical expertise identified by the claimant that would require substantial retraining, conservatively measured in years, including the requirement for further postgraduate study. The claimant's expressed concerns in respect of her clinical expertise and suitability for the role are founded on the basis of her detailed knowledge of the requirements of the role, having worked with and recruited into that team previously. They are corroborated by the views expressed by Dr Miller and this gives considerable weight to the claimant's concerns. The claimant's lack of clinical expertise is acknowledged by the respondent to the extent that, should the claimant have accepted this role, there would be an additional requirement of recruitment of somebody who could actually carry out the duties while the claimant came up to speed. This potential workaround of backfilling the role was not shared with the claimant at the time. It demonstrates that the claimant's and Dr Miller's concerns are valid. In any event backfilling was likely to be unworkable due to lack of available suitable personnel.

34. Further, the Band 7 nursing role would involve a substantial drop in the claimant's status as described above. She has moved from being a senior person within the team's orbit to effectively a 'vacancy' within the team, requiring considerable mentoring, training, and support from both her peers and the Band 6 nurses those who would be technically more junior than her. The required level of training together with the demands placed upon the team, is likely to have a detrimental effect on the claimant's inclusion within the team. While there is no suggestion that any member of staff would not treat the claimant with respect, the claimant's loss of status was likely to have practical and substantial day-to-day negative consequences for the claimant.
35. I conclude that the Band 7 specialist nursing role does not constitute reasonable alternative employment. If I am wrong, I repeat the findings above and conclude that the claimant's refusal of the offer of the alternative nursing Band 7 role for these reasons was reasonable. Further, it was reasonable for the claimant to consider the respondent's proposals for protecting her pay by reference to potentially finding an alternative position to be incompatible with requiring the claimant to undertake substantial specialist retraining. This again either alone or in combination with all the above factors would render the claimant's refusal of the role reasonable. The claimant did not unreasonably refuse this offer of alternative employment.
36. The respondent offered the Band 8 role with a risk that the claimant's SCS status, as they believed her to have at the time, would be lost. This was an extremely valuable benefit to the claimant. The respondent sought to retain this SCS by reference to changed wording within the role documentation. The claimant questioned whether the changed wording was sufficient. Ms Cornell accepts that the changed wording was made without any reference to the substantive role itself but only to seek to attract SCS. It is reasonable that the claimant would seek reassurance. The respondent failed to take steps to check the position prior to the termination of the claimant's employment. The respondent refused to extend the claimant's employment to allow it to confirm whether or not SCS status would attach to the Band 8 role. I conclude that the alternative Band 8 role was offered without confirmation of SCS and as such cannot be said to be a suitable alternative employment.
37. If I am wrong in relation to the suitability aspect, I consider that the claimant acted reasonably in taking the lack of confirmation of the SCS benefit into account and refusing this role. Further, the claimant was not provided with reassurance in relation to the retention of her nursing background skills in what appeared to be entirely management role. It was reasonable for the claimant to consider that she had worked as a nurse for many years and wish to retain this element within her career. The claimant was proud of being a nurse. I conclude that this either individually or cumulatively also both made the role unsuitable for the claimant and, if I am wrong, made it reasonable for the claimant to reject the offer.

38. I conclude that neither the alternative Band 7 nursing role nor the alternative Band 8 role constituted suitable alternative employment. I conclude that it was reasonable for the claimant to refuse these offers of alternative employment. The claimant is entitled to a statutory redundancy payment. I heard submissions from both parties in respect of the appropriate calculation of a statutory redundancy payment and the sum was agreed to be £13,988.

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Employment Judge Skehan –  
Date: 8 March 2023  
Sent to the parties on: 24/3/2023

NG - For the Tribunal Office