



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs D Fox

**Respondent:** Sirona Care & Health CIC

**Heard at:** Bristol **On:** 3 & 4 June 2019

**Before:** Employment Judge O'Rourke

## **Representation**

**Claimant:** Mr Fox – Claimant's son

**Respondent:** Ms Hirsch – Counsel

## **RESERVED JUDGMENT**

The Claimant's claims of constructive unfair dismissal and failure to pay a redundancy payment fail and are dismissed.

## **REASONS**

### Background and Issues

1. The Claimant was employed for twelve years by the Respondent, latterly as a Community Nurse, following her employment having been TUPE-transferred from North Bristol NHS Trust in April 2016. In this role, she was based at Bradley Stoke, in north Bristol. The Respondent is a Community Interest Company providing a range of specialist health and social care services and is funded by the NHS. Part of its services relate to the provision of nursing services to schools.
2. In late 2016/early 2017, the local NHS Commissioning Group indicated to the Respondent that they would no longer be funding the post of Community Nurse, with effect 1 April 2017, as such posts were no longer required. As a consequence (and as is not disputed by the Claimant), her role became redundant. In January 2017, the Respondent therefore embarked on a search for 'Suitable Alternative Employment' (SAE) for the Claimant. It is a matter of dispute as to whether such SAE was offered, thus entitling the Respondent to withhold redundancy pay (fifteen months' pay), but, suffice to say, following an appeals procedure and periods of sick leave, the Claimant resigned on 22 February 2018, with her effective date of termination being 21 March 2018. At the time, she was aged fifty-seven.

3. As a consequence, she claims constructive unfair dismissal and failure to pay a redundancy payment. The issues in respect of those claims were fully canvassed at a telephone Case Management Preliminary Hearing, on 8 March 2019 and are not therefore repeated here.

### The Law

4. Section 141(4) of the Employment Rights Act 1996 (ERA) states that where an offer has been made to an employee before the end of their employment to re-engage them under a new contract of employment and their contract of employment is renewed, in pursuance of the offer, the employee is not entitled to a redundancy payment if:

*'(b) the provisions of the contract as renewed or new contract as to the capacity or place in which he is employed or the other terms and conditions of his employment differ (wholly or in part) from the corresponding provisions of the previous contract,*  
*(c) the contract is suitable in relation to him, and*  
*(d) during the trial period he unreasonably terminates the contract, or unreasonably gives notice to terminate and it is in consequence terminated.*

5. 'Suitability' is to be assessed objectively by the Tribunal *'in relation to the employee concerned'* and the reasonableness or unreasonableness of a refusal also depends on factors personal to the employee and is assessed subjectively from his or her point of view at the time of refusal. **Executors of JF Everest v Cox [1980] ICR415 EAT**, stated that *'the employee's behaviour and conduct must be judged, looking at it from her point of view, on the basis of the facts as they appeared, or ought reasonably to have appeared, to her at the time the decision had to be made.'*

### The Facts

6. I heard evidence from the Claimant and on behalf of the Respondent, from Ms Kay Sumner, the Claimant's line manager for some of the relevant period; Ms Karen Evans, who took over as line manager and from Ms Patricia Davis, a senior manager, who heard the Claimant's appeal against the Respondent's decision that she was being offered SAE and therefore was not entitled to a redundancy payment.
7. I set out the following uncontentious chronology:
  - a. On 12 January 2017 (all dates hereafter 2017, unless stated otherwise) – the Claimant met with Ms Sumner and notified her that her role would be redundant and there was some discussion as to SAE. There was some dispute as to whether or not the redundancy of the role was discussed in the telephone call arranging this meeting, but I don't consider that issue relevant to my findings.
  - b. 18 January– the Claimant's Royal College of Nursing representative (RCN rep) wrote to the Respondent's HR department [48], seeking clarification as to the roles then offered,

stating that two of them were unlikely to be SAE that the Claimant *'did not wish to retrain as a health visitor at this stage of her career'* and asking for a calculation of her redundancy pay entitlement. HR responded the next day [47], stating that they believed discussion as to redundancy was *'premature'*, as they believed that SAE was available.

- c. 31 January – the Claimant and Ms Sumner met again and as the Claimant had stated that some roles currently on offer were unsuitable, she was asked to set out her skills, experience and any personal circumstances that may impact on SAE. She did so on 8 February [62] and said that in her four years in her current post, she worked in a 'non-clinical role' (disputed by the Respondent, who said that while she didn't work in a hospital, her role was still 'clinical') delivering healthcare to 0-5 year olds, working with their families. She also outlined personal circumstances of relevance, in that she was the primary carer for her daughter, who suffers from mental illness and that therefore that she required, as necessary, to be able to quickly leave work and get to her daughter as speedily as possible and that therefore that distance from home and shift patterns were vital factors in whether a role would be SAE.
- d. February – discussions and correspondence continued, with HR writing to the RCN rep on 16 February [72] to state that they *'feel confident that a large organization providing health and social care will have work you can undertake, but it may take a little time to find the right role for you and to make the necessary arrangements to set up a trial period for you.'* and that if that was not possible by 31 March, her pay and terms and conditions would be maintained. There were concerns that Ms Sumner was not being sufficiently proactive at this point and she accepted in evidence that this was the first time she had dealt with such an issue, but nonetheless there is minuted meeting on 27 February with the Claimant and her rep, at which an action plan was agreed [78].
- e. 16 March – Claimant signed off as being unfit for work and continues to be on sick leave until the end of May (allowing also for a week's holiday).
- f. 24 March – Ms Evans writes to the Claimant [86] stating that while the Respondent was not yet in a position to organise a trial period, roles, as a school nurse, based at Patchway (in north Bristol) and as a school-based immunisation nurse, would be offered, both *'in the meantime'*, but also as long-term SAE and job descriptions were enclosed. In addition, the Claimant was asked to further consider a role in Lifetime Services, when further detail of that role would be provided to her. There was also mention of a possible expansion of the immunisation team, due to take place in September (and as referred to in evidence by Ms Davis). In considering the school nurse role, Ms Evans had looked at the job description for that role [89-95] and considered that the Claimant would be suitable for it.

- g. 10 April – the Claimant still being on sick leave, Ms Sumner wrote to her [105] asking whether she'd had an opportunity to consider these proposals. No response was received and Ms Sumner wrote again on 13 April [107]. A letter was received from the Claimant on 25 April (albeit dated 5 April) [109-110] stating that on medical advice she *'will not be reviewing in detail your proposals until I am fit to return to work'*. She also requested that she not be contacted by phone and that any correspondence be sent by post, not email.
- h. 18 and 23 May – Ms Evans wrote to the Claimant to arrange a meeting to discuss the proposed SAE, after the Claimant returned from sick leave, on 5 June [122]. It was also agreed that she could return to Bradley Stoke for a week to handover her clients and say goodbye to colleagues.
- i. 5 June – at that meeting a phased return to work was agreed and the proposed SAE roles were discussed in more detail and it was stated that once the Claimant had decided on one, she would be offered a trial period in that role [125].
- j. 19 July – Ms Evans and the Claimant met again and the Claimant agreed to trial the school nurse role [127]. However, on 20 July, the Claimant wrote stating that she did not *'feel that is likely to be suitable as an alternative role ... the role is completely different to the type of work I carried out before, I am feeling massively out of my depth and the role needs almost complete retraining. At my age, and this point in my professional career, I have no desire to start a re-learning process. I would find this a huge challenge. I am now working in an area for which I have no passion or desire which is making me incredibly unhappy.... I wanted to flag at this point, upon reflection, at present I feel like I am being constructively dismissed by being forced into a role that is a complete and utter change from my previous role.'* She also raised the issue that the post had a child protection caseload, which she had not previously done.
- k. 27 July – a further meeting took place, towards the end of the trial period, at which the Claimant stated that her feelings had not changed, as she was not enjoying the post and felt very stressed; it was impacting on her work/life balance and that for that reason, she didn't wish to come to work [130]. Nonetheless, Ms Evans considered the role SAE and pointed out the Claimant's options, to include appeal against that decision.
- l. 3 August – the Claimant confirmed by email that she was unwilling to accept the post [133] and her options, to include appeal, were confirmed to her. By letter of 11 August, Ms Evans confirmed that if the Claimant appealed, her trial role of school nurse would be extended [142].
- m. 18 August – the Claimant submitted an appeal [144-147]. She appealed on five grounds: firstly that her experience was with

children aged 0-5, in a home setting, whereas this role would be in a school setting, dealing with older children, with more complex needs, to include contraceptive advice, sexual health, smoking, with which she *'would feel out of her depth'*. She was particularly concerned about dealing with mental health issues, in view of her own daughter's condition. Secondly, she considered that the role was really only a term-time one and that she would have no meaningful work out of term-time. Thirdly, due to her daughter's condition, she may need to leave work suddenly and this role and its location would result in greater delay than before. She was also concerned about being contactable, due to having to switch her phone off in case conferences. Fourthly, her own mental health was adversely affected by the Respondent's stance and fifthly, the level of training required for this role was disproportionate and that she *'would hope that you would recognise that at 57, retraining for an entirely new role in an entirely new area is not something I have ever wanted or expected to do, and at this stage in my career would not be reasonable to expect.'* She stated that she was redundant and requested payment of her redundancy pay. The appeal hearing was set for 29 August, but subsequently varied to 13 September and again to 25 October, at the Claimant's request.

- n. 10 October – the Claimant was signed off unfit for work and was not to return to work, between then and her resignation, four months later.
- o. 25 October – the appeal hearing takes place [notes 157-162] and following some consideration, Ms Davis concludes that the role is SAE, notifying the Claimant of her decision on 2 November [164-167]. In respect of the five grounds of appeal, she firstly found that the Claimant's skills and experience were transferrable to the new role. Secondly, she did not accept that there was no meaningful role for the Claimant out of term time, stating that the service specification for the role set out that *'demand for the service for school-aged children may dip during school holidays but the service should be provided year round'* and said that *'from reviewing the school nursing activity data that a 52-week service is in operation as commissioned and detailed in the service specification'*. Thirdly, in respect of the Claimant needing to leave work quickly, due to her daughter, she pointed out that this had not been a problem in the past, with the Claimant being permitted to do so over the years and there was no intention to change that arrangement. As to phone use, she indicated that it could be arranged that the Claimant could keep her phone on during meetings. Fourthly, in respect of working with adolescent children, particularly with mental health problems, Ms Davis upheld this ground of appeal and stated that she had instructed that an amended job description be written to adapt the role, to be focused around two main areas of practice, these being primary school and school health immunisation. Fifthly and finally, she did not consider that the Claimant's age rendered it unreasonable for her to undertake training.

- p. Thereafter, the Claimant continued on sick leave, with sickness absence monitoring by the Respondent. On 12 January 2018, Ms Evans wrote to the RCN rep [179], enclosing a draft revised job description and inviting the Claimant's input on it, as she '*did not wish to make assumptions*' on her behalf. The draft stated that the role had been adapted to focus on primary schools and school immunisation [182]. The immunisation role was to be at named schools and '*for further discussion*' and to be excluded from managing requests for support involving significant mental health needs [184].
  - q. 12 February 2018 – the Claimant is notified that the Respondent may initiate the next stage of the sickness absence programme [193].
  - r. 22 February 2018 – the Claimant resigns [196].
8. Whether School Nurse Role SAE. I find, objectively, that this role was SAE, for the following reasons:
- a. The Respondent had, throughout a lengthy and, certainly in the latter stages, thorough procedure, considered and dealt with all the Claimant's concerns about the role, albeit that they didn't agree with her conclusions in respect of it.
  - b. Ms Evans had carried out a thorough examination of the role, scrutinising the job description in detail and comparing it to the Claimant's training and experience and considered them transferable and complimentary (and as was fully canvassed in the appeal hearing [158]). I am not in a position to second-guess her expertise and experience in this area and had absolutely no reason to consider that she was motivated to reach this conclusion for any other reason than that she and the other managers felt that the Claimant's skills and experience were valuable and should not be lost to the Respondent. It had been contended by the Claimant that the Respondent and its managers were motivated to impose this supposed SAE on her to avoid having to pay her redundancy pay. This assertion was not really maintained in cross-examination and I was satisfied that when I put that assertion to the witnesses that it was not part of their consideration. The Claimant accepted in cross-examination that the Respondent was making a genuine effort to find her alternative employment. Indeed, I note that the Claimant was kept on in employment for almost a year, after her previous role disappeared, on full pay, much of that on sick leave. This was not an employer keen to be rid of her, avoiding the need for incurring further expenditure. I noted Ms Davis' evidence that on this point, had there been capability issues as to the Claimant's performance, the Respondent would have certainly not maintained their stance on the SAE route. This statement somewhat balanced the other witnesses' views that '*we would never make a nurse redundant*' and '*there was always a role for a nurse*', which I took to mean that where the person concerned was a highly competent

and experienced individual (as, clearly, from all the evidence, the Claimant was), the Respondent would do all in its power to retain such a person's services – a laudable aim.

- c. The evidence indicated that, if not initially on the trial period (which was for two weeks during term time and two weeks during school holidays), there would eventually be meaningful work for the Claimant to do during holiday periods. Both Ms Evans and Ms Davis stated that there were other full-time school nurses and Ms Davis said that once the Claimant developed in the role, she would have more than enough to occupy her time, perhaps developing a niche area of interest ('a *champion* role', for example in healthy eating) and assisting in other areas. As the service specification states, it is a 'year round' service. Ms Evans said that there would be no over-manning of full-time school nurses, as one was shortly retiring and confirmed that she had discussed that development with the Claimant. Ms Davis, additionally, had been once herself a school nurse and therefore had personal knowledge of the role.
- d. As to the Claimant's ability to leave work quickly and to be able to get home to her daughter in a reasonable time, all the evidence indicated that this would be same situation as she had experienced before. Extracts from Google Maps (which she did not dispute) [205-206] showed that the travel time from her home to Bradley Stoke and to Patchway were practically identical. While she asserted that in rush-hour traffic, it might be longer to get home from Patchway, she provided no corroborative evidence of this and as stated, the distances are, for practical purposes, the same. She also asserted that the 'catchment area' in which she would be expected to work, from the Patchway 'base', could mean that there would be additional travel time, in the event of such an emergency, but the Respondent disputed this and the Claimant provided no evidence to support this assertion.
- e. As to the ability to be in constant contact, in the event of an emergency, she cited an incident during the trial period, when she was asked to turn off her phone during a case conference. This issue was dealt with at the appeal and it was Ms Davis's clear evidence that it could simply be arranged, in advance, with the half-dozen or so independent chairpersons of such conferences, that the Claimant be permitted to keep her phone on 'silent', thus ensuring contact, if necessary.
- f. The Claimant's personal circumstances, in relation to her being the sole carer for her daughter and her wish to avoid dealing with adolescent children and particularly those suffering from significant mental health issues were noted and Ms Davis upheld that element of her appeal. She specifically instructed that a revised job description be drawn up to focus the Claimant's school nurse post on primary schools and the school health immunisation team. While the Claimant contended that the immunisation team's work would be largely carried out in secondary schools, thus

contradicting the aim of avoidance of adolescent children, it seems a statement of the obvious that carrying out immunisations is not going to involve intimate involvement with children's personal affairs, thus greatly reducing the risk of awareness of any mental health issues. If the Claimant's desire was to have no contact whatsoever with adolescent children then, as a nurse that would seem an unreasonable demand on her part.

- g. The Claimant also stated in the appeal that in her previous role she had not held a child protection caseload, reducing her stress and supporting her work/life balance, by avoiding the need for her to attend case conferences, potentially within a large catchment area. (There was reference in closing submissions to the wish to avoid attendance at court cases, but this was not raised in the appeal.) In the appeal hearing, Ms Evans went through the Claimant's 'skill-set', from both the Community Nurse role and previous roles she had filled [158] and identified that the Claimant '*recognises (the) importance of safeguarding issues and completed safeguarding training – has been allocated as named nurse for children on child protection register*'. In cross-examination, the Claimant was asked about this list of skills and denied that she had ever been a 'named nurse' on the child protection register. When it was pointed out to her that the application form she had submitted for the community nurse role [209] had included this information, she said that she didn't remember putting it on the application form, but she must have done, if it was on the form, but, from memory, she didn't recall it. She clearly, therefore, did have experience of child protection and no corroborative evidence was provided that attendance at case conferences would be unduly difficult for her. In any event, if appeared from her appeal that her main focus in respect of child protection was the potential requirement to attend conferences '*within a large catchment area*', thus extending her travel time, but no corroborative evidence was provided as to such possibility, or that it would have been any greater than that she experienced within her catchment area as a community nurse.
- h. Finally, in respect of training, the Claimant contended that '*whilst it would be possible to complete some of this training, I would hope that you would recognise that at 57, retraining for an entirely new role in an entirely new area is not something I have ever wanted or expected to do ...*'. However, Ms Evans considered that firstly, the Claimant's skill-set and experience were transferrable and complimentary to the school nurse role (with the implication that it would not necessarily be the case that a great deal of re-training would be required). Secondly, she stated that if, however, the Claimant '*identified any area of practice in which you feel you require refresher training or update*', then training would be arranged. She clearly did not, therefore, consider that a great deal of re-training would be required, but, in any event, rejected the Claimant's contention that her age alone rendered it '*unreasonable*' for her to undertake such training and I concur.



9. Whether it reasonable, from the Claimant's perspective, to refuse the alternative role. I do not, for the reasons set out below, find that it was reasonable, subjectively, for the Claimant, based on '*the facts as they appeared*', to refuse the alternative role:
- a. In cross-examination, the Claimant agreed that it was probably her intention to retire at age sixty. The payment, therefore, to her of fifteen months' gross salary (subject to income tax for any payment in excess of £30,000), plus her notice period, at age 57, would have greatly eased an effective 'early' retirement. I find, despite the Claimant's denials that it was the case that she, from the outset, was keen to be dismissed on grounds of redundancy and thus be effectively permitted to retire earlier than she had previously planned. It cannot, however, be a reasonable expectation of an employee, even from their own perspective that an employer be required to set aside their views as to the availability of SAE and instead make a large redundancy payment to an employee when, instead that money could be used to pay them to continue to provide their services, particularly if those services were, as was clearly the case here, highly valued. I come to my conclusion about the Claimant's true motivation, for the following reasons:
    - i. From a very early stage, the Claimant, via her RCN rep, was keen to know her redundancy payment calculation, despite the Respondent considering that issue to be premature. While it might be entirely reasonable for an employee at risk of redundancy to want to know what money they could expect, to support themselves in that eventuality, in this case those queries were combined with quite peremptory ruling out of potential SAE offers. The whole tenor of the correspondence was that the Claimant's preferred option was redundancy dismissal.
    - ii. The Claimant told Ms Evans that she did not want SAE, but to leave with a redundancy payment. While the Claimant denied having ever said this, I however prefer Ms Evans' evidence on this point. She gave entirely straightforward and unemotional evidence as to her involvement in this matter. In contrast, however, the Claimant's evidence was less reliable. There was at least the impression that her evidence was not entirely her own, but based, at least to some extent, on her son's perception of events. She said that her statement was written '*in consultation*' with her son, but there are several references in it to her, in the 'third', as opposed to the 'first person'. While she said that these were typographic errors, I consider it much more likely that her son at least drafted her statement, but failed to correct all the third person references. She also did not know that the phrase quoted in italics in her appeal letter, namely '*personal circumstances and appropriateness*' was taken from the Respondent's redeployment policy, stating that her '*son supported me*'. Also, she was picked up in cross-

examination on some apparent discrepancies in her statement (paragraphs 3 and 16) not of themselves particularly important, but to which she answered that she considered them accurate *'from memory'*, rather than on any reliance on contemporaneous correspondence. This indicated, to me, a willingness to sometimes overstate her case, without seeking to rely on corroborative evidence, particularly so as the events described took place two years ago. Finally, I found her answers to questions to be, on occasion, evasive or inaccurate, such as her outright denial that she had been a named nurse on the child protection register, which seemed inherently unlikely to be a role she would forget, until confronted with the evidence of her job application. She also denied having been provided with a revised job description, stating that her unwillingness to continue to consider the role as SAE was because she *'was waiting for (the Respondent) to provide one'* when in fact one had been provided. When that was shown to her she said she *'couldn't remember'*, but now, in evidence, *'didn't see this draft as a revised job description'*.

- iii. When confronted with the real possibility that the Respondent was going to maintain their view that SAE was available, she threatened constructive dismissal, in an effort, I consider, to intimidate the Respondent and force them to pay her redundancy pay.
  - iv. Her prolonged sick leave and the limitations she placed on communication with her during it indicated a desire on her part not to genuinely engage in the SAE process.
- b. Her refusal to accept Ms Davis' assurances that she would work principally with primary school children and not be expected to work with adolescents with mental health problems, or that she would be able to have her phone on during conferences, without any real rationale for such stance, or having trialed such assurances in practice cannot, even from her own perspective, have been a reasonable stance to take. It was more likely, I consider, to be driven by her desire to instead justify her being paid redundancy pay.
  - c. Her assertions as to increased travel time were just that, assertions, unsupported by any corroborative evidence, indicating that they were not genuinely held, but presented as yet another stumbling block to SAE. There was no convincing evidence that her ability to be with her daughter, as and when required, was lessened in any way than when in her previous role, particularly when it was undisputed evidence that the Respondent had been entirely supportive, in the past, when such situations had arisen.
  - d. Her assertions as to prolonged training/retraining to take on the role is unsupported by corroborative evidence and appears to be an

exaggeration of the true situation, more accurately reflected, I consider, in Ms Davis' conclusion that some '*refresher or update*' training might be necessary.

10. Conclusion on Claim for Redundancy Payment. For these reasons, therefore, I find that the Claimant is not entitled to a redundancy payment.

11. Constructive Unfair Dismissal. As set out in the case management summary, the Claimant identifies five alleged fundamental breaches of contract, as follows:

- a. The Claimant's role of Community Nurse being decommissioned: it was evident, however, that this decision was taken by the local commissioning board and that the Respondent was merely reacting to that decision and taking the appropriate steps to find SAE for the Claimant. There was nothing they could do to reverse the decommissioning.
- b. Refusing to recognise that the Claimant was redundant: there was no dispute by the Respondent that the Claimant's Community Nurse role was redundant, but the Respondent carried out their legal duty to find SAE, before coming to any such conclusion. Indeed, had the Respondent not taken such step, they could potentially have faced a claim for unfair dismissal. Being dismissed on grounds of redundancy is not an automatic right, but can, as it was in this case, be avoided by the offer of SAE.
- c. Re-deploying the Claimant to a role for which she did not have adequate experience, qualifications or training: as should be clear from my findings as to SAE above, I do not find that to be the case.
- d. Requiring the Claimant to undertake a variety of unspecified tasks during school holidays, during which the role of school nurse was not required: this is not, as found above, a true reflection of the likely future situation and was based on a very short two-week school holiday period during the trial, seen through the prism of the Claimant's negativity to the proposed role.
- e. Failing to heed the Claimant's concerns about the impact of the role upon her health and her ability to care for her daughter: as should be clear from my findings above, I consider that the Respondent did 'heed' those concerns, to the extent that they considered them, but either discounted them, or agreed to changes to the role, to mitigate them.

12. Conclusion on Constructive Dismissal. Accordingly, therefore, I conclude that the Respondent was not in breach of the Claimant's contract, fundamentally or otherwise and that therefore the Claimant cannot succeed in a claim of constructive dismissal.

13. Judgment. For these reasons therefore, I find that the Claimant's claims of constructive unfair dismissal and failure to pay a redundancy payment fail and are dismissed.

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Employment Judge C H O'Rourke

Date : 6 June 2019

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