Appeal No. EA-2019-000834-RN (previously UKEAT/0334/19/RN)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 14 July 2021
Judgment handed down on 5 August 2021

Before

THE HONOURABLE MR JUSTICE BOURNE

(SITTING ALONE)

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(1) MRS CATRIONA STEVENSON
(2) MRS CATHRONA LEEKE
(3) MRS SARAH STEWART

APPELLANTS

MID ESSEX HOSPITAL SERVICES NHS TRUST

RESPONDENT

JUDGMENT

APPEARANCES

For the Appellants	MS MARGARET PENNYCOOK (of Counsel) Instructed by: Direct Access
For the Respondent	MR IAN SCOTT (of Counsel) Instructed by: Capsticks Solicitors 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

REDUNDANCY

Each of the Claimants was employed as a Head of Human Resources. Following a restructure, their roles were made redundant. They were offered alternative employment in the role of Senior HR Lead but declined. The Respondent decided that they had unreasonably refused offers of suitable alternative employment and that they would not be entitled to redundancy payments. The Employment Tribunal upheld that decision and dismissed their application for redundancy payments. Each Claimant appeals against that decision.

Held (allowing the appeal) that although the Tribunal correctly stated the legal test and analysed the facts, it erred by not deciding the practical effect of certain differences between the Claimants' old roles and the allegedly suitable alternative roles i.e. what difference it made that they would perform some functions only as "allocated" or "directed" when previously they had autonomy over them, what was the significance of certain duties which were part of the old roles but not of the alternative roles and what practical difference would be made by working for a Group of 3 NHS Trusts rather than, as previously, for the Respondent only. The questions of the suitability of the alternative employment and the reasonableness of the refusal would be remitted to the same Tribunal.

THE HONOURABLE MR JUSTICE BOURNE

Introduction

1. This is an appeal by the Claimants against a decision of EJ Burgher ("the EJ") which was sent to the parties on 17 July 2019, ruling that they had unreasonably refused an offer of suitable alternative employment and therefore were not entitled to a redundancy payment, pursuant to section 141 of the Employment Rights Act 2006 (and/or pursuant to their contract of employment).

Legal framework

2. The material parts of section 141 provide:

> "(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment—
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> (a) to renew his contract of employment, or
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> (b) to re-engage him under a new contract of employment,
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> 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.
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> (2) Where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.
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> (3) This subsection is satisfied where—
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> …
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> (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."

3. The employer has the burden of proving that the employment offered was suitable and that the employee's refusal of it was unreasonable: *Bird v Stoke on Trent PCT* (2011) UKEAT/0074/11 per Keith J at [11].

4. Although suitability is tested objectively, in each case it is necessary to decide whether the proposed job, considered with reference to every aspect of it, was suitable for the employee in question, i.e. whether it suits his or her skills, aptitude and experience: *Bird* at [18].

5. Similarly, it is necessary to decide whether the particular employee in question (and not some other hypothetical reasonable employee) was reasonable in refusing the offer, i.e. had sound and justifiable reasons. This is judged from the employee's point of view, on the basis of the facts as they appeared or should have appeared to the employee at the time of the refusal: *Bird* at [19].

The facts found by the Employment Judge

6. From around May 2016, the Respondent participated in joint working arrangements with two other NHS Trusts.

7. Each of the Claimants was employed by the Respondent as a Head of Human Resources ("HHR") and worked at Broomfield Hospital. They had been employed by the Respondent since, respectively, 2004, 2014 and 2002. They reported to the Director of HR, Bernard Scully. Until December 2014 he was supported by a Deputy Director of HR but when that postholder left, the relevant duties were redistributed to the Claimants, they were given the title of HHR and they were upgraded from band 7 to band 8a. Other officers in the other two Trusts were undertaking similar duties to theirs but were paid at a higher grade. In July 2017 the Claimants therefore asked for their roles to be re-evaluated.

8. By 2017, plans were afoot for a restructure which would integrate the HR function across the three Trusts, and a consultation took place. It was proposed that the overall headcount would be reduced by two full-time equivalent posts. The three HHR roles at band 8a which were filled by the Claimants would be removed. There would be three new posts at band 8c (changed to band 8d after feedback), also called Head of HR, and these would report to one of two new Group HR Directors at band 9, who would report to the Chief HR Director.

9. The Claimants felt that the consultation process was a sham and that their dismissals were predetermined. They did not provide any meaningful input, but on 2 August 2017 requested redundancy. However, the consultation proceeded. There were one-to-one meetings with them and they were ring-fenced for new roles, guaranteeing them an interview.

10. Meanwhile, on 16 August 2017, the Claimants submitted a grievance about their roles not having been re-evaluated. As a result, on 5 September 2017 their HHR roles were moved to band 8b.

11. However, on 8 September 2017, the Claimants were informed that their employment would come to an end on 8 December 2017. They were warned that if they were offered suitable alternative employment but unreasonably refused it, they would forfeit entitlement to a redundancy payment.

12. During September 2017, the Claimants expressed interest in the new Head of HR post at band 8d. Meanwhile, they claimed of feeling stressed and unsupported.

13. Internal discussions led to a second phase of the restructure being brought forward. Ms Foulkes told the CEO that she was keen to retain the Claimants' skills and knowledge. It was decided to move forward and introduce three new senior roles at band 8b, which had not been part of the first phase. The Claimants were told that they would be offered band 8b employment based at Broomfield. Meanwhile, they were also invited to attend interviews for the band 8d Head of HR role.

14. On 4 and 5 October 2017, Mrs Stevenson and Mrs Stewart informed the Respondent that they had accepted offers of employment outside the Trust. Mrs Leeke attended her interview for Head of HR but it did not go well.

15. On 5 October 2017, the three Claimants were offered the alternative new role of Senior HR Lead at band 8b.

16. On 17 October (Mrs Stevenson) and 19 October (Mrs Leeke and Mrs Stewart), the Claimants refused the offer, citing significantly reduced levels of autonomy and status, uncertainty about the role because it was not set out in the consultation documentation, lack of confidence about job security in the new post and a lack of confidence in the leadership of the HR team.

17. In meetings with the Claimants, the Chief HR Director Ms Foulkes discussed amendments to the job description for the new role which would address these concerns. She made those amendments but did not send them to the Claimants before their termination date.

18. By letters dated 24, 29 and 30 November 2017 Ms Foulkes informed the Claimants that she did not consider their reasons for refusing the new role reasonable and therefore that they would not be entitled to redundancy payments. They appealed unsuccessfully, the appeal decision being announced by a decision letter dated 8 February 2018.

The Employment Judge's ruling

19. The EJ decided that the Senior HR Lead role was suitable alternative work. The grade, pay, location and hours were the same as in the Claimants' previous roles. Their concerns about perceived reduced autonomy and status were addressed by Ms Foulkes agreeing to make changes. Although these were not sent to the Claimants, they did not enquire further about them. Mrs Leeke told the EJ that if Ms Foulkes had shared the revised job description which she had prepared, they could have reached agreement to avoid redundancy. The changes were "not substantive". This, and Mrs Leeke's readiness to accept the job with those changes, showed that the role offered was suitable. However, the Claimants were "inflexible and uncooperative" towards Ms Foulkes.

20. Although Mrs Leeke in particular objected to the lack of the word "Manager" in the job title, suggesting a demotion, this was rejected by an appeal panel consisting of the Respondent's CEO and an experienced HR professional. Given that the restructure consolidated the functions of three Trusts with many more employees to manage, the EJ found that the Senior HR Lead role was not of a reduced status.

21. The refusals were held to be unreasonable because:

i. Mrs Stevenson adopted a closed mind. Her judgment was clouded by having accepted a role elsewhere, her hope of a large redundancy payment (£71,404) and her negative feelings towards Ms Foulkes. The EJ noted that he "was not required to assess the reasonableness of her continuing to work with Ms Foulkes, which would have occurred if there was no redundancy". Mrs Stevenson did not consider undertaking a trial period before deciding whether to refuse the role.

ii. The same observations were made about Mrs Stewart, whose redundancy payment would have been £54,336.

iii. Mrs Leeke also had a closed mind. She was heavily influenced by the plans and intentions of the other Claimants and her negative feelings towards Ms Foulkes. She refused the role despite knowing that the Trust's MD, Lisa Hunt, had expressed an intention to keep her in the Trust and wished to support her. Although she was concerned to have the word "Manager" in her job title, Mrs Leeke would have accepted the role if the other Claimants had done so. Their refusal was unreasonable, as was her decision to follow them. She too unreasonably rejected a trial period.

Grounds of appeal

22. At a preliminary hearing before HH Judge Auerbach on 14 October 2020, the Claimants were permitted to advance the following grounds:

1. In considering the suitability of the alternative employment offered, the Employment Judge erred in law by failing to give any, or any adequate, consideration to the content of the relevant job descriptions and person specifications when comparing the duties and responsibilities of the Claimant's existing job role (Head of HR) with those of the

new role as offered to the Claimants on 5th October 2017 (Senior HR Lead), in order to determine whether the employment offered amounted to suitable alternative employment. In particular, the Employment Judge failed to give any, or any adequate, consideration to matters related to the degree of autonomy and responsibility which the Claimants would have in their new proposed role, as compared with their old role.

2. In considering the suitability of the alternative employment offered, and the reasonableness of the Claimants' refusal of it, the Employment Judge erred in law by failing to give any, or any adequate, consideration to a relevant factor that he had found as a finding of fact, namely the change of reporting line.

3. In considering the reasonableness of the Claimants' refusal of the alternative employment offered, the Tribunal erred in law by failing to give any, or any adequate, consideration to the relevant fact admitted by the Respondent that the new employment offered had not been evaluated by the NHS Job Evaluation Process.

4. In considering the reasonableness of the Claimants' refusal of the alternative employment offered, the Employment Judge erred in law when he failed to give any, or any adequate, consideration to a relevant finding of fact, namely that the Claimants had a serious lack of faith in Ms Foulkes, in whose reporting line the new roles were placed.

The Claimants' submissions

23. As to ground 1, Ms Pennycook, for the Claimants, submits that the EJ did not set out a comparison of the job descriptions of the Claimants' old jobs and the proposed new role, but

made the comparison from the Respondent's point of view when stating (paragraph 97) that "as far as status was concerned, the role was at a comparable level and although their previous specific duties were not necessary going forward their skills and experience in a more expansive group was".

24. Although the job descriptions are similar, Ms Pennycook points to a number of differences. In particular, there are numerous instances where, in the Senior HR Lead role, functions are to be performed "as directed" or as "allocated" or consisting of providing "support", but where in the old HHR role, those functions were to be performed without those qualifications. Also, a few activities which appear in the HHR job description do not appear in the Senior HR Lead job description (e.g. to be "Trust Recruitment and Retention Lead").

25. Ms Pennycook also submits that the EJ erred in law by having regard to the amended job description, as this in fact was never given to the Claimants, and that suitability should be judged strictly with regard to the offers that were made on 5 October 2017.

26. As to ground 2, Ms Pennycook points out that, as the EJ said at paragraph 34:

> "The new structure would have the effect of meaning that there would be another layer of management between the Claimants and the Group HR Director role, similar to when there was a Deputy Director in situ at MHET."

27. Ms Pennycook contends that requiring the Claimants to report to one or more of the new Heads of HR at band 8d was fundamental to the issue of the status of the new posts. Previously they reported to the HR Director at band 9 (but with the prefix VSM, which I am told indicated greater seniority). The EJ also found that the Deputy Director role had not been filled since December 2014.

28. So, Ms Pennycook submits, the change would return the Claimants to their reporting position of three years earlier, before they were appointed as HHR, and although that fact is visible in paragraph 34 of the judgment, it is not recognised in the EJ's conclusion (at paragraphs 97 and 100) that the status of the old and new roles was comparable.

29. This, she submits, was an error of law affecting both tests i.e. of suitability of the new posts and the reasonableness of refusing them.

30. As to ground 3, Ms Pennycook makes the short point that although the EJ concluded that the new post was at the same grade as the old, the new role had not been formally evaluated under the Respondent's Job Evaluation process. It was therefore vulnerable to change and to potential downgrading. She referred to provisions in the NHS Job Evaluation Handbook to show that new posts in the NHS are given a provisional grading, which is revisited after a bedding down period when the full demands of the post are clear.

31. As to ground 4, Ms Pennycook notes that the EJ expressly declined to assess the reasonableness of each Claimant's refusal to continue to work with Ms Foulkes. But this, she submits, was an indispensable part of testing each Claimant's refusal "on the basis of the facts as they appeared or should have appeared to the employee at the time of the refusal" (see paragraph 5 above).

The Respondent's submissions

32. For the Respondent, Mr Scott reminds me that an appeal to this Tribunal is on a point of law only. If the employment tribunal has "essentially properly directed itself on the relevant law", then this Tribunal should not interfere and should not "subject the reasons of the employment

tribunal to unrealistically detailed scrutiny": see *Aslef v Brady* [2006] IRLR 576 at [55]. Questions of attribution of weight are for the ET and are not for this Tribunal to reconsider. The hurdle of showing perversity, if that is alleged, is very high.

33. Mr Scott also said that during the course of the hearing, some of the grounds came to resemble a challenge to the ET's reasoning. He submitted that that reasoning in fact complies with the well known guidance in *Meek v Birmingham City Council* 1987 IRLR 250:

> *... the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises ...*

34. As to ground 1, Mr Scott points out that the EJ expressly referred to the Claimants' concerns about status. It set out the Claimants' reasons for refusing, and rejected them. He found, and it was open to him to find, that the new role was suitable and at a comparable level. In particular the EJ made the important point at paragraph 100 that, as the appeal panel concluded, the restructure consolidated the functions of three Trusts with many more employees.

35. Mr Scott also relies on Mrs Leeke's evidence, accepted by the EJ, that agreement could have been reached if some agreed amendments to the job description had actually been made, coupled with the finding that these were "not substantive".

36. Mr Scott also rejects the criticism of the EJ's reliance on the amended job description. He submits that the EJ in paragraph 84 made permissible findings of fact that the proposed changes would have overcome the Claimants' concerns but that, for their own reasons, they did not co-operate.

37. As to ground 2, Mr Scott contends that this is an attempt to re-open the EJ's findings of fact at paragraphs 97 and 100 about the status and responsibilities of the roles. The EJ, he says, was entitled to reject the allegation of a reduction in status. Ms Foulkes had given evidence that the new Head of HR, to whom the Claimants would have reported, would be the most senior site-based HR professional. The change would have been part and parcel of an upgrade in the Claimants' role i.e. the move to a Group structure.

38. In any event, Mr Scott submits, further consideration of the reporting line would not have displaced the EJ's fundamental findings about the suitability of the new roles and the unreasonableness of the Claimants' refusal, and this ground is an attempt to subject the judgment to unrealistically detailed scrutiny.

39. As to ground 3, Mr Scott contends that any dispute about the reliability of the grading of the new post at band 8b was not emphasized at the ET hearing. The Respondent had told the ET that it did not consider job evaluation to be necessary. The EJ at paragraph 65 found that Mr Scully was asked "to draft a job description for the new band 8b role using the recently evaluated 8b job description". That was a job description which, on the findings of the EJ, the Claimants had submitted as applying to their previous roles in August 2017, which led to the re-banding of their post at band 8b.

40. Alternatively, Mr Scott submits that this consideration too could not have displaced the EJ's fundamental findings about the suitability of the new roles and the unreasonableness of the Claimants' refusal.

41. As to ground 4, Mr Scott submits that the EJ made repeated references to the Claimants' lack of faith in Ms Foulkes but nevertheless found that they had acted unreasonably. He did not find that any of their concerns about her were well founded. Meanwhile, although ground 4 suggests that the restructure would place the Claimants in Ms Foulkes' reporting line for the first time, in fact she had always been at the head of the Respondent's HR reporting structure.

42. In any event, Mr Scott submits, the EJ's positive findings about Ms Foulkes show that the ET could not have concluded that the Claimant's concerns about working with her were reasonable.

Discussion

Ground 1

43. With some hesitation, I have concluded that ground 1 succeeds. Although I agree with Mr Scott's comment that this ground has come to resemble a challenge to the EJ's reasons, it is important to remember that the requirement of sufficient reasons helps to ensure that the right questions have been asked and fully answered.

44. In the present case, the EJ correctly stated the relevant legal tests and carried out a painstaking analysis of what occurred between the Claimants and the Respondent at the relevant time. However, ground 1 in my judgment does identify an important missing element.

45. A case where the issue is the suitability of alternative employment will always require a careful comparison of the alternative employment with the employee's former employment. A tribunal will need to identify what if any differences there are, decide whether those differences matter and explain why.

46. In this case, the EJ made a clear finding that there was no difference between the status of the proposed new posts and the old HHR posts. I am reluctant to disturb that finding. However, reading the judgment as a whole, I am left uncertain about some key facts. I do not know what practical difference it would have made to the Claimants to have certain functions "allocated" or "directed" when previously they had autonomy over them. I do not know the significance of the duties which were part of the old jobs but not the new. And I do not know what if any practical difference it would have made to the Claimants to be working for the "Group" as opposed to the "Trust".

47. I have considered whether these are matters that can be read between the lines, by inferring the answers from the findings that the EJ made.

48. The relevant passages of the ET's judgment are the following:

> "81. During the hearing it was apparent that the key concern regarding suitable alternative work related was status. However, it was evident that a lack of trust in Ms Foulkes and the HR team played a significant part in the Claimants assessment of the suitability of the role offered.
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> 82. Ms Foulkes expressed the view that there was not a loss of status in respect of the Senior HR Lead role. They Claimants would have reported to a Head of HR who would report to the Managing Director in group HR about it. They would therefore still have been one step removed from the Managing Director. Ms Foulkes stated that budgetary responsibility was delegated to them by the Director of HR at his discretion and therefore they were not currently accountable for the budget management. In respect of the new job description the words 'allocated' and 'directed' were used in relation to managing group projects across three Trusts.
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> 84. Mrs Stevenson met with Ms Foulkes on 3 November 2017 to discuss her refusal to accept the Senior HR Lead role. Ms Foulkes addressed the concerns and stated that the job description could be amended to accommodate her concerns. Ms Foulkes did in fact do this this but did not send the amendments to the Claimants before their employment came to an end. Following questioning the Claimants accepted that the proposed changes may have helped them overcome their concerns. Had the Claimants sought to follow up

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> the changes that Ms Foulkes had readily indicated during the meetings that she would make then it is unlikely that their employment would have come to an end at all …
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> 97. I conclude that the offer of the Senior HR Lead role to the Claimants was suitable alternative work. It was offered on the same grade, pay, location and hours as their previous roles. As far as status was concerned, the role was at a comparable level and although their previous specific duties were not necessary going forward their skills and experience in a more expansive group role was.
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> 98. Ms Foulkes addressed the Claimants' concerns about perceived reduced levels of autonomy and reduced status by stating that the job description could be amended. Whilst Ms Foulkes did not actually send the revised job description to the Claimants before their employment came to an end, the Claimants did not make any enquiries about the changes that Ms Foulkes agreed she would make. I accept Ms Leeke's evidence that had Ms Foulkes shared the revised job description they could have reached agreement to avoid the redundancies. The changes made were not substantive and this demonstrates that the role offered was suitable. However, the communication difficulties founded on the mistrust by the Claimants towards Ms Foulkes prevented towards agreement. They were inflexible and uncooperative towards her.
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> 100. In respect of status, Mrs Leeke in particular placed emphasis on the fact that the word Manager was no longer in the job title. She stated that she perceived the role to be a demotion. Ms Panniker considered this at the appeal and was assisted by an experienced and independent HR professional who found that there was no loss of status. Looked at reasonably, with an organisational restructure consolidating the corporate HR functions of three Trusts with a much greater number of employees and workers to manage, I do not conclude that the Senior HR Lead role was of a reduced status.
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> 101. The Senior HR Lead role therefore amounted to suitable alternative work."

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49. Although Mrs Leeke's willingness to accept the offer with some "not substantive" changes to the job description was consistent with the posts being suitable, I do not agree that it was logically probative of that fact. That is because Mrs Leeke might have been prepared to accept a job which a Tribunal could later have judged not to be suitable within the meaning of section 141. It remained necessary to compare the posts, and to decide precisely what new terms were on offer at the point when the Claimants' employment ended.

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50. Paragraphs 82 and 100 suggest a connection, and/or a balance, between the fact of some functions being "allocated" or "directed" and the fact of working for the Group rather than the Trust. However, the nature of that connection or balance is not elucidated, and I cannot speculate about what it consisted of.

51. Paragraph 97 touches on the crucial facts of "previous specific duties" disappearing and a "more expansive group role" being taken up. Unfortunately, it does not identify, or consider the importance of, the duties, or explain how the new role would be "more expansive". For example, there is no comparison of old and new management responsibilities: whether these would shrink because of the allocation/direction point, or grow because of the Group nature of the role, or neither.

52. Ground 1 therefore succeeds because the Tribunal's judgment leaves unanswered some questions which are an indispensable part of the section 141 exercise in this case.

53. That being so, it is common ground that the questions of suitability and reasonableness, which are separate but connected, must be remitted to the Employment Tribunal.

Ground 2

54. There is something in Mr Scott's point about ground 2 applying a fine tooth comb to the Employment Judge's reasoning, and I doubt that it could succeed as a free-standing ground.

55. However, when the Employment Tribunal reconsiders suitability and reasonableness following my ruling on ground 1, the proposed change in the Claimant's reporting line will be a

relevant fact. Its significance, if any, in the comparison of the old and new posts will need to be considered.

Ground 3

56. During this hearing I ascertained that although the banding of the new role was questioned before the ET, the Claimants did not take the technical point that the roles could or would be re-banded in future.

57. Also, whilst there may be cases in which issues that were not in the employee's mind at the time of refusal might nevertheless be relevant when an ET decides the question of reasonableness under section 141(2), it seems clear that this rather technical point (that the roles might not necessarily always remain at band 8b) could not have affected the EJ's conclusion on that issue in the present case.

58. In those circumstances ground 3 does not identify any error of law by the ET.

59. However, it will be open to the parties to make any relevant submissions about the effect of grading issues on the questions of suitability and reasonableness when the matter is remitted.

Ground 4

60. Nor do I think that the EJ, when deciding the question of reasonableness of refusal, made any error of law in respect of the Claimants' lack of faith in Ms Foulkes.

61. The EJ did say that he "was not required to assess the reasonableness of [each Claimant] continuing to work with Ms Foulkes, which would have occurred if there was no redundancy" (paragraphs 105, 110 and 114). I was not entirely sure of the significance of that remark.

62. However, he also made clear findings rejecting the Claimants' specific criticisms of Ms Foulkes, and he found the refusals to be unreasonable in particular because the Claimants adopted a closed mind and an inflexible approach. It seems tolerably clear that, for the EJ, those factors outweighed the fact that the Claimants had lost trust in Ms Foulkes, a fact of which the judgment shows that he was fully aware.

Conclusion

63. The appeal is allowed.

64. The questions of suitability of alternative employment and the reasonableness of refusal are remitted to the Employment Tribunal.

65. Applying the guidance in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763, I have decided that the matter should be remitted to the same Employment Judge.

66. A party who lost at first instance may always feel that a judge, upon remission, will be tempted to justify his original decision by arriving at the same ultimate conclusion. However, one can rely on judges to have the professional integrity to consider a remitted case with an open mind. Significant sums are at stake, but considerable time and costs have already been devoted to the trial of this matter. The great majority of what was decided at trial will not need to be revisited. I perceive no flaw in the Tribunal's fact-finding as such, or indeed in its legal directions.

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The problem identified is an omission to answer some specific questions. It therefore seems to me proportionate to invite the same EJ to cure the omission and then, armed with any factual findings which are not disturbed by that exercise, to apply section 141 anew and with a completely open mind.

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