



RESERVED JUDGMENT

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE HALL-SMITH

BETWEEN:

Dr Sebastian Potter

Claimant

AND

South London & Maudsley NHS Foundation Trust

Respondent

ON: 5, 6 April 2017

APPEARANCES:

For the Claimant: In person

For the Respondent: Ms S Ramadan, Solicitor

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL is that:-

1. The Claimant was fairly dismissed by the Respondent and accordingly the Claimant's complaint of unfair dismissal is dismissed.
2. The Claimant's complaint of breach of contract is not well founded and is accordingly dismissed.

REASONS

1. By a claim form received by the Tribunal on 30 April 2016 the Claimant, Dr Sebastian Potter, brought complaints of breach of contract and of unfair dismissal against the Respondent, South London and Maudsley NHS Foundation Trust.

2. At the hearing at the Claimant attended in person and gave evidence before the Tribunal. The Respondent was represented by Ms S Ramadan, Solicitor, who called the following witnesses on behalf the Respondent, namely Suzanne Roche, Head of Pathway for Neuropsychiatry Services at the Respondent Trust and Sally Dibben, Head of Employee Relations. There was a bundle of documents before the Tribunal.

The issues

3. The issues to be determined by the Tribunal included the following:
 - 3.1 the parties agree that the Claimant was dismissed for the potentially fair reason of redundancy.
 - 3.2 The Claimant contends that his dismissal was unfair within the meaning of section 98(4) of the Employment Rights Act 1996;
 - 3.3 the Claimant contends that there was inadequate consultation with him, that the Respondent failed to adopt a fair basis for his selection for redundancy and that the Respondent failed to consider adequately or at all suitable alternative employment for him.
4. In relation to the Claimant's complaint of breach of contract, the issues involved the question of whether the Tribunal had jurisdiction to hear the Claimant's complaints having regard to Article 3c of the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994.
5. In the event that the Tribunal did have jurisdiction the issues involved the following, namely
 - 5.1 The question of whether previous NHS including periods of employment that occurred more than 12 months prior to the Claimant's employment with the Respondent;
 - 5.2 and/or previous non-NHS employment would be taken into account for the purposes of calculating the Claimant's contractual redundancy pay?
 - 5.3 If so was the Respondent in breach of that term or terms of the Claimant's contract of employment?

The facts

6. The Respondent, the South London and Maudsley NHS foundation Trust provides the widest range of NHS mental health and substance misuse services in the UK. The Trust operates from sites at the Maudsley Hospital in Camberwell and at the Bethlehem of Royal Hospital in Beckenham Kent.
7. The Claimant, Dr Sebastian Potter, was employed by the Respondent as a Band 8(c) Neuropsychologist. The Claimant's role was funded within the establishment of the Respondents Brain Injury Outpatient Service. The

Claimant's employment with the Respondent commenced on 11 November 2002.

8. The Claimant also worked at Blackheath hospital two days a week pursuant to a Service Level Agreement (SLA), page 77,. The Service Level Agreement provided that the Respondent Trust should supply to Blackheath a Consultant Neuropsychiatrist one day a week and a Consultant Neuropsychologist for two days per week. The income generated from the service level agreement covered the Claimant's cost as a full-time Band 8(c) Consultant Clinical Neuropsychologist in the Trust's Outpatient service. The Claimant was an expert in his particular field and was clearly a dedicated and conscientious member of the Respondent's senior medical staff.
9. In late 2013 early 2014, Suzanne Roche who was then Clinical Service Lead for Neuropsychiatry undertook a review of the Brain Injury outpatient service, pages 91 to 92. Suzanne Roche also looked at the level of activity within the Respondent service.
10. In November 2014 a report of the Care Quality Commission raised some significant concerns about the standard of care delivered by Blackheath hospital. Although an action plan was put in place to improve standards at Blackheath, improvements did not take place and the Respondents clinical academic group executive gave notice of termination of the Service Level Agreement.
11. On 13 March 2015 Susanna Roche sent the following email to the Claimant, page 94.

At our discussion in December I informed you that SLAM and Hunter Combe had both agree the current SLA with Blackheath hospital was no longer sustainable from a clinical governance perspective. We have been hoping the clinical governance concerns will be resolved following a detailed action plan put in place by Hunter Combe. Unfortunately at this point in time we have yet to see this happen. I'm forwarding the email below from the CAG's clinical director to Huntercoombe as the formal notification that the SLA with Huntercoombe will cease as expected as at March 31. I have spoken to Neil Powell at Blackheath to confirm this is the end date for you and Mike providing a service to Blackheath hospital. Mike has sent an email to NHS England and the other London providers informing them of the changes at Blackheath. I appreciate this will result in significant changes to your role and responsibilities which I will need to discuss with you.

12. The reference to Mike was a reference to Dr Mike Dilley who was a Consultant Neuropsychiatrist. The Claimant enquired whether a short-term SLA to cover a subsequent period of three to four months should be put in place in order to provide some continuity to cover the transitional period. The Respondent did not consider the Claimant's proposal to continue the

arrangement on a short-term basis with Blackheath was appropriate having regard to what it considered had amounted to poor care provided by Blackheath.

13. In an email to the Claimant of the same date 13 March 2015 Susanna Roche pointed out the following:

I've not been given any assurances over the last three months that significant changes occurred nor that care has improved. If we stay involved we will be complicit with ongoing poor care, yet powerless to influence things. It is for those reasons that I would not support a further SLA."

14. On 17 March 2015 Susanna Roche met the Claimant to discuss possibilities for the way forward following the cessation of the SLA with Blackheath, page 96. One possibility discussed was a move to a part-time clinical neuropsychologist post at St Thomas's Hospital which was becoming vacant on the retirement of a colleague of the Claimant, Dr Hana Laing. However the post was not subsequently filled by the Respondent and such an option was not a possibility.

15. The Claimant had a further meeting with Suzanne Roche on 14 April 2015, page 99. The Claimant raised a number of proposals, including the creation of a training/lead role across the CAG's, which includes her neuropsychiatry. The Claimant also is suggested a part-time secondment with the Institute of psychiatry undertaking academic tutor sessions.

16. On 22 April 2015 Mark Balham of the Department of psychology wrote an email to Suzanne Roche and to Dr Janice Rigby who was head of psychology for the CAG, in which he stated the following page 101:

I hope you're well. I'm writing with regards the proposed 12 month secondment for Dr Seb Potter as Academic Tutor for our programme, starting on 1 June 2015 which I believe Seb has discussed with you."

17. Suzanne Roche had had no prior discussion with the Institute of psychiatry about such proposal. In an email to Dr Janice Rigby, who was keen to support the proposal, Suzanne Roche pointed out that she was unclear how a possible part-time secondment would apply during the time when the Respondent was looking at the full-time grade 8c and that she had asked HR to advise her, page 100.

18. Suzanne Roche's approval was required in order to initiate the secondment and on 29 April 2015 she emailed the following to the Claimant, page 102:

As you will be aware there has been delay re-any formal paperwork about the consultation. I was unhappy about what was originally drafted and advice received by HR and therefore I needed to get a second opinion on this to ensure it was correct

and the correct process is followed.

As we discussed at our last meeting the formal process is yet to start and our meetings to date seen as informal. This does enable us to have a bit more time to present some alternatives rather than rushing things, which I would think is better for all. What this also means is that the secondment option will need to be discussed as part of the consultation meetings. Therefore I cannot go ahead and authorise at this point, as a process has started about your post. This is not to say it cannot be considered and hopefully along with other options.

19. Suzanne Roche published a consultation paper which she distributed to the Claimant on 3 June 2015, pages 105 to 109. The consultation paper set out the background leading to the proposed changes, the proposed changes and the Rationale for the Proposal.

20. The proposed changes included the following:

The one-day consultant neuropsychiatrist time will be transferred within neuropsychiatric services where there is significant demand and lengthy waiting times for initial generic neuropsychiatric assessments which are funded from NHSE block contract.

Following a review of the whole brain injury outpatient caseload which included those in treatment with psychology and those in follow-up with psychiatry, we discharged a large number of patients. Currently there is no waiting list for neurocognitive assessment or cognitive behavioural psychotherapy. Following our review of the demand for SLAM's brain injury outpatient service there is no evidence to support the view that the B1 outpatient service requires psychology services of a full-time 8C consultant clinical psychologist. The result is that the full-time post be placed 'At Risk'.

21. The rationale for the proposal included the fact that brain injury outpatient demand had significantly reduced as a result of current commissioning arrangements, costings and the fact that the current demand for brain injury psychology assessment and treatment would not cover the full costs of a Consultant clinical Neuropsychologist post.

22. The consultation paper also set out a timetable for the consultation period which involved an informal pre-consultation meeting, and open staff meeting and an interview individual staff meeting. It was proposed that the consultation would close on 3 July 2015 and the decision communicated on 13 July 2015.

23. The consultation paper informed the Claimant that his role was potentially at risk and that if suitable alternative employment could not be found, redundancy pay would be calculated in line with section 16 of the Agenda for

Change terms and conditions of service Handbook.

24. On 23 June 2015 Dr Richard Brown, Professor of Neuropsychology and Clinical Neuroscience emailed Suzanne Rosche, page 111, stating that he had met the Claimant and requested a meeting with all parties. Suzanne Roche agreed to extend the consultation period to 10 July 2015.
25. A meeting took place on 3 July 2015 attended by the Claimant. Suzanne Roche, Professor Brown, Dr Janice Rigby, Professor Laura Goldstein, Consultant clinical neuropsychologist. The other member of staff at risk, Dr Mike Dilley was unable to attend the meeting.
26. Following the meeting the Claimant together with Professor Goldstein and Dr Rigby produced a detailed response, dated 10 July 2015 to the consultation, pages 112 to 123. The response contained detailed proposals for possible roles and options for the Claimant's continued employment both in out-patient and in-patient settings. The response was a very impressive document and contained detailed proposals. Suzanne Roche described the response as thorough and creative.
27. Suzanne Roche considered the proposals contained in the Claimant's response but concluded that they were financially unsustainable. The Claimant's role at Band 8c was a senior role which involved him in supervising junior colleagues, rather than carrying a caseload involving delivering on a target of 50% patient facing time. There were budgetary constraints when looking at the level of activity required for an out-patient role. Thus, Suzanne Roche did not consider that the proposals in the response for post-concussion syndrome, page 114, translated into funded cases for treatment.
28. Suzanne Roche concluded that even if the Claimant was able to focus on clinical delivery and see as many patients as possible during work hours, there would not be the required number of patients to be funded by the clinical commissioning group, and that accordingly the demand did not exist. Suzanne Roche considered that income funded on the basis of patients seen could not be guaranteed.
29. On 28 August 2015 Suzanne Roche produced her outcome paper to the Claimant's response, pages 126 to 129. It was clear from the contents of the outcome paper that Suzanne Roche had considered the Claimant's proposals at length. Under the heading '*Contribution to inpatient service*', the outcome paper stated the following:

The points made about the contribution of the post holder to the inpatient ward we take on board and we acknowledge that the team does benefit from the expertise and experience of current post holders; however there is insufficient funding for the Lishman Ward to provide the cost of an 8C post either full-time or part-time. Work is already underway to review how we can meet the need for more psychology input on the ward, but this is within tight financial constraints. We plan to address the gap in

psychology of 1 to 1:9 (Staffing levels recommended by British Rehabilitation Society) with more junior qualified staff to meet the recommended staffing levels for tier 1.

30. A meeting had been scheduled to take place on 7 September 2015 but was rescheduled to 10 September 2015 at the request of the Claimant to enable his union representative to be present. At the meeting on 10 September 2015 Suzanne Roche was accompanied by Kerry Gallaher, senior employee relations adviser and Dr Potter was accompanied by Prof Goldstein. Suzanne Roche informed the Claimant the reasons why she considered that his proposals were unviable and that the income generated would be far below his pay and was therefore financially unsustainable and that there was no clinical need for a Band 8C position within the outpatient service. There had been a significant income loss from the termination of the SLA.
31. Suzanne Roche informed the Claimant that his post was formally at risk and he was placed on a 12 week redeployment period from 10 September 2015 to 2 December 2015 which represented his notice period. The Claimant was informed that the Respondent Trust would endeavour to search for suitable alternative employment. In a letter to the Claimant dated 10 September 2016 at Suzanne Roche included the following, pages 145 to 146:

We discussed that it been difficult to seek an alternative outcome of the consultation, and that all options with Brain Injury and elsewhere had been thoroughly considered and explored, including part-time provision. The financial disinvestment has resulted in activity in services within the Psychological Medicine CAG being scrutinised in order to meet Trust wide efficiency savings.

Therefore I confirmed, regrettably you been put at risk, and therefore, at our meeting you were placed on a 12 week redeployment period from 10 September 2015 up until 2 December 2015. This means that until 2 December 2015, within your redeployment period will end, we will seek a suitable alternative post for you.

The redeployment was explained to you as follows –

It was explained that we would endeavour to find you a suitable alternative post at your current protected grade of Band 8c. You currently work 37.5 hours per week.

All redeployments are initially on a four-week trial basis, which is determinable by either party. If no suitable post at this grade is available, we would look for jobs at a lower grade. If this course of action were necessary, you would receive long-term protection of salary in accordance with the Trust's Protection of Pay policy. This policy was emailed to you.

If you turned down a suitable alternative, or suitable alternative post cannot be found for you within the redeployment period, which ends on 2 December 2015 your contract with the Trust will be terminated on the grounds of redundancy. Should you turn down a suitable alternative option that it would mean you forfeit your right to redundancy payment.

Your contractual notice period of 12 weeks is run concurrently with your redeployment period from 10 September 2015 until 2 September 2015.

Your HR caseworker will be Sally Dibben, Head of Employee Relations,. Sally will immediately start looking for any other suitable posts that become available. I suggest you also check the Trust's intranet recruitment site on a regular basis for any posts you feel may be suitable and we will make sure vacancies advertised on the Trust's website are made known to you due to you not having access.

32. The Claimant provided Sally Dibben with a completed redeployment form, pages 153 2156, and an updated CV, 65 – 68. On 25 September 2015 Sally Dibben emailed the Claimant, page 148, stating the following:

I do have access to what we call the unpublished vacancies list – this is basically all jobs across the Trust that are being put out advert and prior to release recruitment services to NHS jobs. I will advise you soonest of any suitable alternatives.

In addition if you have an NHS jobs logon I can arrange you to have access to their restricted job site. This is a site of NHS bodies across London signed up to some time back to allow staff, like yourself, at risk to have first chance to apply for posts across London for which you are suitable. Whilst this is a normal recruitment process you would only be in competition with others in the same position as yourself.

All of that said I do also have to say that the number of jobs on that site has really fallen off over the past few months.

I will have a look at the list now of any suitable matches and let you know.

33. According to Sally Dibben there were generally very few Band 8C and Band 8B vacancies at any given point in time. In addition the availability was even more restricted in relation to identifying roles which matched the Claimant's very specialised skill set. Sally Dibben was unable to find anything suitable for the Claimant and on 20 October 2015 at she emailed Jane Hannon, Service Manager for Psychology Services, stating the following, page 158

I am as you are probably aware seeking redeployment for Seb but there is really nothing that I can offer so far and is likely to be for the foreseeable – so likely redundancy – unless you have anything that you can think of?

34. Jane Hannon emailed to say that she was sorry (*that she could not offer anything*). On 20 October 2015 Sally Dibben emailed the Claimant to inform him that she had nothing to put forward for his consideration in terms of redeployment opportunities. The Claimant replied by stating that he had been keeping an eye on the internal vacancies but had not spotted anything suitable, page 160.
35. The Claimant and Sally Dibben arrange to meet on 28 October 2015. At the meeting Sally Dibben stated that it was unlikely that suitable alternative employment across the Trust would be found having regard to the Claimant's seniority and specialist field of expertise. I accepted Sally Dibben's evidence that the Claimant told her at that he was not unhappy with being made redundant, at that he acknowledged that a suitable role within the Trust was unlikely to be found and that he wished to be paid his contractual redundancy pay. The Claimant did not raise at the meeting any potential alternative post for himself.
36. Sally Dibben continued to search for suitable alternative positions. On 13 November 2015 the Claimant's union representative emailed Sally Dibben, page 167, stating the following:

I hope this finds you well. I'm writing on behalf of the above named employee who is currently going through the redeployment phase. I believe one can now conclude that redeployment will not apply as there was no reasonable prospect of a suitable alternative employment within SLAM F NHS foundation Trust. I have arrived at this point because of my most recent conversation with sept.

If this is the case and we are now dealing with redundancy; I will appreciate if you would advise me of the Trust's position regarding the following at:

- Would Seb be released earlier than the project projection date to enable him to pursue job opportunities and attend interviews or at least paid time off to attend job interviews?**
- He currently does 1.0 WTE and should he find an alternative employment during no more than 0.4 WTE with another NHS employer. Would that be considered as a non-entitlement to redundancy even though the job is obviously not suitable alternative employment albeit with another NHS employer?**

We have noted that Seb qualifies for additional years having had NHS – relevant work, including a period of 18 months as an assistant psychologist working at Poole Hospital, and three years as a trainee

clinical psychologist (which included a number of placements within SLAM). We believe this should be considered in addition to his 13 years of direct employment with SLAM.

37. Sally Dibdin replied at to the query raised by the Claimant's union representative in relation to additional NHS service for the purpose of calculating his redundancy payment and and stated that she would see if it qualified.
38. On 1 December 2015 Sally Dibben wrote to the Claimant pay, pages 176 to 177 and her letter included the following:

In a formal at-risk meeting held on 10 September 2015, Suzanne Roche head of clinical pathway for neuropsychiatry, CFS and PPS advising your post was at risk of redundancy due to restructuring of your service. In line with the Trust job protection policy, you are formally placed on a redeployment/notice period and issued with the formal notice of redundancy, during which we would endeavour to find all suitable alternative employment within the Trust for you. The redeployment/notice period ran from 10 September 2015 to 3 December 2015.

As previously discussed and is now confirmed there have been no suitable vacancies to offer to you during this redeployment/notice period and this letter is formal confirmation that your employment with the Trust will be ended on the grounds redundancy on Thursday, 3 December 2015.

You have previously been advised of your redundancy entitlements and confirming that your service with the IOP as discussed is currently being clarified. Should it be confirmed as reckonable service then there will be two more complete years of service to be paid as redundancy payment. I will confirm this position to you as soon as I have an outcome. The paperwork is been completed for payroll which will commence the redundancy payment process.

39. At the letter informed the Claimant at that he had a right of appeal against the Trusts decision to dismiss him on grounds of redundancy. The Claimant did not appeal his dismissal.
40. The Claimant raised at the fact that he had been surprised to see notification alerts from the NHS jobs website on Tuesday 8 December 2015, relating to two posts in the Neuropsychiatry service. One of the posts was for a part-time Consultant role in the depersonalisation service at his grade, Band 8C, and the other post was in relation to a full-time role for a more junior clinical psychologist, Band seven. The job descriptions for the roles are at pages 192 – 197 and 186 – 191 in the Tribunal bundle.
41. The Claimant did not apply for the Band seven post because the Claimant himself recognised that it was for a much junior position and was not suitable

at for someone of his experience in circumstances where such posts were often taken by individuals who are just completed their clinical training.

42. In relation to the other post that of the Band C Consultant role, the role was for a Consultant Clinical/Counselling Psychologist and was not for a Neuropsychologist. Suzanne Roche had herself prepared the business plan for the role but the budget for such role had not been authorised until December 2015. Suzanne Roche did not consider that the role was suitable for the Claimant as it did not match his skill set and the role involved working with a specific client group namely those with a depersonalisation disorder, a group with whom the Claimant had never previously worked. Suzanne Roche did not consider that it was a suitable alternative post for the Claimant. In any event the Claimant himself decided not to apply for the post.
43. On 31 of December 2015 at the Claimant received a redundancy payment in the sum of £80,325.96, which reflected the 13 years he had worked in SLAM. The Claimant contended that his previous NHS employment between 14 April 1998 and 18 September 1999 at Poole General Hospital should have been taken into account in the calculation of his redundancy payment.
44. The Claimant also contended that a period of employment with the Institute of Psychiatry (IOP) between 1999 and 2002 should be taken into account towards his reckonable service for NHS redundancy payment calculation purposes, and that accordingly he was entitled to a further three years reckonable service.
45. The IOP is not an NHS employer but is a private academic research facility. The Agenda for Change NHS terms and conditions of service under the heading '*Definition of reckonable service*' provided the following at paragraph 16.5, page 70:

Reckonable service for the purposes of an NHS redundancy payment which is calculated on the basis of the service up-to-date of termination of the contract, means continuous full-time or part-time employment with the present or any previous NHS employer but with the following additions:

- **this subject to paragraph 16.6 below, where there has been a break in service of 12 months or less, the period of employment prior to the break will count as reckonable service;**
- **periods of employment as a trainee with a general medical practitioner, in accordance with the provisions of the trainee practitioners scheme, will count as reckonable service;**
- **at employer's discretion, any period or periods of employment with employers outside the NHS, where these are judged to be relevant to NHS employment, can be included in reckonable service – see section 12 of the handbook.**

46. According to Sally Dibben at the Respondent Trust has never taken into account non-NHS employment in calculating reckonable service. Accordingly the the Claimant's employment with IOP was not included in his redundancy payment calculation. On 16 May 2016 Sally Dibben emailed the following to the Claimant, pages 205 – 206:

You were paid redundancy at a rate of 13 complete months of salary to reflect service from 2002 – to date of redundancy.

It is confirmed that the service with the IOP would not constitute NHS employment for redundancy purposes – it is sometimes considered for annual leave purposes where service can be aggregated. However it is not used in the redundancy calculations of the NHS as they are a separate employer, have different terms and conditions of employment and pay scales.

For redundancy purposes service is continuous, with a break of one year or less and unfortunately this would mean that your time with Poole is also not counted for redundancy purposes.

This being the case I believe that you have been correctly paid for your years of continuous NHS service at 13 complete years.

47. I heard submissions from Ms Ramadan on behalf of the Respondent and from the Claimant. I also read the Respondent's written submissions prepared for the hearing. The parties' submissions are not repeated in these reasons.

The Law

48. Section 139 of the Employment Rights Act 1996 provides:

For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to -:

(a) the fact that his employer has ceased or intends to cease -

(i) to carry out the business for the purposes of which the employee was employed by him; or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirement of that business –

(i) for employees to carry out work of a particular kind; or

(ii) for employee to carry out of work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

49. Redundancy is a potentially fair reason for dismissal. The Claimant did not seriously challenge the fact that there was a genuine redundancy situation at the time of his dismissal, but contended that the process adopted by the Respondent leading to his dismissal was unfair. Section 98(4) of the Employment Rights Act 1996 provides:

The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

50. In a genuine redundancy situation at the Respondent employer should act reasonably throughout the entire process. The Tribunal has to remind itself that it is not its role to substitute its own view and to consider what it would or might have done had it been the employer at the material time. The role of the Tribunal is to review the process adopted by the employer and consider whether throughout the entire process including the dismissal of the employee concerned, the Respondent acted reasonably or in other words whether the steps undertaken by the employer fell within the range of reasonable responses available to a reasonable employer. A dismissal for redundancy is always unfortunate for the employee concerned, because unlike the position in a conduct or capability dismissal, there is no fault on the part of the employee,

51. Ms Ramadan on behalf of the Respondent referred me to the guidelines of the Court of Appeal in ***R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72***, namely, consultation with the employee when the proposals are still at a formative stage, adequate information on which to respond, adequate time in which to respond and conscientious consideration of the response to the consultation. An employer should also take steps to search for suitable alternative employment for the employee concerned.

52. I was also referred to ***Barratt Construction v Dalrymple [1984] IRLR 385***, in which the EAT observed:

Without laying down any hard and fast rule we are inclined to think that where an employee at senior management level who is being made redundant is prepared to accept a subordinate position he ought, in fairness, to make this clear at early stage so as to give his employer an opportunity to see if this is a feasible solution.

Conclusions

53. I reached my conclusions having regard to the evidence, to the submissions on behalf of the parties and to the relevant law.
54. In the circumstances of this case I concluded that a genuine redundancy situation existed at the time of the Claimant's dismissal and at the time of the process leading to his dismissal. The Claimant himself did not seriously dispute that there was a genuine redundancy situation following the termination of the SLA with Greenwich, and the subsequent reorganisation involving the Claimant's position at SLAM.
55. I found that the reason for the Claimant's dismissal was redundancy in circumstances where the requirement for the Claimant to carry out work involving two days a week at Blackheath and three days a week for the Respondent as a Band 8c Consultant Neuropsychologist had diminished following the termination of the SLA. The Respondent was unable to provide a the work for a full time post absorbing the two days per week the Claimant had provided at Blackheath. The requirement for a Band c Consultant clinical Neuropsychologist had diminished.
56. The Claimant complained that there had been inadequate consultation with the Respondent. I concluded that there had been a reasonable and adequate consultation process which had included Suzanne Roche meeting the Claimant on 17 March 2015 and a further meeting on 14 April 2015. At the April meeting a number of possibilities were discussed including the Claimant's possible secondment to an academic tutor post at the Institute of psychiatry at Kings College Hospital.
57. The Claimant was provided with the consultation paper prepared by Suzanne Roche which informed the Claimant that he was at risk of redundancy. The consultation process afforded the Claimant time to prepare a consultation response paper which was an impressive document containing a number of possible proposals. In her response, Suzanne Roche provided her reasons why the proposals were not viable having regard to the circumstances at the time. I found that Suzanne Roche's response was genuine and that she had given adequate consideration to the proposals raised in the Claimant's response paper.
58. The Claimant's role was a very specialised one as a Consultant Clinical Neuropsychologist. The termination of the SLA had not only affected the Claimant but had also affected a Neuropsychiatrist, Dr Dilley. Suitable alternative employment had been located for Dr Dilley in a specialist neuropsychiatry role. Unfortunately, a role could not be found for the Claimant and I note that both the Claimant and his union representative appeared to recognise this at the time. In circumstances where the Claimant and Dr Dilley were Consultants in different specialties, I accepted the submission of Ms Ramadan on behalf of the Respondent that each of them were in a pool of one, and that therefore they should not have been considered in a pool of two.

59. I found that the Respondent had made a genuine attempts to find suitable alternative employment for the Claimant, as evidenced by Sally Dibben's endeavours on the Claimant's behalf and to inform him of the position during his notice period. Sally Dibben's searches involved the NHS jobs website, the unpublished vacancies list, the Respondent Trust's vacancy bulletin and the restricted jobs website. On the evidence the two posts which were subsequently advertised, following his dismissal did not represent suitable alternative employments for the Claimant and the Claimant himself did not apply for the roles. The Claimant had never made it clear that he would consider a subordinate position at a lower banding, which I did not consider surprising, having regard to the Claimant's skills and expertise.
60. In my judgment the Respondent acted reasonably throughout the entire process, and it was unfortunate that no suitable alternative employment could be identified for the Claimant. I concluded that the Respondent acted reasonably in dismissing the Claimant, having regard to section 98 (4) of the Employment Rights Act 1996. Accordingly, it is the judgment of the Tribunal that the Claimant was fairly dismissed by the Respondent and that his complaint of unfair dismissal is dismissed.
61. An interesting point arose in relation to the calculation of the Claimant's redundancy payment entitlement. The Agenda for Change NHS terms and conditions of service provides at the following by 16.23, namely:

For the purposes of this scheme any suitable alternative employment must be brought to the employee's notice in writing or by electronic means agreed with the employee, before the date of termination of contract and with reasonable time for the employee to consider it. The employment should be available not later than four weeks from that date. Where this is done, but the employee fails to make any necessary application, the employer shall be deemed to have refused suitable alternative employment. Where an employee except suitable alternative employment the trial period provisions in section 138 (3) of the Employment Rights Act 1996 will apply.

62. Ms Ramadan submitted that the terms of the Agenda for Change during do not allow an employee to be entitled to redundancy pay because at the time of termination of employment, the right only bites once the Claimant is able to certify as required by paragraph 16.23 of the Agenda for Change and that can only properly be done after a period of four weeks following termination of employment. It was accordingly submitted that in circumstances where article 3 (c) of the *Employment Tribunal's Extension of Jurisdiction (England and Wales) order 1994* provides that proceedings for the recovery of damages for breach of contract can only be brought if the claim arises or is outstanding on the termination of the employee's employment.
63. It was it was contended by the Respondent that under the provisions of Agenda for Change, a claim for redundancy payment entitlement only accrued

after a period of four weeks after dismissal. Thus it was argued an Employment Tribunal had no jurisdiction to hear and determine the Claimant's complaint because it had not arisen or was outstanding and was not outstanding at the termination of his employment. I do not consider it necessary to consider such a point, in circumstances where I have concluded that the Claimant was fairly dismissed and has already received a redundancy payment entitlement calculated on the basis of 13 years continuous employment with the Respondent.

64. There had been a break in the continuity of the Claimant's employment with the NHS when he was working at the IOP between 1999 and 2002. In such circumstances, I concluded that there was no requirement on the part of the Respondent either contractually or otherwise to treat it as reckonable service for the purposes of the Claimant's redundancy payment entitlement. The provisions of Agenda for Change only went as far as providing that such periods could be included at the employer's discretion and I accepted the evidence of Sally Dibben that such periods had never been taken into account by the Respondent.

Employment Judge Hall-Smith
Date: 7 August 2017