Appeal No. UKEAT/0063/17/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 December 2017
Judgment handed down on 11 January 2018

Before

THE HONOURABLE MR JUSTICE KERR

MR D J JENKINS OBE

MR M SIBBALD

ROYAL SURREY COUNTY NHS FOUNDATION TRUST — APPELLANT

MS M DRZYMALA — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS SARAH KEOGH (of Counsel) Instructed by: Hempsons Solicitors Hempsons House 10 Villiers Street London WC2N 6NJ
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SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

UNFAIR DISMISSAL - Reasonableness of dismissal

An employer who complies with the non-discrimination regime in the **Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002**, as between permanent staff and those on fixed-term contracts, does not necessarily act fairly under section 98(4) of the **Employment Rights Act 1996** where the employer does not renew the employee's fixed-term contract.

The question of fairness of the dismissal depends, in the normal way, on the facts of the case and the application of the fairness test in section 98(4) to the facts. Dismissals by non-renewal of a fixed-term contract are likely to be potentially fair for "some other substantial reason" but are not a special case attracting different considerations from those ordinarily considered under section 98(4) of the **1996 Act**.

The Tribunal below did not err in law either by substituting its own view for that of the employer on the issue of fairness, nor by placing too high a burden on the employer when deciding that it should have offered to discuss possible alternative employment with the employee; nor by misunderstanding the Respondent's submissions; nor by acting perversely when deciding that the employer had dismissed the employee unfairly.

A **THE HONOURABLE MR JUSTICE KERR**

Introduction

B 1. This appeal is about a doctor who was employed on a series of fixed-term contracts. Eventually, her contract was not renewed. A permanent post holder was appointed instead and so she was dismissed in law when her last contract expired. She brought a claim for age discrimination, which she lost. She does not appeal against that result. She won her claim for C unfair dismissal. The employer, the Respondent below, appeals against that result.

2. The Respondent to the appeal was the Claimant below; we shall refer to her as the D Claimant. The Appellant was the Respondent to the claim below; we shall refer to it as the Respondent. The appeal is brought on four of five grounds authorised by His Honour Judge Richardson following an Appellant-only Preliminary Hearing held on 13 July 2017.

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3. The Decision against which this appeal is brought followed a hearing held in the Reading Employment Tribunal over eight days in October 2015, before Employment Judge Gumbiti-Zimuto, sitting with Mrs Low and Mr Walter. The Decision was dated the day it was F sent to the parties, 20 January 2016.

The Relevant Law

G 4. The claim with which we are concerned in this appeal was a claim for unfair dismissal. Where a fixed-term contract expires and is not renewed, that is a dismissal in law: see section 95(1)(b) of the **Employment Rights Act 1996** ("the 1996 Act"), as amended by the **Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002** ("the 2002 H Regulations").

5. The **2002 Regulations** were made under sections 45 and 51 of the **Employment Act 2002**, belatedly transposing into domestic law the provisions of Council Directive 1999/70/EC, adopted to implement a framework agreement (annexed to the Directive) entered into between three Europe-wide bodies representing employers and employees.

6. The avowed purpose of the framework agreement was to improve the quality of fixed-term work and to prevent abuse arising from the use of successive fixed-term contracts. The **2002 Regulations** enact an anti-discrimination regime whereby, broadly, unless there is objective justification, there must not be less favourable treatment of staff employed on fixed-term contracts, as compared with that of staff not employed on fixed-term contracts.

7. Unlawful treatment under the **2002 Regulations** can include a "deliberate failure to act" as well as subjection to a detriment (regulation 3(1)(b)). The right not to be treated less favourably includes treatment in relation to the opportunity to secure any permanent position in the employer's establishment (regulation 3(2)(c)). To secure the employee's ability to exercise that right, she must be informed by the employer of available vacancies for permanent posts in the establishment (regulation 3(6)).

8. We mention the **2002 Regulations** because the Respondent relied heavily upon them. However, the claim here was for ordinary unfair dismissal. It was not a claim made under the **2002 Regulations**, although the Tribunal was referred to them. It was agreed that the Claimant was dismissed when the last of her successive fixed-term contracts came to an end. Her locum post was made permanent and she was an unsuccessful candidate in a competitive appointment procedure for the permanent post.

9. Where the reason for a dismissal is the expiry of a fixed-term contract, it is well settled that the expiry of the contract can be "some other substantial reason" for the dismissal (see e.g. **Beard v St Joseph's School Governors** [1978] ICR 1234, per Slynn J at 1237H-1238B). The fairness of the dismissal is then considered in the normal way applying the test of fairness in section 98(4) of the **1996 Act**:

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

10. The statutory test of fairness is expressed in the same words whether the reason for the dismissal is conduct, capability, redundancy, contravention of a statutory requirement or some other substantial reason; and whether the dismissal takes the form of a positive decision to bring an end to a "permanent" contract of employment, with or without notice, or whether it takes the form of expiry, without renewal, of a fixed-term contract.

11. For the sake of clarity, and in the light of submissions made to us and below, we confirm the following. It is not the law that an employer who complies with the non-discrimination regime in the **2002 Regulations**, as between permanent staff and those on fixed-term contracts, necessarily acts fairly under section 98(4) of the **1996 Act** by not renewing a person's fixed-term contract. It all depends on the facts of the case and the application of the fairness test in section 98(4) to the facts.

The Facts

12. So far as relevant to this appeal, the Tribunal found the following facts. The Claimant qualified as a doctor in 1987. She developed a specialism in cancer and worked at various

hospitals, improving her qualifications and experience. From April 2005, she held locum appointments, joining the Respondent as a Locum Consultant in the Oncology Department at Royal Surrey County Hospital in November 2011. She was employed on successive six month fixed-term contracts and was interested in obtaining a permanent appointment.

13. Her contract was extended either five or six times, but she did not succeed in obtaining a permanent appointment. Although she claimed that this was due to her age, that aspect of her claim failed and there is no appeal against the failure of the age discrimination claim. In her unfair dismissal claim, she relied on the circumstances in which her fixed-term employment contract, expiring at the end of September 2014, was not renewed.

14. In April or May 2014, the Claimant applied for a permanent appointment in a role as an Acute Oncology Breast Cancer Doctor. The Claimant and another candidate were interviewed for the post. The Claimant's interview was on 28 May 2014. Twenty minutes after the interview, two of the interview panel members, Dr Cummins, the Clinical Director, and Mrs Freeman, the Respondent's Deputy Director of Operations, told the Claimant she has been unsuccessful and that the other candidate had scored more highly and had been selected.

15. A conversation then took place, the content of which was partly contentious. Mrs Freeman's evidence was that the Claimant was upset and that they "*discussed with the claimant that there may, in the future, be other substantive roles … potentially as a speciality doctor*" (the correct terms is "Specialty Doctor"), but the Claimant was upset and did not want to discuss that at the time. A Specialty Doctor is a lower ranking post than the Claimant's then Locum Consultant post.

16. The Tribunal found (at paragraph 129 of the Decision) that immediately after the interview "*[i]t is not disputed that there was a mention made of the possibility of the claimant working for the Trust as a specialty doctor*", though the exact content of the conversation was not agreed. It is clear that no further discussion occurred on that date about the possibility of the Claimant working for the Respondent as a "Specialty Doctor".

17. After the interview and the subsequent conversation, the Claimant was on leave until 2 June 2014. From 10 June 2014, she was off work on sick leave. On 23 June 2014, Mrs Freeman wrote to her giving her three months' notice, the notice period to start on 1 July 2014; thus, her fixed-term contract would not be extended and her employment would end on 30 September 2014. The letter made no mention of a right of appeal, nor of any possible alternative employment with the Respondent.

18. In the letter, Mrs Freeman did offer a meeting with her or Dr Cummins "*to talk about this matter*" and invited her to call either or both of them to arrange this. Mrs Freeman decided not to mention a possible Specialty Doctor role. In an internal email the same day, she explained that she had not offered a Specialty Doctor role "*to keep 'on topic' with her regarding the notice period and secondly as I think we need to think through how effective/content she would be if we were to employ her as a Speciality Doctor*" (Decision, paragraphs 65 to 67).

19. The Claimant submitted a formal grievance, which included complaints about the appointment process and included a request to "*appeal the decision to terminate my contract*" (Decision, paragraph 68). A grievance meeting was held in September 2014, but the process was not concluded by the time the Claimant's employment ended on 30 September. On 14

November 2014, the Respondent wrote to the Claimant confirming that she had a right of appeal.

20. The Claimant then wrote a letter of appeal, making various points of complaint. The only part of the appeal which was upheld in the decision letter, sent on 16 March 2015, was that the Respondent recognised that Mrs Freeman's letter of 23 June 2014 should have included an offer of a right of appeal; but "*an earlier appeal would have made no substantive difference to the outcome*".

21. The parties were ably represented before the Tribunal by the same counsel as appeared before us. The Tribunal summarised the parties' submissions at paragraphs 81 and 82 of the Decision. We shall return to this aspect. In closing, the parties made written submissions, copies of which were before us, as well as oral submissions.

22. For the Claimant, Ms Criddle's closing submissions included the proposition that on expiry of an employee's fixed-term contract, while the expiry of the contract could constitute "some other substantial reason" for dismissal, "*a failure to consider the employee for alternative employment will render the dismissal unfair:* ***Beard v St Joseph's School Governors*** …". Before us, Ms Criddle rightly accepted that the correct proposition would be that the failure *may* render the dismissal unfair rather than that it *will* render it unfair.

23. Ms Criddle also submitted in her written closing submissions that the dismissal was unfair because the Respondent had failed to apply its own procedures and chose not to offer the Claimant any alternative employment at any time prior to giving notice of termination in June 2014, down to the final appeal decision in March 2015, even though "*there were multiple jobs*

available during those periods of time: the specialty doctor job mentioned at the end of the … interview …" and various other posts.

24. For the Respondent, Ms Keogh acknowledged in her submissions to the Tribunal below (at paragraph 13(iii) and (iv) of her written closing) that the Claimant was saying there should have been consultation and an earlier appeal in accordance with the Respondent's disciplinary policy; and that the Claimant relied on failure to offer the Claimant alternative employment as a Specialty Doctor.

25. Ms Keogh also submitted below (paragraph 19 of her written closing) that where a fixed-term contract employee is not "*treated … less favourably*" within the meaning of the **2002 Regulations**, it is not "*incumbent upon [the Respondent] in the circumstances of the termination of a fixed-term contract of less than 4 years to find or offer [the Claimant] alternative employment*"; but "*[n]evertheless, attempts were made to do so*". Ms Keogh continued at paragraph 20:

> **"… The possibility of a role as a speciality doctor was raised immediately after the [interview] on 28 May 2014, and it is not in dispute there was an offer to discuss this with Charlotte Freeman … on her return from leave. …"**

26. Ms Keogh went on to submit in writing that the offer was not taken up due to the Claimant going on sick leave; that further offers were made to communicate or meet with the Claimant, which were also not taken; and that there were no available roles as a Specialty Doctor owing to lack of funding, or none with a start date before 30 September 2014, when the Claimant's contract was to expire.

27. The Tribunal's reasoning and conclusion on the unfair dismissal claim were set out at paragraphs 127 to 136 of the Decision. The Tribunal found, uncontroversially, that the reason

for the dismissal was a potentially fair reason, namely that the Claimant's locum contract had come to an end. They rejected the Claimant's proposition that she had some sort of legitimate expectation of being preferred to the successful candidate for the permanent post.

28. The Tribunal then said it was "*concerned by two features of the way that the claimant was treated by the respondent*". The first was that, after mention had been made after the interview of the possibility of the Claimant working for the Respondent as a Specialty Doctor, "*the matter was not raise[d] again by the respondent during the claimant's employment. In fact the topic was deliberately avoided by the respondent*".

29. The Tribunal went on to note that "*[i]t was not made clear that the claimant had options available to her for discussion with the Trust*" and that "*the claimant could have been offered a specialty doctor role by the respondent at about the time that she was serving out her notice*". Thus, the Tribunal clearly did not accept the Respondent's contention that there were no relevant roles available at that time.

30. The second feature that gave the Tribunal "*cause for concern*", was that the Claimant was "*denied the right to appeal the decision to dismiss her*". When the right was eventually accorded to her after her employment had ended, "*the actual appeal hearing did not take place until the exercise was purely academic as the claimant's appeal was bound up with her complaints about the way that she was treated in respect of the substantive consultant post*".

31. The Tribunal considered that "*a timely appeal would have enabled the claimant and the respondent to engage on the issues relating to the termination of her employment*" and that "*may have led … to a discussion about the possibility of other roles which may have led to the*

claimant accepting some other role that existed", or "*may have led to nothing*" given the Claimant's perception that she should have been given the substantive Consultant role.

32. The Tribunal then stated at paragraph 132:

> **"… the combined effect of these two features … has led the Tribunal to conclude that the claimant was unfairly dismissed. Denying the claimant a timely right of appeal, which the respondent ultimately accepted the claimant was entitled to, in circumstances when the respondent had other employment opportunities available for the claimant was in our view unfair."**

33. The Tribunal found "*explicable*" the Claimant's failure to approach Mrs Freeman and Dr Cummins for a discussion. Being upset at having failed to secure the substantive post, and believing the Respondent was not willing to employ her as a Consultant, "*it is not likely that the claimant would feel there was anything to discuss with Mrs Freeman and Dr Cummins*" (Decision, paragraph 133). Having briefly raised the possibility of other employment after the interview:

> **"… Mrs Freeman and Dr Cummins should have made clear what the position was. They should have done this by making it clear that there were options for discussion with the claimant and offering a meeting to discuss such options. The offer should have been repeated after the meeting when the dust had settled."**

34. The Tribunal (paragraph 136) was:

> **"… not satisfied that the dismissal was fair because of the following circumstances: there was other employment available for the claimant; the claimant was denied a timely right of appeal; the respondent is the largest (or one of the largest employers in Surrey) with professional human resources and other administrative resources; it was unreasonable to deny the claimant the right of appeal."**

<u>Ground 1: Misdirection on Treatment of Fixed-Term Employees</u>

35. Under this heading, Ms Keogh for the Respondent advanced four arguments: that the Tribunal failed to apply the "band of reasonable responses" test and substituted its view for the employer's on the issue of reasonableness of the dismissal; that the Tribunal failed to consider the statutory framework for fixed-term employees provided by the **2002 Regulations**; that the

A Tribunal misunderstood the effect of Slynn J's judgment in **Beard v St Joseph's School Governors**; and that the Tribunal wrongly treated the dismissal as if it were for redundancy, requiring the Respondent to consider suitable alternative employment.

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36. In relation to the band of reasonable responses test, Ms Keogh cited well known authority for the proposition that the Tribunal must avoid substituting its own view on the issue of reasonableness where an employer decides to dismiss: **British Leyland UK Ltd v Swift** C [1981] IRLR 91, per Lord Denning MR at paragraph 11; and **Bevan Harris Ltd v Gair** [1981] IRLR 520, per Lord McDonald MC at paragraphs 7 to 9 (EAT in Scotland). She contended that the latter case provided a direct analogy with this case: in **Bevan Harris Ltd**, the EAT decided D that the employer was not required by reasonableness to demote the employee instead of dismissing him.

37. E The contention of Ms Keogh was that the Tribunal fell into error by deciding that the Respondent, having briefly raised the possibility of an alternative but lower ranking role as a Specialty Doctor, should have made clear what the position was by offering a meeting to discuss options for alternative employment that were available. She submitted that this F amounted to the Tribunal substituting its view, on the issue of reasonableness, for that of an employer acting within the band of reasonable responses. She pointed out that the Decision does not refer to the band of reasonable responses test and there is no finding that the G Respondent acted in a manner that fell outside it.

38. Her second argument relating to the **2002 Regulations** was that an employer who H complies with the duty under regulation 3 to provide information about vacancies, has invariably done enough to satisfy the requirements of fairness under section 98(4) of the **1996**

Act, if the employee then leaves without applying for any of the posts drawn to her attention; or, alternatively, that compliance with the duty to provide information about vacancies is, at least, a very strong pointer in the direction of the employer having acted fairly in dismissing the employee.

39. Ms Keogh argued that the duty to provide information about vacancies was fully performed and that the Tribunal failed to consider the scope and effect of the **2002 Regulations**, when considering the fairness of the dismissal. She took us through part of the **2002 Regulations**, pointing out that, under regulation 8(2), an employee employed under successive fixed-term contracts can only be treated (subject to an objective justification test) as a permanent member of staff once four years have elapsed since the start of her employment.

40. Next, it was said that the Tribunal wrongly treated the **Beard** case as authority for the proposition that failure to consider alternative employment necessarily renders unfair a dismissal constituted by the non-renewal of a fixed-term contract. Ms Keogh's linked argument was the Tribunal illegitimately drew on the jurisprudence in the case of redundancy dismissals, which include a statutory requirement, absent here, to consider suitable alternative employment for the purposes of the right to a redundancy payment.

41. On the facts, she submitted that the lower ranking role of Specialty Doctor would not be considered suitable alternative employment in the context of redundancy. The Tribunal should not, she said, have subjected this employer to the high burden than would be imposed on an employer dismissing a permanent member of staff for redundancy. It would be too onerous for employers to be placed under an obligation to seek out alternative employment each time the contract of a short-term locum employee expires.

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42. For the Claimant, Ms Criddle defended the reasoning and conclusions of the Tribunal. She submitted that the Respondent's critique of the decision relied on an over-detailed textual examination of the language used in the decision, of the type deprecated by Waite J in **Royal Society for the Protection of Birds v Croucher** [1984] ICR 604, at 609F-H. She said there is ample authority that an employer may be required by the duty of fairness under section 98(4) of the **1996 Act** to engage in discussion and consultation about alternatives to outright dismissal.

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43. Ms Criddle's contention was that this was a fact sensitive issue and does not depend on whether the employee is employed on a fixed-term contract or on whether there is a redundancy situation. The **Beard** case was an example of a case where fairness required consideration of alternative employment. She cited other such examples, including **Rochdale MBC v Jentas** EAT/494/01 (HHJ Reid QC), where the employee had, as in this case, been employed on a series of fixed-term contracts.

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44. She took issue with the contention that the question of fairness of the dismissal could be answered by looking at different provisions in the **2002 Regulations**; if Parliament had intended those **Regulations** to provide the answer to the question of fairness, it would have said so. The fairness issue requires the Tribunal to apply the ordinary test in section 98(4) and nothing in the **2002 Regulations** alters that test. Compliance with obligations under the rules is evidence, but not evidence enjoying any special status on the issue of fairness.

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45. She pointed out that the purpose of the duty arising under regulation 3(6) to inform the employee about available vacancies is expressly stated: "*to ensure that an employee is able to exercise the right*" conferred by paragraph (1) read with (2)(c), i.e. the right not to be treated less favourably than the employer treats a comparable permanent employee in relation to "*the*

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opportunity to secure any permanent position in the establishment". The duty to inform is thus not confined to vacancies considered to be suitable alternative employment.

46. We come to our reasoning and conclusions on the first ground of appeal. First, we do not accept that there is any merit in the argument that the Tribunal failed to apply the "band of reasonable responses" test and substituted its own view of whether it was reasonable to dismiss the Claimant. The Tribunal expressly deferred to the Respondent's view that it was reasonable to appoint the successful candidate to the permanent post, since he was preferred to the Claimant on merit. It rejected the suggestion that the Claimant had any expectation of permanent appointment.

47. It was to that issue that the band of reasonable responses test was relevant in this case. The test is particularly important in cases where exercise of the employer's judgment is being considered. In a "conduct" dismissal or a "capability" dismissal, there is a positive decision based on the employer's judgment whether to dismiss or not. Thus, **British Leyland UK Ltd v Swift** was a straightforward conduct case and **Bevan Harris Ltd v Gair** was a straightforward capability case. In both cases, the band of reasonable responses test was central to the issue of fairness.

48. Where the employee is on a fixed-term contract, the employer does not have to take any positive step to dismiss; passive non-renewal will cause the contract of employment to cease by lapse of time. But there may still be a need for the employer to exercise judgment, as in this case where the Claimant was competing for a permanent post and the employer must decide which candidate to prefer. That exercise of judgment is subject to the band of reasonable responses test and the Tribunal must not substitute its own view of the merits.

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49. This Tribunal did not do so and did not fall into the error with which Ms Keogh charged it. This was not a conduct or a capability dismissal. It was a "some other substantial reason" case. It is well established that to act reasonably under section 98(4) in such a case an employer may, depending on the facts, have to engage in some degree of discussion or consultation. In such cases, the emphasis is more on the "equity" part of the fairness test and less on the "substantial merits" part of the test.

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50. A dismissal by non-renewal of a standard fixed-term contract may, depending on the facts, have some features in common with a redundancy dismissal or, where there is no redundancy situation, with a non-redundancy "business reorganisation" case, or a case where the employer wishes to impose changed working practice or terms of employment on an unwilling or reluctant employee. Possible alternatives to dismissal may need to be discussed as a matter of fairness, where such alternatives are or may be available.

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51. These generalisations are just that; they should not be taken to be propositions of law. There is no substitute for applying the actual words of section 98(4) when considering whether a dismissal is fair or unfair. We agree with Ms Criddle that the content of the employer's procedural duty, if any, is fact sensitive. The Tribunal was correct to treat it as such.

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52. The Tribunal in this case found that the Respondent treated the Claimant poorly in two ways: having initiated a discussion about alternative employment on 28 May 2014, after the Claimant's unsuccessful interview, the Respondent then failed to pursue the discussion about possible alternative roles for her; and then failed to provide her with a timely right of appeal. Neither of these findings involved questioning the employer's exercise of managerial judgment.

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53. The main submission Ms Keogh made below was that compliance with the **2002 Regulations** meant the dismissal was necessarily fair. That is, as already explained, wrong. The **2002 Regulations** sit alongside the unfair dismissal regime and compliance with them does not of itself afford a defence to an unfair dismissal claim where the dismissal is effected by non-renewal of a fixed-term contract.

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54. Nor did the Tribunal misunderstand the scope and effect of the **Beard** case. They treated it, correctly, as authority for the proposition set out in the Decision (at paragraph 87) that dismissal on expiry of a fixed-term contract may be for "some other substantial reason". We do not agree that they fell into the error of supposing that failure to consider alternative employment necessarily rendered the dismissal unfair as a matter of law.

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55. We also reject the proposition that the Tribunal placed a higher burden on the Respondent than it would have had to bear if the case had been one of redundancy. The statutory provisions relating to suitable alternative employment are relevant to the right to a redundancy payment rather than to the fairness of the dismissal. The latter is always a question of fact.

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56. For those reasons, we reject the first ground of appeal. The findings on which the Tribunal based its decision were open to it, provided they were not perverse, a contention pursued in the fourth ground of appeal, which we consider below.

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57. We would add a further point in deference to Ms Keogh's submission that an employer should not have to raise the question of alternative employment every time a fixed-term contract expires. We respectfully agree. In many cases, the employer will not be obliged as a

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matter of fairness to engage in any discussion at all about alternative employment. But in the present case, it was the Respondent itself, through Dr Cummins and Mrs Freeman, that chose to engage in such discussions.

58. The Tribunal was well entitled to find that, having taken the decision to pursue that dialogue after the interview, the Respondent then acted unfairly by, in effect, changing direction and retreating from the dialogue it had itself initiated. That finding does not entail any general obligation on an employer to pursue discussions about alternative employment every time a fixed-term contract is due to expire. The content of the duty of fairness depends on the facts.

Ground 2: Inadequate Reasons

59. The second ground of appeal is that the Tribunal's reasons are inadequate. We can deal with this ground shortly since, in our view, there is nothing in it. The Tribunal explained carefully and fully why the Respondent lost on the issue of the fairness of the dismissal.

60. The Tribunal was not required to engage in a detailed discussion of the **2002 Regulations**, although it mentioned that it had been referred to them. It was not dealing with a claim made under those **Regulations**. It would have been an unhelpful distraction to have dealt with them at length. Nor was the Tribunal required to set out its understanding of the scope and effect of the **Beard** case or to discuss in detail the other authorities cited to it.

61. The duty to give reasons required the Tribunal to state why it found the dismissal unfair. Having made detailed findings of fact, it then stated its reasons fully in paragraphs 127 to 136 of the Decision. It cannot conceivably be said that the reasoning in those paragraphs left the Respondent unaware of why it had lost on the issue of fairness.

Ground 3: Misunderstanding of the Respondent's Position

62. We pass on to the third ground of the appeal. Ms Keogh submits that the Tribunal misunderstood what she was submitting to it and accordingly made an error of law. She complains that in paragraph 82 of the Decision, the Tribunal recorded that her position was as there set out: "*[t]he claimant was not a substantive employee but should be given opportunities for alternative employment*".

63. Ms Keogh does not accept that she made any concession below that the Claimant "*should be given opportunities for alternative employment*". However, her written submissions to the Tribunal include the contention that the Respondent had complied with the **2002 Regulations** and should be credited with that compliance when the Tribunal considered the fairness of the dismissal.

64. The **2002 Regulations** include an obligation on the employer to give the employee opportunities for alternative employment, in the sense that the employer is required to notify the employee of all available vacancies for substantive posts. Indeed, the word "opportunity" appears in the **Regulations**, in the phrase found in regulation 3(2)(c) which refers to "*the opportunity [of the fixed-term employee] to secure any permanent position in the establishment*".

65. It is therefore not surprising to find that the Tribunal records the Respondent's position as including a concession in the same terms as are provided for in the **2002 Regulations** on which the Respondent was relying. We consider that on a fair reading of the Tribunal's Decision at paragraph 82, it did not misunderstand the Respondent's position.

66. As regards the fairness of the dismissal under section 98(4) of the **1996 Act**, there is nothing wrong in law with the proposition that, on the facts here, the Claimant should have been given a fair opportunity of staying on if there were potential roles for her. Fairness may demand as much on the facts, applying that test. If that was not the Respondent's position below, it should have been and any mischaracterisation of the Respondent's position therefore does not matter.

67. However, we should add that we do not think the Tribunal did mischaracterise the Respondent's position, which was that the Respondent had indeed considered alternative employment but had concluded that a Specialty Doctor role would not be suitable because it would involve demotion and that in any case no such role was available, a proposition the Tribunal rejected.

Ground 4: Perversity

68. The fourth and final ground of the appeal is that the Tribunal's finding of fact that there were alternative roles potentially available to the Claimant was ungrounded by any evidence and was perverse. In support of that ground, Ms Keogh in written and oral argument took us to passages in the documents and witness statements which, she contended, the Tribunal ought to have accepted as ruling out the possibility of any alternative roles being available.

69. In particular, she noted that the only advertised vacancy for a Specialty Doctor role in Oncology had a closing date for applying in October 2014, after expiry of the Claimant's contract at the end of September 2014. She also relied on answers given in cross-examination by her witnesses to the effect that roles made available to other Doctors were dependent on funding, a business case and a job plan.

70. However, we agree with Ms Criddle that the Tribunal's finding that there were potential alternative roles available, was not perverse; it was supported by sufficient evidence and was properly open to the Tribunal. As Ms Criddle pointed out, the Tribunal was entitled to reject the Respondent's evidence that no viable alternative roles as a Specialty Doctor were available. She outlined the evidence to the contrary in her skeleton argument.

71. That evidence consisted mainly of instances in which difficulties of the type relied on in the Claimant's case had been overcome in the case of other appointments. The ability and willingness of the Respondent to facilitate these other appointments was a proper foundation for a finding that the Claimant could equally have benefited, if the Respondent had wished to pursue the dialogue about appointing her also to such a role.

72. If those discussions had been pursued, they might or might not have produced a positive result in the form of alternative employment for the Claimant. That is, we think, a matter for a remedies hearing, as the Tribunal correctly observed. The Respondent's criticism does not address the heart of the case against it, upheld by the Tribunal: that the Respondent, having initiated a dialogue after the interview on 28 May 2014, then deliberately avoided discussions that could have led constructively to a different outcome for the Claimant.

73. We therefore reject the suggestion that the Tribunal made any perverse finding of fact. The fourth ground of appeal is therefore not upheld.

Conclusion

74. It follows that the appeal must be dismissed. We reiterate that this case does not raise any new issue of law in relation to the fairness of a dismissal where a fixed-term contract

A expires. Whether the employee is treated fairly in such a case is a question of fact for the Employment Tribunal, as it is in any other unfair dismissal claim.

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