EMPLOYMENT TRIBUNALS

Claimant: Mrs P Haslam-Jones

Respondent: 1. Lancashire County Council
2. The Governing Body of Hippings Methodist Primary School

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the written reasons sent to the parties on 21 August 2018, are corrected as set out in bold type at paragraphs 5 and 18 of the reasons.

Employment Judge Humble

28 January 2019

SENT TO THE PARTIES ON

1 February 2019

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FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

Claimant: Mrs P Haslam-Jones

Respondents: 1. Lancashire County Council
2. The Governing Body of Hippings Methodist Primary School

Heard at: Manchester **On:** 18 June 2018

Before: Employment Judge Humble

REPRESENTATION:

Claimant: Mr T Haslam-Jones
Respondents: Ms K Nowell, Counsel

JUDGMENT having been sent to the parties on 19 July 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Hearing

1. The hearing took place on 18 June 2018. The claimant was represented by her husband, Mr Haslam-Jones, and she gave evidence on her own behalf. The respondents were both represented by Ms Nowell of Counsel. A witness statement was presented from Tracey Westwell, Head Teacher of Hippings Methodist School but she did not appear and therefore little weight was attached to her evidence. The tribunal had reference to an agreed bundle of documents which extended to 143 pages. The following Judgment was given orally at the conclusion of the hearing.

The Issues

2. The claimant confirmed at the outset of the preliminary hearing that the claims were for breach of contract and unfair dismissal in respect of the alleged termination of a contract (referred to in this Judgment as contract B) which the claimant said took place on 31 August 2009.

3. It was agreed at the outset of the hearing that the issue to be determined was whether those claims should proceed. In particular, the tribunal would have regard to section 111(2) of the Employment Rights Act 1996 and determine whether the claimant had shown that it was not reasonably practicable to bring the claims within the period of three months beginning with the effective date of termination, and if so whether the claims were brought within such further period as the tribunal considered reasonable.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal did not make findings upon all the evidence presented but made material findings of fact upon those matters relevant to the issues to be determined):

4. The claimant was employed at Hippings Methodist Primary School ("the School") from 1 March 2001 to 31 August 2017 when she retired from her employment. The claims are brought against that school and Lancashire County Council. Any reference in this Judgment to the respondent is a reference to both respondents unless specified otherwise.

5. The claimant was initially employed by the respondent on a part-time fixed term contract as a teaching assistant from 1 March 2001, and then as a higher level teaching assistant from September 2008. This contract is referred to in these proceedings as contract A. On 1 September 2004 the claimant commenced work as a teaching assistant with the respondent at the same school under a separate part-time fixed term contract, referred to in these proceedings as contract B, which was also, in February **2009**, upgraded to a higher level teaching assistant post. The two contracts ran concurrently.

6. In August 2009 the Head Teacher at the School, Mrs Lewer, suggested that contracts A and B should be amalgamated, in effect they should be combined, to and the claimant agreed. Thereafter, the claimant continued to work on the same pay, with the same hours and all other terms and conditions of her employment remained the same. The only difference, as far as the claimant was aware, was an administrative one: the respondent would not be required to pay the claimant under two separate contracts and it would be treated as a single contract for payroll purposes. Whereas previously payslips had referred to contract A and contract B, thereafter they simply referred to a single contract and gave a global pay figure rather than two separate figures for each contract.

7. An undated letter from the claimant's pension provider to the claimant was produced at page 93 of the bundle, which stated in terms that the claimant's

employment under contract B was being treated as terminated for the purposes of her pension. It is also stated: "*If you are continuing in another employment that you held concurrently with this post you may elect to combine your benefits by informing us in writing within 12 months of leaving this employment*", and it referred to a fact sheet which could be accessed via a website. This letter was unsigned and undated and was provided to the claimant by pension provider at some point either within these proceedings or during the course of a grievance process which the claimant raised in 2017. It was said to have been sent to the claimant in 2009.

8. The tribunal accepted the claimant's account that she had no recollection of receiving that letter in 2009, and that no other information was imparted to her at that time to the effect that the amalgamation of her contracts might in some way affect her pension entitlement. The first she became aware that the amalgamation of the contracts might affect her pension was in November 2016. At that point she was considering retirement and she requested a pension statement. A statement was provided under cover of a letter dated 18 November 2016 (page 111), the statement was at page 112. The pension statement revealed that, for pension purposes at least, the claimant's employment under contract B was treated as having terminated on 31 August 2009. The effect of this, under the claimant's case, was that the pension she was to receive was of lesser value than she would have obtained if contract B had been treated as continuing alongside, or running concurrent to, contract A.

9. There followed a period, between November 2016 and May 2017, when the claimant was seeking to obtain further information and then seeking to resolve the matter informally with the Head Teacher and her pension provider.

10. By early May 2017 the claimant had concluded that the issue had arisen from facts which she summarised in her letter of grievance submitted on 8 May 2017 (pages 117-118) as follows:

> "[Contract B] *was converted from 12 hours per week as a teaching assistant to 12 hours per week as a higher level teaching assistant in March 2009. Then from 1 September 2009, these 12 hours were amalgamated with 15.5 hours of contract A making a total of 27.5 hours higher level teaching assistant. This meant that contract B was terminated on 31 August 2009.*"
>
> *As post* [B] *was covered by a number of consecutive fixed term contracts lasting for over four years in total, it should have been considered to be a permanent post under the provisions of section 8(2) of the Fixed Term Employees (Prevention of Less Treatment) Regulations 2002.*
>
> *This being the case, the ending of* [contract B] *should have been subject to the normal procedures for terminating a permanent contract but these procedures were not carried out.*"

11. These are the essential facts which gave rise to the claimant's claims of unfair dismissal and breach of contract. She maintained that if contract B had been made permanent by virtue of the 2002 Regulations, or if contract B had otherwise been deemed to have run concurrent with (rather than combined with) contract A then there would have been no affect upon her pension. Instead the circumstances were

such that the treatment of her contract as terminated on 31 August 2009, she said, gave rise to a breach of contract and/or an unfair dismissal claim. The losses arising from that claim came from the adverse impact upon her pension.

12. There followed, after submission of the letter of grievance in May 2017, a grievance procedure. The claimant attended a grievance hearing on 12 July 2017 and the outcome of that hearing was communicated to her on 13 July 2017 (page 130). The grievance was not upheld and among other things it was held that, "*The way in which your contracts were set up and terminated were correct based on the business needs of the school at the time. It was agreed that you raised no concerns at the time*".

13. The claimant appealed the grievance outcome on 23 July 2017 (page 131). The grievance appeal hearing, for various reasons, did not take place until 24 November 2017. The claimant had by that stage obtained advice from her trade union who attended the appeal hearing with her.

14. The outcome of that grievance was communicated to the claimant on 28 November 2017 (page 140) and, among other things, stated:

> "*As a result of the fact that you were not losing working hours and your salary was increasing in 2009, when your contract related solely to your HLTA role, the Committee concluded that there was no requirement for Mrs Lewer to go through a process to terminate your 'B' contract.*
>
> *The Committee heard that the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 include provision that an employee shall be a permanent employee when they have been continuously employed under a fixed term contract for a period of four years or more, but only where the continuing employment under a fixed term contract was not justified on objective grounds. As a result the Committee concluded that you had no automatic right for the 'B' contract to become permanent on 1 September 2008.*"

15. On 16 January 2018 the claimant notified ACAS of her claims. A certificate was issued under the early conciliation regime on 17 January 2018, and on 18 January 2018 her claim was submitted to the Employment Tribunal.

Conclusions

16. The tribunal found, on the balance of probabilities, that the claimant was not aware that contract B had terminated (for pension purposes at least) until November 2016. She was not advised in 2009 that contract B was terminated and, on the balance of probabilities, did not receive the letter at page 93 at the relevant time. Accordingly, it was not reasonably practicable for the claimant to present her claim within three months of the effective date of termination, that being 30 November 2009.

17. However, the claimant was on notice from November 2016 that there was a potential cause of action. It was not unreasonable for her to initially seek clarification of the facts or to seek to resolve the matter informally in the first instance through her Head Teacher and pension provider. However, by 8 May 2017 at the latest, it was

apparent to her that the matter could not be resolved informally, since on that date she submitted a formal grievance which contained the essential elements of her claim before this tribunal.

18. The tribunal were of the view that the eight month delay which followed after 8 May 2017 was not a further reasonable period for the purposes of section 111(2)(b). The delays in the grievance, albeit caused in part by the respondent, were not said to be deliberate and were not enough in themselves either to prevent the claimant from presenting the claim or to excuse the delay in her doing so. Aside from the attempts to resolve the matter 'informally' and through the respondent's grievance procedure, no other reason was given for the substantial delay. Further, by 28 November **2017** the claimant was in receipt of advice from her trade union and the grievance process had been exhausted. There was, thereafter, a further seven week delay before the claim was presented to the tribunal and even that, in the tribunal's view, was too long particularly given that the claimant had received professional advice by that stage. The tribunal also took account of the fact that this was a claim arising from matters which dated back a considerable period of time, which meant that the claimant and her advisers should have been particularly aware of the need for a swift presentation of the claim form.

19. Accordingly, the tribunal held that claimant had not satisfied the provisions of section 111(2)(b). The claimant did not present the claim within a "*such further reasonable period*" as the tribunal considered reasonable and the claims are therefore dismissed.

20. The respondent made an alternative submission to the effect that there was in fact no dismissal at all, there was no actual dismissal or constructive dismissal under section 95 (1) ERA 1996. It was said that the circumstances of this case did not fit the Hogg v Dover College [1990] ICR 39, EAT type dismissal since the claimant essentially carried on working on the same terms and conditions as before, the only difference being that there was a loss of pension which was only identified much later, either because the claimant was not properly notified of the effect on her pension at the time or was notified of it but did not act upon it. It was said that this was, if anything, an administrative mistake on the part of the pension provider and it did not give rise to a breach of contract or unfair dismissal claim but instead was something to pursue with the pension provider or the Pensions Ombudsman. There appeared to be some weight to that argument, but the tribunal made no finding upon it since it did not have the full evidence before it to enable it to make the material findings of fact and in any event was not required to do so.

Employment Judge Humble

Date: 15 August 2018

REASONS SENT TO THE PARTIES ON

21st August 2018

FOR THE TRIBUNAL OFFICE

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