EMPLOYMENT TRIBUNALS

Claimant: Ms I Wyllie

Respondent: Gower Furniture Limited

Heard at: Leeds **On:** 20, 21, 22 March 2019

Before: Employment Judge D N Jones
Mr R Stead
Mr G Corbett

REPRESENTATION:

Claimant: In person
Respondent: Miss C Souter

JUDGMENT having been sent to the parties on 26 March 2019 and the claimant having made an application in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

1. This is a claim for direct age discrimination and infringement of the rights of Ms Wyllie, the claimant, as a fixed-term employee, against her former employer, Gower Furniture Limited. The complaints and issues were identified at a preliminary hearing before Employment Wade on 7 January 2019 and they remain those for determination by us this week.

2. The findings and determinations of the Tribunal are unanimous.

Evidence

3. The Tribunal heard evidence from the claimant and, for the respondent, from Mrs H Hardwick, HR business partner and Mrs J Huntley, HR manager. A bundle of documents of 241 pages was submitted.

Background/findings of fact

4. The respondent manufactures and supplies kitchens to the DIY retail and trade markets in the UK. It is one of a number of companies owned and operated by Nobia UK Ltd.
5. On 5 April 2017 the claimant was engaged as an agency worker in the capacity of human resources (HR) assistant by the respondent. That engagement terminated on 29 September 2017. It was for the purposes of giving support to Mrs Iley, the HR manager, at a time of a recruitment drive.
6. On 16 October 2017 the claimant was recruited on a fixed term contract as HR support manager by the respondent. That was because Mrs Iley was to undertake project work for four days per week and it was intended that the claimant would cover her operational duties during the remaining 32 hours. The fixed term was for one year. On 24 May 2018 the claimant's weekly hours were reduced from 32 to 26, to reflect a reduced requirement of the respondent for HR work.
7. In a meeting in late May or early June 2018, Mrs Iley asked the claimant how old she was. The claimant told her she was 59. Mrs Iley said, "*I thought you were younger than me*".
8. On 11 July 2018 Mrs Iley wrote to the claimant to inform her that she had resigned as HR manager and would leave on 26 October 2018. She said she did not know what plans were to be made to find a replacement and that was a matter for Mrs Hardwick, HR business partner for Supply Chain, an associate company.
9. On 10 July 2018 Mrs Hardwick sent a LinkedIn message to Joanne Thorley to inform her that there was a potential opportunity for her at the respondent. This was a reference to Mrs Iley's job which was becoming available. She met her on 13 July 2018 and provided a job specification. A few days later, on or about 16 July 2018, she offered her the job and Ms Thorley accepted.
10. The claimant had seen the HR manager post on a vacancy report on 13 July 2018. It recorded the post as waiting for approval. On 26 July 2018 she saw the vacancy marked as live and expected to see a subsequent job advertisement. On 7 August 2018 the claimant telephoned Mrs Iley to book her summer holiday. Mrs Iley informed her that a new HR manager was to take up her post on 1 October 2018.
11. On 21 August 2018 Mrs Iley worked at the Halifax site with the claimant. She informed her that there was a new HR manager who was younger than her (referring to herself).
12. On 5 September 2018 the claimant submitted a grievance. She complained about not having been informed of any vacancy for the permanent HR manager post. She also complained that she had been treated less favourably as a fixed term employee by not having been provided with private healthcare insurance, not been given an increase in pay in April 2018 at the annual pay review, being paid by reference to a pro rata equivalent of 40 hours and not 37.5 hours per week, not been sent on induction training, not being allowed to work from home and her suspicion that she had not been considered for the potential new post because of her age. She referred to what Mrs Iley had said.
13. The grievance was investigated by Mrs Huntley, HR manager at Magnet, who met Mrs Hardwick, Mrs Iley and the claimant. In respect of the private health insurance, it became apparent that there was not consistent treatment across the different companies. The claimant was paid a lump sum to reflect the premium for

the cover she had not received. Otherwise the grievances were dismissed and communicated by letter dated 25 October 2018.

14. On 7 August 2018 Mrs Iley informed the claimant that as her project was coming to a close, her fixed term contract was to terminate earlier than the annual anniversary. Her last working day was to be 27 September 2018. The claimant was off work with ill health from 6 September 2018.

The Law

15. By section 39 of the Equality Act 2010 (EqA) an employer must not discriminate against a person in the arrangements he makes for deciding to whom to offer employment, or by not offering a person employment or by subjecting a person to any other detriment.

16. Direct discrimination is defined in section 13 of the EqA:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourable than A treats or would treat others."

17. By section 5 of the EqA, age is a protected characteristic and is a reference to a person of a particular age group.

18. By section 23 of the EqA:

> "On a comparison of cases for the purpose of section 13… there must be no material difference between the circumstances relating to each case".

19. Section 136 of the Equality Act 2010 provides that if there are facts from which the court could decide in the absence of any other explanation that a person contravened the provision concerned the court must hold that the provision occurred but that does not apply if the employer shows that it did not contravene the provision.

20. The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 provide, by regulation 3, that a fixed-term employee has the right not to be treated by his employer less favourably than an employer treats a comparable permanent employee as regards the terms of his contract, or by being subject to any other detriment by any act or deliberate failure to act of his employer.

21. By regulation 3(2) the right confirmed by paragraph (1) includes, in particular, the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to … the opportunity to secure any permanent position in the establishment (parapgraph 3(2)(c).

22. By regulation 3(6):

> "In order to ensure that an employee is able to exercise the right confirmed by paragraph (1) as described in paragraph 2(c), the employee has the right to be informed by his employer of available vacancies in the establishment."

23. In respect of the right to bring a complaint to the Tribunal and time limits, regulation 7(2) provides that an employment tribunal shall not consider a complaint

unless it is presented before the end of the period of three months beginning in the case of an alleged infringement of the right confirmed by regulation 3(6) with the date or if more than one the last date on which other individuals, whether or not employees of the employer, were informed of the vacancy.

24. Paragraph 2 of the Regulations provides:

> "For the purpose of these Regulations, an employee is a comparable permanent employee in relation to a fixed-term employee if, at the time when the treatment that is alleged to be less favourable to the fixed-term employee takes place, both employees are employed by the same employer and engaged in the same or broadly similar work, having regard where relevant to whether they have a similar level of qualification and skills."

25. We have considered the extent of the right contained in regulation 3(6) and whether it applies regardless of whether or not the employer has notified permanent comparable employees of the vacancies. The language of regulation 3 would appear to indicate that the right is conditional upon a fixed-term employee establishing that he or she has been treated less favourably in regard to the notification of vacancies to a comparable permanent employee. The claimant draws our attention to a number of journals published by HR professionals and a reference to the EAT decision in Royal **Surrey County NHS Foundation Trust v Drzymala.** She says these suggest the right is not so restricted, but applies regardless of whether or not a permanent employee has been notified of the vacancy. In that respect the claimant is supported to a degree by the language of regulation 7(2)(b). It is not clear why a Tribunal would take into account individuals who were not employees, to whose attention the vacancy had been drawn, if the right is restricted to less favourable treatment compared to permanent employees.

26. We have had regard to the European Directive 1999/70 EC concerning the framework agreement on fixed-term work, and the Employment Act 2002 which gave domestic effect to the Directive. It is provided by paragraph 14 in the Recital:

> "*The signatory parties wish to conclude a framework agreement on fixed-term work setting out the general principles and minimal requirements for fixed-term employment contracts and employment relationships and had demonstrated their desire to improve the quality of fixed-term work by ensuring the application of principle of non-discrimination and to establish a framework to prevent abuse arising from the use of successive fixed-term contracts or relationships*."

27. In the Directive, that purpose is enshrined under Article 1, in two parts, namely to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. Those two purposes are then enacted in section 45(1) of the Employment Act 2002, which empowers the Secretary of State to make delegated legislation, which transpired by the 2002 Regulations.

28. Article 4 of the Directive refers to the principle of less favourable treatment of comparable permanent workers, and Article 6 states that:

> "*Employers shall inform fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunities to secure permanent positions as other workers. Such information may be provided by way of a general announcement at a suitable place in the undertaking or establishment*".

29. Miss Souter submits that the purpose of the Directive regarding the provision of information of employment opportunities is to ensure that the fixed-term employee is in no less favourable position than the comparable permanent employees of the employer. She submits that is a thread which runs through the Directive and the domestic legislation. We had canvassed the possibility that the objective of preventing abuse from the use of successive fixed-term employment contracts or relationships may have been enhanced if the right to information on employment opportunities was not as restricted as she argued for, but it is apparent from the Directive, and Regulation 8, that this mischief is addressed elsewhere.

30. On a reading of regulation 3 alone, it appears uncontroversial that the right contended for by Miss Souter is correct. The language of regulation 3(6) specifically includes reference to both paragraph 3(1) and paragraph 3(2), both of which necessitate less favourable treatment measured against a comparable permanent employee. The only feature which throws that into doubt is regulation 7. We agree with Miss Souter that if there was no requirement for a comparison with a permanent employee, this right would not have been included under regulation 3 and the subheading "*less favourable treatment of fixed-term employees*". The reference to treatment being less favourable introduces the comparison. The qualification in Regulation 3(6), "*in order to ensure that the employee is able to exercise the right confirmed by paragraph 1 as described in paragraph 2(c)*" would have been unnecessary and would have been omitted by the Parliamentary draftsman, had there been an unqualified right to be shown all vacancies. Similarly, Article 6 of the Directive would have read: "*Employers shall inform fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the opportunity to secure permanent positions*" and the words "*the same*" and "*as other workers*" which are included (see paragraph 28 above) would have been omitted. We do not consider this meaning can have been altered by a sidewind in Regulation 7, which is not concerned with defining the right but relates to the right to bring a claim to the tribunal and time limits.

Analysis and conclusions

31. The first question, which has taken up some time in evidence and submissions, is whether the Mrs Iley was a comparable permanent employee to the claimant. There were two aspects to the respondent's submission. The first concerned what Mrs Illey had been doing in her role of HR manager up until the claimant's appointment and the second concerned what she had been doing during the claimant's fixed term contract.

32. As to the first, we are satisfied that the work undertaken by the claimant prior to the commencement of Mrs Iley's project work was broadly similar. The job descriptions of both the HR Manager and HR Support Assistant is in identical language in respect of areas of responsibility, save for three exceptions identified in the claimant's witness statement, which we are not satisfied creates any material

difference. Although the respondent stated that Mrs Iley's job description was out of date, having been created when appointed in 2011, we note that the shorter job description of Ms Thorley was noticeably similar. That militates against the argument that the skills and responsibilities which had evolved in this role were substantial and significant. Most significantly, although the job title was different, HR Support Manager, the purpose of engaging the claimant was to cover the work of Mrs Iley while she was otherwise engaged. It is almost inevitable, in our judgment, that the work was therefore broadly similar to that of HR manager.

33. The respondent stated that Mrs Iley undertook a number of strategic functions which were of a higher level of responsibility and skill to that of the general operational human resource function. The Regulations require us to have regard to levels of qualification and skill. The statement of Mrs Hardwick was short on particulars and she was unable to give a sufficient number of examples in her evidence to satisfy the Tribunal that any strategic duties discharged by Mrs Iley were of a sufficient number and extent to distinguish the work she undertook on the fifth day of her working week when she was not doing project work.

34. The difficulty for the claimant in this claim concerns the second submission of the respondent, which involves a comparison of the work during the fixed term contract. For four days out of five until 1 June 2018, Mrs Iley was undertaking project work and she was not working on what we have described as operational human resources duties. After 1 June 2018, for the remaining 3½ months of the claimant's employment, Mrs Iley was undertaking three days out of five on that project work. That meant that 60% of her duties in the latter phase were on project work and 40% were on what we are satisfied were broadly similar duties to those being undertaken by the claimant. The project work being undertaken by Mrs Iley was to consider the footprint of the associate companies and that of the respondent across the UK to determine whether cost reductions could be made, such as by merging roles and responsibilities across sites or reducing locations. The epithet 'strategic' was appropriate to this aspect of Mrs Iley's work and it was quite different, and not broadly similar, to that of the operational duties in HR undertaken by the claimant.

35. For the purposes of the comparison under regulation 2, the same or the broadly similar work is to be considered at the time when the treatment alleged occurred. Even in the latter stages, the majority of Mrs Iley's duties were qualitatively different to that of her previous role and that being undertaken by the claimant in her role as Support Manager. In other words, more than 50% of her time was not being spent on the same duties, even though, if we have had regard to the job undertaken by Mrs Iley prior to the appointment of the claimant, the position would have been very different.

36. We find that Mrs Iley was not a suitable comparator at the material time. It follows that the claims for less favourable treatment under the Regulations cannot succeed. There was no other permanent comparable employee. The Regulations restrict consideration to those employed by the employer, this respondent, and not associated companies. The provisions are not similar, in that way, to the equal pay provisions of the EqA. Without a comparable permanent employee none of the complaints of less favourable treatment can succeed.

37. The claim for the breach of the right to be informed of the available vacancy does not succeed because we accept the submission of Miss Souter that the Regulations restrict that right to circumstances in which permanent employees have been shown such a vacancy. The vacancy was not shown to a permanent employee.

38. We turn to age discrimination. At the material time the claimant was 59 years of age. She identified a hypothetical comparator age group of those under 59 years. Ms Thorley was 37 years of age.

39. Mrs Iley asked the claimant about her age, remarked about her being older than herself and later, following the appointment of Ms Thorley, referred to the fact that the new HR Manager was younger than Mrs Iley. In addition, on its recruitment page of the website there was at the time the following statement:

> "*Wanted: Gower is always interested in meeting enthusiastic and committed individuals and we are able to provide employment opportunities. If you are looking for the next step in your career and think you have the ability to make a difference then come and join our young and energetic team where change is the only constant*."

40. In fact, the demographic of the group is not reflective of that statement. Half of the team are over the age of 45, a quarter being between 55 and 64, and the oldest employee is 79. An Occupational Health Nurse has recently been recruited who is 69. Nevertheless, the terms of the website project a picture of a young workforce, implying that an application from a younger candidate would fit in with the working environment and therefore be more favourably received than an older candidate.

41. Had Mrs Iley played a part in plans to recruit and appoint her successor we would have found that the burden of proof had shifted because of her remarks about age. We accepted Mrs Hardwick's evidence that she had not discussed this with Mrs Iley and she was no part of the process to recruit and appoint her successor. We also accepted her evidence that she had only become aware of at promotional material on the recruitment page of the website at the preliminary hearing and this was no part of her approach to recruitment. Ms Wright, the HR Director, had suggested to her that Ms Thorley be approached for the role. She had worked with the respondent and the associated companies for some time when she had been working at a firm of solicitors (Cobbetts). The HR team had been impressed by her work.

42. Our attention was drawn to the CV of Ms Thorley and an attempt was made, in evidence, to compare the respective qualities of her and the claimant. No such exercise had been undertaken at the time of consideration of the appointment. Mrs Hardwick only considered Ms Thorley for the job.

43. We are not satisfied that Mrs Hardwick was influenced by either the age of Ms Thorley or the claimant in deciding to whom the HR manager job was to be offered or in appointing Ms Thorley to it. Mrs Iley had no role in the recruitment exercise and the failure of the managers to draw the vacancy to the attention of the claimant had nothing to do with her age group or that of Ms Thorley. In fairness, the claimant acknowledged that in cross examination. She said if Ms Thorley had been selected as Mrs Hardwick had said, age would be irrelevant. The determining feature which

led to the appointment was that Ms Wright and Mrs Hardwick had singled out Ms Thorley from their knowledge of her previous work and their belief she would be a good HR manager.

44. We recognise it is possible for an employer to have a mindset for a suitable candidate, that mindset including people within a particular age bracket. We also recognise that discrimination can often operate at a subconscious level. People rarely admit to behaving in a discriminatory way, even to themselves. Having regard to the evidence of Mrs Hardwick and all the other circumstances we find that considerations of age played no part of her thought process when she contacted Ms Thorley and decided to appoint her. She never thought of approaching the claimant. That too was not influenced by factors touching upon age.

45. We are not satisfied, in respect of either act of alleged less favourable treatment, that there are facts on which we could decide, in the absence of any other explanation, that the respondent had discriminated against the claimant because of her age group. Had the burden of proof fallen on the respondent we accepted its explanation which discounted any age discriminatory factors.

46. We would add this. The claimant had worked in her post at the respondent for a period of nearly a year and there had been no complaint about her work. We fully understand her sense of unfairness in having been overlooked for consideration for the permanent vacancy which had arisen at the end of her fixed-term employment.

Employment Judge D N Jones

Date 10 April 2019

REASONS SENT TO THE PARTIES ON

12 April 2019