



# EMPLOYMENT TRIBUNALS

**Between:**

Miss S Tett  
**Claimant**

**and**

Secretary of State for Work & Pensions  
**Respondent**

## At an Open Attended Preliminary Hearing

**Held at:** Nottingham      **On:** Wednesday 8 May 2019  
Thursday 9 May 2019

**Before:** Employment Judge Hutchinson (sitting alone)

**Representation**

**For the Claimant:** In person  
**For the Respondent:** Mr Ed Beever of Counsel

## JUDGMENT

The Employment Judge gave judgment as follows:

1. The following allegations are struck out on the basis that they are misconceived and/or have no reasonable prospect of success;
  - 1.1 The allegations relating to the application of the Fixed-term Employees Regulations which relate to the period 5 September 2016 to 5 September 2017 comprising allegation 2.2.g in the agreed list of issues.
  - 1.2 The allegations 2.2.c in the agreed list of issues that predate 6 September 2017.
  - 1.3 The allegation that the Respondent failed to apply an exception in the recruitment principle on the ground that the Claimant was a fixed-term employee in paragraph 2.2.f.

- 1.4 The allegation in respect of the Part-time Workers' Regulations in paragraph 3.1.a and 3.1.b.
- 1.5 All the allegations in respect of disability discrimination.
- 1.6 The claims in respect of breach of contract.

The balance of the claims will proceed to a hearing.

## REASONS

### **Background to this hearing**

1. The Claimant presented her claim to the tribunal on 2 January 2018. She was employed by the Respondent at the Annesley Service Centre from 5 September 2016 until her resignation on 29 November 2017 when she resigned.
2. It is not in dispute that she was initially engaged on a fixed-term contract from 5 September 2016 to 5 September 2017. It was on a 12-month apprenticeship programme delivered by the Respondent in partnership with Capita Talent Partnerships. The NVQ element of the apprenticeship was to be completed by 4 September 2017 after which the Claimant would revert to a telephony role if her contract with the Respondent was extended.
3. The Claimant was offered a contract extension which she accepted on 24 February 2017. The contract extension meant that the Claimant's contract would end on 29 December 2017.
4. The Claimant made a statutory request for flexible working on 3 April 2017 which was granted by the Respondent on 27 April 2017 with effect from 8 May 2017. From then, she worked 17.9 hours per week.
5. On 25 August 2017, the Respondent notified the Claimant that her fixed-term appointment would expire on 29 November 2017 and invited her to a meeting on 26 September 2017. At that meeting, the Claimant was told that her fixed-term appointment with the Respondent would come to an end.
6. After appealing against the decision to end her fixed-term contract, the Claimant resigned on 22 November 2017. She worked her notice period of one week and her employment ended on 29 November 2017. She started a new position on 4 December 2017.
7. In her Claim Form, the Claimant complained of;
  - less favourable treatment of a fixed-term employee
  - less favourable treatment of a part-time worker

- breach of contract
  - discrimination arising from disability
  - failure to provide particulars of employment.
8. There were other claims which the tribunal did not have any jurisdiction for and these were dealt with by my colleague, Employment Judge Milgate on 30 April 2018.
9. The remaining claims are set out in a schedule of issues agreed on 11 October 2018, which is at pages 61 – 70 of the agreed bundle of documents.
10. These will be referred to in my reasons and I clarified with the Claimant that the following claims were to be the subject of this hearing;
- detriments under Fixed-term Employee Regulations
  - detriments under Part-time Worker Regulations
  - disability discrimination
  - breach of contract claims.
11. The other claims, namely
- failure to provide a written contract
  - detriment for making protected disclosures
- will proceed to a hearing in any event as the Respondent does not contest that these matters should go forward to a hearing.

### **The hearing today**

12. This was ordered by my colleague Employment Judge Ahmed on 13 February 2019. At that hearing he had granted permission for the Claimant to amend her claim subject to the principles in ***Galilee v Commissioner for Police for the Metropolis***, i.e. subject to the Respondent's right to maintain a challenge on the time point.
13. I heard submissions from Mr Beever and also from the Claimant. Mr Beever conceded that some of the claims should proceed but other claims should be either struck out or subject to a deposit order.
14. He referred me to the appropriate rules in the Employment Tribunals Rules of Procedure 2013, namely;
- Rule 37 - Striking out
    - “**37.** —(1) *At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
    - (a) *that it is scandalous or vexatious or has no reasonable prospect of success;*



(a) *the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*

(b) *the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),*

*otherwise the deposit shall be refunded.*

...”

15. Mr Beever also referred me to the cases of –

- ***Eszias v North Glamorgan NHs Trust [2007] EWCA Civ 330***
- ***Sivanandan v IPCC UKEAT/0436/16***
- ***Van Rensburg v Royal Borough of Kingston-upon-Thames ukeat/0096/07***

16. In the Claimant’s submissions, she referred me to the case of ***The Secretary of State for Justice v Betts & others UKEAT/0284/16/DA***. It is a case about illegal contracts where the claimants in that case had not been appointed by a process of fair and open competition as required by the Constitutional Reform and Governance Act 2010. The case found that the contracts of employment in those cases were “*ultra vires*” although the claimants’ status as workers was unaffected.

17. In fact, I heard submissions from the Claimant both at the end of the first day of my hearing and then again on the second morning before considering my decision. The Claimant had provided further documents and the above-mentioned case and I had agreed to hear further from her before I made by decision.

18. As I explained during the course of the hearing, I have not heard any evidence and my findings are based on a certain number of agreed facts, together with a consideration of the pleadings and contentions put forward by both parties. There were two lever-arch files of documents and I have only been referred to a few of those documents and where they are relevant, I will refer to them by page number. I have also been handed some additional documents by the Claimant, both at the start of the hearing on the first day and also on the second day.

**My findings and conclusions**

19. I will deal with my findings based on the agreed schedule of issues which is at pages 61 – 70 of the bundle.

Sections 1 and 4 ERA 1996; failure to provide particulars of employment

20. It is not in dispute that these matters should go to a hearing.

21. Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002

21.1 Did the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 apply to the Claimant at any stage or were they excluded by reason of regulation 18.

21.2. I am satisfied that by regulation 18, the Regulations are excluded in cases of apprenticeships. It is not in dispute that the Claimant's case is that she worked under a fixed-term apprenticeship agreement beginning on 5 September 2016 and ending on 5 September 2017. The Claimant's apprenticeship agreement was signed by her on 30 September 2016 and is at page 318.

21.3 I am satisfied also that the position may be different for the period of time after the apprenticeship agreement ended. It is agreed that her contract was extended on 24 February 2017 to 29 December 2017 (page 119). It may be arguable therefore that during the period 5 September 2017 until the end of her employment the apprenticeship may have converted into an ordinary fixed-term agreement.

21.4 I am satisfied that allegations which relate to the period of apprenticeship (i.e. 2.2.g) has no reasonable prospect of success. Similarly, in respect of allegation 2.2.c, any allegation that relates to the period if April to 6 September 2017 also has no prospect of success and only allegations from 6 September 2017 will be considered by the tribunal. This is entirely because regulation 18 of the regulations specifically excludes apprenticeship agreements and the claimant was working on an apprenticeship agreement during this period.

22. Allegations 2.a and b

22.1 These allegations relate to the Claimant not being given an opportunity to apply for vacancies. The contention from the Respondent is that the reason for this was simply that the Claimant's recruitment into a position was not done by a "fair and open" competition.

- 22.2 It is contended that the rationale for recruiting apprentices is to *“take people who would not otherwise be successful in securing employment; train and educate them; and give them experience of a working environment – so that they leave us after 12 months (366 days) in a much better position to return to the labour market to find gainful employment, or to successfully compete at a fair and open competition with the Civil Service”* (page 609).
- 22.3 Mr Beever contends that recruitment principles in the Civil Service require fair and open competition with some specific exemptions and that fixed-term applicants can only apply for internal vacancies if they were recruited themselves through a fair and open competition (page 646).
- 22.4 He says that the claims 2.a and 2.b have no reasonable prospect of success because of these rules. Whilst I have my doubts about whether the Claimant will be successful in her arguments in respect of this, I am satisfied that these matters should be considered by a full tribunal after hearing the evidence.
- 22.5 A similar arguments applies in respect of allegation 2.f relating to the failure to apply exemption in recruitment principles.
- 22.6 It is Mr Beever’s contention that the failure to apply exemption in recruitment principles on the ground that the Claimant was a fixed-term employee is misconceived. He says that the construction is designed to *“convert”* a position into a permanent one and is not applicable where, as in this case, the Claimant’s job was terminated. He says that it is not feasible to argue that it was on the grounds of her being a fixed-term employee. He says it is applicable to all who are not employed on a fair and open basis.
- 22.7 Whilst I understand the strength of his arguments I am satisfied that the Claimant should be able to present her evidence and her arguments in respect of this point even though, as above, I have my considerable doubts as to whether she will succeed.

Allegation 2.2.f

23. With regard to allegation 2.2.f, which is a failure to apply the exemption in recruitment principles on the ground the Claimant was a fixed-term employee, I am satisfied that the allegation of failure to apply such an exemption is misconceived. This construction is designed to convert a position into a permanent one and is not applicable in this case where the Claimant’s job was terminated. I am satisfied that there is no reasonable prospect of the Claimant succeeding with her allegation that it was on the ground that she was a fixed-

term employee because it is applicable to all who are not employed on a fair and open basis. That claim should be struck out.

Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002

24. Allegation 3.1.a, which is the allegation of failure to apply exemptions in CSC recruitment principles to treat the Claimant as having been recruited on a fair and open basis with the consequence that the Respondent did not explore alternative opportunities or consult with the Claimant has no reasonable prospects of success. I am satisfied that there is no prospect of the Claimant showing that the failure to apply the exemption was because she was a part-time worker because it applied to all, whether working part-time or otherwise.

Allegation 3.1.b

25. This allegation similarly has no prospect of success. It is clear that the apprenticeship contract was only ever envisaged to be for a 12-month period. It has nothing to do with the Claimant being a part-time employee.

Allegations 3.1.c – h)

26. In respect of allegations 3.1.c) – h), I am satisfied that, whilst these are a repeat of the allegations in the fixed-term workers' claim, these should be allowed to proceed. The Claimant puts these are an alternative to the fixed-term workers' claim. As with the fixed-term workers' claim, I have my considerable doubts as to whether these claims would succeed and that they are weak but I am satisfied that the Claimant should be allowed to present her arguments and have her evidence heard before the tribunal.

Disability discrimination claim

27. In the agreed list of issues, this comes under headings 4, 5, 6, 7 and 8.
28. It is not in dispute that the Claimant has a disabled daughter but the Claimant will have to establish her case on the following sections of the Equality Act 2010.

28.1 Section 13 – direct discrimination  
**“13 Direct discrimination**

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

...”



- 28.1.1 The less favourable treatment complained about by the Claimant is set out at paragraphs 6.a – e. I am satisfied in respect of each of these allegations that the claim that she has been treated less favourably because of her daughter’s disability has no reasonable prospect of success.
- 28.1.2 None of the Claimant’s contentions show that there was any requirement to work full-time after May 2017.
- 28.1.3 There is no evidence that her 22-year-old daughter’s disability placed her at any disadvantage or had anything to do with the matters that she complains of in paragraphs a – d.
- 28.1.4 The events that she describes in paragraph e are not complaints of events of less favourable treatment because of her daughter’s disability. They only arise out of her daughter’s disability and cannot therefore be made under section 13 of the Equality Act.
- 28.1.5 In any event, this is an individual event that occurred in July 2017. In this case, the Claimant presented her claim on 2 January 2018 and such an allegation is well out of time and no arguments have been presented to me as to why it would be just and equitable to extend the time. On these two grounds, therefore, the claims have no prospect of success.

28.2 Section 19 – indirect discrimination  
“19 **Indirect discrimination**

- (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
  - (a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*
  - (b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

(c) *it puts, or would put, B at that disadvantage, and*

(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

...”

28.2.1 In this case, the Claimant says that she was required to work full-time and that she had been placed at a disadvantage. I am satisfied that the contention that she was “*required to work full-time*” has no reasonable prospect of success. This is because the Claimant applied to work part-time and that was granted. In any event such a claim would be well out of time as the claimant was granted part-time work in May and did not make her application to the tribunal until January 2018. I have heard no arguments about a just and equitable extension of time.

28.3 Section 26 – harassment  
**“26 Harassment**

(1) *A person (A) harasses another (B) if—*

(a) *A engages in unwanted conduct related to a relevant protected characteristic, and*

(b) *the conduct has the purpose or effect of—*

(i) *violating B's dignity, or*

(ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

...”

28.3.1 This relates to the events set out in paragraph 8 of July 2017, which is the same events that the Claimant also claims under indirect discrimination.

28.3.2 I am satisfied that on the merits, the Claimant has no reasonable prospect of success of arguing that in any way the conduct she alleges amounts to harassment or that it related to her daughter’s disability. Again, in any event, I am satisfied that the claims have no reasonable prospect of success because they are so out of time and there is

nothing that could be put forward as a reason for me to extend time on a just and equitable basis.

28.4 Breach of contract claim

28.4.1 The tribunal has jurisdiction to only deal with contract claims in limited circumstances. This is provided for in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. That provides:

***“Extension of jurisdiction***

3. *Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum ... if—*

...

(c) *the claim arises or is outstanding on the termination of the employee’s employment”*

28.4.2 As described therefore, the tribunal only has jurisdiction to deal with claims arising or outstanding at the termination of the employee’s contract of employment. The claims at 9.a and b do not arise in any way out of the termination of the Claimant’s employment nor were they outstanding at the time of termination of her contract. The employment tribunal therefore does not have jurisdiction to deal with these claims which have no reasonable prospect of success. Those claims are therefore struck out.

28.5 Section 47B – detriments on grounds of making protected disclosures

28.5.1 It is agreed that those claims should proceed.

**Listing the hearing**

29. The outstanding claims will be dealt with by an Employment Judge sitting with members at the **Employment Tribunal Hearing Centre, 50 Carrington Street, Nottingham NG1 7FG on Monday 9 March 2020, Tuesday 10 March 2020, Wednesday 11 March 2020, Thursday 12 March 2020 and Friday 13 March 2020** at 10 am or as soon thereafter on each day as the tribunal can hear it. The first morning will be a reading morning and the parties will attend at 2 pm on the first day to commence the proceedings promptly.

30. **Case management orders**

- 30.1 The Claimant is ordered to produce to the Respondent documents that she wishes to be included in the bundle by **13 June 2019**.
- 30.2 The Respondent will be responsible for production of an agreed bundle which will be paginated and indexed and will provide a hard copy of the documents to the Claimant by **4 July 2019**.
- 30.3 The Claimant and Respondent shall prepare full written statements containing all the evidence they and their witnesses intend to give at the final hearing. They must exchange witness statements on before **5 September 2019**. No additional witness evidence will be allowed at the final hearing without the tribunal's permission. The witness statements must have numbered paragraphs and be cross-referenced to the bundle. They should only contain evidence relevant to the issues in the case. The Claimant's witness statement must include a statement of the amount of compensation or damages she is claiming, together with an explanation of how it is calculated.
- 30.4 The Respondent will be responsible for providing to the tribunal by **4 pm on 6 March 2020**, the following:
- 4 copies of the bundle;
  - 4 copies of the witness statements.

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Employment Judge Hutchinson

Date 29 May 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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Case No: 2600009/18