



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs P Bradley

**Respondent:** The Governing Body of St Edward's Catholic Primary School

**Heard at:** Liverpool

**On:** 2, 3 and 4 April 2019  
20 May 2019  
(in Chambers)

**Before:** Employment Judge Sherratt  
Ms F Crane  
Mr A Wells

## REPRESENTATION:

**Claimant:** Ms L Amartey, Counsel

**Respondent:** Mr J Jenkins, Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed.
2. The claimant was not indirectly discriminated against due to her age.
3. Notice of a remedy hearing will be sent to the parties.

# REASONS

1. The claimant brings claims of indirect age discrimination and of unfair dismissal. The respondent says that the processes it followed did not amount to indirect age discrimination and that the claimant was fairly dismissed for some other substantial reason which related to the cessation of a fixed term contract.

2. There was a preliminary hearing before Employment Judge Robinson on 27 February 2018 after which the pleadings were amended.

### **The Parties**

3. The claimant is a teacher. Her NQT year was the academic year 2007/8 and at that time the claimant was aged 50. She came to teaching as a second career.

4. The respondent is a small catholic primary school with five classes.

### **The Evidence**

5. The claimant gave evidence on her own behalf and produced a witness statement from her trade union representative who attended the appeal against dismissal.

6. For the respondent we heard from Karen O'Hare, the Head Teacher; Father Peter Wright, the Parish Priest and a School Governor on the Religious Education and Staffing subcommittees; Andrea Williams, Chair of Governors at another primary school who was on the appeal panel; and Kara Newton, who provided clerking services at the claimant's appeal against dismissal.

7. There was a bundle of documents containing in the region of 450 pages.

### **The Facts**

8. The claimant was first involved with the respondent as a Teaching Assistant from April to August 2012, then between October 2013 and July 2014 she worked there on occasion as a supply teacher.

9. The claimant was appointed as a temporary teacher on fixed term contracts over three years as follows:

1/9/2014 – 31/12/2014

1/1/2015 – 31/8/2015

1/9/2015 – 31/8/2016

1/9/2016 – 31/8/2017

10. The claimant was provided with a contract of employment for service as a teacher in a catholic school when she commenced her first fixed term contract. The commencement date was 1 September 2014 and as to duration the post was said to be a temporary post to expire on 31 December 2014. Thereafter there was an annual letter extending the temporary contract for another year serving as an amendment to the written statement of particulars. The claimant would sign a copy of the letter and return it to confirm her acceptance of the further year's employment.

11. The claimant told us that the first contract was to cover a role when the respondent was looking for a permanent deputy/assistant headteacher. It was extended to the end of the academic year to allow the appointment process to proceed and the claimant was then asked to return for the 2015 autumn term to

allow for the notice period of the new appointee. On 31 July 2015 another teacher resigned at short notice and the claimant was asked to stay for the whole of the 2015/16 academic year. The contract was renewed for another year following the respondent's decision to recruit for a permanent class teacher to start in September 2017.

12. According to the claimant, in April 2016 the Head Teacher, Karen O'Hare, asked her if she was interested in being appointed permanently to teach Years 2-3 and if not then Mrs O'Hare would advertise the post along with the Reception class teacher post that had come up. The claimant says that she agreed to take the job permanently. At the time the claimant was working as a class teacher over four days and another teacher, Clare Williams, taught the class on Fridays. Clare Williams was looking to change her career and therefore the school knew eventually she would leave. It suited the claimant at the time to work four days per week but she was prepared to work five days if required. She asked the Head Teacher if it was alright for her to do the job for four days a week until Clare left, when she would move to full-time, and Mrs O'Hare agreed to that.

13. The Reception class teacher left at the end of August 2016 after giving her notice in the spring and her job was advertised. The claimant did not apply because she believed that the Head had told her she was going to be permanently employed in her then current role.

14. According to the Head Teacher, in the spring term of 2016 the Reception Class teacher was successful in gaining a job elsewhere which amounted to a promotion, and she gave notice to leave at the end of the 2015/16 academic year. The school, she says, opted to advertise the Reception year position only and for the Year 2-3 class position to be advertised in the 2016/17 academic year. The school prioritised the appointment of the Reception teacher as it considered it was important to provide a suitable candidate to that post and to be in a position to provide the necessary support. By "support" the Head Teacher meant that newly qualified and/or recently qualified teachers would need more support than a more experienced teacher, and given the size of the school they would not want to have two teachers needing support at the same time. She expected any applicants would be newly or recently qualified rather than experienced teachers.

15. According to Mrs O'Hare, she discussed the Reception post with the claimant and also explained they were not going to advertise the Year 2-3 post yet because of her concerns about getting enough applicants with experience. The Year 2-3 post was to be advertised the following year. Mrs Bradley stated she was happy to continue in the post with the same arrangements for family reasons.

16. Mrs O'Hare denies having offered the year 2-3 post to the claimant.

17. The claimant told us that she spoke to friends during the summer term about her permanent job and was advised she should get a written contract confirming matters in case the school just left things without giving her one. Before the end of term she asked the Head Teacher if she could get a contract to her because in the past there had been delays. She also wanted to ensure the existing arrangement of working four days and Clare working one day in class continued. According to her, Mrs O'Hare was to speak to the governors and "there shouldn't be a problem".

18. Mrs O'Hare recollects things differently, telling us that in the summer of 2016 Mrs Bradley came to see her and explained that her financial circumstances had changed for reasons which are not relevant to this Judgment. The claimant needed a full-time position and asked if she could be given the Year 2-3 post on a full-time permanent basis rather than it being advertised. Mrs O'Hare felt really sorry for her and although she knew it would not be approved by the governors she told Mrs Bradley she would speak to them and come back to her.

19. The Governing Body met on 23 May 2016 and in part two of the minutes, in respect of the confidential part of the meeting, the Head Teacher reported that the claimant was on a temporary contract and had been for two years. She has asked for governors to consider making her a permanent member of staff. The governors agreed that the item would be discussed at committee level.

20. There was a meeting of the personnel subcommittee immediately after the meeting of governors, and although it is not minuted Mrs O'Hare says that she put forward Mrs Bradley's request and a governor with HR experience said it would not be appropriate as it had not been advertised and Father Wright stated that as it was a permanent position the school would need to follow due process and it needed to be advertised externally.

21. It was apparent from the personnel meeting note that in respect of the Reception/Year 1 Class Teacher post, the job was advertised and although three candidates were shortlisted, two pulled out. On Monday 23 May 2016 there was a very successful lesson observation, presentation and interview resulting in Ms Lloyd being appointed to the post from September 2016.

22. Mrs O'Hare says she told Mrs Bradley of the governors' response and that the post would need to be advertised, but there was nothing stopping her from applying for the role and she was in a great position to apply as she had been doing it for four days a week. Mrs Bradley, she said, was visibly upset and said she would not apply as she was not good at interviews. Mrs O'Hare encouraged her to apply, and when Mrs Bradley finished in the summer of 2016 she knew she would be returning in September on another fixed term contract with the Year 2-3 post being advertised in the 2016/17 academic year.

23. According to the claimant it was at the end of the summer term that the Head Teacher told her that one of the governors had advised that the job needed to be advertised, which made her very upset. Karen O'Hare told her that her job would not be advertised until January 2017 for a position starting in September 2017, and the claimant's contract was duly extended.

24. According to Mrs O'Hare in the autumn term of 2017 she told Mrs Bradley the personnel Committee were convening to discuss how the Year 2-3 post would be advertised, and after a few days the claimant came to see her to ask if she could meet with her and Father Wright. At a meeting in her office:

“Mrs Bradley started by explaining that her counsellor had said she could request again if she could be offered the job.”

25. The claimant referred again to personal difficulties. It was explained to her that the position had not previously been advertised and as such it would need to

follow due process, but at no point did Mrs Bradley assert that the job should be hers or that she had previously been offered it. She wanted them not to advertise the post because she needed a permanent role due to her personal circumstances, but she left the meeting saying she would not apply.

26. The claimant confirms that she met with Mrs O'Hare and Father Wright at this time being aware that she had been told in July that the job had to be advertised, so she knew that she was not going to get a permanent contract without applying for one. She followed the union's instructions. Her objective was for them to agree with her or to follow it up. Father Wright confirmed that the job had to be advertised. She wanted them to say either "yes, we have not realised that the job was hers" or she wanted to prevent them from advertising it. She thought they probably did say it would be advertised but Father Wright told her she was in a good position, and she did in fact apply.

27. Father Wright in cross examination denied advising the claimant that she was in a good position.

28. The respondent's Personnel Committee met on 2 November 2016 minuting that in recent years the school has been one full-time teacher short with part-time teachers filling the gap, therefore the post of a full-time teacher will be advertised both internally and externally. The position will be a full-time qualified teacher covering Years 2/3 or 3/4 with the pay scale being M1-M6. The advertising was to start on 6 January 2017, with applications by 20 January 2017 and interviews in February with a view to the newly appointed teacher starting in September 2017.

29. In respect of the advertising of the job, according to the claimant in the last week of the autumn term, 2016, Mrs O'Hare interrupted one of her lessons and handed her a piece of paper which she could not look at straightaway as she was in the middle of teaching. When she saw it, it was the job advert. Later that day she spoke to the school secretary who said that the job had been advertised and that the closing date for applications was in January. The claimant was shocked, having understood it was not going to be advertised until January and she had hoped she might be able to stop the advert going out if she spoke to the Head.

30. Mrs O'Hare denies that she went to the claimant in a lesson and handed her a piece of paper. She recollects waiting behind after school and seeing the claimant alone when she told her of the advertisement. According to Mrs O'Hare, she certainly would not have gone into the claimant's classroom while she was teaching and given her a note of this nature. Again, according to Mrs O'Hare, the claimant was the first person to see the advertisement before it was published.

31. An email was sent on 15 December 2016 by the school's Finance and Administration Officer to secretaries of local schools concerning job vacancies, saying that there were three vacancies: one was a class teacher, one was a maintenance officer and the third was her job as Finance and Admin Officer. All details were said to be on the school website.

32. The advertisement was for a class teacher, M1-M6. The post would probably be for teaching upper Key Stage 1 and lower Key Stage 2. They were not looking for any particular subject strength, just flexibility and professional competence.

33. M1-M6 is the pay scale for teachers without further responsibilities. A newly qualified teacher might reasonably expect to start on M1 and to progress to M6, which was the claimant's grade. In answer to a question from the Tribunal at the end of her evidence Mrs O'Hare stated that it was for the governors to decide the maximum pay to be offered and the post could have been advertised at any point from 1 to 6.

34. When the claimant started at St Edward's she was on grade M5 and she was advanced to grade M6 by the Head Teacher because another person doing substantially the same work as the claimant was paid at M6 and it was thought fair to the claimant to pay her at the same rate.

35. The person specification used in connection with the advertisement for a class teacher seems to the Tribunal to be a generic person specification for a class teacher.

36. The generic application form collected the applicant's personal details, present employment, employment history and professional experience, other employment/work experience, post-11 education and training, professional memberships, interests and hobbies, and then there was to be a statement of no more than 1,300 words detailing why they believed their experience, skills, personal qualities, training and/or education were relevant to their suitability for the post and how they met the person specification, paying particular attention to the national standards for the position for which they were applying.

37. Mrs O'Hare accepted that the claimant had said that she was not good at interviews. She asked the claimant if she would like help with the application but the claimant did not take this up. If the claimant had wanted such assistance an assistant head could have given it. The claimant, unlike the other applicants, sent a separate letter rather than completing her personal statement on the application form.

38. There were ten applications for the post.

39. Four governors met on 23 January 2017 to consider the applications and to decide who should be shortlisted. We have been provided with the shortlisting sheet completed by Mrs O'Hare and the sheet completed by Christine Cornes, together with what is said to be "summary notes for feedback if requested" document prepared by Mrs O'Hare, but with a column stating whether or not the candidate was shortlisted.

40. The shortlisting form contained boxes for name, necessary qualifications, previous experience, known to school (plus or minus), good communication skills (standard of application and letter), catholic, team player, evidence of supporting others/after school club/voluntary work, and finally personal skills and expertise.

41. The person specification referred to knowledge and understanding, skills and personal characteristics. As to knowledge and understanding, it stated what the class teacher should have knowledge and understanding of. Under skills, the class teacher would be able to do certain things and the required personal characteristics were set out. The matters to be determined from the application form rather than at interview or by means of a reference were:

- (1) qualified teacher status;
- (2) knowledge and understanding of the statutory requirements of legislation concerning equal opportunities, health and safety, SEN and child protection;
- (3) the skill to communicate effectively (both orally and in writing) to a variety of audiences; and create a happy, challenging and effective learning environment; and as to personal characteristics
- (4) is an enthusiastic and creative practitioner who is passionate about providing the best opportunities for every child;
- (5) has the highest aspirations and expectations for all.

There does not appear to the Tribunal to be any direct alignment between the person specification and the shortlisting form. Nevertheless, all of those carrying out the shortlisting exercise did so on the form provided.

42. The respondent receives HR advice from Halton Borough Council and as part of that they are provided with recruitment guidance in a document which is said to be “a practical guide offering guidance on best practice in delivering safe and effective recruitment”. The document starts with planning the recruitment, writing effective adverts and advertising the vacancy, with a list of “dos” and “don’ts”:

“Shortlisting should be an objective assessment of each application against the essential, and if necessary, the desirable criteria, detailed in the person specification. You should assess applicants against the selection criteria and not against each other. Therefore, it is very important to ensure the person specification is clear, up-to-date and appropriate to the duties to be undertaken. New selection criteria should not be introduced at the shortlisting stage. When conducting shortlisting, other aspects of the application form should not influence your decision as this could be deemed discriminatory. You should consider only the facts in order to avoid assumptions being made. Shortlisting panels should be aware of equality legislation and mindful of protected characteristics when conducting shortlisting. It is advisable that shortlisting be conducted by more than one of the recruiting (interview) panel members to ensure impartiality and avoid claims of unfair bias. It is good practice for panel members to shortlist independently and convene to discuss any discrepancies in scoring. The hiring manager, as Chair, should make the final decision on shortlisting. Processes should be applied in a fair and consistent manner and applicants who fail to meet all the essential criteria should not be considered, unless there is some organisational reason such as At Risk status applicable. Dependent on the volume of applications you receive and the quality of those applications; you may only need to shortlist using the essential criteria. Where a large proportion of applicants meets the essential criteria, and you still wish to reduce the pool for interview, desirable criteria should be assessed.”

43. The document also provides a shortlisting checklist of “dos” and “don’ts”:

<b>Dos</b>	<b>Don'ts</b>
Use the person specification to assess each applicant against the essential criteria.	Don't assess candidates against each other.
Only assess against factual information provided in the application form.	Don't make assumptions about applicants.
Be consistent and fair.	Don't treat internal applicants any differently – they should be assessed in the same way as external applicants.
Be mindful of equality legislation and protected characteristics.	Don't introduce any new criteria.

44. As to the shortlisting process, the panel consisted of Christine Cornes, Chair of Governors, Father Wright, the Head Teacher and a Foundation Governor.

45. According to Father Wright, the claimant's application was of poor quality in comparison to the other candidates. He remembered it as being of a very poor standard but knowing that it was Mrs Bradley's application they spent more time considering it than they otherwise would have done. He recalled the contents of her application being very historical whereas they expected candidates to have current knowledge and demonstrate what they intended to do going forward at the school to raise standards and drive it forward.

46. Mrs O'Hare confirms the determination that the quality of the claimant's application was poor in comparison to other candidates, and the three who were shortlisted provided applications and letters in support which were very good or excellent.

47. At this point in her statement Mrs O'Hare said in respect of the three candidates who were shortlisted that:

“They gave examples of current educational priorities and demonstrated this in the letters really well. In addition they demonstrated expertise in ICT, music or PE, areas where the school was lacking.”

48. In cross examination Mrs O'Hare stated that questions related to ICT, music or PE were only introduced after the claimant's application had been eliminated from those going forward.

49. It is apparent that the two shortlisting governors who were not Mrs O'Hare or Father Wright expressed the view that Mrs Bradley should be invited to interview, but after discussion they are said to have accepted that the shortlisting process should be carried out on merit.



50. When Father Wright was cross examined he agreed that they were required to judge on the application forms only. The recruitment process should be without reference to personal knowledge to maintain fairness. If things not in the application forms or letters were taken into account it made shortlisting unfair. They could only deal with what they saw on the form.

51. As to the claimant's application, it was said to be historical. She had referred to some work in the Parish which was very historical. She had referred to "Every Child Matters". The approach to education had changed radically in the last six or seven years. A lot of what the claimant put in her application was not relevant to the job. For things claimed, how do people show they have done it? Where is the evidence? With reference to individual/independent educational plans he says she ticked the box but does not give the evidence. He was expecting in the briefest way for her to say how she had done a particular thing. She said she was competent in ICT but he was aware it had moved on, it was now much more than a whiteboard. She said she did email in respect of ICT but for him what she said was insufficient and inadequate. ICT is so much beyond that.

52. As to the process in general, everyone was allowed a free voice. They discussed matters at length.

53. The claimant was too far down the list to even be considered after a candidate for interview had dropped out.

54. As to experience, "you had to look at what you see in front of you".

55. In cross examination Mrs O'Hare said that she had not looked at the recruitment guidance although she was more familiar with it now. She had looked at it previously.

56. As to marking against criteria, she confirmed they only considered ICT, PT and music after they had decided who not to shortlist. She agreed it was wrong to bring in new criteria but she looked at what the school needed.

57. It did not occur to her that Mrs Bradley might be At Risk for the purposes of the Halton recruitment policy. She could see now there might have been a reason to interview the claimant but she was not aware of it at the time.

58. The four governors looked at the applications separately then discussed them. They did not use numerical points. Three were shortlisted, one dropped out and another was substituted. No-one else would have been shortlisted.

59. With regard to the two governors who wanted the claimant to be shortlisted, in her view they had not looked at the claimant's application in an objective way. They had assumed she would be interviewed, however when they went through all of the applications they agreed on merit that there should not be a place on the shortlist for the claimant.

60. The pay scale was not a consideration for Mrs O'Hare in the shortlisting process.

61. Looking at the claimant's application Mrs O'Hare felt that her letter had poor content. She agreed that from her own matrix candidate D's letter was said to lack chronology, although D was shortlisted.

62. When asked about a reference to SEN children in the claimant's application form, Mrs O'Hare suggested that this was not the letter that the claimant originally sent in. Her application and letter had been shredded before the claim came about and because all of the rest of the applications were emailed they could be reconstituted. The claimant was asked to send in the letter and Mrs O'Hare thought that the claimant might have amended the letter based on feedback given to the claimant. She could not be certain there were things she had referred to in her feedback which she would not have said from what was in the letter accompanying the application. She could not explain why this was not in her witness statement.

63. This point was not put to the claimant, who did not have the opportunity to deal with it.

64. Mrs O'Hare was taken to the section in the claimant's application concerning how she would deal with SEN children, and she said that what was stated would be an improvement but there was still not enough detail for an experienced teacher. There were things Mrs O'Hare referred to in her feedback which she would not have said from what was in the letter.

65. She was then asked about candidate A's supporting statement, which was from an NQT who had no experience of dealing with SEN children, and Mrs O'Hare said that she would give her an allowance so A was not disadvantaged because she could not speak from experience. The experienced teacher has the advantage to explain and to express themselves. It is a difficult task faced with 10 applicants to have a scientific view.

66. She had referred to the claimant's involvement with the school football club which was something not in the application form, although Mrs O'Hare said this was something she was going to give oral feedback on. The claimant had in her letter mentioned running football, netball and chess clubs but there no reference to being upset by older boys. She had not, however, shared a matter relating to the football club with the panel.

67. We were taken to the application made by candidate D who had had a placement at the school which was good. She noted that she had had good relationships at the school.

68. Looking at the feedback form, the claimant is also noted as having good relationships.

69. Looking at the application process from the claimant's perspective, she accepted in cross examination that the job was advertised with the pay scale from M1-M6 and that there was no reference to age in the application documentation.

70. With regard to children with special educational needs, she accepted that on her application form she had only mentioned it briefly. She probably could have said more about it but there was a limit to the number of words that she could use.

71. As to “Every Child Matters” she accepted that the title “Every Child Matters” had been replaced in 2010 but having said that it was the claimant's belief that every child did matter.

72. As to ICT, she confirmed that she did set homework using ICT but did not mention this on the application form. The person who worked alongside her updated the school's website. This was the only thing she was not proficient in. She could have included more detail about ICT.

73. She had not had any performance management discussion with the Head Teacher concerning IT. She still thought that she was good enough for an interview on the basis of the application form. She had used her application letter, with appropriate name changes, in respect of another post and she was called for interview.

74. When she was off sick after not being shortlisted she went in fortnightly with her sicknote. The Head Teacher told her there was little supply work in the school. After this the claimant did not go into the school.

75. The claimant remembered that Clare Williams wanted to move on and to start a new job in September 2017 but could not remember Mrs O'Hare discussing Clare Williams with her and how any changes to Clare might affect her.

76. The claimant said in cross examination that not being selected for interview affected her that much. She felt humiliated. Had she got an interview but not got the job she would have wanted to stay, but she did not get interviewed and she was not prepared to work at the school in anything but a permanent full-time role. She would not have been prepared to do a part-time role there because of what had happened to her.

77. We have referred above to the respondent receiving HR assistance from Halton Borough Council. This included a document entitled “Termination of Employment in relation to Temporary and Fixed-Term Contracts”. The document defines “temporary and fixed-term contracts” and then looks at the process for dealing with termination of temporary, fixed-term contracts and for temporary/fixed-term workers with one or more years' service:

- “When it is known that the final date of a temporary/fixed-term contract is nearing, the Head Teacher will write to the employee calling them to a meeting to discuss the expected date of termination.
- The Head Teacher will consult with the employee to consider whether there is suitable alternative employment at the school if the contract is not being extended.
- The individual will have the right to be accompanied at this meeting by a trade union representative or fellow employee to discuss the nature of the contract and reasons for non renewal.
- Any employee not suitably redeployed before the expiry of their contract will have their employment terminated due to the expiry of the temporary/fixed-term period.

- The Head Teacher will formally write to the individual giving them notice of the end of their contract, with a right of appeal given to the staff dismissal appeals committee.
- Appeals received as a result of this process will be dealt with in accordance with the school's dismissal appeals procedure."

78. As to the process followed by Mrs O'Hare, her evidence was that the claimant was absent on sick leave from 7 March 2017 until the end of August when her employment ended. During the Easter holidays 2017 the claimant came to see her and enquired what would happen in September. Mrs O'Hare explained that Clare Williams had applied for another role and if she was successful there would be a position for Mrs Bradley replacing Clare Williams. If Clare Williams was not successful then the claimant could revert to supply work through the Local Authority as and when there was a need. According to her, Mrs Bradley really wanted to return to work. Unfortunately, Ms Williams was not successful and as such there was no other position to be filled by the end of term.

79. On 20 July 2017 Mrs O'Hare sent a letter to the claimant:

"As you are aware, your fixed-term contract is due to expire on 31 August 2017.

Unfortunately St Edward's does not have any further work for you beyond that date and you reemployment with us will therefore terminate on 31 August 2017.

You will be paid by the St Edward's in the usual manner and a form P45 will be sent to you from HR.

You have the right to appeal against the decision to terminate your contract on the grounds of the fixed-term coming to an end. If you wish to appeal you should do so in writing within five working days to [Chair of Governors] stating the grounds for your appeal.

I would like to thank your hard work at St Edward's and wish you all the best for the future."

80. Looking at the termination of fixed-term contracts policy, the claimant was told when her fixed-term contract would end as early as April 2016 although there does not appear to have been a written invitation from the Head Teacher to the claimant calling her to a meeting to discuss the expected date of termination.

81. The only discussion the Head Teacher had by way of consultation with the employee to consider whether there would be suitable alternative employment if the contract was not being extend took place at Easter 2017, and before the outcome of Clare Williams' job application was known. There does not appear to have been any further meeting with the claimant once it was known that Clare Williams had not found alternative employment.

82. The letter to the claimant, sent on 20 July, was sent at about the end of the summer term 2017.

83. According to Mrs O'Hare, there were no alternative roles within the school which could be offered to the claimant. Had Ms Williams being successful in her application they would have been happy for Mrs Bradley to take on that role.

84. In cross examination Mrs O'Hare confirmed that Clare Williams was a part-time teacher on the M6 pay grade. The claimant was doing more or less the same job as her. Clare Williams had worked a year more than the claimant. When the new teacher came in September 2017 the class arrangements had to change, and Mrs O'Hare needed someone to do a role in school which involved English and Maths for Year 1 giving extra support in the mornings only. This was a new role. Clare Williams was there and she was asked to do it. Her number of hours worked remained the same. She did however do these hours over five mornings. The only reason Ms Williams was kept on for the equivalent of three days was that there were more children than previously. Clare Williams was not doing the same classes as previously.

85. In further cross examination Ms O'Hare confirmed that they budgeted for an M6 teacher in both the roles that were being advertised for.

86. The claimant appealed against the decision to end her employment. The appeal hearing took place on 28 September 2017. The claimant's grounds of appeal do not make any reference to the role found for Clare Williams. The claimant's witness statement does not make any mention of this either.

87. The outcome of the appeal was confirmed to the claimant in writing on 2 October 2017. After stating who was present at the appeal, including the claimant's trade union representative, the grounds of appeal were summarised:

“As the work I was doing is continuing my contract should have been renewed;

If the contract is not renewed and a permanent appointment made, I should have been appointed to the role;

By not appointing me to the permanent role the school have acted unfairly.”

88. Each of these points was considered and the reasoning of the panel which turned down the appeal was set out in a subsequent letter confirming what the claimant had been told at the end of the appeal hearing.

### **The Claimant's Claims**

89. The amended grounds of claim do not refer to the fixed-term contract offered to Clare Williams to start in September 2017.

90. As to unfair dismissal, it is argued that the respondent unfairly dismissed the claimant as it did not have a fair reason to dismiss the claimant in accordance with section 98(2) of the Employment Rights Act 1996:

“Notwithstanding that the claimant was on a fixed-term contract there was still a need for her class to be taught and before her employment came to an end

the respondent advertised her job. The advertisement was for a qualified teacher.”

It goes on to state:

“If, which is not accepted, the respondent did have a potentially fair reason to dismiss the claimant, they did not act reasonably in accordance with section 98(4) in treating it as a sufficient reason to dismiss the claimant because:

- (a) she was not properly consulted when the respondent was considering advertising the job; and
- (b) she was not given an interview for the job notwithstanding that she had carried out the job for a number of years to the respondent’s satisfaction.”

91. A claim for redundancy originally pleaded was deleted from the amended particulars.

92. As to age discrimination, the claimant believed that the respondent had decided to terminate her contract and replace her with a teacher on a lower salary scale than the claimant. The claimant believes that the respondent applied a provision, criterion or practice to select a teacher, namely that the teacher who continues to be employed at the school following the end of the claimant's fixed-term should be on the lower end of the pay scale for qualified teachers. The claimant was 60 years of age and as a result of the number of years of her experience as a qualified teacher was on a higher pay scale than what the respondent believed they would have to pay a potential replacement. The PCP put the claimant at a particular disadvantage in her employment because of her higher rate of pay in comparison with other potential teachers who the respondent hoped to recruit.

93. The claimant believes that all the candidates who were selected for interview, including the successful candidate, were under 35, or at least considerable younger than 60. Teachers are normally awarded an annual pay increment. The claimant believes she was on a higher pay scale than those selected for interview, including the successful candidate, as a result of the number of years’ experience as a qualified teacher.

94. The PCP of being at the lower end of the pay scale for qualified teachers puts teachers aged 60 or more at a particular disadvantage because the length of service is likely to result in them being employed on a higher pay scale than a teacher under the age of 35.

95. This PCP put the claimant at a particular disadvantage when:-

- (a) The respondent considered replacing her temporary position as class teacher with a permanent position of class teacher. This was because of her higher rate of pay in comparison to the potential candidates.
- (b) The respondent selected candidates to interview. This was because of her higher rate of pay in comparison to the other candidates.

- (c) The respondent selected the successful candidate to offer the job to. This was because of the claimant's higher rate of pay in comparison to the candidate who was appointed.

96. The claimant therefore considers that she has been unlawfully indirectly discriminated against by the respondent as defined by section 19 of the Equality Act 2010 by being dismissed.

97. The respondent pleads that it had a fair reason for dismissal related to the expiry of the fixed-term contract and that this was some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held. The respondent submits that the dismissal was fair.

98. The respondent denies discriminating against the claimant by reason of her age.

### **The Relevant Law**

99. Section 98 of the Employment Rights Act 1996 provides that:

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
  - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it –
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  - (b) relates to the conduct of the employee,
  - (c) is that the employee was redundant, or
  - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (3) In subsection (2)(a) –
- (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

- (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
  - (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
  - (b) shall be determined in accordance with equity and the substantial merits of the case.

100. Section 19 of the Equality Act 2010 provides that:

- (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.
- (3) The relevant protected characteristics are –
  - age;
  - disability;
  - gender reassignment;
  - marriage and civil partnership;
  - race;
  - religion or belief;
  - sex;
  - sexual orientation.



**Submissions**Claimant's Submissions

101. For the claimant Ms Amartey submitted that it was for the respondent to establish the reason for the dismissal and then for the Tribunal to consider the question of fairness.

102. The first factual dispute relates to whether or not the claimant was offered the role by the Head Teacher.

103. There was the astounding allegation from Mrs O'Hare that the claimant had "improved" her application form which was not in her witness statement or in the bundle. She should not be believed.

104. It was not clear whether or not the candidates' knowledge of ICT, PE and music was only ruled out after the initial shortlisting process.

105. The evidence of the claimant was consistent and clear and had not changed. She should be believed if there are questions of credibility between her and Mrs O'Hare.

106. The minutes of the appeal meeting were appalling with a wholesale failure to take notes of the points raised by the claimant.

107. There was a lack of evidence in relation to the decision making when the respondent only applied for a Year 1 Reception Teacher. There was no credible explanation as to why two posts were not advertised for at the same time. The respondent was under no obligation to appoint to either role.

108. If Mrs O'Hare offered the claimant the role then Mrs O'Hare must have been satisfied the claimant could do it. There was no concern for the children. The respondent must have been satisfied with the claimant's performance over three years.

109. The claimant had been there for more than two years and was a person at risk of redundancy. The respondent failing to consider the claimant being At Risk was unfair.

110. The respondent had not identified the source of the rule that they needed to advertise the job. It was unreasonable for the respondent not to offer the role to the claimant. They should be able to look at people at risk when shortlisting and they should vary things to take the "At Risk" status into account.

111. Father Wright stressed that the Personnel Committee would have checked matters with HR but did not know if this had been done. Any reasonable employer would have done this.

112. It was unreasonable, once a decision had been made to advertise the role, for the respondent not to sit down with the claimant to explain what the school was looking for and perhaps someone else should have been found to guide the claimant through the appointment process rather than Mrs O'Hare.

113. As to shortlisting, there was a wholesale failure to follow best practice and the respondent's own policy. The panel seem to have used their own opinion. There was no document on which the candidates were marked consistently. The claimant, for instance, was marked down on matters where the newly qualified teachers did not have anything to say. In this regard Mrs O'Hare's evidence was incredible: that it was not necessary for a newly qualified teacher to say how they would do certain things.

114. If Father Wright and Mrs O'Hare used matters within their knowledge not contained within the application form then this was unfair, but we know that Mrs O'Hare did in relation to the claimant and boys' football. It was on her summary feedback notes.

115. In the claimant's submission the selection process was unreasonable and no reasonable employer would have done it in this way. It was clearly in breach of policy.

116. The respondent says that selection was on merit but there was no way this could be checked. It was totally subjective. The comparison between the candidates was in breach of the policy. The shortlisting was unfair.

117. The respondent must produce cogent evidence to show that it did not take into account the relative salary costs of a newly qualified teacher and an experienced teacher. The claimant submits that the newly qualified teachers are most likely to be the younger candidates. The claimant was put to the disadvantage of being at the higher end of the pay scale which would disproportionately be the case for people of her age when compared with the newly qualified.

118. There was no consultation on the question of alternative employment in breach of the fixed-term policy. The claimant should have been consulted in relation to the new work. It was totally unfair and/or unreasonable not to mention to the claimant that new work was available.

#### Respondent's Submissions

119. For the respondent Mr Jenkins started his submissions on the question of credibility submitting that it was not so much credibility as reliability. The claimant may be convinced of the truth of her evidence but what actually happened was inconsistent with her evidence. In his submissions Mrs O'Hare was credible and reliable and willing to make concessions and was not afraid to say when she could not remember or was not sure.

120. As to age discrimination, there is no evidence that the respondent wanted to recruit at the lower end of the pay scale. The mere fact that a newly qualified teacher was recruited was not enough. The person who was appointed qualified in 2012 so was neither a newly qualified nor an experienced teacher.

121. If the respondent had wanted to restrict the role to someone in pay scales M1-M3 then it could have done so but did not. The role was advertised as M1-6 to create as big a pool of applicants as possible. This is the strongest evidence of a lack of discrimination. There was no evidence the respondent needed to save money.

122. In the respondent's submission the burden does not shift.

123. With regard to unfair dismissal, the respondent submits that the dismissal was for some other substantial reason. As to the question of fairness, the standard is reasonableness not perfection. The fact that the claimant thinks something could have been done differently does not make it unreasonable but a failure to follow own procedure can go to the question of reasonableness.

124. If the claimant was offered the job by the Head Teacher than this was superseded by their later discussions and the subsequent fixed-term agreement accepted by the claimant replaced the verbal agreement. The verbal agreement is nowhere mentioned in any notes of the meetings nor does the claimant refer to it when she meets with the Head Teacher and Father Wright.

125. As to the application process and the concept of "At Risk", in his submission this refers organisational change or redundancy. The claimant's position was not redundant. She was not at risk. There was therefore no duty or onus to offer the claimant her role or to give her an interview unless it was merited.

126. In his submission the sifting process was well constructed, fair and well applied but if it was not flawless the errors did not render it unreasonable.

127. In his submission the Head Teacher's summary notes for feedback if requested document clearly showed the candidates who met the criteria and those who did not. A comparison of candidates has to come in when deciding who to shortlist.

128. As to alternative employment, the conversation between the claimant and Mrs O'Hare at Easter happened and it was sufficient. There was no role for the claimant to go into. In any event the claimant gave clear evidence that unless offered a permanent role she would not have returned to work with the respondent. This causes the claimant a major problem. In his submission consultation would have made no difference to the claimant leaving. The evidence, in his submission, has to lead to a 100% finding that the claimant would have left her employment in any event.

### **Discussion and Conclusions**

129. Looking first at the claim of indirect age discrimination under the Equality Act, there can be no doubt that the respondent decided in 2016 not to renew the claimant's fixed-term contract after 31 August 2017 but to appoint a permanent teacher to the class that was being taught by the claimant. The claimant had the same right as anyone else to apply for the permanent role.

130. We are unable to find on the evidence that there was an intention to appoint someone to the permanent role who would be paid on a lower salary scale point than the claimant. In reaching this conclusion we find that the post was advertised at a salary scale from M1 to M6, when the decision could have been to limit it to M3 or 4, and that the school had budgeted for a salary up to M6 for the post.

131. It therefore follows that in our judgment the respondent did not apply a PCP that the person to be appointed would be on the lower end of the pay scale for qualified teachers.

132. The claimant asserts that teachers are normally awarded an annual pay increment. If a teacher is newly qualified at the age of 25 and is employed on the M pay scale, which we understand is used for teachers without any other responsibilities, then if given an annual increment they would progress to M6 by the age of 30. If there was an increment every other year then M6 would be achieved by the age of 35.

133. The claimant was 60 years of age but had only ten years of post-qualification experience. This would not, in our judgment, be typical for a teacher aged 60.

134. The claimant paid at M6 with 10 years of post-qualification experience at the age of 60 was therefore in the same position as her chosen comparators up to the age of 35 and so in our judgment she was not put at the particular disadvantage she has pleaded.

135. The claim that the claimant was indirectly discriminated against therefore fails.

136. As to the unfair dismissal claim we start by finding that the claimant was dismissed for the purposes of section 95 of the Employment Rights Act when her fixed-term contract was not renewed after it expired on 31 August 2017.

137. The claimant has explained the reasons for her working under a series of fixed-term contracts. We have no doubt that the claimant's series of fixed-term contracts came to an end because of a positive decision taken by the respondent that there should be an open recruitment process to recruit a permanent, full-time teacher to start on 1 September 2107. In our judgment this constitutes a substantial reason of a kind so as to justify the dismissal of the claimant holding the position which she held.

138. Was the dismissal fair or unfair for the purposes of section 98(4) of the Employment Rights Act 1996?

139. The claimant alleges that she was not properly consulted when the respondent was considering advertising the job. We find that she was given more than adequate notice that her employment on a fixed-term contract would come to an end some 14 months later. The respondent did not follow its own policy when informing the claimant without a formal meeting but as she had such a prolonged period of notice we do not think this goes to unfairness.

140. The claimant alleges that the Head Teacher told her that the job was hers. As a matter of fact, we do not find that this was the case but if we are wrong and the Head Teacher did tell the claimant in April 2016 that the job was hers, there is no doubt that the claimant was later informed that it was not hers and that there would have to be a formal application process. The claimant had a discussion with Mrs O'Hare and Father Wright but did not mention her belief that the job had been promised to her.

141. We do not find that the Head Teacher took a copy of the advertisement in to the claimant whilst she was teaching. We prefer the evidence of the Head Teacher to the effect that the claimant was notified in a separate meeting, after classroom hours, that the job was to be advertised.

142. We find that there was an offer of assistance to the claimant in respect of the application process but that the claimant did not take it up.

143. Turning now to the selection process followed by the respondent, we have noted above at paragraph 34 that the person specification used was a generic person specification for a class teacher, and at paragraph 35 we have made reference to the generic application form. We noted at paragraph 40 that there did not appear to be any direct alignment between the person specification and the shortlisting form used by the respondent.

144. From the evidence given by the Head Teacher and by Father Wright and our comparison of the matters to be determined from the application form when compared with the shortlisting sheet, there is no evidence as to how or indeed whether those on the sifting committee considered the applications against the person specification. We have noted at paragraph 44 that Father Wright gave evidence as to the claimant's application being of poor quality in comparison to the other candidates. According to Mrs O'Hare, the claimant's application was poor in comparison to those of the other candidates.

145. Looking at the guidance given to the respondent set out at paragraph 41 above, the respondent has not provided us with an objective assessment of each application against the essential, and if necessary, the desirable criteria, detailed in the person specification. The evidence suggests that they assessed the claimant against the other candidates and not necessarily against the selection criteria.

146. We have referred in paragraph 41 to guidance on the shortlisting process to the effect that:

“Processes should be applied in a fair and consistent manner and applicants who fail to meet all the essential criteria should not be considered, unless there is an organisational reason such as At Risk.”

147. Although the policy does not seem to define who is to be considered as being “at risk”, in our judgment the claimant was such a person given that her employment under a fixed-term contract was to end on 31 August 2017.

148. On the basis of the evidence before us it is impossible to know whether the respondent found that the claimant met all of the essential criteria. We do however know that Mrs O'Hare did not consider the claimant to be at risk and she did not take the respondent's own policy into account in the shortlisting process.

149. Turning to the policy on the termination of employment for those on temporary and fixed-term contracts set out above at paragraph 77, the Head Teacher will consult with the employee to consider whether there is suitable alternative employment at the school if the contract is not being extended.

150. The oral evidence of the Head Teacher was to the effect that Clare Williams did not get the job she had applied for to start in September 2017, and that there were some hours of teaching available at the respondent school from September 2017 onwards.

151. As we understand it, the fixed-term contract of Clare Williams was due to expire on 31 August 2017 which was the same date that the claimant's fixed-term contract expired. Ms Williams was in the same position as the claimant but Mrs O'Hare did not consider the claimant before she offered the available hours from September 2017 to Ms Williams.

152. Considering all of these matters we conclude that the claimant's dismissal was unfair.

153. It will therefore be necessary to fix a remedy hearing to deal with the question of unfair dismissal. At the remedy hearing the Tribunal will consider "Polkey" submissions from both sides.

154. We do not consider that the findings we have made in relation to unfair dismissal affect our conclusion that the claimant was not the subject of indirect discrimination on the ground of age.

Employment Judge Sherratt

28 May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

3 June 2019

FOR THE TRIBUNAL OFFICE

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