



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss M Kazhadub

v

Deloitte LLP

Heard at: London Central

On: 17 September 2019

Before: Employment Judge H Clark
Ms K Church
Ms N Foster

Representation:

Claimant: In Person

Respondent: Mr G Graham - Counsel

WRITTEN REASONS

1. These written reasons are provided pursuant to a request by the Claimant under the cover of an email dated 30 September 2019. By a Claim Form presented on 4 December 2018 the Claimant claimed disability discrimination, breach of contract and less favourable treatment due to her status as a fixed term employee. The disability discrimination and breach of contract claims were struck out on 12 August 2019. The only issue before this Tribunal was, therefore, relating to the Claimant's fixed term status.

The Proceedings

2. At the start of the hearing, the Tribunal allowed an application by the Respondent to amend its Response Form on the basis that the information contained in it was unwittingly incorrect concerning the notice periods of employees transferred to the Respondent from Berry Appleman & Leiden LLP ("BAL") under TUPE. The application to amend was made in writing prior to the hearing (on 10 September 2019) and the Claimant consented to it. The relevant part of the amendment was as follows:

"The Respondent understands that prior to 2018, BAL issued fixed term contracts and permanent contracts with a notice period of 3 months. Following a decision made by BAL's HR team at the end of 2017, fixed term contracts issued from 1 January 2018 were to be issued with a 1 month notice period to reflect that in practice, fixed-term employees are employed for a specific purpose which was

normally short term and as such, fixed term employees should be on shorter notice periods. The Respondent contends that this practice can be objectively justified given that by their very nature, fixed term contracts are entirely different in terms of notice requirements to permanent contracts. In a permanent employment relationship, it is anticipated that employees will be with the company for many years, building technical knowledge, client relationships etc. whereas in a fixed term situation, employees are recruited for a specific purpose which is usually short term. As such, the Respondent contends that fixed term employees should be on shorter notice periods as permanent employees are considerably more difficult to replace.”

3. For the purposes of this hearing, the Tribunal heard evidence from Ms Rowsell-Messchaert on behalf of the Respondent and she was questioned on her evidence. The Claimant did not prepare a witness statement and did not give evidence, but made oral submissions, as did Mr Graham on behalf of the Respondent. The Tribunal was provided with a joint bundle of documents.

The Issues

4. In order to determine this claim, the Tribunal had to answer three questions:

4.1 Whether the Claimant and her comparator were engaged on the same or broadly similar work. The Claimant compared herself to a permanent employee, Ms Ziriukina. It was conceded by the Respondent that they were engaged on broadly similar or the same work and that Ms Ziriukina was, therefore, an appropriate comparator. The less favourable treatment which is alleged concerns the notice period for a fixed term employee, such that for the Claimant it was one month whereas for a permanent employee in the same or similar job it was three months.

4.2 Was the less favourable treatment on the ground that the Claimant was a fixed term employee. As a result of the Respondent's amendment which was granted today, this was also conceded.

4.3 Whether the treatment was justified on objective grounds. This third question was, therefore, to only issue in dispute.

The Law

5. The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 implemented European Directive 99/70. The relevant part for the purposes of this claim is as follows:

“3.—(1) A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee—

(a)as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) Subject to paragraphs (3) and (4), the right conferred 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—

(a) any period of service qualification relating to any particular condition of service,

(b) the opportunity to receive training, or

(c) the opportunity to secure any permanent position in the establishment.

(3) The right conferred by paragraph (1) applies only if—

(a) the treatment is on the ground that the employee is a fixed-term employee, and

(b) the treatment is not justified on objective grounds.”

6. At the start of the hearing, the Tribunal referred the parties to *Del Cerro Alonso v Osakidetza (Servicio Vasco de Salud)* [2008] ICR 145 ECJ which gives the Tribunal guidance on how to approach the question of justification. The burden is squarely on the Respondent to prove justification. *Del Cerro Alonso* made it clear that objective justification requires “*the unequal treatment at issue to be justified by the existence of precise and concrete factors characterising the employment condition to which it relates in the specific context in which it occurs and on the basis of transparent criteria in order to ensure that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.*”

7. If the Claimant is successful in her claim, the Tribunal has the power to award compensation in accordance with Regulation 7(8) of the 2002 Regulations. This provides that the amount of any compensation under the Regulations should be “*such as the tribunal considers just and equitable in all the circumstances, having regard to (A) the infringement to which the complaint relates and (b) any loss which is attributable to the infringement.*”

Factual Background

8. The Claimant was employed by the Respondent as an Immigration Coordinator. Her employment with a predecessor of the Respondent, BAL commenced on 8 January 2018 and transferred to the Respondent under the Transfer of Undertaking (Protection of Employment) Regulations 2006 on 9 July 2018. Her employment was terminated on 14 August 2018 and she was paid one month’s pay in lieu of notice.

9. The Tribunal heard in evidence concerning the context in which BAL, a predecessor of the Respondent, had granted a number of fixed term contract to its

Immigration Coordinators. At the time the Claimant was engaged, there was uncertainty at BAL due to the potential loss of client. The less favourable treatment on which the Tribunal must focus is the provision of one month's rather than three months' notice of termination, not the decision to offer a fixed term contract in the first place. Until sometime in 2017 fixed term employees at BAL had a three-month notice period consistent with their permanent colleagues.

10. The Tribunal heard evidence from Ms Rowsell-Messchaert, a Solicitor with the Respondent, who was transferred from BAL and had supervised the Claimant. She had some knowledge of employment practice at BAL but was not present when the decision was taken to reduce the notice period for fixed term employees from three months to one month, so bases her evidence on what she has learned in the last month in the course of her investigations for the purpose of these proceedings. There were no contemporaneous notes of the decision to reduce the notice period of fixed-term employees from three months to one month or indeed any documentation about it at all. The Tribunal (and Respondent) does not even know the precise date on which the decision was taken.

11. The Tribunal found Ms Rowsell-Messchaert to be an entirely straightforward witness, who was placed in the difficult position of having to justify a decision to which she was not party and which took place at a time when she was on maternity leave. The Tribunal was left with very limited evidence with which to assess the Respondent's defence. Having regard to the decision of *Del Cerro Alonso* (above) and its use of terms such as "precise and concrete factors" and "transparent criteria," the Tribunal has struggled to find these in the evidence. Ms Rowsell-Messchaert explained that BAL was using fixed-term contracts in order to reduce the risk of redundancies at a time when BAL was anticipating the loss of a major client. In oral evidence she stated, "*I don't think the reduction in notice was due to the loss of the client,*" but related to the interplay between the probationary period of three months and the unexpired three-month term. There was no evidence before the Tribunal as to whether this was a particular problem for the Respondent (or BAL).

Conclusions

12. The Tribunal accepts Ms Rowsell-Messchaert's evidence that the purpose of the reduction in notice for fixed term employees was to stop those who fail probation being entitled to the full 6 months' pay. This was potentially a legitimate aim, however, the measure taken to achieve the objective also caught those employees who passed their probationary period, such as the Claimant. The Tribunal is not, therefore, satisfied that it was necessary or proportionate to reduce the notice of those who passed their probationary period to achieve the objective. The Respondent could have differentiated between those who passed their probationary period and those who did not. There was a suggestion in the evidence that some employees wanted a shorter notice period, but the Tribunal was not told how many or what percentage of employees were involved. It is unclear why they could not have been dealt with individually and offered shorter notice periods.

13. The Respondent's pleaded justification was not borne out by the evidence and is predicated on an assumption that a fixed term contract is of short duration with no real expectation of renewal. This appears contrary to the purpose of the 2002 Regulations, which provide a right to permanent employment after successive renewals of fixed term contracts over four years. The evidence suggests that the shorter notice period was directed to deal with employees who fail their three-month probationary period rather than a result of any assumptions made about the likely length of employment or the difficulty in replacing permanent rather than fixed-term employees.

14. Mr Graham invited the Tribunal to infer that the coincidence of timing between the increased use of fixed term contracts and reduction in notice permitted the Tribunal to conclude that there was a wider economic imperative. The Tribunal understands why such a submission was made, but this was simply not borne out by the evidence. The Tribunal recognises the difficult position in which the Respondent found itself as it inherited the policy from BAL, but the Tribunal can only judge the justification defence on the evidence before it.

15. The main problem with the measures taken to achieve the Respondent's objective was that it caught all those employees who passed their probation period, including the Claimant. For that reason, the Tribunal is not satisfied that it was either necessary or proportionate to reduce the notice of those who pass their probation period to achieve what may well have been a legitimate objective on the part of the Respondent in relation to those who failed it. It is not for the Tribunal to decide what the Respondent should have done to achieve that aim, but it must have been possible to differentiate between those employees who have passed their probationary period and those who fail it in this regard.

16. Having announced its decision on liability, the Tribunal invited submissions from both parties as to remedy. Neither party had provided evidence in the form of payslips from the Claimant and the Claimant's pay details were not included in her Claim Form, such that the Claimant's net pay could not be readily discerned. Time was given to the parties within the hearing to obtain the evidence electronically. The Tribunal considered it would not be proportionate to relist the hearing to enable hard copy evidence to be adduced in circumstances where the hearing was listed for both liability and remedy. It was common ground that the Claimant's losses were confined to the additional 2 months' notice which the Tribunal's judgment suggests she should have received.

17. The Respondent was able to obtain from the Senior Payroll Manager the level of deductions made from the Claimant's final payslip in which she received one month's notice of termination of her employment. From her gross monthly pay of £2,050, tax of £410.71 and National Insurance of £161.52 was deducted. On production of these figures, the Claimant was given a 15-minute adjournment to consider whether she accepted them.

18. Whilst the Claimant did not challenge the Respondent's figures, she submitted that she was entitled to two months gross rather than net pay in compensation, ie. £4,100. She put forward a number of reasons for this: firstly, that she did not work the full tax year, so the total amount she earned would fall

within her personal allowance and so would not be subject to tax. Secondly, the Claimant was worried that as she was not longer on the Respondent's payroll, she would not know how to account for it. She was concerned that the Respondent might report the payment wrongly to HMRC (she had an issue with the Respondent's calculation of her tax in the past) and it would take a lot of time and energy to correct things with HMRC. Being paid the gross figure would avoid confusion and stress. The Claimant was also concerned that the payment would be received in the current tax year rather the tax year to which it related. Mr Graham submitted that the Claimant's claim for additional notice was akin to classic breach of contract claim, where compensation should be net rather than gross

19. Compensation for forms of discrimination is assessed on tortious principles, to put the Claimant in the position they would have been in had the tort not occurred. The less favourable treatment for which the Claimant is entitled to be compensation is the fact that she received one month rather than three months' notice of termination of her employment. She received her month's notice net of tax and national insurance. Had she received three months' notice from the Respondent, that too would have been net of tax and national insurance. But for the Claimant's less favourable treatment, she would have received £4,732.04 in notice pay from the Respondent. In fact, she received £1,551.62. Her loss as a result of the less favourable treatment was, therefore, the difference between the £4,732.04 she should have received and the amount she received (£1,551.62), which is £3,180.42. The Tribunal has no power to award injury to feelings in relation to this claim. In so far as the Claimant has overpaid tax, she is entitled to recover such overpayment from HMRC.

Employment Judge Clark

Dated: 6 November 2019.

Reasons sent to the parties on:

07/11/2019

For the Tribunal Office