EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100007/2018

Held in Glasgow on 5, 6, 7 and 10 December 2018

Employment Judge M Robison
Mrs J Ward
Mr E Borowski

Ms X	**Claimant** **Mr N MacDougall** **Counsel**
Ministry of Justice	**Respondent** **Represented by** **Dr A Gibson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for unfair dismissal does not succeed and is therefore dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 3 January 2018, claiming unfair dismissal, discrimination because of sex and pregnancy/maternity, breach of contract and breach of the Fixed Term Employees Regulations. The respondent entered a response resisting the claims.

2. The claimant subsequently withdrew the discrimination, breach of contract and claim under the Fixed Term Workers Regulations. The hearing proceeded in respect of the unfair dismissal claim only. Mr MacDougall for the claimant confirmed during the hearing that he was not pursuing an argument that dismissal was procedurally unfair.

3. The Tribunal heard evidence for the respondent from Mr Gordon Newall, at the relevant time director of legal services with the Criminal Injuries Compensation Authority (CICA); Ms Linda Brown, at the relevant time deputy chief executive of CICA; and Mr S McNally, chief executive of the Legal Aid Agency for England and Wales. The Tribunal then heard evidence from the claimant.

4. The Tribunal was referred by the parties to a number of productions from a joint bundle of productions. These documents are referred to by page number.

Findings in Fact

5. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

6. The claimant commenced employment as a trainee solicitor with the respondent on 9 March 2015. She worked with the CICA, an executive agency of government, based at Atlantic Quay in Glasgow. She was engaged on a fixed-term two year contract as a band D trainee solicitor. On the completion of her traineeship on 8

March 2017, she was engaged on a six-month fixed term contract, which terminated on 8 September 2019.

7. The claimant was a member of the legal team, which formed part of a wider team called policy legal and decision support (PLADS). The respondent also engaged another trainee at the same time as the claimant, namely Melanie McMaster. Initially, during their traineeship, the claimant and Melanie McMaster were line managed by a band B solicitor, Wendy Wilson, who was their training supervisor. The Law Society of Scotland Admission of Solicitor (Scotland) Regulations 2011 require trainee supervisors to have been in continuous practice as a solicitor for a period of at least three years.

8. The CICA also employed one other legal adviser in the band B role, namely David Paton. Wendy Wilson's departure in September 2015 created a vacancy for a band B solicitor. David Paton, the only other Band B legal advisor employed by the CICA (who had more than three years PQE), then undertook the role of training supervisor of the two trainees, whom he line managed.

9. In December 2016, the claimant and Melanie McMaster, who were due to qualify the following March, were interviewed for the vacancy created by the departure of Wendy Wilson.

10. Melanie McMaster was appointed to the role. The claimant was however considered appointable and was placed on a reserve list for 12 months. This was in line with civil service recruitment principles which state that "where a competition identifies more appointable candidates than there are available vacancies a reserve list may be created for other similar roles in the civil service. This may be used for up to 12 months to fill the same role or other similar roles with the same essential criteria without further testing of merit" (page 359).

11. In or around mid-December, Michael Hanlon, then director of legal services, spoke to the claimant and advised that he was investigating the possibility of a

business case for an additional legal resource for a time limited period of 6 months and that she might be kept on for that period of time.

12. On 26 January 2017, Michael Hanlon submitted a "resourcing business case" form (page 40) in which he sought approval to engage a band B lawyer on a fixed term appointment of between 3 and 6 months. The stated need for the role was "to provide additional resource to support: 1. smooth transition of new trainees; 2. legal work during vacancy filling activities (director-post – this is not yet public knowledge as it remains subject to employment checks etc) 3. extra cover for increasing operational decision-making capacity when required. The additional requirement is expected to last no more than 6 months and should also help the newly qualified legal trainee secure another post. Period of this appointment – from end of current legal traineeship contract (9.3.17 to 8.9.17)".

13. This business case was approved by Carole Oatway, then chief executive, who added, "6 month temporary contract agreed. This will provide additional support during a transitional period in the legal and policy support team and our current performance challenge. Due to the confidentiality issues around the current Director of Legal Services new appointment, this business case should be retained at EMB (Executive Management Board) level until confidentiality embargo is lifted".

14. Following approval of the business case, Michael Hanlon spoke to the claimant and advised her that the fixed term contract had been approved in order to complete ongoing work and members of the legal team to assist the operations team engaged in meeting the targets set by the so-called "Mission Possible" project. She was advised that she would continue to be in the legal team, assisting the operations team.

15. Michael Hanlon also advised that, although not yet public knowledge, he would be vacating the post of director of legal services. He indicated too that the claimant could assist during that time in supporting the new trainees who would commence employment in March.

16. On completion of her traineeship, the claimant was therefore offered and accepted the role of legal advisor band B, specialist level a, on a fixed term six-month contract. Under the summary of the main terms and conditions of employment which accompanied the offer (page 44 – 53), it is stated, inter alia, that "Your employment is for a fixed term to undertake defined time-bound work from 09-Mar-2017 to 08-Sep-2017. Our procedure for ending fixed term contracts is set out on the Ministry's intranet". It was made clear that the claimant's employment with MOJ was continuous from 9 March 2015. Under Notice (page 46) it is stated that for all employees with up to 4 years continuous service, the respondent will give notice of 5 weeks. For employees, those employed in bands A and B are required to give three months' notice of the termination of their employment.

17. In March 2017, Michael Hanlon left the organisation. Gordon Newall initially acted as interim director until he was appointed on a permanent basis following a recruitment exercise. David Paton replaced Gordon Newall on an interim basis as head of policy (band A) and in May 2017 was successful in being recruited to the permanent post.

18. This created a band B legal advisor vacancy. Following a business case (213A-C), that vacancy was subsequently advertised as a band A post in November 2017, and was filled in March 2018. Following correspondence between Gordon Newall and the trade union side (pages 229-237), that business case was approved by the union. One of the essential criteria of that role was a requirement to have three years post qualification experience (page 345) in order to act as training supervisor and to line manage the band B legal advisor (Melanie McMaster) and the claimant, who were both newly qualified, as well as two new trainees who commenced employment in March 2017.

19. In or around May 2017, Gordon Newall approached the claimant to ask her if she was on the Royal Faculty of Procurators mailing list in respect of vacant positions. The claimant did not welcome this approach because she had recently

commenced the FTC and because in her view she was very experienced at making job applications and did not require advice about it.

20. In or around June 2018, at a one to one meeting, Gordon Newall asked the claimant whether she would be interested in one of the senior decision making roles but she made it clear that she was not interested in a non-legal role now that she was qualified.

21. On 26 July 2017 the claimant submitted a letter to Carole Oatway, then chief executive, setting out her grievance relating inter alia to the decision not to appoint her to the current vacant post of legal officer (at that time band Ba) within PLADS while on the reserve list.

22. By standard template letter dated 27 July 2017 (page 60) the claimant was advised by David Paton that her "fixed term appointment ("FTA") will end on 8 September 2017. The reason for termination is because this is contractually agreed end date of the FTA…..Please let Gordon Newall or me know if you would like to meet to discuss the end of your FTA and any concerns you may have".

23. The claimant was upset that this was from David Paton and not her line manager who was at that time Gordon Newall, and that it was sent to her by e-mail and not handed over in a private discussion. On 3 August 2017, Gordon Newall explained that he was on holiday at the time and that he thought that the appropriate process had been followed (page 85).

24. On 4 August 2017, the claimant was advised by Linda Brown, then deputy chief executive, that she had been appointed to hear her grievance and invited her to a fact-finding investigation meeting on 16 August 2017 (page 92).

25. On 7 August 2017, the claimant made a formal request for written reasons for dismissal (page 94).

26. By letter dated 9 August 2017, Linda Brown sought a written statement from Gordon Newall (page 102) requesting that he respond to 18 specified questions (page 104-106) in relation to the claimant's grievance.

27. On 10 August 2017, Gordon Newall met with the claimant and her TU rep (Cheryl Mackin) to discuss the ending of the fixed term appointment. Notes were taken by Loudelle Johnstone, with a typed version being created (pages 111 – 116). The claimant subsequently proposed adjustments to those notes using track changes (pages 116A to 116G).

28. During that meeting, the claimant requested reasons for her dismissal. Gordon Newall explained what he understood to be the reasons why she was given the FTA, which he said was to cover a period of flux because the previous director of legal services was moving on; to provide support for the "Mission Possible" challenge; and because one lawyer (David Paton) was going on paternity leave. He also advised that the appointment was in recognition that she had completed her traineeship and to allow her time and opportunity to seek a permanent position. He advised that the business was now beyond these issues and that was the reason for dismissal. She said that she was still confused about the reason why her FTA was not being extended or her post not being made permanent.

29. By letter dated 11 August, Gordon Newall responded to Linda Brown's questions in regard to the fact-finding investigation in respect of the grievance (pages 120 – 128).

30. By letter dated 13 August, the claimant submitted an "appeal against dismissal" to Carole Oatway, who appointed Linda Brown to deal with this matter in parallel with the grievance.

31. On 15 August, Linda Brown wrote to Gordon Newall inviting him to a meeting to discuss the appeal (page 133).

32. On 16 August 2017, the claimant met Linda Brown in connection with the investigation of the grievance. The claimant was accompanied by her trade union rep, Cheryl Mackin. Notes were taken of that meeting by Judith Mallinson (pages 135A-H), which the claimant adjusted using track changes (135I-135R).

33. The claimant thereafter completed, as requested, the standard grievance notification form (page 54) referring to the letter which she had sent to Carole Oatway on 26 July 2017, setting out the details over six pages (59A to 59F). The stated outcome sought was (page 55): "1. To be placed in the permanent post from the reserve list and 2. To receive an acknowledgement that there have been shortcomings in recruitment processes and an assurance that improvements/changes will be made in order that other candidates do not experience the same in future".

34. On 22 August 2017, Linda Brown wrote to Michael Hanlon in connection with the investigation of the appeal against dismissal (Page 176I-J), to which he replied setting out his recollection of circumstances surrounding the reasons for and extent of the fixed term appointment in response to the questions posed (176M-N). In his response, Michael Hanlon stated, inter alia, that he recalled mentioning that there was no guarantee of a further position arising within CICA, and that the claimant should use the period provided to seek other opportunities elsewhere, with which he was willing to assist.

35. On 1 September 2017, Linda Brown advised that the grievance was not upheld, inter alia finding that "the decision by the Director of Legal Services on behalf of CICA not to appoint you to the currently vacant post in the Legal and Policy Team Band Ba has been made on the basis of business requirements, is justified and does not contravene the Civil Service Recruitment Principles" (page 58), setting out in full in her decision in the letter.

36. On 6 September 2016, Linda Brown advised the claimant about the outcome of her appeal against her dismissal from the fixed term contract, and that was to

uphold the original decision to end the FTC. She set out the reasons in an eight page letter (pages 203A – 203H), together with eight enclosures.

37. She stated, inter alia, that she was satisfied that the claimant was sufficiently made aware of the reasons for the appointment, namely that there were resource and work pressures in the team at the time, and the nature of the work being undertaken which was both routine legal and operations work; that she was aware that the FTC was not intended to last for more than six months from the outset and that the CICA had complied with MOJ FTC guidance. She was satisfied that it was reasonable that the notice of termination of the FTC should come from David Paton, and that the reasons given by Gordon Newall provided a satisfactory and reasonable explanation for the ending of the FTC. She further confirmed that the work she had been performing in the legal team was ongoing, whilst the time-bound specific resource pressures for which the FTC was made were ending. She did not accept that there was a significant risk to the business if she was dismissed, as the claimant had asserted. She was satisfied that Gordon Newall had appropriately concluded that there were no sufficiently good business reasons to extend the FTC. The claimant was advised that having exercised the right of appeal that decision was final.

38. On 21 September 2017, the claimant completed a grievance notification form appealing against the grievance decision (page 209-213). This was accompanied by a letter dated 22 September 2017 which consisted of 15 pages (pages 214-228) with 10 appendices in addition.

39. The appeal was heard by Shaun McNally, at a meeting which took place on 2 November 2017. Mr McNally is Chief Executive of the Legal Aid Agency for England and Wales, independent of CICA, and experienced at handling grievances. He was accompanied at the appeal by an HR case manager, and the claimant was accompanied by her TU rep Sharon King. Notes were taken by Helene Morgan. (238-245). The claimant made track changes to these notes (260C-M).

40. Mr McNally did not uphold the appeal against the outcome of the grievance (pages 256-259). He was satisfied that a thorough and reasonable investigation into the grievance had been conducted, and the recommendations justified by the evidence.

41. While employed at the CICA, the claimant was a good performer and her managers had no concerns about the quality of her work or output.

Relevant law

42. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (the 1996 Act). Section 94(1) states than an employee has the right not to be unfairly dismissed by his employer. The expiry of a limited term contract without renewal is a dismissal by reason of section 95(1)(b).

43. Where a fixed term contract (FTC) is not renewed, a relevant employee may make a claim for unfair dismissal since dismissal following the expiry of a fixed term contract is not automatically fair. Section 98(1) states that in determining 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.

44. The most common reasons relied upon by employers for termination of a FTC are SOSR and redundancy. In this case, there is no question of redundancy and it is for the employer to show that the reason for dismissal was “some other substantial reason” (*Terry v East Sussex County Council 1976 ICR 536*).

45. In *Fay v North Yorkshire County Council 1985 ICR 133*, the Court of Appeal approved the reasoning in *Terry* and set out the circumstances when the expiry of a fixed term contract can amount to SOSR, namely:

a. It must be shown that the fixed term contract was adopted for a genuine purpose;
b. That fact was known to the employee; and
c. That the specific purpose for which the fixed term contract was adopted has ceased to be applicable.

Respondent's submissions

46. Dr Gibson lodged written submissions, which he supplemented with oral submissions. He set out proposed findings in fact, submitting that there was only one significant fact in dispute, namely whether the claimant knew of the reasons for the creation of the fixed term contract. He submitted in essence that given that the claimant was a qualified lawyer with 10 years of previous experience in HR, that she knew or ought to have known the reasons for it, otherwise she would not have entered into it and that she took no steps to find out about it.

47. With regard to the reasons for dismissal, relying on *Beard v St Joseph's School Governors [1978] ICR 1234*, Dr Gibson submitted that it is well-settled law that where the reason for a dismissal is the expiry of a fixed-term contract that the expiry of the contract can be "some other substantial reason" for the dismissal. He submitted that it is clear from the evidence that dismissal was for the potentially fair reason of some other substantial reason, namely the ending of the fixed term contract and for no other reason. He relied on the offer of appointment letter, which has a clear start and end date; the letter of 27 July setting out the singular reason for termination, namely the contractually agreed end date of the FTA; the resourcing business case application, which sets out why additional support would be required; as well as the letter from Mr Hanlon which sets out why it was set up and why it was temporary.

48. There is only one reason for dismissal, that is the FTC was coming to an end, with the letter of 27 July giving the facts behind that reason, indicating that it would not be brought to an end if there were good business reasons for extending or

renewing. The letter explains in detail what those business reasons are, which mirror the reasons given in the business case.

49. While the burden of proof is on the respondent, the respondent need only establish an SOSR reason which could justify the dismissal of an employee holding the job in question, since there are two parts to the test. Here the claimant is conflating two distinct parts of test, but it is not appropriate to consider justification, reasonableness or fairness of dismissal for SOSR at this stage.

50. Here the claimant held the position of a newly qualified solicitor on a fixed-term contract, and in justifying dismissal of the claimant from that particular role, the respondent is entitled to look at the structure of the team, the business needs of the organization and funding priorities and take the view that the needs of the organization are best met by utilizing their resources in a different way. The claimant does not aver that dismissal was for the potentially fair reason of redundancy, although she refers to ongoing work. The respondent does not deny that there was an ongoing need for legal work to be done, but importantly that included supervision of trainees which the claimant was not qualified to do. The respondent does not dispute that there was a vacancy, but that was not for the same role as the claimant was performing.

51. Relying on *Terry v East Sussex County Council* and *Fay v North Yorkshire County Council*, he submitted that the claimant did have enough information to allow her to enter the contract knowing what it was for, and without enquiring further, and here the particular job was band Ba legal adviser. Nor did she have a reasonable expectation that the contract would be renewed, since no-one said that was even a possibility, and the fact she was busy and had work ongoing is not sufficient. He submitted that there is evidence to support the conclusion that the contract was for a genuine purpose, and that was known to the employee, and that the reason given has ceased.

52. Here the specific purpose was the need for cover for six months to meet targets and cover ongoing work while there was changes in personnel with one member

of staff on paternity leave and the department head leaving. As Gordon Newall put it, they needed an extra pair of hands to get over the hump and having got over that hump, the purpose had ceased, and there was no need for a second newly qualified solicitor.

53. On the question of the reasonableness of dismissal, even if the Tribunal accept, which he denied, that the claimant did not know the reasons for the FTC in March 2017, that fact does not make the decision to end the contract in September 2017 unreasonable.

54. There were no good business reasons for extending or renewing her employment, namely that the salary she was costing the business was to be allocated to employing a more experienced lawyer who could act as trainee supervisor, given that David Paton had been promoted by 10 May 2017. The facts behind the reason for dismissal (that there were good business reasons for not extending or renewing her employment because she did not have three years PQE) are well removed from the reasons for giving her a fixed term contract. The issue is not whether there was ongoing work and a significant workload, but rather who was best placed to perform that.

55. With regard to alternatives to dismissal, the claimant did not wish Mr Newall to investigate the possibility of working as a senior decisionmaker, and there were no other reasonable alternatives. The claimant's suggestions regarding alternative ways of dealing with the workload were considered and rejected, Mr Newall being far better placed than the claimant to know how best to structure his team, what could be delegated and the fact that Mr Paton could not continue indefinitely supervising trainees in addition to his head of policy role.

56. With regard to the claim about moving the goalposts, the original band Ba role advertised was suitable for a NQ, whereas the role vacated by Mr Paton was not, and was subsequently advertised as Band A. The respondent has a right to choose how to best utilize their budget, which they chose to do in a different way after 8 September, and that is acting reasonably.

57. With regard to the claimant's argument that Mr Newall prejudged the outcome of the grievance appeal, this post-dates the dismissal and in any event when he made the decision, the appeal had not yet been lodged.

Claimant's submissions

58. Mr MacDougall lodged written submissions which he supplemented with oral submissions. He first set out the issues and then the relevant legal principles.

59. Relying on IDS Employment Law Handbook Volume 1 and on *Fay v North Yorkshire Council*, Mr MacDougall submitted that it is well established that expiry of a fixed term contract is not, in itself, a potentially fair reason for dismissal; the expiry is the dismissal itself; not the reason for it. He submitted that the true reason for the claimant's dismissal in this case was simply that her fixed term contract had come to an end, this being the only reason stated in the dismissal letter. The e-mail exchange between Jackie Keenan and Gordon Newall when she stated that "the guidance on FTA states that the end of the agreed FTA is treated as a fair and reasonable dismissal" is an incorrect or at least incomplete statement of the law, demonstrating a lack of understanding on the part of the respondent.

60. The reason for the termination must be judged as at 27 July; being the date the respondent first sought to terminate the contract, but the reason evolved from one to two reasons. By the time of Mr Newall's letter dated 18 August 2017, the reasons became first the ending of the fixed term appointment and secondly the fact that there were good business reasons for not extending or renewing the claimant's employment. He invited the Tribunal to reject Mr Newall's evidence that the reason had not changed but merely been elaborated upon, given the use of the word "and"; and to interpret that document on the basis of what was said, not what he meant to say. For these reasons it is submitted that the respondent did not have a potentially fair reason to dismiss; they cannot reverse engineer a reason upon realisation that there may be a difficulty with that position in law.

61. Mr McDougall challenged Dr Gibson's submission that the particular job here was a Band Ba legal advisor, referring to the case of *Terry*. Rather what was envisaged was the job the employee was employed to do, referring to *Fay* (at 143E) and using the analogy of the job title of builder, he submitted that if the contract was for the completion of a house and that was complete, then the specific purpose of the FTC would have ceased, whereas if it was a skyscraper, then the specific purpose would not have ceased. He submitted that a key issue on either view of the law is whether the purpose of the contract was communicated to the claimant prior to commencing employment.

62. If the Tribunal does not accept that there was no potentially fair reason, then the question is whether the good business reasons relied on can be a potentially fair reason. He submitted that the respondent had provided a number of different reasons, to different parties on different occasions; first those stated in the business case, then those given by Mr Newall and those given by Mr Hanlon. He submitted that none of these three accounts are on all fours with one another, and if there were clear reasons for the contract they should be.

63. He submitted that there were no specific "good business reasons" for granting the contract other than the PLADS department was very busy and was becoming busier all the time. The claimant said she was performing largely the same work as the two other band B solicitors, which was the same type of work which she had gained experience of during her traineeship. While this would be a good business reason for appointing her, this is not the reason given by Mr Newall, given that, relying on *Fay*, where the work is ongoing then the date of expiry cannot be a potentially fair reason for dismissal.

64. If it is argued that the good business reason for the non-renewal was the need for a band A solicitor with three years PQE, that could not have been a reason for the claimant's contract at the outset. At that time David Paton was in the PLADS department and it could not have been known that his post would become vacant thereby creating the need for a three years PQE solicitor in the department, which was a problem of the respondent's own creation.

65. The claimant was brought in to do the job that she was trained to do, which was the genuine purpose of the contract. The PLADS department was busy and getting busier and the work the claimant was involved in was ongoing. At the date of expiry she was one of only two Band B solicitors who would pick up work from the inbox. She was involved in various ongoing projects. She had taken an interest in mentoring the trainees and was clearly involved in their development at a time when there was no three years PQE solicitor in the department.

66. Mr MacDougall then turned to the requirement to act reasonably in the present case, submitting that the purpose of the contract had not been communicated to the claimant. He said this is complicated by the fact that the genuine purpose of the contract was the job that she was trained to do, but even if the genuine purpose of the contract was the reasons cited in the resourcing business case which created the post and contract, the position remains that those were not communicated to the claimant. The claimant's evidence, that there had only been 'general' or 'wooly' discussions about the reasons for the contract, should be accepted where the Tribunal did not have the benefit of oral evidence from Mr Hanlon. His letter does not assist the respondent is discharging the onus of proving they did communicate the purpose of the contact, because he says that "[he] cannot recall if [he] explained in terms the full reasons for the fixed term contract being offered". All that Mr Hanlon can recall is that there was mention of it being related to ongoing work; and he "took [the duration] as being understood". He did not say she would require to leave at the end of the period, which makes sense if there was ongoing work rather than a contract for a specific period or a specific piece of work. Nor were there discussions about covering paternity leave and smoothing the transition of new trainees.

67. Mr MacDougall also submitted that there was a failure to give consideration of suitable alternative employment. Neither of Mr Newall's attempts, with regard to the band C role or the reference to the Royal Faculty of Procurators of Glasgow's mailing list amount to sufficient consideration to make the decision to dismiss reasonable given the size of the MOJ.

68. Further, in light of Mr McNally's evidence that he had the power to uphold the grievance on appeal and order reinstatement to a Band Ba post and that PLADS would have to bear the additional cost, the failure to reinstate was also unreasonable. Mr Newall gave the instruction to advertise the band A post prior to the outcome of the appeal against the grievance being known. However both Mr Newall and Mr McNally accepted that the claimant could have been reinstated. That being so, it necessarily follows that funding for that continued post would be available.

69. At the point in time that David Paton was promoted the claimant went from being an asset to a liability. She did not have the requisite PQE to satisfy law society requirements for a training supervisor. That was not her fault. It was not a condition of her appointment to the contract. Ultimately, it was the reason for her dismissal.

70. Mr MacDougall referred to the schedule of loss lodged at pages 455-456 , which was amended and agreed following previous discussion with Dr Gibson.

Tribunal's discussion and decision

Observations on the witnesses and the evidence

71. In this case, although there were a number of key facts in dispute, the outcome of this case comes down to our findings about those disputed facts. We got the impression that ultimately there was a difference in perspective about the significance of the facts, and the application of the relevant legal principles to them.

72. We found Mr Newall to be credible and reliable. We found him to be an intelligent witness, whose answers were clear and comprehensive and well-informed. He was careful not to give definitive answers where he was unable to recall the details at this remove of time. He was patient although in a number of instances had reason to suggest that he had already covered the topic under discussion. We got the clear impression that he was genuinely keen to assist and support the

claimant in the transition from the end of her traineeship to a role as a qualified solicitor.

73. Ms Brown's evidence was also clear and straightforward, and it was evident both from the documentary evidence and from her oral evidence that she had taken her roles seriously and was very well acquainted with the details of the claimant's case following a comprehensive consideration of the issues.

74. Mr McNally too was credible and reliable, and evidently an experienced manager who had dealt with many appeals against grievances and the like, and who had a clear understanding of his remit. He too had a comprehensive understanding of the details of the case, and again we were of the view that he had given careful and reflective consideration to the details of the claimant's arguments.

75. Although we have not found for the claimant, we do not say that the claimant was not a credible witness. We noted in particular that she did accept that she had a conversation with Mr Hanlon regarding in broad terms the reasons for her contract. We observed however that the succinctness of her answers seemed at odds which the prolixity of her submissions in the various internal proceedings. Ultimately, we came to the view that she was rather naïve in her assessment of her case, and that was because she considered the circumstances only from her own perspective, and failed to take an objective view of the circumstances, bearing in mind the position of the respondent. We found this rather surprising given her background in HR, and her references to having been involved in organizational design and restructuring. From her own standpoint, she was busy and she had ongoing work, and the circumstances were not about to change. As she herself said in cross examination, dismissal at that juncture did not "feel" fair to her. We have no doubt that she did feel unfairly treated, but that is a very different matter from what is unfair upon the application of the relevant legal principles.

Unfair dismissal

76. In this case, there was little, if any, disagreement about the applicable law or legal principles. Rather, we were of the view that there were a number of key facts in dispute. Our findings in relation to those key facts determine the outcome of this claim.

77. We deal first with Mr McDougall's argument that there was no potentially fair reason for dismissal. This was because here the (initial) reason given (and the one he says must be relied on, that is as at 27 July) is the expiry of the fixed term contract, which (as was accepted) is well-established is not in itself a potentially fair reason for dismissal. He argued that is the only reason given, it cannot amount to a potentially fair reason.

78. Dr Gibson in response submitted that the very fact of dismissal means there must have been some reason for it and the claimant does not aver an unfair reason such as bullying or discrimination, or that there was another potentially fair reason which was the real reason for dismissal. He submitted that, even if there was "the ongoing need for the work to be done and the existence of a permanent vacancy for the same role as the claimant was performing", that does not mean that dismissal on the grounds of ending of the fixed-term contract was not a potentially fair reason for dismissal, but may mean that it was an unfair dismissal as the respondent was not acting reasonably in treating the ending of the FTC as a sufficient reason for dismissing the claimant, but not that it was not a *potentially* fair reason for dismissal.

79. We did not accept Mr MacDougall's submission. As Mr MacDougall himself submitted the expiry of a fixed term contract is the dismissal itself and not the reason for it. The letter sent by David Paton was a proforma letter giving notice. Mr Newall stressed in evidence that this was the style from the MOJ guidance and he described that as giving notice of the end of the FTC. The giving of notice and the reasons for dismissal are two different things, and there was no detail given of the reason for the termination beyond the fact that that was the contractually agreed end date of the FTC. As Mr Newall said, the letter gave the opportunity for the claimant to meet with him to discuss the situation further, which

she did, and she took advantage of her statutory rights to ask for written reasons, which he provided in the subsequent letter. He did not view those stated reasons to consist of two reasons or of "further" reasons. We accepted Dr Gibson's submissions that the Mr Newall's letter contained one reason, and gave the facts behind that reason.

80. We concluded therefore that the respondent is entitled to rely on SOSR, which is a potentially fair reason. However, the expiry is not *automatically* SOSR for dismissal. We require to go on and consider whether or not the respondent has shown what the reason was, and indeed that it was "substantial".

81. The Court of Appeal in *Fay* set out the circumstances when the expiry of a fixed term contract can amount to SOSR, namely: it must be shown that the fixed term contract was adopted for a genuine purpose; that fact was known to the employee; and that the specific purpose for which the fixed term contract was adopted has ceased to be applicable. We turn then to consider whether these requirements are satisfied.

Contract for a genuine purpose

82. There was of course no dispute that this was a fixed term contract of six month duration. However, there was a disagreement about the purpose of the contract. As we understood his argument, Mr MacDougall sought to argue that the purpose of the contract was for the claimant "to do the job that she had been trained to do".

83. Relying on the wording of LJ Browne-Wilkinson in the Court of Appeal in Fay, we were of the view that we required to consider whether the fixed term contract itself was adopted for a genuine purpose (or specific – it seems the words are used interchangeably).

84. As is clear from our findings in fact, we have determined that the genuine purpose of the contract was as set out in the "resourcing business case" form (page 40), namely "to provide additional resource to support: 1. The smooth transition of

new trainees; 2. Legal work during vacancy filling activities by reference to the director post; and 3. Extra cover for increasing operational decision making capacity when required".

85. While we accepted Mr MacDougall's submission that the reasons were communicated on a number of different occasions by a number of different parties, we did not accept that there were a number of different reasons provided. In the meeting on 10 August (page 111), Mr Newall explained his understanding that it was to cover "a period of flux" within the team given the fact that the director of legal services was moving on (which aligns with point two); to provide support for the Mission Possible challenge (which aligns with point three) and because one lawyer was going on paternity leave. Although this latter point was not stated in terms in the business case, Mr Newall in evidence explained that this was a relevant factor because the lawyer going on paternity leave was the training supervisor for the trainees, and therefore this point links to point one referencing the smooth transition of the trainees.

86. We did not hear evidence from Mr Hanlon but we had the benefit of his best recollection as at 30 August 2017 following the investigation by Ms Brown into the claimant's appeal against dismissal. In his letter, he advised that the particular rationale for presenting a business case to the chief executive was the time demands on the legal and policy team created particularly by the so-called "Mission Possible" project, as well as the recent restructuring. He said that he had spoken to the claimant at the time about investigating the possibility of an additional legal resource for a time limited period of six months. Once approval was granted, he said "I cannot recall if I explained in terms the full reasons for the fixed term contract being offered". We note here his use of the words "in terms" and "full reasons", but he states that he does recall mentioning that it was tied to the Mission Possible work and the need for legal and policy to assist the operations team. He recalled this because of concerns expressed by the claimant about performing the role of a senior decision maker (rather than a lawyer). While these are not "full reasons", what is clear is that the reason related to a particular need for assistance with a particular project.

87. We came to the view that these were simply different ways of wording the same purpose and that it would be unrealistic to expect different managers to use identical or even very similar wording to describe the purpose of the contract. We were of the view that the purpose, in general, was clear.

88. We were fortified in this view by the evidence of Mr Newall, whose understanding largely aligned with the written business case, which he said in evidence he had not in fact seen at this point. His understanding was informed by general discussions that he had with Mr Hanlon. We were further fortified in our view because we have concluded that these were largely the reasons the claimant herself understood for the FTC, as we now come to discuss.

Purpose of contract known to claimant

89. As is clear from our findings in fact, we did not accept that the claimant was not aware of the purpose of the fixed term contract. We were of the view that in her own evidence she confirmed that she was aware, in general but sufficiently specific terms, of the purpose of the contract which generally accorded with the reasons set out in the business case.

90. Crucially, we noted that the claimant candidly admitted during her evidence in chief that the "themes" of her discussion with Mr Hanlon were "similar" to those set out in the business case. In particular, he advised her that he was moving on, which she recognised accorded with point 2. Her evidence was that he had complimented her on how well she had mentored the trainees, which she recognised would relate to point 1. She also recalled him mentioning that she may be "spending time in the regions", which she thought might relate to point 3. As we understood it, "the regions" was a term which related not to geographical outreach work, but rather to the work of the operations team, that is "senior decision makers". We took this therefore to be a reference to assisting the operations team with their work and in particular the "Mission Possible" project, and we were of the view that the claimant would have understood that too.

91. We accepted Dr Gibson's submissions that the claimant came to the view, in retrospect, that she had not been given specific reasons for the FTC, which she described as "wooly", "loose" and "general". However, we were satisfied that, albeit the reasons given may have been general and advised informally rather than formally, still we were of the view that the claimant was given sufficient information for her to be appropriately aware of the purpose of the contract.

92. We accepted Dr Gibson's submissions too that, as a lawyer with more than 10 years of HR experience, had she been concerned about the lack of detail given as to the reasons for the FTC, then she would have taken steps to have become better informed before accepting the contract.

Specific purpose has come to an end

93. Once the specific purpose is determined, then the answer to whether that has ceased becomes clear from the evidence. We have accepted Mr Newall's evidence that the purpose of the contract had ceased. Although he was not involved in the creation of the FTC (and although he said he had seen the business case when it came to the end of the FTC), as discussed above, he said that he came to be aware of the purposes of the FTC largely through discussions with Mr Hanlon. We have accepted that his understanding of the reasons for the FTC were essentially those set out in the business case, which we have concluded set out the purpose of the FTC.

94. It clearly follows therefore that the purpose for which the FTC was created has ceased. Mr Newall talked of a "period of flux" which had come to an end. In particular, by the end of the FTC the specific "Mission Possible" targets had been completed; the former director of legal services had taken up a post elsewhere and had been replaced by Mr Newall; and a transitional period during which the new trainees had time to settle in had passed. Further, Mr Paton had returned from paternity leave, and therefore the need to assist with the mentoring of the trainees had diminished. Mr Newall said that the FTC had been created to "get

us over the hump" and as Dr Gibson submitted, by September 2017 it was clear that they had got "over the hump".

95. In all these circumstances we were therefore satisfied that a potentially fair reason for dismissal, namely SOSR, was made out in this case. Being satisfied that the respondent had proved the reason for dismissal was a potentially fair one, we then turned, in the usual way, to consider whether dismissal in the circumstances was reasonable.

Reasonableness in the circumstances

96. Mr MacDougall put forward three reasons to support his submission that the respondent had not acted reasonably in the circumstances.

97. The first was that the purpose of the contract was not communicated to the claimant. He made this argument in light of his submission that the genuine purpose was for the claimant to do legal work. However, he made this submission even if we were to conclude, as we have done, that the genuine purpose of the contract was for the reasons set out in the resourcing business case. For the reasons discussed above, we have concluded as a matter of fact, that the claimant had a sufficiently good understanding of the purpose of the contract.

98. The second reason advanced was the failure of the respondent to give consideration to suitable alternative employment. Reference was made to a conversation about alternative band C roles. The claimant had made it clear that she was not interested in non-legal roles in the organisation.

99. With regard to alternative legal roles, the claimant had lodged a grievance complaining about not being appointed to the band B role which became vacant due to Mr Paton's promotion, when she was on the reserve list. This, as we understand she accepted, was a different matter to the question of whether there was an alternative legal role which she could do. We can understand the claimant being aggrieved that although another Band B post did come up while she was on the reserve list that she did not get it. However, we readily accepted the

evidence of the respondent's witnesses that the essential criteria for this job included, because of the particular operational requirements of the department, a lawyer with at least three years PQE. Mr Newall said this was a "business critical role" because of the law society requirement for those acting as training supervisor of trainees. Were the claimant to have been offered the band B role, that would leave only two newly qualified in the band B roles, neither of whom could act as training supervisor. This matter was in any event thoroughly considered by Ms Brown through the grievance process.

100. Further, Mr Newall came to the view that alternative suggestions, of Mr Paton or Mr Newall continuing to supervise the trainees, were not deemed to be feasible given the business needs and limited resources of the department, particularly given the decision following the business case approval to convert the Band Ba role to Band A. We considered that decision had been reached following appropriate consideration and was a reasonable one in the circumstances.

101. We also noted Mr Newall's evidence that he had felt his suggestion of roles outwith the organisation was not welcomed, and indeed the claimant confirmed that to be the case in her evidence.

102. We therefore accepted Dr Gibson's submission that Mr Newall gave such consideration as was reasonable in the circumstances to alternative employment, but that there was no alternative employment for which the claimant was qualified for or would consider (such as a senior decision-maker role).

103. The third reason advanced in support of the argument that dismissal was not reasonable in the circumstances was made in light of the evidence of Mr McNally that he had the power to uphold the claimant's grievance on appeal and order reinstatement to a band Ba post, and that PLADS would have to bear the additional cost. He submitted that this therefore meant that there was funding available to engage the claimant.

104. Dr Gibson complained that there was no reference to this in the pleadings, and therefore that he had no fair notice of the funding argument, and in particular had he known this would be argued he would have led evidence to counter it. Mr MacDougall said that the respondent could not guard against evidence which they considered damaging which came up in response to questions asked.

105. We were of the view that the submissions regarding funding were insufficiently connected to the reinstatement point to entitle Mr MacDougall to rely on such a proposition. In any event, the question of the engagement of the claimant in the band B role was thoroughly explored by Ms Brown in the grievance, and then by Mr McNally, who was independent of the organization, and who after careful consideration concluded that the outcome of the grievance could be upheld. Consideration was therefore given to whether or not re-engagement of the claimant was a reasonable response to the grievance. Given the level of scrutiny, we could not say that there was any unreasonable failure to consider reinstatement as an alternative to dismissal.

106. Further and in any event, we were of the view that the fact that funding may have to be found in the face of an adverse adjudication does not mean that it was in the budget in the first place.

107. We accepted in any event that Mr Newall could not have been said to have prejudged matters, or acted unreasonably, by instructing the advert for the post after the grievance but before the appeal, particularly given the fact that it was advertised with the support of the union.

Conclusion

108. We understood why the claimant would be aggrieved when her FTC ended and was not continued. She was busy and there was no less work to be done in the department, and indeed it may be that the workload for lawyers was increasing. However, as discussed above, the claimant's sense that it was unfair and the

conclusion reached following application of the legal principles to the facts found are two different things.

109. Further, with reference to what Mr McDougall termed the "obiter" reason for the setting up of the contract, that was to give the claimant a further opportunity to obtain alternative employment, the claimant's failure to appreciate the opportunity she was given of further time to seek a qualified post was ultimately to her detriment.

110. The Tribunal has concluded, based on our findings in fact, that the respondent has shown that there was a potentially fair reason for dismissal, namely SOSR, and that in all the circumstances the decision to dismiss the claimant was reasonable. Her claim for unfair dismissal cannot succeed and is therefore dismissed.

Employment Judge: M Robison

Date of Judgement: 31 December 2018

Entered in Register,

Copied to Parties: 27 November 2019