EMPLOYMENT TRIBUNALS

Claimant: **Mrs E Corbett**

Respondent: **Ffestiniog Railway Company**

Heard at: **Cardiff via CVP** **On: 24 May 2021**

Before: **Employment Judge S Moore (sitting alone)**

Representation:
Claimant: In person (joined by telephone)
Respondent: Mr McDevitt (Counsel)

RESERVED JUDGMENT

1. The Claimant's claims brought under the Fixed Term of Employees Regulations 2002 were presented outside the required time limit and it is not just and equitable to extend time.
2. The Claimant's claim for notice pay was presented out of time but may proceed as it was not reasonably practicable to have presented it within time.

REASONS

Background and Introduction

1. This was a Preliminary Hearing to determine the following issues:

2. Were the Claimant's complaints presented within the time limit set out in the relevant Regulations and Statutes in respect of the claims pleaded by the Claimant:

   a. Regulation 7 (2) of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("the FTC Regulations") in respect of the less favourable treatment and / or dismissal claims;

b. S164 (2) Employment Rights Act 1996 ("ERA 1996") in respect of the failure to pay a redundancy payment and;
c. Rule 7 (Employment Tribunal Extension of Jurisdiction Order 1994) in respect of the breach of contract (notice pay) claim.

3. There have been two previous Preliminary Hearings in this case. The first was before me on 3 September 2020. I directed that there would be a Preliminary Hearing to consider a number of preliminary issues as set out in paragraph 7 of the Order dated 4 September 2020. That Preliminary Hearing came before Employment Judge Powell on 5 and 6 January 2021. Judge Powell's Judgment dated 6 January 2021 determined:

a. That the Claimant was continuously employed by the Respondent between 16 April 2006 and 8 November 2019 and;
b. That she had been dismissed from her employment on 8 November 2019, this being the effective date of termination.

4. Judge Powell refused an application to amend the claim to include age discrimination and "ordinary" unfair dismissal. There was insufficient time at that hearing to decide the time points and therefore these were rolled over into a further Preliminary Hearing which as stated above was the subject of the Preliminary Hearing before me today.

5. We took some time to confirm the nature of the claims being brought by the Claimant with the Claimant and Counsel for the Respondent.

<u>Fixed Term Employees Prevention of Less Favourable Treatment Regulations 2002.</u>

6. This had been described in my previous Order at paragraph 4(a) as a claim for less favourable treatment and/or dismissal as a fixed term employee. The Claimant confirmed her detriment claim relied on six acts of less favourable treatment as follows:

i. the Claimant was not offered a permanent contract whereas others were;
ii. the Claimant did not receive notice pay;
iii. the Claimant did not receive a redundancy payment;
iv. the Claimant missed out on furlough pay;
v. the Claimant was not made aware of permanent vacancies and;
vi. the Claimant was subject to marginalisation namely she was not involved in a trip to Llechwedd Slate Caverns and was excluded from training opportunities in Spring 2018.

7. It should be noted that the latter two acts of detriment were set out in the Claimant's Further and Better Particulars that were lodged with the Tribunal undated but received in compliance with the Order at paragraph 2.1 of the September 2020 Order.

8. Judge Powell found that there was a mutual expectation between the Claimant and the Respondent that the Respondent would offer the Claimant such work as would become available. In the year 2020 the Respondent had included her on the draft roster for the summer season of 2020 before making any offer of employment to the Claimant. Judge Powell found this expectation did not amount to any contractual undertaking or that it was evidence of an umbrella contract. He found that the last day on which the Claimant worked for the Respondent was 8 November 2019 (and this was the effective date of dismissal). The Claimant was next formally offered a contract by the Respondent by letter dated 20 March 2019 (it is common ground this should have read 2020) which offered her the opportunity to commence employment on 28 March on a zero hours basis.

9. At this Preliminary Hearing today I had an agreed bundle before me running to 81 pages. The Claimant joined by telephone and with agreement of the Respondent I heard evidence from the Claimant by audio only. The Claimant had submitted the same witness statement as for the previous Preliminary Hearing but this did not address the issues or circumstances to enable me to make findings on the time limits and accordingly it was agreed that the Respondent would undertake cross-examination and if there were any questions from the Tribunal necessary to elicit the evidence in accordance with Rule 41 that this would form part of the Claimant's evidence in chief with Mr McDevitt being given the opportunity to ask any further questions arising. It should be noted that the Claimant was unable to join the hearing by video and had telephoned in. Mr McDevitt informed me that this was in fact the procedure at the last Preliminary Hearing given the IT technical difficulties the Claimant finds, she does not have access to IT hardware or reliable broadband connection and the Respondent was content with this approach.

Findings of Fact

10. These are made against the previous findings of Judge Powell that the effective date of termination of the fixed term contract was 8 November 2019 and that this amounted to a dismissal. Judge Powell also found that there was an expectation by both the Respondent and the Claimant that the Claimant would be returning to her usual role in March 2020 but this did not amount to a contractual undertaking or umbrella contract.

11. Judge Powell made findings of fact regarding the contractual documentation before him at paragraphs 23 – 31.

12. In respect of the Claimant's last fixed term contract I make the following findings.

13. The Claimant signed an offer letter on 23 March 2019. This provided that the offer was for a “part time, fixed term appointment”. Further on it stated “Your employment is for a fixed term from Wednesday 27 March 2019 to Sunday 3 November 2019”. The offer was subject to other terms and conditions set out in the contract of employment which was enclosed with the letter. This was also signed by the Claimant on 23 March 2019.

14. The contract was dated 27 March 2019. It was titled “Terms and Conditions of Employment”. The employment commencement date was 27 March 2019. Under Section 11 it provided as follows:

“Termination of employment
11.1 You are employed on a fixed term contract, which will expire on Sunday 3 November 2019. Notwithstanding that this contract is fixed term; either party can terminate your employment by giving not less than one week’s notice in writing. In the Company’s case this could be for operational reasons, or for any reason that the Company deems appropriate.”

15. Notwithstanding the written terms the Claimant understood when she ended in November 2019 that she would be returning to work in March 2020 as she had done for many previous years. She thought signing the fixed term contract was a “formality” The Respondent had sent her on a first aid course and allowed her to retain keys. I accepted her evidence that in November 2019 she could not have been reasonably expected to know that she would not be returning in the Spring of 2020 as she had done for many years previously.

16. The Claimant accepted that she was sent a P45 and outstanding holiday pay around 26 November 2019. This had also happened in previous years.

17. On 20 March 2020 the Respondent wrote to the Claimant explaining that due to the COVID-19 outbreak that the railway had to curtail its operations for the foreseeable future and they were unable to offer her the position as a part-time Station Supervisor as they had done in previous years. The letter contained an offer for a zero hours fixed term appointment from 28 March 2020 to 30 October 2020. On 25 March 2020 the Claimant wrote to the Respondent by email. The Claimant stated as follows:

> **“Thank you for your letter of 20 March and your offer of possible employment later in the current season - I would welcome the opportunity to return.**
> **However I have been advised by my Union (TSSA) that as I have worked with you for more than 4 years any gaps in my employment can be viewed as “a temporary cessation of work”. This means that in employment law I am viewed as a permanent employee with the equivalent rights of other permanent workers.**
> **As such I will be a candidate for the Governments coronavirus job retention scheme (furlough leave) and thus receive 80% of my wage to secure my position once the crisis is over….**
>
> **… should this not be possible TSSA (The Union) have advised me that this would constitute a redundancy situation which will clearly need further consideration on both our parts”.**

18. I find that this email dated 25 March 2020 from the Claimant amounted to a claim for the payment by notice in writing given to the employer in accordance with S164 (1) (b) ERA 1996.

19. The Respondent replied by letter of 31 March 2020. The Respondent refuted that the Claimant had continuity of employment as a result of temporary cessation of work and advised that in order to qualify for the furlough she needed to have been on the payroll of 28 February 2020 and as her employment had ended in November 2019 she would not qualify for furlough or a redundancy payment.

20. The Claimant raised a formal grievance on 5 April 2020. She pointed out again that she had been advised that as she had been employed seasonally she should be classed as permanent staff and be treated in the same way as other permanent staff and gaps in her employment should be treated as a temporary cessation of work. She invoked a formal grievance on the basis that any employee on fixed term contracts for 4 years or more should automatically become permanent employees unless the employer could show objective justification. Further, the Claimant asserted she could not be legally excluded from the Statutory Redundancy Scheme even if they could show objective justification. The Claimant asserted she was not going to return the zero hours contract as upon the advice she had been given, she did not consider it to be the right course of action at that time. She wanted to resolve the issue informally and amicably but if not she had been advised by her Union that the next course of action was to pursue a claim of unfair dismissal and if so the Union would support her.

21. The Respondent replied on 15 April 2020. The letter effectively held the line that there was no temporary cessation between the fixed term contracts and that she had not become a permanent member of staff. Accordingly there was no right to be furloughed and she did not have 2 years continuous service and therefore was not entitled to bring a claim for unfair dismissal or statutory redundancy pay.

22. There was no mention of notice pay by either party.

23. Following receipt of this letter the Claimant told the Tribunal that her Union informed her mid April 2020 that due to the overwhelming demand on their services arising from the lockdown at that time they were unable to assist her further. She therefore sought advice from the Citizens' Advice Bureau initially by telephone and then exchanging a series of emails over a period between mid-April and the end of May 2020. Initially the only advisor that was able to assist her was on leave or on holiday. The Claimant told the Tribunal that everyone including the Citizens' Advice Bureau were working on the basis

that “the clock was ticking” from March 2020 which was why she left it until June to contact ACAS.

24. The Claimant was asked why she had waited until 3 June 2020 to contact ACAS to initiate the Early Conciliation procedure. The Claimant gave a number of reasons, she wanted to exhaust all possibilities and she was very anxious to resolve the dispute without going to, as the Claimant referred to it, an Industrial Tribunal. It was only when all other avenues had become exhausted that she decided to present a claim. However, as can be noted above, the Claimant knew as of 15 April 2020 that the Respondent were standing by their position. It was put to her that she knew by this point that she had “hit a brick wall” and she accepted this was the case. She explained she then contacted Citizens’ Advice Bureau and there was a lengthy process before they finally advised her. She understood now that that Citizens’ Advice Bureau helped with employment matters but had thought previously that they advised on consumer issues which is why she did not contact them until mid April 2020.

25. The Claimant accepted that she had internet access and that her daughter had previously helped her but was unable to do so after she was taken off of furlough and had to go back to work. She was unable to speak to a solicitor due to financial constraints. The Claimant has a mobile telephone with access to the internet but she does not have computer at home and is unable to do video calling. The Claimant’s evidence and I accepted her evidence on this, that she was understood the “clock was ticking” from March 2020. This cannot have been before 31 March 2020 as this was the first time the Respondent told the Claimant they refuted her assertion of having continuous employment in their letter of that date.

Findings of fact regarding date of alleged less favourable treatment

26. In respect of the dates of the alleged less favourable treatment for not being offered a permanent contract, the Claimant’s evidence, which I accepted was as follows. The Claimant alleged this occurred when the Respondent opened a station in Caernarfon at the start of the season in 2019. She was unable to say exactly when in 2019 this happened. She only became aware these staff had been offered permanent contracts in March 2020 when she was told by Ms Rowley. In addition that Ms Rowley had been given a permanent contract that had not been advertised in March 2018.

The Law

FTC Regulations 2002

27. Under Regulation 2 a 'fixed-term employee' means an employee who is employed under a fixed-term contract.

Regulation 3 provides:

3 Less favourable treatment of fixed-term employees

(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.**
(4) Paragraph (3)*(b)* is subject to regulation 4.
(5) In determining whether a fixed-term employee has been treated less favourably than a comparable permanent employee, the pro rata principle shall be applied unless it is inappropriate.
(6) In order to ensure that an employee is able to exercise the right conferred by paragraph (1) as described in paragraph (2)*(c)* the employee has the right to be informed by his employer of available vacancies in the establishment.
(7) For the purposes of paragraph (6) an employee is 'informed by his employer' only if the vacancy is contained in an advertisement which the employee has a reasonable opportunity of reading in the course of his employment or the employee is given reasonable notification of the vacancy in some other way.

Regulation 6 provides:

6 **Unfair dismissal and the right not to be subjected to detriment**

(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(2) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, of his employer done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are—

(a) that the employee—

(i) brought proceedings against the employer under these Regulations;

(ii) requested from his employer a written statement under regulation 5 or regulation 9;

(iii) gave evidence or information in connection with such proceedings brought by any employee;

(iv) otherwise did anything under these Regulations in relation to the employer or any other person;

(v) alleged that the employer had infringed these Regulations;

(vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations;

(vii) declined to sign a workforce agreement for the purposes of these Regulations, or

(viii) being—

(aa) a representative of members of the workforce for the purposes of Schedule 1, or

(bb) a candidate in an election in which any person elected will, on being elected, become such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate, or

(b) that the employer believes or suspects that the employee has done or intends to do any of the things mentioned in sub-paragraph (a).

(4) Where the reason or principal reason for dismissal or, as the case may be, ground for subjection to any act or deliberate failure to act, is that mentioned in paragraph (3)(a)(v), or (b) so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the employee is false and not made in good faith.

(5) Paragraph (2) does not apply where the detriment in question amounts to dismissal within the meaning of Part 10 of the 1996 Act.

Regulation 7 deals with the time limit for bringing a complaint to the Tribunal.

7 Complaints to employment tribunals etc.

(1) An employee may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 3, or (subject to regulation 6(5)), regulation 6(2).

(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—

(a) in the case of an alleged infringement of a right conferred by regulation 3(1) or 6(2), with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them;

(b) in the case of an alleged infringement of the right conferred by regulation 3(6), with the date, or if more than one the last date, on which other individuals, whether or not employees of the employer, were informed of the vacancy.

[(2A) Regulation 7A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (2).]

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2)(a)—

(a) where a term in a contract is less favourable, that treatment shall be treated, subject to paragraph (b), as taking place on each day of the period during which the term is less favourable;

(b) a deliberate failure to act contrary to regulation 3 or 6(2) shall be treated as done when it was decided on.

(5) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of paragraph (4)(b) to decide not to act—

(a) when he does an act inconsistent with doing the failed act; or

(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to have done the failed act if it was to be done.

(6) Where an employee presents a complaint under this regulation in relation to a right conferred on him by regulation 3 or 6(2) it is for the employer to identify the ground for the less favourable treatment or detriment.

<u>Notice Pay claim</u>

28. Rule 7 of the Employment Tribunal Extension of Jurisdiction Order 1994 provides:

7 Time within which proceedings may be brought

[Subject to [[article 8B]], an employment tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

[(ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).]

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

Redundancy pay claim

29. S164 ERA 1996 provides:

164 Claims for redundancy payment

(1) An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date—

(a) the payment has been agreed and paid,

(b) the employee has made a claim for the payment by notice in writing given to the employer,

(c) a question as to the employee's right to, or the amount of, the payment has been referred to an employment tribunal, or

(d) a complaint relating to his dismissal has been presented by the employee under section 111.
(2) An employee is not deprived of his right to a redundancy payment by subsection (1) if, during the period of six months immediately following the period mentioned in that subsection, the employee—

(a) makes a claim for the payment by notice in writing given to the employer,

(b) refers to an employment tribunal a question as to his right to, or the amount of, the payment, or

(c) presents a complaint relating to his dismissal under section 111,

and it appears to the tribunal to be just and equitable that the employee should receive a redundancy payment.

(3) In determining under subsection (2) whether it is just and equitable that an employee should receive a redundancy payment an employment tribunal shall have regard to—

(a) the reason shown by the employee for his failure to take any such step as is referred to in subsection (2) within the period mentioned in subsection (1), and

(b) all the other relevant circumstances.

[(4) ....

[(5) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsections (1)(c) and (2).]

Conclusions

FTC claims

30. In relation to the alleged acts of less favourable treatment: failure to pay redundancy pay and furlough pay I have concluded these claims fail as the Tribunal does not have jurisdiction to hear them. The Respondent decided not to make these payments on or by 31 March 2020 as this was the date they told the Claimant they would not be doing so. At the time these acts occurred the Claimant was not a fixed term employee of the Respondent and therefore cannot bring the claims under Regulation 2. In accordance with Judge Powell's findings of fact, the Claimant was not employed at the time of the less favourable treatment and therefore the claims must fail. She has no standing on which to make the claims as she was not an employee and the Regulations require her to be so. In my judgment time cannot be extended for a claim that arises when the Claimant does not have the locus standi to bring the claim in the first place.

31. In relation to the less favourable act of failing to pay notice pay. This is more complex. Mr McDevitt submitted that the Claimant's fixed term contract had always provided for a period of notice which was effectively served during the duration of the fixed term. The Claimant was informed in the contract her employment would end when she signed the contract on 23 March 2019. However, factually, this was not the less favourable act complained of. The less favourable act complained about is the decision taken by the Respondent, also on 31 March 2020 not to pay the Claimant notice pay. This was not because she had already had her notice pay by serving the fixed term contract in 2019. This was because the Respondent asserted she was not so entitled as she did not have continuity of employment. I therefore find that the relevant date for limitation purposes for the failure to pay notice pay was also 31 March 2020 and as such this must also fail for the same reasons as set out in paragraph 30.

32. In relation to the other acts relied on as less favourable treatment I conclude as follows. In respect of not being offered a permanent contract these claims are also substantially out of time. The Claimant relies on events in 2019 using the employees who she says were offered permanent contracts at Caernarfon. There was a lack of specificity as to when in 2019. The Claimant was not aware of these events until March 2020. The comparison with Ms Rowley is even more out of time as that occurred in in March 2018. The

alleged marginalisation from 2016 onwards culminating with exclusion from a trip to Llechwedd Slate Caverns in Spring 2018 and was excluded from training opportunities at the same time.

33. I did not hear any evidence on why it would be just and equitable to extend time for these claims and why they had not been brought sooner. The focus of the evidence was on issues of practicability after March 2020 which was long after time expired for these claims. I therefore dismiss these claims.

<u>Notice pay</u>

34. Claims for notice pay must be presented within 3 months beginning with the effective date of termination of the contract unless it was not reasonably practicable. Judge Powell held that the effective date of termination was 8 November 2019 giving a primary limitation date of 7 March 2020. The Claimant did not contact ACAS until 3 June 2020 and lodged her claim on the same date.

35. The Claimant's submission was (by way of her evidence) that the Respondent told her in March 2020 she did not know and could not reasonably have been expected to know that she was no longer an employee as of 8 November 2019. She had returned every year in the Spring since 2007. She relied upon her subsequent efforts to resolve the issue and obtain advice as set out in paragraphs 19, 21 – 23 as reasons why it had not been reasonably practicable to have presented the claim and that she had presented the claim within such further period as was reasonable.

36. Mr Mc Devitt submitted that the claim for notice pay was wholly without merit as she had already received her notice pay during the duration of the 2019 fixed term contract. In other words the 12 weeks statutory notice to which she was entitled had been served in the fixed term duration of the 2019 contract. I do not agree this is settled. The Claimant, by virtue of Regulation 8 and Judge Powell's finding she had continuous employment between 16 April 2018 – 8 November 2019 must have become a permanent employee as she had been employed for more than four years on a series of successive fixed term contracts. Such employees normally acquire the minimum statutory notice periods as set out under S86 Employment Rights Act 1996. We have not heard any evidence nor has the Claimant had the opportunity to prepare for this aspect of her claim. It is not at all clear to me whether the 2019 contract satisfied that requirement and duly provided for the statutory minimum notice period. For these reasons this needs to be listed for a full merits hearing.

37. I have concluded that it was not reasonably practicable for the Claimant to have presented her claim within the requisite time period. This is because the Claimant did not know and could not reasonably have been expected to know

she had been dismissed on 8 November 2019 and that time had started to run. She had returned to work after this break every year since 2007 and had every expectation she would do so in 2020 as did the Respondent who trained her in first aid at the end of the 2019 season and allowed her to retain keys. It cannot be reasonably practicable to present a claim in these circumstances. I also find it was reasonable for the Claimant to have been ignorant that she had been dismissed.

38. The Claimant later became aware that the Respondent were not going to offer her the same contract as previously and they were not going to agree she had continuity of employment by 15 April 2020 when she received the Respondent's response to her grievance. She then sought advice and experienced difficulty obtaining advice from her union and then the CAB for a number of reasons that were beyond her control. I have also taken into account her limited ability to be able to undertake her own research at home with her limited IT skills and resources as well as the impact on the pandemic at that time on her ability to obtain advice. I accepted that the Claimant had limited or no understanding of time limits and that this was reasonable ignorance given the factors above limiting her ability to obtain advice and do her own research. As soon as the Claimant contacted ACAS on 3 June 2020 she promptly took steps lodging the ET1 that day. I find this was a within a further reasonable period.

39. The claim for notice pay may therefore proceed.

<u>Unfair Dismissal claim under Regulation 6</u>

40. This was a matter that was due to be addressed at this hearing (see Judge Powell's order dated 6 January 2021 (a) (i)) and my order dated 3 September 2020 at paragraph 4 (a). Judge Powell had refused an application to amend the claim so as to add an ordinary unfair dismissal claim.

41. My note of the hearing recorded that the Claimant was not pursuing this claim but regrettably this was not returned and a matter I overlooked to seek a clear position from the Claimant. I did so after the hearing by writing to the parties.

42. Understandably no submissions were made in respect of the time point for the unfair dismissal claim brought under Regulation 6 of the Fixed Term Employee Regulations 2002 by Mr McDevitt.

43. Mr McDevitt confirmed that his note also recorded that the Claimant had advised she was bringing detriment and not dismissal claims. In the alternative he made further written submissions on the time point.

44. The Claimant also made further written submissions. It is clear to me from those submissions that the Claimant had not understood the difference

between an “ordinary” unfair dismissal claim under S98 ERA 1996 (which Judge Powell refused an application to add) and her claim brought under the FTC Regulations, which is a live claim before the Tribunal.

45. Although the Claimant states she was not pursuing her FTC claim at the hearing I have concerns that to record and treat this as a withdrawal would not be in the interests of justice because:

    - It was not at all clear from the words used that the Claimant intended to withdraw this claim and the Claimant’s letter after the hearing makes it clear she wishes to pursue it;
    - It has been lodged as a valid claim (as evidenced in previous orders) and it would not be in the interest of justice to treat the Claimant’s comment at the hearing as amounting to a withdrawal;
    - The Claimant is a litigant in person;
    - It is clear the Claimant has not been in a position to understand the difference between the two unfair dismissal claims and there are important legal differences.

46. I turn now to deal with whether the claim can be pursued given the time points.

47. Given the finding that the dismissal took effect on 8 November 2019 this is the point at which time started to run. For the same reasons at paragraphs 36-38 I conclude it would be just and equitable to extend time as the Claimant did not know she had been dismissed and she subsequently presented a claim within a further reasonable period.

48. Mr McDevitt submits that I should not extend time as the claim has no merit. He submits that given the dismissal is found to have occurred on 8 November 2019 it cannot have been caused by matters in Regulation 6 (3) as they were no such matters arising at that time. The effect of Judge Powell’s finding on the effective date of termination must mean that the reason for the dismissal was the expiry of the last in a series of fixed term contracts.

49. When considering the reason or principal reason for dismissal a Tribunal is required to establish the reason by hearing evidence about the true reason for the dismissal and what motivated the employer at the time. There are two choices here. Either Judge Powel’s finding on the effective date of termination requires an assessment of the reasons at that point in time (and I agree the circumstances at that time point towards the reason for the dismissal being the expiry of the fixed term contract) or the reason is somehow considered retrospectively. The basis of this argument is that the Respondent certainly behaved as if there was an expectation that the Claimant would return to work and arguably, according to the Claimant’s case, the Respondent only then

changed their mind due to the pandemic and that they regarded her as not a permanent employee.

50. I have concluded that given the finding on the effective date of termination, there cannot be a form of retrospective examination for the reasons for the dismissal, as it must be assessed at the date it has been found to have occurred. I further agree that the chronology does not support the dismissal being caused by the protected conduct in 6 (3) in any event. 6 (3) requires the employee to do "something" in connection with the Regulations (i.e. any of the conduct set out at 3 (a) (i) – (viii) or the employer must believe or suspect the employee intends to do that "something" to establish that that conduct is the reason or principal reason for the dismissal. The Claimant in this case had not done anything that could amount to the conduct prescribed in sub paragraph (a) before she was dismissed.

51. For these reasons I must also find that I cannot extend time for a claim that is bound to fail as it would not be just and equitable to do so. This would require a finding of reason for the dismissal which simply cannot have existed at the effective date of termination.

Redundancy pay

52. The right to receive a redundancy payment is set out in S135 ERA 1996. It arises if the employee is dismissed for reasons of redundancy.

53. The redundancy pay claim was in time as the Claimant made a claim for redundancy in her letter dated 25 March 2020.

54. However given my findings on the reason for dismissal, the Claimant cannot have been dismissed for reasons of redundancy. This claim is also bound to fail. For these reasons I have directed that a strike out warning is issued to the Claimant. The preliminary hearing was not listed to deal with any strike out and to proceed to do so without giving the Claimant the opportunity to read my decision and respond would not be in accordance with the rules.

55. I recognise that by the factual circumstances of this case and the effective date of termination being 8 November 2019 that the Claimant finds herself unable to pursue the FTC claims and redundancy pay claims even though the Claimant did not know and in my judgment could not reasonably have been expected to know she had been dismissed and as such was no longer a fixed term employee, thus depriving her of the ability to pursue these claims any further.

Employment Judge S Moore
Dated: 30 July 2021

JUDGMENT SENT TO THE PARTIES ON 2 July 2021

………………………………………………
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.