



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Dr Emmeline Hall

Newcastle University

Heard at: Newcastle CFT On: 6th, 7th, 8th and 9th June 2022

Before: Employment Judge G Johnson

Members: Mr A Egerton

Dr D B Tirohl

Representation:

Claimant: In Person

Respondent: Mr R Dunn, of counsel

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.
2. The claimant's complaint of being subjected to less favourable treatment on the grounds of being a fixed term employee is not well founded and is dismissed.

REASONS

1. The claimant conducted this hearing herself, gave evidence herself but did not call any other witnesses. The respondent was represented by Mr Dunn of counsel who called to give evidence Professor Robert Edwards (Head of School of Natural and Environmental Sciences) and Miss Clare Brunton (People's Services Business Partner). The claimant and both witnesses for the respondent had prepared typed and signed witness statements, which were taken "as read" by the Tribunal, subject to questions in cross-examination and questions from the Tribunal. There was an agreed bundle of documents marked 'R1', comprising an A4 ring binder containing 391 pages of documents.
2. By claim form presented on the 29th March 2021, the claimant brought complaints of unfair dismissal and less favourable treatment on the grounds that she was a "fixed term employee", contrary to Regulation 3 of the Fixed Term Employees (Protection from less favourable treatment) Regulations 2000.

The respondent defended the claims. The respondent's position is that the claimant was fairly dismissed for reasons relating to redundancy and that no part of the process which led to that dismissal was tainted by less favourable treatment on the grounds of being a fixed term employee. The claimant challenges her selection for redundancy on the basis that there was not a true "redundancy situation" within the definition set out in Section 139 of the Employment Rights Act 1996 and that the identification of the pool from which selection for redundancy would be made was also unfair. The claimant does **not** challenge the criteria by which selection from that pool would be made, nor does she challenge the scores which were allocated to her following a competitive interview for the remaining posts. The claimant does not challenge the process of consultation which led up to the redundancy selection process and finally does not challenge the fairness of the respondent's attempts to obtain alternative employment for her. The claimant alleges that she and the other fixed term employees were treated less favourably because the decision to implement redundancies was materially influenced by the number of fixed term employees within the department and the decision as to whom would be in the pool from which selection would be made, was materially influenced by the number of fixed term employees within the department.

3. Having heard the evidence of the claimant and the two witnesses for the respondent; having examined the documents in the bundle to which it was referred and having carefully considered the closing submissions of Miss Hall and Mr Dunn, the Tribunal made the following findings of fact on a balance of probabilities.
4. The claimant was employed by the respondent as a lecturer in the School of Natural and Environmental Sciences ("SNES"). The claimant was employed under a fixed term "teaching and scholarship" contract. The claimant had originally been employed from 1st July 2014 and that employment thereafter continued under a series of fixed term contracts. The claimant's last contract expired on 31st October 2020, following a re-organisation within SNES, which led to a reduction in the number of lecturers in that School.
5. The claimant worked as a Grade F lecturer, undertaking teaching and scholarship work. Another category of Grade F lecturers undertook teaching and research work. The key difference between the two is that staff engaged on T&R contracts are expected to conduct research where as those on T&S Contracts are not contractually obliged or expected to.
6. As a Grade F TNS lecturer, the claimant was required to deliver teaching and to contribute to the development of programmes, which Professor Edwards described as a more "junior" teaching role than that of a Grade G Lecturer, which is a more senior appointment which involves designing new modules, undertaking research and applying for funding. Professor Edwards' evidence (which was not challenged by the claimant) was that Grade G Lecturers hold more senior academic management roles.
7. At the beginning of the October 2019 term, SNES had 9 Grade F Lecturers (7.85 Full time equivalent). Of those 9 Lecturers, 3 were on permanent contracts and 6 were on fixed term contracts.
8. SNES undertook an annual review of its workforce as part of part of the Faculty's budgetary requirements. At that time SNES had a financial deficit in

excess of £1m and was required to take steps to reduce that deficit. As part of that review, it was identified that SNES could reduce the number of Grade F T&S Lecturers from 7.85 full time equivalent to 5.85 full time equivalent. That effectively meant a reduction of 2 full time equivalent posts. The evidence of the respondent's witnesses was that in August/September 2019, SNES carried out an initial assessment of teaching and teaching related activities, which involved looking at the workload allocation model, student numbers planning and the amount and level of teaching to be delivered. It was agreed that the requisite standard of teaching could be delivered with a reduced number of Grade F T&S Lecturers.

9. One of the difficulties encountered by SNES in preparing its annual budget, was that there was no ongoing budgetary provision for fixed term contract employees. In simple terms, the budget contained provision for those employees up to the end of their fixed term contract, but nothing beyond that. This meant that frequent applications had to be made for provision to be made in the annual budget to extend the contracts of those fixed term employees. SNES also considered that repeated fixed term contracts were disadvantageous to those employees, in that it was more difficult for them to plan their careers and did not provide employment stability or stability of teaching provision, which in turn, could adversely impact on student experience. The Tribunal accepted the respondent's evidence that there was a preference for permanent contracts from the point of view of the university as an employer and from the employees themselves. Indeed, the claimant's evidence was that she would have preferred to have been working on a permanent contract, rather than a fixed term contract.
10. For those reasons, the respondent decided that it would create 5.85 full time equivalent Grade F TNS Lecturers, all of which would work on permanent contracts. The effect of that decision was that there would be a reduction from 7.85 to 5.85 full time equivalent roles, effectively a reduction of 2 full time equivalents.
11. Following a lengthy and detailed consultation period with the UCU Trade Union, it was decided that 2 full time equivalent roles would be made redundant. It was further decided that all Grade F T&S Lecturers in the SNES would be put in a single pool, from which selection would be made for those 5.85 full time equivalent roles. Those to be placed in the pool included all those working on permanent contracts and all those working on fixed term contracts. The only Grade F T&S Lecturer in the SNES who was not included in the pool, was the one who specialised in Food Marketing. That was identified as being a specialised skill with specific qualification requirements. Only one Grade F T&S Lecturer had those qualifications and skills and the respondent decided that this Lecturer should be excluded from the pool for those reasons. The claimant challenged that decision, but did not provide any meaningful explanation for her challenge. The Tribunal accepted the Respondent's explanation that this role was one which required specialised skills and it was reasonable to exclude it from the pool.
12. Before the selection process began, one of the Grade F T&S Lecturers was dismissed for reasons relating to conduct. As a result, only one full time equivalent role needed to be made redundant from the remaining pool.

13. Following the identification of the pool, a selection criteria was determined by the respondent and the selection process took the form of an interview for one of the remaining Grade F T&S Lecturer posts. Points were awarded depending on performance at the interview. Interviews took place on 18 March 2020. Of all those who were interviewed, the claimant scored the lowest number of points. The claimant has not challenged the criteria adopted by the respondent, nor has she challenged the scores she was allocated in the interview process. The claimant accepts that full and fair consultation took place with the Trade Union prior to the decision to implement redundancies, in connection with the identification of the pool and the identification of the criteria.
14. Part of the claimant's challenge to the fairness of the pool itself, was that Grade G T&S Lecturers should also have been included. The claimant's evidence in this regard, was that, due to the length of time she had worked for the respondent, she was capable of working to Grade G and had in fact been undertaking some of the roles associated with a Grade G Lecturer. Indeed, after she had been served with notice of termination on the grounds of redundancy, the claimant was told that she was being promoted to Grade G as part of the respondent's employee improvement programme. The respondent's position was that at the time the reorganisation took place, it was decided to exclude Grade G Lectures from the pool because they were undertaking more senior roles with different duties and it would have had a disproportionately adverse impact on the department if a much larger number of lecturers had been included in the pool from which the selection was to be made. The Tribunal accepted that this was a fair and reasonable business decision taken by the Respondent and one which some reasonable employers in all the circumstances may have taken.
15. The claimant challenged whether the real or principal reason for her dismissal was because the respondent's requirements for employees to carry out work of a particular kind had actually ceased or diminished. The claimant insisted that the work she had previously been doing was subsequently being done by other employees, including some who had been engaged after the decision was made to terminate her employment. The claimant challenged whether there was a need for the respondent to implement redundancies at that particular time. The claimant gave two examples (Dr Pattinson and Dr Jenson) whom she alleged were engaged after her dismissal, to undertake duties she had been previously undertaking. The Tribunal accepted the respondent's evidence that Dr Jenson was not engaged until the start of 2021, after the claimant had been dismissed. Dr Pattinson was already employed by the respondent before October 2020 and was in fact undertaking teaching and research duties at Grade G. The Tribunal accepted the respondent's evidence that Dr Pattinson and Dr Jenson subsequently undertook only a small part of the duties which had previously been undertaken by the claimant.

The Law

16. The relevant statutory provisions in the claims brought by the claimant are contained in the Employment Rights Act 1996 and the Fix Term Employees (prevention of unfavourable treatment) Regulations 2002.

Employment Rights Act 1996

Section 94 - the right not to be unfairly dismissed.

- (1) An employee has the right not to be unfairly dismissed by his employer
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 – 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 – 239).

Section 98 – General

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
 - (a) the reason (or, if more than one, the principal reason for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it –
 - (a) relates to the capacity or qualification of the employee for performing work of the kind which he was employed by the employer to do.
 - (b) relates to the conduct of the employee
 - (c) is that the employee was redundant, or
 - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or in that of his employer) or a duty or restriction imposed by or under an enactment.
- (3) In subsection (2)(a) –
 - (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
 - (b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
- (4) [where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the dismissal is fair or unfair (having regard to the reason shown by the employer) –
 - (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.
- (5) ...
- (6) [Subsection (4)] [is] subjected to –
 - (a) sections [98A] to 107 of this Act, and

- (b) sections 152, 153, [238 and 238A] of the Trade Union and Labour (Consolidation) Act 1992 (dismissal on the ground of trade union membership or in connection with industrial action).

Section 139 Redundancy

- (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
 - (a) the fact that his employer has ceased or intends to cease –
 - (i) to carry on the business for the purposes of which the employee was employed by him, or
 - (ii) to carry on that business in the place where the employee was so employed, or
 - (b) the fact that the requirements of that business –
 - (i) for employees to carry out work on a particular kind, or
 - (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer.
- Have ceased or diminished or are expected to cease or diminish.

FTE Regulations 2002 R.33

- (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 –
 - (b) by being subjected to any other detriment by any act or deliberate failure to act of his employer
- (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) Objective justification
 - (1) Where a fixed term employee is treated by his employer less favourably than the employer treats a comparable permanent employee as regards any term of his contract, the treatment in question can be regarded for the purposes of Regulation 3(3)(b) as justified on objective grounds if the terms of the fixed term employees contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment.
- (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).

- (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) Allege that the employer had infringed these Regulations.

17. The claimant's first challenge in these proceedings is to whether there was a true "redundancy situation" as defined in **S.139 above**. In simple terms, the claimant challenged whether there was a real business need to reduce the number of Grade F T&S Lecturers within SNES. As is quite common in cases of this nature, the claimant appeared to conflate the level of work with the number of employees required to undertake that work. What matters is the number of employees required to undertake that amount of work. The wisdom or otherwise of the employer's decision to implement redundancies is not one which ought to be challenged, or even examined by the Tribunal, unless there is a clear and obvious alternative reason for the dismissal. The question is, "What was the reason for the dismissal?", not, "What was the reason for the redundancy?". The Tribunal must ask itself whether the dismissal was attributable to a diminution in the employer's requirements for employees to undertake work of a particular kind. If the Tribunal is so satisfied, then there is a true redundancy situation. The Tribunal need only then consider whether the principal reason for the dismissal was because the employee's role was redundant.
18. The Tribunal accepted the evidence of Professor Edwards and Miss Brunton with regard to the reorganisation of SNES in 2019. The Tribunal accepted their evidence about how it had been identified that the necessary level of teaching at the appropriate level could be undertaken by fewer Grade F T&S Lecturers. The requirements of the business for employees to carry out work of that particular kind had diminished or were expected to do so. The definition of "redundancy" in **Section 139** was therefore satisfied.
19. The Tribunal accepted the evidence of Professor Edwards and Miss Brunton about how it had approached the identification of the pool of employees from which selection would be made for the newly created permanent roles. All the Grade F T&S Lecturers were included in the pool. That included both permanent employees and those working on fixed term contracts. There was no difference in the treatment of those two categories and thus there could be no less favourable treatment of the fixed term employees.
20. The Tribunal found that some reasonable employers may have limited the pool to the Grade F T&S Lecturers, excluding the Grade G Lecturers. The Tribunal accepted that the respondent had properly addressed its mind whether the Grade G Lecturers should be included and had good business reasons for excluding them. It is not the Tribunal's function to interfere with those genuine

business reasons. Some reasonable employers would have excluded the Grade F Lecturer who specialised in Food Marketing, as there were sound business reasons for so doing. Again, the Tribunal did not look behind those sound business reasons, as it was satisfied that the respondent had properly addressed its mind to them.

21. Accordingly, the Tribunal found no fault with the respondent's decision to limit the pool from which selection would be made, to all Grade F T&S Lecturers in the SNES. The claimant's challenge to the identification of that pool is not well founded.
22. The claimant alleges that she was subjected to a detriment by being placed in the pool from which the selection was to be made, because she was a fixed term employee. The Tribunal accepted that part of the respondent's business reasons for the reorganisation was to reduce or eradicate the number of employees on fixed term contracts. The respondent's reasons for so doing were to facilitate better budget planning and to enable those on fixed term contracts to better partake in career progression within the university. The pool contained all the fixed term employees and all those working on permanent contracts. There was no difference whatsoever in treatment between those two categories. Accordingly, the fixed term employees were not treated less favourably than those on permanent contracts. The claimant's contention that she was treated less favourably on the grounds that she was a fixed term employee is therefore not well founded.
23. The claimant was not placed in the pool from which selection was made because she was a fixed term employee. She was placed in the pool along with all others who were Grade F T&S Lecturers in SNES. She was treated in exactly the same manner as the others. The claimant was not selected from that pool because she was a fixed term employee. She was selected because she scored the least of those who were interviewed, including the fixed term employees and permanent employees.
24. For those reasons the claimant's complaints of unfair dismissal and being subjected to detriment on the grounds that she was a fixed term employee are not well founded and are dismissed.

Employment Judge G Johnson

Date: 20 July 2022