EMPLOYMENT TRIBUNALS

Claimant:		Respondent:
Mrs S Bashir	v	Star Academies

Heard at:	Reading (by CVP)	On: 16 December 2022
Before:	Employment Judge Anstis Mrs A E Brown Ms B Osborne	

Appearances

For the Claimant: In person

For the Respondent: Ms K Barry (counsel)

RESERVED JUDGMENT

The respondent must pay the claimant a net amount of £21,630 as compensation for breach of the Fixed-Term Employees (Protection of Less Favourable Treatment) Regulations 2002.

REASONS

A. INTRODUCTION

Introduction

1. This is our reserved decision on the remedy that follows from our liability judgment of 30 June 2021

The hearing

2. On 11 December 2022 the claimant made an application to postpone this hearing. We considered the application at the start of the hearing, but, having given our decision that we would not postpone the hearing, the claimant indicated that this was not an

application she was pursuing and that she was willing to proceed with the hearing today, so we will say no more about that.

3. This hearing arises in difficult circumstances, which have been set out in previous tribunal orders. In particular, it is the claimant's position that the contract which contains a four-week notice period is a forgery and that her true fixed-term contract has no provision for early termination at all.

4. As we have previously observed, if that is the case, then our decision in her favour under the Fixed-term Employees Regulations cannot stand, since it is made on the basis that the inclusion of a four-week notice period in her fixedterm contract was less favourable treatment when compared to the term's notice that would be included in the contract of a comparable permanent employee. If there was no notice period at all in her fixed-term contract then that would not amount to less favourable treatment – or at least not the less favourable treatment that we have found she was subject to.

5. There was considerable discussion about this at the start of the hearing, although the claimant was eventually prepared to proceed on the basis of our liability finding. We must proceed today on the basis that our original liability decision was correct but understand that there may be an appeal or appeals outstanding which may to some extent relate to the "forgery" issue, the question of her true contract and other matters, including questions in relation to recusal of the employment judge. We take the claimant's eventual willingness to proceed with this hearing as being without prejudice to the position she may adopt in those appeals. In other words, her willingness to proceed today is not intended as any concession that our liability decision was correct or that the employment judge should be permitted to continue his involvement in her case.

6. We heard evidence from the claimant and Mr Musa. The claimant's witness statement was wide ranging and touched on some of the matters that are subject to appeal. Ms Barry chose not to cross-examine the claimant on her witness statement, seeing nothing there that was relevant to the remedy decision we had to make today. As with the claimant's willingness to proceed with the hearing, we do not see this as being any concession that the claimant is correct in what she says about matters that are subject to appeal.

7. Finally, a theme in the claimant's arguments since the liability hearing has been that the respondent's witnesses have lied under oath and, possibly, that its lawyers have committed some form of professional misconduct. We will later give our views on the evidence that we heard, but we record that we do not see that any question of professional misconduct or perjury arises in respect of the evidence that we have heard at this hearing.

8. At the end of the hearing the claimant indicated that she should now be treated as representing herself and that this reserved judgment should be sent to her directly rather than to her former representative.

B. THE LAW AND RELEVANT ISSUES

9. We are to award the claimant a remedy for our finding that:

> "The respondent acted in breach of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 by including in the claimant's contract of employment a term concerning notice that was less favourable than that of a comparable permanent employee."

10. It is not in dispute that the comparison in this case is between a four-week notice period and a term's notice. In the Burgundy Book, a term's notice means a minimum of two months' notice ending on 30 April, three months' notice ending on 31 August and two months' notice ending on 31 December. Thus the dates on which notice is to be given are by 28 February (for 30 April), 31 May (for 31 August) and 30 October (for 31 December). We accept Mr Musa's evidence that these dates would be well known to anyone working in education.

11. The relevant provisions of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 are at regulation 7:

> "(7) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable …
>
> (b) ordering the employer to pay compensation to the complainant ...
>
> (8) Where a tribunal orders compensation under paragraph 7(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to:
>
> (a) the infringement to which the complaint relates, and
>
> (b) any loss which is attributable to the infringement.
>
> (9) The loss shall be taken to include:
>
> (a) any expenses reasonably incurred by the complainant in consequence of the infringement, and
>
> (b) loss of any benefit which he might reasonably be expected to have had but for the infringement.
>
> (10) Compensation in respect of treating an employee in a manner which infringes the right conferred on him … shall not include compensation for injury to feelings."

12. We make the following observations on that:

12.1. This is a case in which it is just and equitable to award compensation. The respondent did not suggest that we should be limited to the declaration

previously made. The question is what the amount of that compensation should be.

12.2. Despite the claimant's arguments on the point, there is no room for making an award of injury to feelings in this case. That is specifically precluded by regulation 7(10).

12.3. The claimant's schedule of loss and witness statement sought wideranging losses including in relation to things like pay rises, the costs of her training, damage to her health, her career and so on. We do not see that these are properly awardable in respect of the fixed-term employees claim. Even if they were there is nothing to suggest that the difference in notice period made any difference on these points. Her general complaints of mistreatment by the respondent and the long-term consequences of that for her do not relate to the question of notice periods or her status as a fixed-term employee, but relate to the wider aspects of her claim.

12.4. We do not see any question of an uplift for failure to follow the ACAS Code of Practice arises when we are awarding compensation for the difference in contractual terms between a fixed-term employee and a permanent employee.

12.5. The claimant's schedule of loss and witness statement also suggests a claim for legal costs, but this would require a formal application for costs which, as far as we are aware, has not been made.

13. Just and equitable compensation in this case must be based on the difference between the fixed-term and permanent employees' contracts – that is, the difference between the four-week notice period and the term's notice provided for in the Burgundy Book.

14. In an attempt to assist the parties we had included our provisional view on this in the liability judgment, and it is set out as follows:

> "The approach to remedy for a breach of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 is set out in regulation 7 of those regulations. We note that in accordance with regulation 7(8) any award of compensation is assessed on a "just and equitable basis", and that under regulation 7(10) an award of compensation for injury to feelings cannot be made. While we have not formed any concluded view, the tribunal's provisional view on this is that, subject to any question of mitigation (regulation 7(11)), the starting point for any award of just and equitable compensation would appear to be what the claimant would have received if her notice period had been as it was for a comparable permanent employee (i.e. under the Burgundy Book). We have no concluded view on this and will consider all submissions made by the parties at the remedy hearing, but set out our provisional view in case it assists the parties in preparing for the remedy hearing."

15. We had wondered whether any question in relation to sick pay needed to be considered by us, given that the claimant was off sick at the time of her dismissal and had been off sick for some time previously. However, Mr Musa said in his evidence that anyone under notice would always receive full pay, so that point does not arise.

16. We had raised the question of mitigation in our provisional view, but it was not any part of the respondent's case that the claimant had failed to mitigate any loss. The respondent's case proceeded entirely on the basis that if the claimant had been employed on a term's notice she would have been given notice of dismissal earlier.

C. OUR DECISION

17. In his witness statement, Mr Musa cited extracts from our liability judgment to the effect that in March 2018 the respondent had decided to end the claimant's employment. He went on to say:

> "As the decision to dismiss the Claimant had been made in March 2018, had the Claimant been a permanently employed member of staff, she would have been served notice to terminate her employment by 31 May 2018 in order that her notice would have ended by 31 August 2018.
>
> Whilst the Respondent would have been sympathetic to the Claimant's mental health position at the time, it was in the Olive School['s] best interests to end the working relationship with the Claimant and have a new Deputy Head Teacher in post ready for the new term, starting in September 2018."

18. This is a proposition that we found difficult to accept for a number of reasons.

19. First, it seems questionable whether this is a proper response to a claim of this nature. It is, of course, the fault of the respondent that the claimant's contract did not comply with the Fixed-Term Employees Regulations, and it seems difficult for them to then say that if they had done things properly they would have given the claimant notice of dismissal earlier. We are, however, persuaded by Ms Barry's submission that consideration of "just and equitable" compensation can encompass an argument of this nature.

20. Beyond that, the extracts from our judgment that Mr Musa relies on do not refer to a decision having been taken to dismiss the claimant. It is a decision that her employment should be brought to an end, but the means by which it was to be brought to an end remained to be established. This was in some ways a repeat of the position as it was in November 2017, where Ms Park attempted a "without prejudice" discussion with the claimant. Nothing had come of that and the claimant remained employed by March 2018. In some respects it could be said that the respondent was slow to dismiss the claimant. It preferred to try to address matters in different ways, possibly through the use of a settlement agreement. There is nothing in our judgment or the surrounding materials to suggest that the respondent was looking for the earliest opportunity to dismiss the claimant.

21. Lest allegations of perjury be made, we record that we do not consider that Mr Musa was attempting to mislead us, but we do find that his evidence is flavoured with a degree of hindsight that was not present at the time and did not accord with the respondent's actions at the time. The respondent was slow to dismiss the claimant. It was not eager to dismiss her at the earliest possible opportunity in order to save money or for the sake of greater efficiency. We do not accept that that with a longer notice period the claimant would have been notified of her dismissal any earlier. Our finding is that compensation should be assessed on the basis that the claimant was notified of dismissal on the date she was actually notified of dismissal, but subject to the extended notice period in the Burgundy Book.

D. CALCULATIONS

22. The calculations that follow will not be exact, but it is the nature of "just and equitable" compensation that broad figures may be appropriate.

23. The claimant was dismissed with pay in lieu of four weeks' notice on 9 July 2018. The effect of our findings is that the claimant is due just and equitable compensation based on what would have been her earnings and benefits (including pension contributions) if paid in lieu of a notice period that stretched from 9 July 2018 to 31 December 2018, rather than for four weeks from 9 July 2018.

24. There was no discussion or evidence from either side during the hearing as to the calculations that may then follow, but we have a schedule of loss from the claimant and a counter-schedule from the respondent that we can use as the basis of our calculations.

25. From 9 July 2018 to 31 December 2018 is 25 weeks, of which 4 weeks were paid by the respondent, so the claimant's compensation is 21 weeks' pay and benefits.

26. The claimant's schedule of loss puts her gross weekly pay at £1,189.00 and her net weekly pay £763.60. She says that her employer made a 23.68% pension contribution. The respondent's counter schedule gives figures of £1,161.08 gross and £827.65 net, along with a £829.16 figure for monthly pension contributions. If £829.16 is the pension contribution figure that is far short of the 23.68% contended for by the claimant. It is more like 16.4%. Neither side have cited evidence in favour of their contentions on the pay figures. Both schedules proceed on the basis that the calculation (and our eventual award) should be made on the basis of net earnings.

27. Given the lack of evidence from either side in support of their calculations, we consider we can do little more than work on the basis of a mid-point between the two figures, rounded a little for ease of calculation. On that basis we will take it that the claimant had net weekly earnings of £795, with 20% pension contributions calculated on gross weekly earnings of £1,175.00 (which adds £235 to the net weekly figure). The effective loss of earnings that we have to compensate for is therefore £1,030.00/week, and this applies across 21 weeks resulting in a net award of £21,630.

Employment Judge Anstis

Date: 16 December 2022

Sent to the parties on:30/12/2022

N Gotecha

For the Tribunals Office