EMPLOYMENT TRIBUNALS

Claimant: **Dr. M Abbasi**

Respondent: **University of Surrey**

FINAL HEARING
Heard at: Bury St Edmunds **On:** 11 and 12 September 2023 and 30 October 2023 (In chambers)

Before: **Employment Judge Boyes**
Mr C. Davie
Ms C. Smith

Appearances:
For the Claimant: Ms Step-Marsden, counsel
For the Respondent: Mr Allen, in-house solicitor

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. **The Claimant's breach of contract claim is not well founded and is dismissed.**

2. **The Claimant was subject to less favourable treatment because he was on a series of fixed term contracts. The Respondent's failure to pay the Claimant a payment under the Enhanced Voluntary Severance Scheme amounted to a detriment and to treatment in contravention of regulation 3 of the Fixed Term Employees (prevention of less favourable treatment) Regulations 2002.**

3. **The Respondent is to pay the Claimant compensation of £17,769.50.**

4. **A separate case management order will be issued relating to interest.**

REASONS

1. The Claimant makes complaints of breach of contract and that he has suffered less favourable treatment under the Fixed Term Employees (prevention of less

favourable treatment) Regulations 2002 ("the FTE Regulations"). Both complaints relate to the non payment of an Enhanced Severance Payment ("EVS") upon redundancy. The Claimant is treated as having been continuously employed by the Respondent as a project manager from 1 August 2012 until his redundancy took effect on 16 January 2020.

2. The claim was presented on 10 February 2020 following a period of early conciliation from 29 November 2019 to 12 January 2020.

The proceedings

3. At the final hearing, the Claimant gave evidence. He adopted his witness statement. He was cross examined by the Respondent and asked questions by the Tribunal.

4. Professor Lampros Stergioulas gave evidence for the Claimant. He adopted his witness statement. He was cross examined by the Respondent and asked questions by the Tribunal.

5. Andrew Miles gave evidence for the Respondent. HE WAS Respondent's Human Resources Manager at the date of dismissal although he no longer works for the Respondent. He adopted his witness statement. He was cross examined by the Claimant and asked questions by the Tribunal.

6. The Respondent wanted to call Professor Ansgar Richter. However, he was in the Netherlands and it was not possible to secure his attendance whilst in the UK. The Netherlands is not one of countries that has given agreement for evidence to be heard from its territory. Instead, we permitted the witness to answer questions by the way of interrogatories.

7. Both parties provided written submissions and we heard oral closing submissions from the parties.

8. We reserved Judgment.

Issues to be determined

9. The issues to be determined by the Tribunal as agreed between the parties are as follows:

Breach of Contract

1. Was the following contractual term in the Claimant's employment contract:

   a. The Claimant's right to an EVS payment should he or his role be made redundant.

   b. In particular:

      i. Was the Respondent's EVS scheme contractual in nature;

      ii. Was a contractual right to an EVS payment for the Claimant created by a change in the scheme's terms on 10 May 2019 extending the scheme to 31 December 2019 and the change as set out in FAQ 2;

      iii. Was a contractual right to an EVS payment for the Claimant created on 28 March 2019 by Professor Richter telling the Claimant that he was entitled to an EVS payment; and

iv. Was a contractual right to an EVS payment for the Claimant created on 28 March 2019 by Professor Miller's letter on that date;

v. Was a contractual right to an EVS payment for the Claimant created on 10 April 2019 by an all-staff announcement that the EVS scheme will be extended to 31 December 2019.

c. Did the events at b.ii to b.v have the necessary:

i. Intention to create legal relations;

ii. Offer and acceptance;

iii. Consideration between the parties; and

iv. Certainty.

to become a binding obligation on the Respondent

2. Did the Respondent breach any or all of the contractual terms by:

a. Not paying the EVS payment to the Claimant in the sum of £17,769.50?

Less Favourable Treatment - Fixed-Term Employees (prevention of less favourable treatment) Regulations 2002

3. Is/was the Claimant a fixed term employee in that they work/worked under a fixed term contract in that the contract will / did terminate:

a. On the expiry of a specific term;

b. On the completion of a particular task;

c. On the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him.

4. Did the Respondent treat the Claimant less favourably than a comparable permanent employee as regards the terms of their contract or by being subjected to any other detriment by any act, or deliberate failure to act?

5. The less favourable treatment relied on by the Claimant is:

a. The non-payment of the sum of £17,769.50 under the EVS Scheme.

6. The comparable full time employee relied on is PR.

7. Is the person identified at (4) above comparable in that they are:

a. employed by the same employer;

b. engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience;

c. based at the same establishment, or works at a different establishment but satisfies the criteria at a and b above.

8. Has the Claimant been treated less favourably "on the ground that the employee is a fixed-term employee".

a. Did the Respondent consider the Claimant to be a fixed-term employee;

b. Did the Respondent treat the Claimant less favourably as described at 2.a above because he was a fixed term employee;

9. If the Claimant has been treated less favourably, can the Respondent justify the treatment, the Respondent relies on the following:

   a. The need to find savings in staff costs;

   b. The need to encourage staff who were not due to leave the Respondent's employment between 27 February 2019 and 31 December 2019 to voluntarily do so, in order to:

      i. meet the above need for savings, and

      ii. as a result reduce or avoid compulsory redundancies.

Redundancy

10. When the Claimant's redundancy "occur" – for the purposes of the EVS scheme.

Remedy

11. Should the claims above succeed, what is the appropriate remedy payable to the Claimant? The Claimant claims he is owed the sum of £17,769.50.

Findings of fact

Chronology of events

10. The Claimant's employment with Brunel University began on the 1 August 2012. At that time, he was a Project Manager within School of Information Systems, Computing and Mathematics. This was on a fixed term contract until 31 July 2014 and subject to three months' notice. In the offer letter it stated that his position was financially viable for the University only because of the availability of external funding from the EU in order for him to work on the Open Discovery Space Project and there was no undertaking to employ him beyond the term of the contract.

11. On 1 April 2014, the Claimant was notified that there was to be a TUPE transfer, the new employer being the Respondent. The transfer occurred on the 1 August 2014. It was noted that the Claimant had continuity of employment from 1 August 2012.

12. On 1 August 2014, the Claimant was given a fixed term contract until 30 September 2015 as a Project Manager.

13. On 6 August 2015, there was a redundancy consultation meeting. On 20 August 2015, the Claimant was told that he would be made redundant on 31 October 2015 following a one month extension.

14. On 24 November 2015, the Claimant's fixed term employment was extended until 29 February 2016. On 24 February 2016, there was then a one month extension until 31 March 2016. The Claimant was told that if his contract was not extended further that he would be made redundant.

15. On 27 April 2016, there was a further extension of the fixed term contract until 30 June 2016 and warned of the possibility of redundancy. On 27 May 2016, his

contract was extended until 30 September 2016. It was still referred to as a fixed term contract at this juncture.

16. On 15 July 2016, the Claimant was invited to a redundancy consultation meeting.

17. The Claimant was sent a letter on 28 July 2016 stating that his employment would end on 27 October 2016. In this letter his contract is referred to as 'permanent linked to funding'.

18. On 25 October 2016, the contract was extended until 25 November 2016.

19. On 28 October 2016, the contract was extended until 23 January 2017.

20. On 2 November 2016, the Claimant wrote to the Respondent stating that he was a permanent employee and that extension letter should not refer to an end date. He stated that he had discussed the matter with the employment expert from UCU and they agreed that he is a permanent employee and his contract remains in place indefinitely.

21. On 2 November 2016, the Respondent wrote to the Claimant to inform him that "*with effect from 1st August 2016 your contract has been viewed as having permanent status with the University of Surrey*". The letter also stated that "*It is important to note that your contract is still funded from external sources. Should these external sources not continue your position would be at risk of redundancy*".

22. On 30 November 2016, the Claimant was invited to a redundancy consultation meeting on 24 January 2017. The Claimant was sent a letter on 14 December 2016 stating that his employment would end on 8 March 2017. On 8 March 2017, the contract was extended until 22 March 2017. On 20 March 2017, the Claimant was told that his contract would continue until 31 May 2017. On 30 May 2017, he was told that his contract would be extended until 31 August 2017.

23. On 21 May 2018, the Claimant was informed that his contract would be extended until 31 December 2018.

24. On 20 August 2018, the Claimant was invited to a redundancy consultation meeting on 29 August 2018.

25. On 13 December 2018, the contract was extended until 31 January 2019.

26. On 30 January 2019, the contract was extended until 31 May 2019. He was informed that as this was a short extension there would not be a further redundancy consultation period and therefore his 3 months' notice of termination would commence on 1 March 2019.

27. In early 2019, the Respondent introduced an EVS Scheme.

28. On 20 March 2019 the Claimant made an application under the EVS scheme.

29. On 21 March 2019, there was an email from Andrew Miles which reads "*Please see attached applications and spreadsheets with some idea of current thinking (not final at this point with a few exceptions). I have included applications for both [redacted] and Munir Abbasi (FTC) which as discussed we would not support*".

30. On 27 March 2019, Ruth Gill emailed a spreadsheet to Professor Ansgar Richter which provided the outcomes of EVS scheme applications.

31. On the morning of 28 March 2019, there was a discussion between the Claimant and Professor Ansgar Richter in which the Claimant was told that his EVS application had been accepted and that he would receive around £22,000. He was told to start clearing his work with a view to handing work to his line manager Professor Lampros Stergioulas.

32. On 28 March 2019, Professor Richter emailed Ruth Gill confirming that the Claimant had been told that his EVS app had been granted and that he would receive a confirmatory letter soon. Ruth Gill replied stating that the Claimant was a '*no*' on the spreadsheet.

33. On the afternoon of 28 March 2019, Professor Richter informed the Claimant that his EVS application had not been accepted. The Claimant states that Professor Richter told him that the university wanted to keep him and that he would be getting a letter later on that day to confirm this.

34. Professor Richter emailed Ruth Gill to say he had told the Claimant that his application had not been granted. He said that it was his mistake because he had misread the spreadsheet.

35. On 28 March 2019, the Claimant was sent a letter from Professor Graham Miller, Dean of Faculty of Arts and Social Sciences. This included, "*It was felt at the present time it would not be in the University's interests to accept your application. If this position changes within the next 6 months the University will speak to you again. As outlined in the guidance previously issued, in the event your role is made redundant within the next 6 months your right to Enhanced Voluntary Severance will be protected*". It went on to say that there was no right of appeal against the decision given that EVS is a discretionary scheme.

36. On 10 April 2019, the Respondent sent a communication by email to all staff in which it stated that "*We've now had final closure on the EVS applications. and can provide some more detail on numbers. We had nearly 500 applications through the scheme. and have agreed 186 of these with the rest declined. We have also extended the period during which EVS will be honoured for those who have been turned down from the initial six months to nine months (until 31 December)*".

37. On 2 May 2019, the Claimant was informed that his contract would be extended until 31 July 2019.

38. On 29 July 2019, the Claimant was informed that his contract would be extended until 31 September 2019. He was informed that a further formal consultation process would not take place but that this could be offered to the Claimant if he requested it and that the 3 month notice period would commence from 1 July 2019.

39. On 2 September 2019, the Claimant was sent a letter confirming that his post would come to an end on 30 September 2019 so his appointment would end on

that date, at which point he would receive Statutory Redundancy Pay of £5,512.50.

40. On 16 September 2019, the Claimant wrote to state that he wished to appeal against the decision to make him redundant and also because he had been paid the wrong redundancy payment. He also stated that, despite informing him on 2 November 2016 that he was a permanent employee, the Respondent has continued to treat him as if he was on a fixed term contract. He has previously informed the University that these fixed term extension letters are contrary to the FTE Regulations and the JNCHES Guidance as well as the Respondent's own fixed term employee policy. He has effectively been at risk of redundancy since November 2016 and has received numerous notices to that effect. He therefore had no reason to believe that his contract would not be extended beyond 30 September 2019. Despite this, he only received 28 days' notice of redundancy, being told by letter on 2 September 2019 that his employment would end on 30 September 2019 which is contrary to his contractual entitlement of 3 months' notice. The Respondent had failed to consult him or provide him with details of any alternative employment.

41. The appeal hearing took place before an appeal committee on the 4 October 2019. The appeal was partially upheld on the basis that the Claimant should be provided with a one week consultation period and 3 months' notice. The Claimant was then sent a letter dated 17 October 2013 in which it was confirmed that his employment would terminate on 16 January 2020.

42. In its report the committee also made the following comments:

"The panel felt that the university had been clear in its communications of 29 August 2018 and 1 October 2018 and letters on 20 August 2018, 2 October 2018, 30 January 2019, 2 May 2019, and 29 July 2019 that Dr Abbasi's permanent position was nonetheless dependent upon external funding and would be at risk of redundancy should this funding become unavailable. It felt that the university had endeavoured to attract additional external funding, however this did not occur and, therefore, the panel did not uphold the aspect of Dr Abbasi's appeal which related to the reason for the redundancy. […]

Dr Abbasi believed that he was eligible for Enhanced Voluntary Severance due to correspondence from FASS HR. However, the panel reaffirmed that any EVS is at the discretion of the University and if it was rejected, this should not be a matter for discussion, particularly as there was no evidence relating to this as part of the appeal bundle. Dr Abbasi did however add that he did not engage in the consultation because he felt he was eligible for EVS. By allowing a new consultation period as a remedy to this appeal for reasons of process mentioned in the previous page, the panel felt that all parties will now be able to properly engage in meaningful consultation.

Dr Abbasi's appeal suggested 'anxiety, high blood pressure and mental stress' had been created by the circumstances. He has recently sought medical treatment to address these symptoms and we very much hope that this will result in a swift recovery. Notwithstanding the above, the panel noted that Dr Abbasi's

health concerns were not disclosed to the university prior this appeal. The university recommends that in the event of any future health concerns, Dr Abbasi, should share these with FASS HR in order that they can support him appropriately.

In reviewing the case, the panel recognised that colleagues in FASS appeared to have worked with the best intentions to maintain ongoing funding for Dr Abbasi's post. It also agreed that there was substantive fairness around the reason for the redundancy. It did however note that some of the communications could have been clearer and for this reason, the panel would advise that both parties now engage with each other in reaching a satisfactory resolution which should as a minimum allow meaningful consultation and – then where required a 3 month notice period."

43. On the 10 October 2019, there was a redundancy consultation meeting with the Claimant. The minutes of that meeting confirm that the Claimant was re-instated following the appeal committee's consultation. It also confirmed that his post was now being funded by the university rather than externally funded. It was confirmed that the Claimant would be placed on the re-deployment register after the meeting. At the meeting the Claimant asked a range of questions including, when were they told his funding will end, what efforts were made to find funding, on how many occasions had efforts been made for funding to be available except the times when he was Co-investigator of the projects and found funding himself, what the funding status of Designscapes and the GCRF Project was and what funds remained available in the Designscapes project. The Claimant stated that he wanted to know the current status of the projects to see if there was any funding available in the projects to stop him being made redundant. Andrew Miles informed the Claimant that he would get back to the Claimant once he had found out the answers.

44. There was a further consultation meeting on the 17 October 2019. Andrew Miles informed the Claimant that he had been informed that there was minimal funds remaining in respect of the Designscapes project. He did not have the exact numbers, as up to date finance reports were not yet available, but there were insufficient funds to sustain the Claimant's role. He has estimated that the remaining personnel budget in Designscapes was £15-20,000. As the project was to continue at least until end of 2020, this remaining amount needed to be retained for personnel costs needed to support the outstanding work. The Claimant stated that those figures were not correct. Andrew Miles informed the Claimant that they were estimates. The Claimant was informed that this was the end of the consultation period and as there was no further funding available for the Claimant's role. Taking in to account his 3 months' notice his last day of employment would be 16 January 2020.

45. On the 16 September 2019, the Claimant also sent a separate letter to Professor Graham Miller submitting a grievance against the decision to exclude him from the EVS scheme.

46. Andrew Miles replied on the 11 October 2019 stating that the HR Director, Will Davies, was of the opinion that the Claimant should not be allowed to raise a grievance in respect of the decision to refuse him an EVS payment. This was because the rules and the FAQs of the scheme were very clear that the EVS scheme is non contractual and that decisions regarding acceptance would be made by the Provost of the COO and would be final. In addition, the Claimant was automatically ineligible for EVS given that at the time the scheme was launched he had a confirmed departure date in place as per paragraphs 3, and 9 of the EVS Policy document and FAQs 1, 2 and 16.

47. The Claimant responded to the email of the 11 October 2019 on the 16 October 2019. He stated that what was said in the letter dated 28 March 2019 was a commitment to him to make an EVS scheme payment, further extended by the communication of 10 April 2019. These communications meant that payment of an enhanced redundancy payment had become a contractual obligation on the part of the Respondent. An EVS payment is being refused solely on the basis that he is a fixed term employee with an end date. The appeal committee had accepted that he was a permanent employee with no fixed end date. No further action was taken by the Respondent in respect of the Claimant's letter relating to the EVS scheme.

48. The Claimant's employment ended on 16 January 2020.

The Enhanced Voluntary Severance Scheme

49. There was a presentation on the scheme on the 12 February 2019 although no list of attendees has been provided. Initially the scheme was open to applications from 27 February 2019 to 20 March 2019. There is a document entitled *Enhanced Voluntary Severance Scheme 2019*. There is a Frequently Asked Questions document. There are three versions of this dated 27 February 2019, 10 March 2019 and 13 May 2019.

50. The following is included in the *Enhanced Voluntary Severance Scheme 2019* document*:*

ENHANCED VOLUNTARY SEVERANCE APPLICATIONS

Staff who wish to apply for enhanced voluntary severance should do so on the attached form. This form should be submitted (hard copy or electronic) to your Dean or Director/Head of Department by 5pm on the 20 March 2019. Applications will be determined at University level by either the Chief Operating Officer (COO), or Provost (subject to business area).

AGREEMENT OF REQUESTS

Decisions regarding acceptance of enhanced voluntary severance requests will take into account a number of factors, including the cost of severance, the time required for the severance cost to deliver financial savings, the capacity within teams to either absorb or cease the work undertaken by colleagues(s) who leave, and the need for the University to retain staff with specific skills, knowledge and experience.

This list is not exhaustive. EVS cases may be approved prior to the deadline as

there will be a regular review of cases.

Decisions made by the COO or Provost will be final, and not subject to any formal appeal, grievance or review. […]

8. COOLING OFF PERIOD

Once the COO or Provost agrees an EVS request, HR will contact the individual concerned to confirm their agreement, the terms of the EVS payment, and the proposed leaving date. Individuals will then have a one week "cooling off" period in which they can withdraw their request, should they so wish.

After this period, requests can only be withdrawn with the agreement of both parties i.e. the individual and the University.

9. CESSATION

The Enhanced Voluntary Severance Scheme is non-contractual, and the University reserves the right to withdraw the Scheme at any point between the Scheme opening and the end date, or extend or re-introduce the Scheme, at its discretion.

Request to be considered for Enhanced Voluntary Severance (EVS)

It should be noted that while all requests for enhanced voluntary severance will be considered thoroughly, submission of this form does not guarantee the application will be successful. Approval of enhanced voluntary severance requests will be made in the interests of the University.

51. The following is included in the Frequently Asked Questions document version 27 February 2019*:*

Q1. Who is eligible for Enhanced Voluntary Severance?

All staff in the University and Surrey Sports Park (regardless of length of service), whether their post is at risk or not, are eligible to apply for enhanced voluntary severance with the exception of staff who have a confirmed departure date already in place (e.g. via an existing notice of resignation, end of contract or retirement) on or before the date that the EVS opens.

It should be noted that while all requests for enhanced voluntary severance will be considered thoroughly, submission of an application does not guarantee the application will be successful. Approval of enhanced voluntary severance requests will be made in the interests of the University. […]

Q14. If I apply for EVS but do not get it approved, who can I appeal to and what additional evidence will I need to change the decision?

There is no appeal process related to EVS which has been declined. EVS is not a contractual right. Decisions of the Provost and/or COO will be final.

Q15. If I am refused EVS and later find myself in a compulsory redundant situation, will I receive EVS?

In the event your EVS is refused but later you are made redundant, the University will honour the EVS payment if the redundancy occurs within a 6 month period following your EVS application.

Q20 What if I make an application, it is approved and then I change my mind?

Once your EVS is confirmed in writing by HR, there is a one week 'cooling off' period during which you are able to withdraw your request.

52. The following is included in the Frequently Asked Questions document version 10 March 2019*:*

Q2. I am on a Fixed-Term Contract with an end date. Can I apply?

As outlined in question one, staff with an end date are not eligible to apply. Such an application would not be deemed in the interests of the University.

53. The following is included in the Frequently Asked Questions document version 13 May 2019*:*

Q17. If I am refused EVS and later find myself in a compulsory redundant situation, will receive EVS?

In the event your EVS is refused but later you are made redundant, the University will honour the EVS payment if the redundancy occurs up to and including 31 December 2019.

The nature of the Claimant's employment

54. The Respondent has a Fixed-Term Employee Policy, the latest version of which is dated June 2015. It states:

"*2. Definition*

Fixed-term – a fixed-term contract is one that ends on a specified date or on the occurrence of a specific event or the completion of a task.

Temporary – employment for which there is no expectation of permanence but where the termination date or the event on which the employment will terminate is not specified (i.e. where it is not a fixed-term contract) e.g. Unitemps, agency

Permanent – staff with no contract end date (and staff with over 4 years' service where there is no justification for the individual to remain as fixed-term)." […]

7. Extension of Fixed-Term Contracts / Transfer to Permanent Contracts

Where an employee on a fixed-term contract reaches four years' continuous service with the University and has had at least one contract extension, or has been issued with a new fixed term contract which is different to the previous fixed term contract, their contract will become permanent. […]

The University will transfer the employee to a permanent contract and will write to confirm this to the employee within 21 days of the effective date outlined above.

In accordance with this policy, where a contract has remained fixed-term after the 4 year anniversary, it will be subject for consideration of permanency at the next extension period, or new fixed-term contract, when the above process will be repeated."

55. It is not in dispute that the Claimant was on a fixed term contract until 31 July 2016.

56. The Respondent began to refer to the Claimant's employment as being '*permanent linked to funding'* on 28 July 2016.

57. On 2 November 2016, the Respondent wrote to the Claimant to inform him that "*with effect from 1st August 2016 your contract has been viewed as having permanent status with the University of Surrey*".

58. Despite this, between 1 August 2016 and the termination of his employment, the Respondent subsequently notified the Claimant on several further occasions, that his "*post will continue for a further period until* [relevant end date]." On the last occasion, in the letter of the 2 September 2019, it was said that "*I write to confirm that your present post of Project Manager comes to an end on 30 September 2019 and that therefore your appointment with the University will end on this date*."

59. Other than no longer referring to the Claimant as a fixed term employee, from July 2016 there is no substantive difference in the wording of the letters to the Claimant relating to the end of, or extensions of, the Claimant's employment.

60. The Respondent asserts that, on the Claimant's own account, he is a permanent employee, and hence excluded from the protection of the FTE Regulations. However, it is clear from various communications from the Claimant, including his letters of the 2 November 2016 and 16 September 2019 that he complained that he was not actually being treated as a permanent employee. It is clear that the Claimant's position has always been that he was entitled to be treated as a permanent employee but he continued to be treated as a fixed term employee.

61. The Claimant is referred to as being on a fixed term contract in the spreadsheet identifying who was/was not to be given a EVS payment. It states that the Claimant is on a "Fixed term contract, end date May 19" [178].

62. The Claimant is referred to as being on a fixed term contract in the email of the 21 March 2021 in which the spreadsheet relating to the scheme is discussed.

63. It is recorded in the minutes of the appeal hearing of the 4 October 2019 that "*The panel understood that he should be recognised as a permanent employee as described in 'Transfer to Permanent Contracts' of the Fixed-Term Employment Contract, and, as such, is due a meaningful consultation*". His suggested that, up until that point, he was not being treated as a permanent employee.

64. The Respondent's own policy defines a fixed term contract as *"one that ends on a specified date or on the occurrence of a specific event or the completion of a task".* Throughout the Claimant's role is qualified as being "linked to funding". It is clear from the correspondence sent to the Claimant from 1 August 2016 onwards that he was repeatedly told that his employment was going to end on a specified date. Even as late as 4 October 2019, the appeal panel found the need to state that the Claimant should be recognised as a permanent employee and should be treated as such. By this point a decision had already been made that the claimant was not entitled to an EVS payment because his employment had an end date.

65. Despite stating that the Claimant's role was permanent from 1 August 2016, he continued to be treated as being a fixed term employee subsequent to that date.

66. Taking into account all of the above factors the Tribunal finds that, in reality, at the material time, the Claimant was treated by the Respondent as a fixed term employee rather than a permanent employee.

Nature of the Claimant's work / Funding for the Claimant's work

67. It is not in dispute that the mainstay of the work that the Claimant did for the Respondent was funded from external sources and that, often, such funding was approved at the last minute.

68. The Tribunal accepts the Claimant's evidence that, at the time of his EVS application in March 2019, he was working on a wide range of projects as identified in his witness statement at paragraph 25. The Tribunal accepts that the Claimant was involved in the GCRF CoNTiNuE project which ended on 1 July 2020.

69. In terms of the funding position at the time that the Claimant was made redundant, the Claimant's evidence is that the Respondent was incorrect to state that there was insufficient funding for the Dreamscapes project to continue after the termination of his employment.

70. The Tribunal accepts the Claimant's and Professor Stergioulas' evidence that the Designscapes project, which was one of the main projects that the Claimant was involved in, continued to be funded until 30 September 2021. The Tribunal finds that the Claimant was given incorrect information by Andrew Miles about the remaining funding available for that project in the meeting of the 17 October 2019. Further the Tribunal accepts Professor Stergioulas' evidence that, between when the Claimant left and he left in July 2020, the Respondent employed a new researcher to work on the Designscapes project. When Andrew Miles was asked about this, he replied that he was not disputing that it may have happened but he did not know anything further.

71. The Tribunal accepts Professor Stergioulas' evidence that the extension of the Claimant's contract on 31 May 2019 was a formality because there was never any intention on either side that his contract would end on that date as he had already secured additional funding for two new projects which he had intended the Claimant to work on beyond 31 May 2019.

72. The Tribunal accepts the Claimant's oral evidence that it was an expectation as part of his role that he would look for and apply for funding for projects that he and other university staff would work on. It was not just a case of him working on the projects for which funding had already been secured. Andrew Miles accepted that this was the case in oral evidence.

The Comparator

73. The Claimant relies upon a comparator referred to as PR. PR is a teaching fellow at the Surrey Business School. He or she was a permanent employee who made an application under EVS on the 11 March 2019 which was approved with a termination date of 31 July 2019. He or she was grade 6, as was the Claimant. The monthly saving from ending his or her employment was estimated by the

Respondent as £6571.08. The estimated monthly saving from ending the Claimant's employment was £6250.

74. Both PR and the Claimant were employed by the Respondent in the Surrey Business School. Both were employed at the same grade which is strongly suggestive of comparable skills, qualification and experience. Whilst the Claimant was undertaking project work and PT employed in a teaching focusing role, both were academic roles within the same school undoubtedly requiring many of the same core skills. We find that PR was a comparable employee for the purposes of the FTE Regulations.

The Relevant Law

Breach of contract

75. Whether or not a breach of contract has occurred is a question of fact. When interpreting the express terms of a contract, the aim is to seek to give effect to what the parties intended. The words of the contract should be interpreted in their grammatical and ordinary sense in context, unless some modification is necessary to avoid absurdity, inconsistency or 'repugnancy'.

76. The primary source for determining what the parties meant when they entered into their agreement are the words actually used in the contract, interpreted in accordance with conventional usage. In *Harlow v Artemis International Corporation Ltd 2008 IRLR 629, QBD*, Mr Justice McCombe said that they "are designed to be read in an informal and common sense manner in the context of a relationship affecting ordinary people in their everyday lives".

77. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* (No.1) 1998 1 WLR 896, HL, Lord Hoffmann stated that a contract should be interpreted according to the meaning it would convey to "*a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract"*. In *Cosmos Holidays plc v Dhanjal Investments Ltd* 2009 EWCA Civ 316, CA, Sir Anthony Clarke stated that "*the particular provision must be construed in the context of the clause as a whole, and the clause itself must be construed in the context of the contract as a whole, which must in turn be considered in its factual matrix or against the circumstances surrounding it'*. context may be highly relevant in ascertaining the parties' intentions behind the words used to express their contractual bargain.

78. In *Adams and ors v British Airways plc* 1996 IRLR *574, CA*, the Court of Appeal said that when resolving any ambiguity in the express terms of a contract, it is proper to have regard to the factual setting in which the contract was made. An employment contract should not be interpreted in a vacuum.

The FTE Regulations

79. The relevant parts of the FTE Regulations 2002 are as follows:

"***Citation, commencement and interpretation***

1. […] fixed-term contract" means a contract of employment that, under its provisions determining how it will terminate in the normal course, will terminate—

(a)on the expiry of a specific term,

(b)on the completion of a particular task, or

(c)on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him,

and any reference to "fixed-term" shall be construed accordingly;

"fixed-term employee" means an employee who is employed under a fixed-term contract;

"permanent employee" means an employee who is not employed under a fixed-term contract, and any reference to "permanent employment" shall be construed accordingly; […]

"renewal" includes extension and references to renewing a contract shall be construed accordingly;

Comparable employees

2.—(1) For the purposes of these Regulations, an employee is a comparable permanent employee in relation to a fixed-term employee if, at the time when the treatment that is alleged to be less favourable to the fixed-term employee takes place,

(a)both employees are—

(i)employed by the same employer, and

(ii)engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and

(b)the permanent employee works or is based at the same establishment as the fixed-term employee or, where there is no comparable permanent employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

Less favourable treatment of fixed-term employees

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

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

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

(2) Subject to paragraphs (3) and (4), the right conferred by paragraph (1) includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to-

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

(b)the opportunity to receive training, or

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

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

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

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

(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.

Objective justification

4.—(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 shall be regarded for the purposes of regulation 3(3)(b) as justified on objective grounds if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment.

(2) Paragraph (1) is without prejudice to the generality of regulation 3(3)(b).

80. A complaint under the FTE Regulations cannot be considered by the Employment Tribunals unless it is presented within three months of 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. A Tribunal may consider a 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.

81. The non-renewal of a fixed-term contract does not, of itself, amount to less favourable treatment.

82. There is no statutory definition of 'any other detriment' contained within the FTE Regulations.

83. In *Coutts and Co plc and anor v Cure and anor* 2005 ICR 1098, EAT, the EAT stated that detriment claims must show both less favourable treatment and a detriment.

84. The burden of proof is on the employer to identify the ground for the less favourable treatment or detriment

85. When considering objective justification, the ECJ decided in *Del Cerro Alonso v Osakidetza (Servicio Vasco de Salud)* 2008 ICR 145, ECJ that the unequal treatment at issue must be justified by "*precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria'*. Further it said that in order for objective justification to be made out the unequal

treatment must respond "*to a genuine need, [be] appropriate for achieving the objective pursued and [be] necessary for that purpose'*.

86. The mere temporary nature of an employment relationship is not capable of constituting an 'objective ground'. However, differing expectations of fixed-term and permanent workers regarding the stability of their employment may, in some circumstances, provide objective justification for differential treatment. Such an assessment is fact specific and will include consideration of the term(s) of the contract and the envisaged duration of the contract.

87. This issue was considered by the ECJ in *Montero Mateos v Agencia Madrilena de Atencion Social de la Consejeria de Politicas Sociales y Familia de la Comunidad Autonoma de Madrid* 2019 ICR 63*,* ECJ, and *Grupo Norte Facility SA v Moreira Gomez* 2018 IRLR 970*,* ECJ. In those cases, the ECJ held that the difference in treatment could be justified by the 'significantly different context'. The compensation for permanent workers in that case was higher because termination was unforeseen when the contract was entered into and therefore frustrated their legitimate expectation of stable employment. The workers on a fixed-term contract were aware from the beginning of the date or event which determined the contract's end.

Our Conclusions

Breach of Contract

88. The Tribunal finds that the EVS scheme was not contractual in nature. This was made perfectly plain in the FAQs which were issued in connection with the scheme. In particular, it is made clear in the February 2019 version of the FAQs that "*EVS is not a contractual right".* It is clear that there was never any intention on the part of the Respondent to create a contractual right. We consider that the Claimant would have read these FAQ before making an application under the scheme and would have been aware of the Respondent's position in this respect.

89. Further, on the same basis, we do not consider that any changes made to the scheme in subsequent FAQs created any form of contractual right.

90. We find that no contractual right was created either by Professor Richter's first conversation with the Claimant on the 28 March 2019 or the subsequent letter from Professor Miller of the same date. It is unfortunate that events unfolded in the manner that they did and that the Claimant was provided with incorrect information on the 28 March 2019. However, the error was quickly corrected on the same date. In so far as the letter was concerned, whilst it was ambiguously worded, it seemed to us that the intention of the letter was to leave open the window for applying under EVS rather than the approval of an application.

91. For those reasons the Claimant's breach of contract claim fails.

FTE Regulations 2002

Time limit

92. The Respondent submits that the refusal to pay the Claimant an EVS payment

was on the 28 March 2019 and therefore that the Tribunal does not have jurisdiction to hear the Claimant's claim under the FTE Regulations. The Respondent further submits that the EVS refusal was due to the Claimant's ineligibility and was therefore a one-off act and does not form part of a series of acts.

93. The Tribunal finds that the decision whether or not to pay the Claimant under EVS was not a one off act ending on the 28 March 2019. As far as the Claimant was concerned, Professor Miller's letter of the 28 March 2019 conveyed the clear impression that there was still the possibility of an EVS payment. It was not until 2 September 2019 that the Claimant became aware definitively that he would not receive an EVS payment and hence suffer a detriment. It is from that point that the three month time limit runs not the 28 March 2019. That being so, and taking into account time taken for early conciliation, the claim was made within three months.

94. Even if the claim had not been made within three months of the Claimant being made aware that he was to suffer a detriment, we would on the particular facts of this case have considered it just and equitable to extend time. The Claimant was given incorrect and misleading information about whether he was entitled to an EVS payment on several occasions, most importantly in the letter of the 28 March 2019. The position regarding whether or not he was entitled to and would receive an EVS payment was at best confusing. He cannot have reasonably been expected to know that he would ultimately be subjected to a detriment on the 28 March 2019.

Was the Claimant subjected to less favourable treatment and a detriment

95. For reasons that we have provided at paragraphs 54 to 66 above, we find as a fact that the Claimant was a fixed term employee at the time that the decision was made that he was not entitled to a EVS payment. He worked under numerous back to back contracts which on each occasion came to an end on a pre-determined specified date. Whilst the Respondent asserts that he was a permanent employee, and hence that the FTE Regulations do not bite, we find that this was a simply a label which made little practical difference to the way in which the Claimant was treated on a day to day basis. The treatment that he received, that is repeatedly being subject to contracts with a specified end date, was not consistent with an employee who has a permanent contract. Even after the Respondent told him that he had become a permanent employee, it continued to treat him as an employee on recurrent fixed term contracts.

96. For reasons provided at paragraphs 73 and 74 above we consider PR to be a comparable employee who is permanent rather than on a fixed term contract. Further, and in any event, we also note that the EVS excluded all fixed term employees by virtue of the fact that no one with an end date was eligible under the scheme.

97. We find that the Claimant was treated less favourably because he was a fixed term employee in that the Respondent decided that he was ineligible for a payment under the EVS scheme.

98. The Respondent submits that the Claimant would not have been entitled to an EVS payment in any event, regardless of whether he was permanent or on a fixed term contract, because his date of dismissal was the 16 January 2020 and

the EVS scheme only applied to those who were made redundant by the 31 December 2019. The Claimant was informed on the 2 September 2019 that he was to be made redundant and that his employment would end on the 30 September 2019. His employment only continued beyond that date because of failings on the part of the Respondent, that is failure to give adequate notice and carry out effective consultation. Had it not been for those failings, and had the Claimant been given the correct contractual notice, his employment would have ended on the 1 December 2019.

99. The Respondent conveyed its intention to make the Claimant redundant on the 2 September 2019. Taking into the specific circumstances that arise in this case, it seemed to us that had the Respondent followed the correct procedure (and intended to make an EVS payment) that it is likely that the Claimant would have been treated as being made redundant within the relevant time frame. As it was he had no control over the situation. On or before 2 September 2019, the Respondent could not have foreseen that the Claimant's employment would extend beyond 31 December 2019. In the circumstances the Respondent cannot rely upon the argument that the Claimant did not, for reasons other than being on a fixed term contract, come within the scope of the scheme.

100. We find that the Claimant was subject to a detriment in that he did not receive a payment under the EVS scheme. That detriment occurred becaue he was a fixed term employee. The detriment amounted to the loss of the sum of £17,769.50 which is what he would have received under EVS had his application been accepted.

Objective justification for the less favourable treatment

101. Whilst not accepting either that the Claimant was on a fixed term contract or that he was subjected to less favourable treatment, the Respondent submits that, in any event, such treatment would be justified because of the need to find savings in staff costs and because of the need to encourage staff who were not due to leave the Respondent's employment between 27 February 2019 and 31 December 2019 to voluntarily do so (in order to meet the need for savings, and as a result reduce or avoid compulsory redundancies).

102. The burden of proof is on the Respondent to justify any less favourable treatment.

103. The Tribunal accepts the reasons why the Respondent established the EVS scheme and its need to reduce overall costs. However, the Respondent is required to justify its less favourable treatment <u>of the Claimant</u>. It is not sufficient to show that in general that there was a good reason to set up the EVS scheme.

104. Firstly, the Respondent's case is that the Claimant was a permanent employee rather than on a fixed term contract. At the same time it, in effect, excluded him from EVS because his contract had an end date. This seemed to us to be a case of the Respondent wanting it both ways.

105. In terms of the aims of the EVS scheme, we considered that there may have been, in general terms, on a case by case basis, justification for excluding employees with a contractual end date because making a payment to someone who was due to leave anyway would not result in any savings.

106. However, in the particular case of the Claimant, the Respondent appears to have made its decision to end the Claimant's employment on a wholly incorrect

understanding of the facts, that is that the funding for the Dreamscapes project was insufficient to continue to employ the Claimant, when there was actually significant funds left. It went on to employ someone else to replace the Claimant. In addition, it seems not to have fully taken into account the other work that the Claimant remained involved in. This was not a case in which the Claimant was working on one discrete project, the funding for which had ended, and there was no other work for the Claimant to do.

107. The Respondent has therefore failed to show that its differential treatment of the Claimant was necessary to achieve the stated aim and justified on the facts.

108. Consequently, the Claimant was subjected to less favourable treatment because his contract had an end date. He suffered a detriment in that he did not receive a payment under EVS. That treatment was not objectively justified.

109. Had the Claimant received an EVS payment it would have been in the sum of £17,769.50. We award that sum.

110. The Respondent submitted that the award should be reduced to reflect the additional pay that the Claimant received from the 1 1o 16 January 2020 although we were provided with no authority for this. No such reduction is made. There is no provision within regulation 7 of the FTE Regulations for any such reduction. Further, and in any event, given that the Claimant only continued to be employed until 16 January 2024 due to procedural errors on the part of the Respondent, it would not be just and equitable to reduce the award on that basis.

Employment Judge Boyes

Date: 26 January 2024

Sent to The Parties On
29 January 2024

FOR EMPLOYMENT TRIBUNALS