EMPLOYMENT TRIBUNALS

Claimant: Ms R King
Respondent: WKCIC Group t/a Capital City College Group

Heard at: Watford
On: 13 October 2023

Before: Employment Judge Caiden

Appearances
Claimant: Mr Philip Naylor (lay representative)
Respondent: Mr Tom Brown (counsel)

JUDGMENT having been sent to the parties on 3 December 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

A) Introduction and apologies

1. On 13 October 2023, the Tribunal had a Preliminary Hearing to determine if the Claimant was a "*fixed-term employee*" within the meaning of reg.1(2) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. At this hearing it heard evidence from Gale Ortanca and the Claimant (both of whom provided witness statements). It also was provided with a Preliminary Bundle that ran to 207 pages, with a separate index (pages in **bold** in these reasons are to this bundle). After having heard evidence, Mr Brown and Mr Naylor on behalf of their respective clients made submissions. The Tribunal then adjourned to deliberate and gave oral reasons at the time and produced a judgment that same day.

2. On 3 December 2023, the judgment produced on the 13 October 2023 was actually sent to the parties and this stated:

   The Claimant was not a "fixed-term employee" within the meaning of reg.1(2) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. She was employed on a contract of indefinite duration with continuity of employment since 3 September 2018. Accordingly, the claims of less favourable treatment of a fixed-term employee (reg.3), right to received written statements for less favourable treatment (reg.5), right to received

written statement of variations (reg.9) are therefore dismissed because the Tribunal does not have jurisdiction to determine them.

3. It appears that following the oral judgment on 16 October 2023, 8 January 2024 and 31 May 2024 the Claimant sent in correspondence requesting written reasons. By way of email of 3 June 2024, the Tribunal administrative service sent an apology to the Claimant, who had made the request for written reasons and copying in the Respondent, informing her that owing to an administrative error none of the applications had been sent to the Tribunal until the 31 May 2024 and informing them that the reasons would be provided. The Tribunal repeats that apology in these reasons, and further apologises for the delay in providing the judgment and the written reasons upon the request being received by it.

B) Findings of fact

4. The Claimant has been employed by the Respondent as an Hourly Paid lecturer since the 3 September 2018 (she had an earlier period of service which his not relevant to the dispute but the Tribunal notes as it was part of her uncontroverted evidence). She was and is still expected to teach two courses for 12 hours per week, but occasionally had to cover others, as well as attend training and team meetings in addition to these.

5. At **pp.73-82** there was a contract. The Claimant accepted that she recognised this as her employment contract. Whilst the contract was not signed, the Tribunal finds that this was the Claimant's employment contract, and it was not provided with any other 'contract'. The Claimant accepted in live evidence, and the Tribunal equally finds as a fact that:
    a. she worked in accordance with this contract;
    b. she continues to be employed by the Respondent and work under the contract;
    c. at the end of each term, she would be told what would happen next term in terms of her hours;
    d. she worked a stable working pattern;
    e. although clause 21.2 stated "*in the event that the Corporation gives you notice to terminate your contract of employment before the end date on this contract you will be entitled to receive…notice…*" there was no end date actually provided and she did not understand what this clause meant. Indeed, she stated that she understood that the contract was open ended;
    f. her start and finish dates for the term were the same as the 'permanent' staff (that is those who were not hourly paid), although in re-examination she confirmed the academic year actually ended 3 weeks later for the 'permanent' staff.

6. Whilst the Claimant had a stable working pattern, it is right to record the contract stated there were "*no guarantee of any minimum number of hours*" however she had to be given "*14 days notice of any reduction in any specific hours that have already been allocated to you*" (clause 4.1, **p.75**). To date, this was allocated in fact by a timetable the Claimant had been provided each

semester which sets out the classes relevant to the Claimant for 18 weeks or so which the semester lasts.

7. The Claimant understood she was entitled to a permanent fractionalised contract as she had worked for more 12 hours a week for three years, and she relied on a collective agreement as providing this right. However, this did not materialise, the argument being she did not work sufficient average hours to gain these, and in effect led to the Claimant making Tribunal claims. In her view she was being treated as a "*zero hours*" employee which was not right as it avoided the Respondent's obligations under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

C) Relevant legal principles

8. The issue is whether the Claimant was a "*fixed-term employee*" as defined by reg.1(2) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. This would enable the Claimant to claim rights conferred by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Accordingly, the starting point is the regulations themselves which:
    a. define "*fixed-term employee*" as "*an employee who is employed under a fixed term contract*";
    b. define "*fixed term contract*" as "*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;
    c. do not define the phrase "*contract of employment*" or "*employee*". However, the enabling provision s.45 Employment Act 2002, which gives the Secretary of State the power to make regulations "for the purpose of securing that employees in fixed-term employment are treated, for such purposes and to such extent as the regulations may specify, no less favourably than employees in permanent employment" does define employee in s.45(6) Employment Act 2002 as "*an individual who has entered into or works under…a contract of employment*". This definition is the same as that under s.230 Employment Rights Act 1996.

9. Case law has established that a contract of employment must have an "*irreducible minimum*" of three things: mutuality of obligations between the putative employee and employer, personal service between the same, and sufficient degree of control over the putative employer (*Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA) [1984] IRLR 240 at [20]-[22] establishing the 'Ready Mixed Concrete test setting out such a minimum). Even if these

three matters a met it may not be an employment contract, and there is no presumption that it is, unless the other aspects are consistent with such a contract (*Gardiner* at [20]-[22] and *HMRC v Atholl House Productions* [2022] EWCA Civ 501; [2022] IRLR 698 at [122]). One matter that would take the relationship outside of an employment contract is if in fact the putative employer is a client or customer of the putative employee (which applies even if as a matter of fact it was its only 'customer): *Alemi v Michell* [2021] IRLR 262 (EAT) at [7]-[9] and *Manning v Walker Crips Investment Management Ltd* [2023] EAT 79; [2023] IRLR 729 at [90]-[91].

10. In terms of ascertaining the 'agreement' between the parties, that is what may or may not be an employment contract, the role of the Tribunal is to ascertain the true agreement, with written contract not necessarily being the starting point but neither is it irrelevant – the Tribunal having regard to whether there are circumstances or features of the wider picture that indicate the written terms may not reflect the true reality of what was agreed without being restricted by conventional principles of contract law (*Ter-Berg v Simply Smile Manor House Ltd* [2023] EAT 2 at [38]-[44], explaining the leading cases of *Uber v Aslam* [2021] UKSC 5; [2021] IRLR 407, see in particular [68] and [76], and *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] IRLR 820, see in particular at [29]-[35]).

D) Summary of submissions

11. The Respondent's submitted in summary that the Claimant accepted that the contract she was employed under was the one the Tribunal had been taken to and she understood that was not a fixed term contract. Accordingly, the starting point is that the parties agreed that the written contract governed the relationship, there being no allegation of sham or that it is not reflective of the agreement. It further stated, the wording in clause 21.2 appears to reflect a version of contract that did have an end date, but the present one did not in fact have such, but this "*curiosity*" did not make the contract fixed term as it has to be assessed objectively. Additionally, it was pointed out that:
    a. in practice the Claimant worked the same as the other lecturers, the only difference identified being the term ended slightly earlier;
    b. the Claimant knew her working hours and so there was mutuality of obligations, there was even a non-conflict term in clause 13 so the relationship appeared to be one of employment;
    c. the Claimant had to complete particular tasks that had been assigned to her;
    d. the issue of a collective agreement and fractionalised contracts is not in issue and has no bearing on the issue of whether the Claimant is a fixed-term employee;
    e. the Claimant had the same overarching benefits and responsibilities as others, including 'permanent' staff. These included pension and holiday pay by way of example.

12. The Claimant provided written submission in a 10-page document "*Claimant's case statement*", which the Tribunal read and considered. Orally the Claimant submitted in summary that the contract was a zero hours contract that was intended to avoid responsibilities under the Fixed-term Employees

(Prevention of Less Favourable Treatment) Regulations 2002, but these should in fact apply. It was stated that by the Claimant:

a. the work temporary work and the contract was merely a framework, with each matter being in essence an assignment;
b. the case of *Kocur v Royal Mail* [2020] CIR 1541 is relevant as to the definition of temporary;
c. the contract in fact only provided temporary work, after all it had been insisted it was a zero-hour contract, each block being a temporary assignment. This is also consistent with the reason for employing hourly paid lectures in the code including "*To cover for seasonal work peaks*" (**p.89**) which was the purported coding used for the Claimant (**p.88**);
d. Zero hours contracts are not appropriate in this case, and government guidance indicates the same;
e. the collective agreement modifies the contract, and the collective agreement is specifically framed to deal with fixed term work and the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

13. In response to these oral submissions by the Claimant, the Respondent stated:

a. the job of the Tribunal is to look at the substance of the relationship, there is no particular definition of zero hours contract, and the government guidance is not determinative either of any agreement – so using the term zero hours is not helpful to determining this case;
b. the issue of any collective agreement is not apt to assist in determining if the legislative definition of fixed term contract is met;
c. the timetable is part of the contract but is not the whole contract – it has no freestanding status.

E) Analysis and conclusions

14. The starting point is the wording of the regulations themselves. To be able to rely upon any rights under the Fixed-term Employees (Prevention of Less Favourable Treatment), the Claimant has to establish that she is a "*fixed-term employee*" as defined by reg.1(2) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. At paragraph 8 above and its sub-paragraphs the relevant wording is set out.

15. The first element is the Claimant needs to be an "*employee*" which is someone who has a "*contract of employment*" (reg.1(2) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002). As the enabling provision (s.45 Employment Act 2002) adopts the same definition as under s.230 Employment Rights Act 1996, the case law set out a paragraphs 9-10 above applies equally to determine if there is a "*contract of employment*". In this case both parties in effect agreed that the Claimant was an "*employee*". Indeed, all the requisite elements were present both in terms of what was in writing **pp.73-82** and in practice: the Claimant was obliged to

work the timetabled hours each term for which she was paid (mutuality of obligations), she had to do that work personally, the Respondent had sufficient control over her given the context of her being a teacher, she had all the other elements that other employed teachers had (holiday pay, pension and so on) and there was never any suggestion that the Respondent was merely a client of the Claimant. The Tribunal therefore agrees with the common position which is the Claimant was an "*employee*" and that she was employed under a contract of employment which **pp.73-82** in effect accurately records the terms (subject to the point made below).

16. The second element of "*fixed-term*" employee is really the crux of the present dispute, namely that the contract of employment, which the parties were in agreement that the Claimant had and the Tribunal has equally found, was one which "*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.*"

17. The Claimant's employment contract had no expiry date, there is nothing of this nature at **pp.73-82**. So, it did not "*terminate…on the expiry of a specific term*". Neither did it "*terminate on the completion of a particular task*", or "*occurrence or non-occurrence of any other specific event*". The contract continued to subsist and the only way that it could end was by the provision of notice, like any other 'non' fixed term contract. Having regard to the law set out at paragraph 10 above and the facts as found at paragraph 4-5 above, it is not simply a case of looking at written terms but that was the true nature of the agreement. That was based on all the evidence the Tribunal heard and the way things operated which was completely consistent with the written contract which was an employment contract. Equally from all this it can be seen it was not a sham. The timetable that was agreed ahead of each term and the times are consistent with the contract, it is not a case of there being freestanding or separate employment contracts based on the termly timetable as the Claimant was arguing. The Claimant in fact had a stable working pattern and continuity throughout, her understanding was that ahead of each term she would be getting the class hours which was precisely what the contract, which was never terminated, in effect provided. She was in effect acting like many in the teaching profession as a 'term time' employee.

18. The Tribunal however does note that clause 21.2 (see paragraph 5.e above) does suggest that there could be an end date. In fact, as pointed out above, no actual end date was provided. Applying the law the Tribunal concludes that that was not part of the true agreement. Indeed, the Tribunal concludes that it was a typographical error, a precedent clause that was there for a contract that was to end on a specified date (which would then have been fixed term as required by Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. After all, the Claimant herself did

not understand what this clause meant and considered the contract to be 'open ended' subject of course to the notice clause.

19. It follows that the Tribunal concludes that the Claimant was not a *fixed-term employee*" within the meaning of reg.1(2) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Nevertheless, the Tribunal will briefly deal with some of the other arguments made by the Claimant:
    a. the Claimant argued that the case of *Kocur* shows that offers of work were in fact temporary. That case however deals with different regulations and does not in the Tribunal's view establish any form of precedent or analogy that is relevant to the reg.1(2) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 which has its own wording and terms;
    b. the Claimant also argued that there was non-contractual documentation that referred to the employment as 'temporary' (see paragraph 12.c). That however does not alter what the true agreement was, and indeed what the contract said. Indeed, looked at another way if a permanent employee who was a Maths teacher specialising in Year 3, was temporarily moved to teach Year 2 he or she may have a timetable that stated, "*reasons for temporary employment*". That statement would be legally inaccurate in that it would not change the employment status of the Maths teacher to fixed term but one could see why the documentation would be phrased that way;
    c. finally, whilst the Collective Agreement appears to have been incorporated by Clause 18 of the contract it bears no relevance to the issue before this Tribunal, as indeed the Respondent submitted. The collective agreement does not change the status of the other agreement, the contract. In any event, it is also the case that the Collective Agreement terms themselves only point one way, that is that they must apply to fixed term (or not). By way of example, it deals with providing maternity cover which is a classic example of fixed term type work not being caught. Equally, the Claimant herself would have qualified to get what she wanted under this very collective agreement *if* she had worked more hours overall, so been timetabled for more. So, the mere existence of the collective agreement and what it states does not seem to have any bearing under the underlying contract and true agreement between the parties.

Employment Judge Caiden
15 June 2024

JUDGMENT SENT TO PARTIES ON 18 June 2024

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