EMPLOYMENT TRIBUNALS

Claimant: Ms T Ashreena **Respondent:** Cabinet Office

Heard at: London Central Employment Tribunal (in private; by video)

On: 5, 6, 7 (in chambers), 10 June 2024

Before: Employment Judge Adkin
Mr S Pearlman
Mr S Godecharle

Appearances
For the claimant: Represented herself (attended first day only)
For the respondent: Ms N Ling (Counsel)

REASONS

1. These written reasons were requested by the Claimant in an email dated 14 June 2024 further to the oral reasons delivered on 10 June 2024.

2. By a judgment dated 10 June 2024, sent to the parties on 14 June 2024 the Tribunal unanimously found that the following complaints were not well-founded:

    a. Maternity Detriment (S 47c Employment Rights Act 1996 and reg 19 Maternity and Parental Leave etc Regulations 1999);

    b. Maternity Dismissal (s.99 Employment Rights Act 1996, reg 20 MPLR Maternity and Parental Leave etc Regulations 1999 (MPLR 1999));

    c. Direct disability discrimination (Equality Act 2010 section 13);

    d. Indirect disability discrimination (Equality Act 2010 section 19);

    e. Direct sex discrimination (Equality Act 2010 section 13);

    f. Indirect sex discrimination (Equality Act 2010 section 19).

Procedural matters

3. The Claimant Ms Tanya Ashreena only attended the first day of the hearing.

4. The Claimant chose not to attend after giving her evidence on the first day of the hearing but invited the Tribunal to continue the hearing in her absence which we did. The Tribunal did consider whether we should adjourn the hearing to a later date, the Claimant was not asking us to do this. This was a case with an unusual absence of disputed facts. The chronology was entirely agreed. The question for the Tribunal was interpretation to put). In those circumstances we continued with the hearing is requested by the Claimant.

5. At the request of the Tribunal, we received written submissions by email from the Claimant 7 June 2024 and from the Respondent a skeleton argument which was amplified orally.

6. The Claimant was notified by an email on 7 June 2024 of our intention to deliver oral decision at 11:30am on 10 June, but did not attend.

Evidence

7. We received an agreed bundle of 344 pages.

8. The Claimant provided a witness statement and was cross-examined on the first day of the hearing.

9. From the Respondent we heard oral evidence as well as witness statements from:

    a. Richard Miller (Deputy Director of UK Border Readiness at the Cabinet Office);

    b. Marie Gadsden (HRBP);

    c. Luke Myers (Claimant's line manager from December 2022 onward; engagement lead based in the EU Member States Technical and Operational Policy.

10. There was a witness statement from Janette Durbin, who did not attend to give oral evidence.

Findings of fact

11. On 4 December 2020 the Claimant commenced employment with Respondent on a Short Term Fixed Term Appointment ("STFTA") as Communication & Reporting at Higher Officer grade. She joined the Borders Operation Centre, a team within the Cabinet Office which dealt with matters relating to post-Brexit border policy.

12. The context in which the Claimant was recruited was an extensive recruitment exercise undertaken quickly to attempt to deal with disruption at borders caused

by post-Brexit policy changes. Recruitment under STFTAs was carried out to expedite the recruitment process.

13. The Claimant was initially line managed by Mark Rowlandson.

Letter of appointment

14. The Claimant says that initially it was agreed that she would work for six months, but that this was extended to nine months.

15. Approximately six weeks after commencement of employment, on 28 January 2021 the Claimant received a letter of appointment which contained the following:

> Your appointment is for a short term fixed-term because you haven't come through fair and open competition. It will last from 04/12/2020/to 04/09/2021 Should it be necessary to terminate your appointment before this date you will be notified in writing and will receive the requisite period of notice.
>
> During this temporary period of employment, you will not be eligible to apply for other Civil Service posts except for those which are advertised externally through fair and open competition.

16. The dates in this document reflect a nine month contract.

Maternity leave

17. On 23 December 2021 the Respondent confirmed by letter to the Claimant proposed maternity leave dates from 18 March 2022 to 18 December 2022 and receipt of Departmental Maternity Pay until 16 September 2022.

Transfer

18. On 25 January 2022 the Claimant transferred to a different team doing work relating to borders, specifically the Operational Testing team within the Borders Readiness Directorate.

19. The Claimant was now line managed by Julian Anderson.

Contract extension

20. On 2 February 2022, in anticipation of the Claimant's contract coming to an end during her maternity leave, her contract was purportedly extended to 18 December 2022. This represented a date which was over 2 years from the date she commenced working for the Respondent. Linda Kissi in the Respondent's HR department sent the Claimant which read as follows:

> "Cabinet Office will extend your contract up to 18 December 2022 (**subject to Civil Service Commissioner approval**).

> You will need to ensure any accrued annual leave is taken before your contract ends."
>
> As your maternity leave ends on or around the same date as your employment you will need to consider whether you return before 18 December 2022. Alternatively, you could seek to secure a permanent position either before or after this point, but you will need to apply for this via fair and open competition.
>
> At the end of your Short Term Fixed-Term Appointment, your line manager will consider whether the appointment should be extended or confirm if the appointment is to be ended. Your line manager will write to you to explain the reasons for ending the contract. If your contract ends when you have at least two years' service and you are in a redundancy situation, you will be entitled to the usual redundancy pay for all Cabinet Office employees."
>
> We will be ensuring we review our policies and processes going forward to make certain individuals on short term fixed term appointments are provided with accurate information by line managers in relation to their status.
>
> [emphasis added]

Two year limit

21. An application to the Civil Service Commissioner would have been required for permission to go beyond a two-year appointment in the case of the Claimant who had not been through a fair and open competition. That is pursuant to Civil Service policy and statutory requirements under the **Constitutional Reform & Governance Act 2010 ("CRGA 2010")**, in particular sections 10 and 11.

22. Selection to the Civil Service must be on the basis of fair and open competition. There are exceptions. One of the is for a short term period of time, under certain conditions. This dealt with under "Law" below.

No application to the CS Commissioner

23. Although the letter of 2 February quoted above referred to "subject to Civil Service Commissioner approval", on the balance of probabilities we find that no application to the Civil Service Commissioner was made on or around February 2022 when this extension was purportedly granted to the Claimant, nor was such an application made at any time subsequently.

24. Marie Gadsden says there is no record of such an application being made. The Claimant line manager Julian Anderson expressed the view in a later email that this had been "missed". Given the lack of any record and the views expressed by the Respondent's witnesses we find that it was missed.

25. It is impossible for this Tribunal to know what the attitude of the Civil Service Commissioner would have been to such an application. They may have

declined this request. In that event at least however the Claimant would have been aware of the fact that the extension had not been granted. In fact she was left to believe that the extension still stood until after the end of the extension.

KIT

26. The following month, on 7 March 2022 Linda Kissi (HR) advised the Claimant's line manager Julian Anderson as follows:

> During her Keep In Touch conversations, you will need to keep her abreast of any opportunities that come up at her grade, but you cannot guarantee a role to her. Before she returns, if a role does come up that fits with her skillset, you will need to seek Civil Service Commissioner approval to extend her contract beyond 18 December. If no roles are available, then you will need to have a discussion with the HRBP to check whether an alternative option is redundancy. I would suggest starting this process around September/October to give you enough time to ensure all options are considered and actioned.

Maternity leave

27. On 18 March 2022 the Claimant commenced maternity leave.

28. On 1 April 2022 the Claimant's son was born. Due to complications at birth he suffered a permanent brain injury and is deaf, leading to multiple healthcare needs.

Redeployment of the Claimant's team

29. In or around April 2022 Jacob Rees Mogg, the then Minister for Brexit Opportunities and Government Efficiency in the UK, postponed the next phase of the Border Target Operating Model. The result was that operational testing work ceased. The circumstances of colleagues whom the Claimant relies upon as comparators are described the end of our findings of fact.

30. The Claimant was at this stage still on maternity leave.

2 year limit raised

31. On 8 September 2022 Julian Anderson made contact with HR in anticipating the Claimant's return to work following maternity leave, picking up the point about her going past the two-year limit.

32. On 22 September 2022 Claimant emailed the Respondent's HR mailbox querying next steps on her return from maternity leave. She was alive to the problem about going past two years service. She wrote:

> "I am on a fixed term contract which ends on 18th December following my maternity leave. However, I have been employed at the Cabinet Office since 4th December 2020, which means I will have completed over two years of employment by the time I'm back. I was just wondering what happens next? As I wasn't employed through open and fair recruitment, will I be made redundant?

33. There was then a back and forth exchange of emails between the Claimant and HR function.

34. On 4 October 2022 the Claimant continued to correspond with a generic HR email address whilst on maternity leave, writing:

> "I believe my HR was Linda Kissi. However, she had told me I'd have to return from my maternity leave early and then my contract would end. However, I will have over 2 years employment, so wanted to know how the process would work."

35. Initially the Claimant was corresponding with a generic HR address. Delays were then caused because Marie Gadsden was away for a week, then Mr Anderson the Claimant's line manager was away.

36. It seems likely from the content of some of the Claimant's emails, e.g. 24 October 2022 that she had some doubt as to the accuracy of what she had told by her manager about full employment rights once she had more than two years' employment.

Extension assumption error

37. In October 2022 Marie Gadsden began supporting the borders team as HRBP.

38. On 24 October 2022 Tomas Dillon, Business Manager, emailed Marie Gadsden (wrongly):

> "the CS Commissioner has granted an extension until the end of December".

39. We have not heard evidence from Mr Dillon, but on the balance of probabilities we find that he assumed given the earlier email of Ms Kissi in February 2022 that approval from the commissioners had been sought and granted. In fact, as we found above, it had not been.

Mr Anderson's update

40. Mr Anderson updated Richard Miller, the Deputy Director of UK Border Readiness on 2 November 2022 on the advice he had received from HR as follows:

> "...when Tanya returns she will be classed as a permanent employee. This not only means she has full employment rights but also needs to

> be demonstrably treated on a par with other Operational Test team members. It is also worth noting that Tanya has statutory rights to return to the same role, or another suitable and appropriate role, on terms and conditions that are no less favourable".

41. Mr Anderson outlined three options ranging from (i) Tanya returning to Mr Miller's team and either being deployed within the team or loaned to other team members; (ii) registering Tanya with the Cabinet Office Resourcing Hub to identify an alternative role outside of my team or (iii) implement a redundancy process.

42. It seems based on the Respondent's case at this Tribunal hearing that those options ought not to have been offered.

Claimant notified that role no longer existed

43. In November 2022 the Claimant attended a KIT (keep in touch) day.

44. She was told by her manager Julian Anderson that the role she had been performing no longer existed. She was offered two alternative roles to commence on her return to work. She was told (wrongly) that since she had worked in the Cabinet office for over two years she had unfair dismissal rights similar to those in permanent employment. In view of the absence of CS Commissioner approval and the effect of CRGA 2010 that was inaccurate.

Change of line manager

45. In December 2022 Mr Anderson retired. Luke Myers took over as the Claimant's line manager.

46. As part of the process of handing over the line management responsibility, Mr Anderson mentioned the traumatic birth in April 2022 to Mr Myer. The content of contemporaneous emails suggest that this Mr Anderson was aware of this in October 2022, although it may have been earlier.

47. Mr Anderson summarised what he understood about the contractual position as follows:

> Tanya's original contract was until March 2022 but was extended until 18th December 2022. (I never got a straight answer from HR about when this was approved but the date is confirmed on the maternity leave application. (just between us I wondered whether it was just missed)

48. In this email he also set out a complete timeline of events based on his understanding to which we have had reference. He explained that the HR Department, and in particular the complex case work team had confirmed to him more than once that the Claimant had "full employment rights" at two years

continuous service and that a redundancy process was necessary. He had received HR advice in March 2022, October and November 2022.

Discussion of alternative roles

49. On 7 December 2022 the Claimant attended an "away day" with Borders team in Liverpool. While there she had a discussion with her new line manager Luke Myers. Part of that discussion was about flexible working to help the Claimant accommodate childcare needs, in particular given that the Claimant's son was still unwell.

50. The other part of that discussion was about alternative roles. One of the matters discussed that was the possibility of the Claimant working in a Border Flow Governments Adviser role in the Border Flow Service. That team was under-resourced at that time and then Deputy Director Ms Hurley had contacted Mr Myers about the possibility of the Claimant going to work for them.

51. There was a discussion about other options for administrative roles within Mr Myers' team and the wider Borders team. Mr Myers said although he had no specific vacancies there were a variety of potential roles which the Claimant could do. Mr Myers says that if the Claimant wanted to provide administrative support, book restaurants, manage diaries etc then that was also an option.

52. Mr Myers followed that discussion by email on 14 December providing her with details of the role they had discussed. The Claimant responded confirming that she would be interested in taking up that role but wanted to know about whether training would be available. Ultimately however the Claimant did not end up taking up this role since her proposed start date of 14 February 2023 was too late to be useful for Border Flow Service team and also long-term funding for that work was uncertain.

Recruitment freeze

53. In his oral evidence Mr Myers explained that at this time there was a "recruitment freeze" at around this time which meant that any external recruitment had to have approval at a ministerial level. This freeze was not lifted until later in 2023.

54. Mr Myers also told the Tribunal that he did not ultimately recruit anyone at the Claimant's level during the period material to this claim.

End of maternity leave

55. On 18 December 2022 the Claimant's maternity leave came to an end.

56. According to an email sent on 14 December 2022 sent by Mr Myers the Claimant was at that stage requesting leave until the middle of February 2023. That two month timescale was flagged up as a problem by Stephanie Hurley whose team there had been discussion about the Claimant moving into.

Claimant chases contract

57. On 26 December 2022 the Claimant emailed the Respondent's HRBP (Marie Gadsden) querying whether she would receive a new contract of employment.

KIT day

58. On 13 January 2023 the Claimant and her manager had a "Keep in Touch" catch up virtually.

59. There was a discussion about what the team was doing and further discussion about flexible working (or possibly part-time working) which Mr Myers said he was amenable to.

"Discovery" of STFTA

60. At around this time the Cabinet Office reviewed how it managed FTAs and HRBPs were asked to check existing FTAs. Ms Gadsden says that she thinks it was following on from this that she obtained a copy of the Claimant's contract and the STFTA "came to light".

61. On 18 January 2023 Mr Myers was informed by Ms Gadsden that Claimant was employed on a STFTA as follows:

> Thanks Luke. I had thought she was recruited on a FTA but have now found out she was actually recruited on a STFTA ie she did not go through fair and open competition which makes it more complicated. If you do have anymore background about why this was the case it would be helpful, but will request some legal advice.

62. There is an important distinction between Short Term FTAs and FTAs as this email made clear.

Reduced hours working chaser

63. On 19 January 2023 the Claimant sent the following email chasing an outcome on reduced working as follows:

> I was wondering whether there is any response from HR on reduced working hours/days?
>
> (Just so I can arrange childcare accordingly)

64. Later on the same day she wrote to her manager Mr Myers:

> Thanks for the update. Do you know if it would be preferable that I worked three continuous days (Monday to Wednesday or Wednesday to Friday) or Monday, Wednesday and Friday? Of course, I'd be

> checking my emails on the nonworking days as well, and will meet deadlines whenever required

65. The Claimant did not ever put in a formal written application so for flexible working or reduced hours.

66. Mr Myers did not provide substantive responses to these queries about flexible working because of the issue regarding the Claimant's contractual status and the two year limit. We consider that Mr Myers ought to have at least acknowledged these emails as a courtesy. We infer that he struggled to know precisely what to say given that there was now very significant doubt about the Claimant's future employment working for the Respondent.

Termination of employment

67. On 27 January 2023 Mr Miller emailed Claimant noting an issue that has been flagged by HR relating to her contract.

68. This led to a meeting on 2 February 2023, which the Claimant and Richard Miller attended with Marie Gadsden. The Claimant's trade union representative Julie Bremner was present. In that meeting the planned termination of the Claimant's employment was confirmed to her.

69. On 9 February 2023 Mr Miller wrote to the Claimant confirming the termination of her employment as follows:

> You were recruited to Cabinet Office as an HEO (Comms and Reporting Lead) on a Short Term Fixed Term Appointment (STFTA) from 4th December 2020 to 4th September 2021.
>
> Your contract was subsequently extended to 18th December 2022 and you took maternity leave between 18th March and 18th December 2022. During your maternity leave you accrued 25 days annual leave and 9 days in respect of bank holidays and privilege days.
>
> You have taken this leave and it ended on 5th January 2023. You have not been required to work since your leave ended whilst we clarify your employment situation.
>
> At the meeting I explained that recruitment to the Civil Service must be through fair and open competition in accordance with the Civil Service Recruitment Principles (see below and attached). Your recruitment as a STFTA was made under exception 1 of the Civil Service Recruitment Principles as it did not take place through fair and open competition and your role was of short term duration.

70. The exception was set out in the letter as follows:

> Exception 1: Temporary appointments

77. Where either the urgency of the need or the short duration of the role make a full competition impracticable or disproportionate, Departments may appoint an individual for up to a maximum of two years, to provide managers with the flexibility to meet the short-term needs of the Civil Service.

78. Any proposal to extend a fixed-term appointment made by Exception (this Exception and any other relevant Exception) beyond a total of two years requires the prior approval of the Commission.

79. Any proposal to appoint an individual by Exception on a fixed-term appointment within 12 months of an earlier fixed-term appointment by Exception (this Exception and any other relevant Exception) requires the prior approval of the Commission.

71. The letter concluded as follows:

Regrettably, given the nature of your recruitment and employment I explained that it will not be possible for you to return to work in the Cabinet Office under your existing contractual arrangements and it will be necessary to end your employment as any further period of employment would be a breach of the Civil Service Recruitment Principles and void for illegality in accordance with s10 of the Constitutional Reform and Governance Act 2010. The role that you were undertaking no longer exists and we are unable to identify suitable alternative roles for you given that you were not recruited through fair and open competition. You are, of course, entitled to apply for externally advertised roles in the Civil Service.

You pointed out at our meeting that on the Cabinet Office Intranet it states that if an employee is made redundant from a role, they would be put forward for other roles. You also added that under employment law, if you return from maternity leave, you should be offered another job if you are made redundant. In response we confirmed that unfortunately due to the nature of your recruitment and employment, as outlined above, we are not able to offer you alternative roles as we are no longer able to employ you given the circumstances of your initial recruitment to a short term role under Exception 1 of the Civil Service Recruitment Principles.

You considered that you had made an application for your original role by submitting an application form and having a probationary period. Marie confirmed that although you submitted an application this did not constitute fair and open competition under the Civil Service Recruitment Principles, and in accordance with your STFTA you would have been required to perform satisfactorily in the role during a probationary period in any case, which you did.

You considered that you had been wrongly advised in relation to potential roles in another team and felt that these “offers” of alternative

roles should be honoured. We confirmed that it had been mistakenly thought at the time the alternative roles were discussed with you that you had originally been recruited on a "standard" Fixed Term Appointment (which is through fair and open competition) but it was subsequently confirmed that it was a STFTA arrangement and as a result we were not unfortunately able to offer you an alternative role.

I do appreciate that this is disappointing news. As explained, in recognition of the fact that the work that you were previously undertaking has ceased and you have been employed at Cabinet Office for 2 years we would like to offer you 3 months' notice and a 2 months' redundancy payment in accordance with the Civil Service Compensation Scheme

72. There were some further details about the timescale for payment which is not relevant for present purposes.

73. The Claimant's employment came to an end on 10 February 2023.

Queries

74. The Claimant made various queries, which were responded to on 14 February 2023 by Mr Miller to Claimant as follows:

Accrued annual leave to 10th February

During your maternity leave you accrued 26 days' annual leave (rather than the 25 days quoted in my earlier letter) and 9 days in respect of bank holidays and privilege days. You have taken this leave and it ended on 8th February 2023. You have also accrued a further 2 days annual leave from the end of your maternity leave until 10th February 2023 - your last day of service. You have not been required to work during this time whilst we clarified your employment situation.

Notice and Redundancy payment

We propose paying you 3 months' pay in lieu of notice in accordance with your contract of employment. This payment will not include holiday that would have accrued during the notice period, i.e. beyond 10th February 2023 and will be paid in February payroll. Your contract sets out how this payment is calculated:

The Cabinet Office may at any time, and in its absolute discretion, terminate this appointment with immediate effect and make a payment in lieu of notice. This payment shall comprise solely your basic salary and pension contributions and shall be paid net of deductions for income tax and national insurance contributions as appropriate.

> As previously advised your redundancy payment needs to be calculated and confirmed by Civil Service Pensions and this may take around 8 weeks to process.
>
> **Breach of Civil Service Recruitment Principles**
>
> In relation to the question of how your employment went beyond 2 years - this should not have been permitted and the prior permission of the Commission was not sought. This has resulted in a breach of the Civil Service Recruitment Principles which we need to rectify as we cannot lawfully continue to employ you and it is unfortunately necessary to end your contract
>
> **Employment rights**
>
> As you say, employees with 2 or more years' service have certain employment rights, including the right to bring an unfair dismissal claim. However, a dismissal will be fair if the employer can show that there is a fair reason for the dismissal and a fair procedure has been followed. In employment law terms the fair reason for your dismissal is breach of a statutory restriction which means that you are no longer lawfully able to continue working in your job.

75. He confirmed that the Claimant had 10 working days to appeal the decision to terminate her employment.

Appeal against dismissal

76. In an undated document submitted in February 2023 the Claimant appealed against termination of her employment. In that appeal she said as follows:

> "While I appreciate that the Civil Service Recruitment Principles have been breached, the Civil Service Commission does not state that the Civil Service is able to breach employment or maternity laws and not follow the Equality Act."
>
> I have noted that in past cases, where a department has breached Civil Service Recruitment Principles, they have asked the Civil Service Commission for an exemption against "fair and open recruitment.
>
> By dismissing me, clearly the HR team is trying to cover up their recruitment mistake to avoid questioning by the Commission."

Appeal hearing

77. The hearing of the appeal took place on 20 June 2023.

78. The appeal was heard by Janette Durbin, with Joanne Whitehead attending as notetaker.

Appeal outcome

79. An outcome to the appeal was provided by letter of 27 June 2023.

80. Ms Durbin took legal advice and refused the appeal. The decision was summarised as follows:

> The role you were taken on to do in the Borders Readiness Team was no longer needed after December and there was a redundancy situation. Had your employment at that time been legal (i.e. not in breach of the Civil Service Recruitment Principles) suitable and alternative employment would have been sought for you. Because your employment had gone over two years, exceptionally, Cabinet Office paid you compensation equivalent to a redundancy payment.

Subsequent employment

81. In July 2023 the Claimant applied for a HEO role at the Department of Business & Trade and happily was successful in that application.

82. Unfortunately there were delays in obtaining security clearance meaning that she lost out on salary for a number of months.

Respondent's policy

83. The policy contains the following guidance:

> Short term fixed-term appointment Task
>
> Short term fixed-term appointments (STFTAs) are made without fair and open competition being undertaken, and are an agreed exception to the Civil Service Commission Recruitment Principles (PDF). These appointments may be made:
>
> - where a manager requires flexibility to meet an urgent short-term specialist staffing need, and
> - for periods of not more than 11 months, although in exceptional cases appointments can be made of up to 24 months.
>
> As they are not a substantive civil servant, employees appointed on a STFTA contract are not eligible to apply for internal or Civil Service-wide advertised roles
>
> …
>
> To extend an STFTA

> STFTA appointments may be extended only on an exceptional basis (for example where the particular job has taken a little longer than originally planned) and up to a maximum of 24 months in total.
>
> Please check the considerations above, including whether this requires prior approval from the Civil Service Commission. For example if the individual has been on a STFTA previously. Otherwise the Cabinet Office could be in breach of the Recruitment Principles.
>
> For an extension to an existing STFTA you should complete the form for STFTA and Secondments (Word) (Word) and discuss with your Business Unit's HR Business Partner. Once you have completed the form and have the necessary approvals, please send the form to the People Business Services Team in order for them to action.
>
> …
>
> Approval from the Civil Service Commission
>
> This is needed where the following applies:
>
> ….
>
> Any fixed-term appointment by Exception, or Exceptions, in excess of two years

Comparators

84. On 1 November 2020 both Mohammed Waqas and Steve Naisbitt commenced employment with the Respondent as a permanent employee at Higher Officer grade.

85. In October 2021 Persephone Burrell commenced placement with the Respondent on "fast stream" programme.

86. Mr Miller summarised the circumstances of the Claimant's comparators at paragraph 30 in his witness statement as follows:

> Mohammed Waqas was a permanent Higher Officer ("HO") employed by the Cabinet Office in my team. He left the Cabinet Office on loan for another government department in June 2023 and has subsequently been promoted.
>
> Persephone Burrell was a permanent employee on the 'fast stream' programme who worked in the Cabinet Office for one year between October 2021 and September 2022.
>
> Steve Naisbitt was a permanent Higher Officer employed by the Cabinet Office in my team and who remains in employment.

Julian Anderson was Tanya's line manager. He was employed as a permanent member of staff at Senior Officer ("SO") grade until his retirement in December 2022.

87. Another of the Claimant's comparators was Tetra Hale, who started working for the Respondent, also on an STFTA at around the same time as the Claimant. Ms Hale was an Officer which was a lower grade than the Claimant. When she joined Mr Miller's team she became his PA. Mr Miller's uncontested evidence is that unlike the situation with the Claimant, he was aware that Ms Hale had been appointed on an STFTA because it came to light when he had sought to extend her contract. He had extended her contract once and then sought to extend again so her appointment would have lasted just under 2 years. This second extension was refused for budgetary reasons. We received evidence which we accepted that that there was a recruitment freeze at that time.

Claim

88. After ACAS early conciliation period between 28 March 2023 and 9 May 2023, the Claimant presented a claim to the Employment Tribunal on 24 May 2023

89. At a preliminary hearing on 17 November 2023 Employment Judge Hopton held that there was no jurisdiction to hear the Claimant's complaint of unfair dismissal because at the time of the dismissal her employment contract was *ultra vires* following the case of **Betts** (described below). That complaint was dismissed.

The Law

Maternity detriment

90. The Employment Rights Act 1996 contains the following provision:

> 47C Leave for family and domestic reasons.
>
> (1) An employee has the right not to be **subjected to any detriment** by any act, or any deliberate failure to act, by his employer done for a prescribed reason.
>
> (2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—
>
> (a) **pregnancy, childbirth or maternity**,

91. The Maternity and Parental Leave Etc Regulations 1999 contains the following provisions:

Protection from detriment

19.—(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee—

(a) is pregnant;

(b) has given birth to a child;

…

(d) took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;

Unfair dismissal

20.—(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or

(b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if—

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;

(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

(a) the pregnancy of the employee;

(b) the fact that the employee has given birth to a child;

…

(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave];

Civil service recruitment

92. The Constitutional Reform and Governance Act 2010 contains the following provisions:

10 Selections for appointments to the civil service

(1) This section applies to the selection of persons who are not civil servants for appointment to the civil service.

(2) A person's selection must be on merit on the basis of fair and open competition.

(3)The following selections are excepted from this requirement—

(a) a person's selection for an appointment to the diplomatic service either as head of mission or in connection with the person's appointment (or selection for appointment) as Governor of an overseas territory;

(b) selection for an appointment as special adviser (see section 15);

(c) a selection excepted by the recruitment principles (see sections 11 and 12(1)(b)).

(4) In determining for the purposes of subsection (1) whether or not a person is a civil servant, ignore any appointment for which the person was selected in reliance on subsection (3).

(5) But, in relation to persons selected in reliance on subsection (3)(c), the recruitment principles may disapply subsection (4) in specified cases.

11 Recruitment principles

(1) The Commission must publish a set of principles to be applied for the purposes of the requirement in section 10(2).

(2) Before publishing the set of principles (or any revision of it), the Commission must consult the Minister for the Civil Service.

(3) In this Chapter “recruitment principles” means the set of principles published under this section as it is in force for the time being.

(4) Civil service management authorities must comply with the recruitment principles.

12 Approvals for selections and exceptions

(1) The recruitment principles may include provision—

(a) requiring the Commission's approval to be obtained for a selection which is subject to the requirement in section 10(2);

(b) excepting a selection from that requirement for the purposes of section 10(3)(c).

(2) The Commission may participate in the process for a selection for which its approval is required by provision within subsection (1)(a).

(3) It is up to the Commission to decide how it will participate.

(4) Provision within subsection (1)(b) may be included only if the Commission is satisfied—

(a) that the provision is justified by the needs of the civil service, or

(b) that the provision is needed to enable the civil service to participate in a government employment initiative that major employers in the United Kingdom (or a part of the United Kingdom) have been asked to participate in.

(5) Provision within subsection (1)(a) or (b) may be made in any way, including (for example) by reference to—

(a) particular appointments or descriptions of appointments;

(b) the circumstances in which a selection is made;

(c) the circumstances of the person to be selected;

(d) the purpose of the requirement to obtain approval or the purpose of the exception.

(6) Provision within subsection (1)(b) may also (for example)—

(a) deal with the way in which selections made in reliance on section 10(3)(c) are to be made;

(b) specify terms and conditions that must be included in the terms and conditions of an appointment resulting from a selection made in reliance on section 10(3)(c).

(7) Provision within subsection (1)(a) or (b) may confer discretions on the Commission or civil service management authorities.

93. In **Secretary of State for Justice v Betts** [2017] ICR 1130 Simler P described this legislation as “an important public safeguard to ensure recruitment on an impartial basis of those who are best qualified to serve, and to preserve, the independence of the civil service” [33]. Additionally, it promotes fairness among

prospective applicants and avoids cronyism [44]. That case considered an earlier version of the Civil Service Recruitment Principles.

Burden of proof

94. We have considered the guidance set out in **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] ICR 1205, EAT, as approved and revised by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* [2005] ICR 931, CA.

95. We have also considered **Nagarajan v London Regional Transport** [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913.

96. In **Hewage v Grampian Health Board** [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

> "'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'.

97. In **Madarassy v Nomura International plc** 2007 ICR 867 CA Lord Justice Mummery held as follows:

> "The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." (para 56)

98. In **Glasgow City Council v Zafar** [1998] ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably". He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with

another in the same circumstances'. It follows that mere unreasonableness may not be enough to found an inference of discrimination.

Causation in discrimination cases: the "reason why"

99. In "criterion" cases of a simple "but for" approach to discrimination as in (**James v Eastleigh Borough Council** 1990 ICR 554, HL) is the correct approach. In that case it was an inherently discriminatory pricing policy where women had free access to a swimming pool at 60 whereas men only did at 65.

100. In other cases (following **Nagarajan v London Regional Transport** 1999 ICR 877, HL) particularly where there is doubt as to the factual criteria relied upon by the alleged discriminator that is not the appropriate approach and a subjective enquiry into the mind of the discriminator is required. In that case Lord Nicolls said:

> "a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a **cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor**. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a **significant influence** on the outcome, discrimination is made out' (our stress). The crucial question, in every case, was 'why the complainant received less favourable treatment… Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?".
>
> [emphasis added]

101. The protected characteristic need not be the only reason for the treatment. All that matters is whether it was an effective cause or a significant influence.

Causation in maternity context

102. In **Interserve FM Ltd v Tuleikyte** 2017 IRLR 615, EAT the claim concerned alleged unfavourable treatment because of pregnancy or maternity under S.18 EqA rather than direct discrimination under S.13. It was accepted by all parties and by the EAT that the correct approach to determining the employer's motivation for any unfavourable treatment was identical in both types of claims. In that claim the unfavourable treatment relied upon was a blanket policy of issuing a P45 to all employees on leave without pay for 3 months. At no point in its judgment did the tribunal consider the thought processes of the putative discriminator. Simler P concluded that if absence on maternity leave formed any part of the reason for her treatment, it could only have been because the relevant manager was — whether consciously or

subconsciously — significantly influenced by her maternity leave. It was therefore necessary for the tribunal to consider the mental processes of the putative discriminator. Since the tribunal had not done that, the EAT remitted the matter to it for reconsideration. [IDS employment law]

103. The Equality and Human Right Commission Equality Act Code of Practice ("the EHRC Code") contains the following:

> 8.20
>
> A woman's pregnancy or maternity leave does not have to be the only reason for her treatment, but it does have to be an important factor or effective cause.

Respondent's policy

104. The version of the **Civil Service Commission Recruitment Principles** relevant to this case was published in April 2018. [pp66-81 of the agreed bundle]

105. Paragraph 38 of the Recruitment Principles states:

> "Wherever practical, staff brought into the Civil Service on fixed-term appointments should be selected on merit on the basis of fair and open competition. Where the urgency of the need or the short duration of the role makes this impractical or disproportionate, they may be brought in using Exception 1 (see Annex A)."

106. Paragraphs 59-61 state:

> "59. Under section 12 of the 2010 Act, the Commission has the power to except a selection from the requirement to appoint on merit on the basis of a fair and open competition. This must either be justified by the needs of the Civil Service or be necessary to enable the Civil Service to participate in a government employment initiative.
>
> 60. The permitted Exceptions, and the delegated authority for departments to apply Exceptions without reference to the Commission, are described at Annex A.
>
> 61. Departments must be able to justify why, in any particular appointment, it has not been possible to select someone on merit through a fair and open competition…."

107. Annex A is entitled 'Exceptions'. Under 'Exception 1', paragraphs 77 and 78 state:

> "77. Where either the urgency of the need or the short duration of the role make a full competition impracticable or disproportionate, Departments may appoint an individual for up to a maximum of two

years, to provide managers with the flexibility to meet the short-term needs of the Civil Service.

78. **Any proposal to extend a fixed-term appointment made by Exception (this Exception and any other relevant Exception) beyond a total of two years requires the prior approval of the Commission**."

[emphasis added]

CONCLUSIONS

108. The list of issues is attached as a separate document.

1. Maternity Detriment (S 47c Employment Rights Act 1996 and reg 19 Maternity and Parental Leave etc Regulations 1999)

1.1. Did the following amount to a detriment?

109. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage.

(1.1.1) Failing to notify the claimant about vacancies for permanent roles during her maternity leave.

110. The Tribunal accepts that the Respondent has shown that there were alternative roles which were discussed with the Claimant in November 2022, given that her role had come to an end. One was a role in Ms Hurley's team. The other were administrative duties within Mr Myers' team. Given that discussion we do not consider that there was a failure from November 2022 onward. From January 2023 the two year limit prevented any further discussion about alternative permanent roles.

111. Has the Claimant shown that there were particular roles during maternity which would have been suitable for her which were not notified to her during her maternity leave?

112. We accepted Mr Myer's oral evidence that there had been a recruitment freeze in a period 2022 - 2023. We understood his evidence to be that this prevented external recruitment. Under CRGA 2010, the Claimant could only apply for alternative roles through an "fair and open" competition.

113. We have not identified based on the evidence we have received particular permanent roles being advertised that that the Respondent ought to have notified the Claimant about, such that the failure to do so was a detriment. We have considered the circumstances of the comparators identified by the Claimant, and dealt with at paragraph 30 of Richard Miller's witness statement to see whether these suggest that there were roles which were obvious for the Claimant to be notified of. We have not found that to be the case.

114. Given that we cannot identify particular vacancies for permanent roles which were suitable for the Claimant during the material period, we do not find that this amounted to a detriment.

(1.1.2) Misinforming the claimant that her role would continue on her return from maternity leave which meant that she did not start looking for an alternative role.

115. Was the Claimant misinformed about her role continuing and if so when?

116. The Claimant was notified on 2 February 2022 that her contract would be extended to 18 December 2022, but that this would end unless she found permanent employment through fair and open competition or if there was an extension by her line manager.

117. In the November 2022 KIT discussion it was made clear to the Claimant that her role not longer existed. She could not be in doubt that the *role* had come to an end. What was misleading was to suggest the possibility of an extension to her *employment* in the absence of a fair and open competition and where no application was being made to the Civil Service Commission. Between the KIT day in November 2022 and Mr Miller's email 27 January 2023 the Claimant had misleadingly been left with the impression that she did not need to start looking for an alternative role.

118. To that extent the Claimant was misinformed. This was detrimental treatment. The question is why?

Reason for detrimental treatment

119. It would be argued on behalf of the Claimant that *but for* the maternity leave this error would not have happened. The misinformation about the continuing role was given in the context of the Claimant being toward the end of her maternity leave, i.e. "but for" the maternity leave she would not have been so misinformed.

120. The Respondent argues that there is a distinction between employment and role and that in any event the error was not connected to the protected characteristic.

121. The Tribunal has to focus on *the reason why* the misinformation occurred. The line management in this case believed in November and December 2022 that it was open to them to find the Claimant another role, and extent of contract. It was for this reason that they were discussing alternative options. It was only in January 2023 that they discovered that they could not do this in the absence of Civil Service Commission approval.

122. We find that the reason that the Claimant was misinformed was entirely due to the misunderstanding of the position as regards the Claimant's STFTA and the CRGA 2010. The maternity leave was no more than the occasion for this misunderstanding. The reason for the misinformation was the misunderstanding i.e. administrative oversight, not the Claimant's maternity leave.

(1.1.3) Failing to notify the claimant that her role was coming to an end.

123. According to her witness statement the Claimant was notified that her role had come to an end at a KIT day in November 2022. There is not a precise date.

124. Whether and if so when the delay in notifying the Claimant ought to be identified as a "failure" such as to amount to a detriment is more difficult. We take account of the fact that in the period immediately after childbirth we would not have regarded it as being good management to tell the Claimant that there was expected to be an end to her role. We would not expect an employer to be immediately confronting her this situation regarding her role during the Spring and Summer of 2022.

125. We find that not notifying the Claimant earlier than September 2022 was understandable and good management, since the Claimant was in the early months of maternity leave.

126. In September 2022 both parties were addressing their minds to the Claimant's return to work later in the year, which was due to be 18 December 2022. On 8 September Julian Anderson made contact with HR about the two-year limit, although he did not make contact with the Claimant directly. By 22 September 2022 the Claimant herself had sent an email to HR querying next steps. There was then a rather slow back-and-forth exchange of emails between the Claimant and initially the generic HR email address and then eventually Marie Gadsden the new HRBP and then the Claimant's manager became involved. It is evident from this email exchange that the Claimant understood that her contract was coming to an end, but there was some confusion about whether she would have over 2 years' employment.

127. With the benefit of hindsight it would have been better management/HR practice for the Claimant to be notified in response to her email of 22 September 2022 that her previous role had come to an end at a point in time when both parties were thinking ahead to the Claimant return to work.

128. Was that a detriment? Focussing on the definition of detriment as something which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage, the reality is that the Claimant was intending to take accrued annual leave at the end of her maternity leave taking her into January 2023 and then further annual leave into the middle of February 2023 before she would return to work. Discussions in relation to the Claimant taking a role in Ms Hurley's team were based on the Claimant proposing to start in that team on 14 February 2023 i.e. approximately three months on from point at which she was told November 2022 about the role coming to an end. (We note that the Claimant's witness statement suggests that she was working on a return to work date after annual leave of 2 February 2023, though not much turns on that slight discrepancy).

129. The reality is we find that the difficulty was caused to the Claimant was the effect of the STFTA contract and the CRGC legislation which the

Respondent's management belatedly realised applied to her situation at the end of January 2023, rather than the slow process of updating her on her previous role coming to an end.

Causation

130. In case we are wrong about detriment on this point, we have separately considered causation.

131. In the period September-November 2022 the Respondent's managers were under the misapprehension that on 18 December 2022 when the Claimant's maternity leave came to an end, they could allow her to continue working in one of two alternative roles that they had identified and that her length of service had been extended over two years such that she had fuller employment rights. At that stage the significance of the end of the role viewed from the line management perspective was about changing duties not the end of employment. Our finding is that the reason for the delay was the misapprehension about rolling on to other roles rather than the fact of the maternity leave.

1.1.4 failing to seek Civil Service Commission approval to extend her contract.

132. There was no application to the commission to seek approval to extend the contract at any stage.

133. There are two distinct points in time work this comes in to sharp focus. First in February 2022 when the extension to the contract was purportedly granted. Second was January 2023, when it became clear that the purported extension was unlawful.

February 2022

134. There was plainly a failure sometime around February 2022 to seek CS Commission approval at a point in time when because of maternity leave the contract was being extended over the two-year period.

135. Notwithstanding the failure to obtain Commission approval, the Claimant received the benefit of the extension, not only to 18 December 2022 but in fact continued being paid into the following month. Had the Claimant been granted an extension to 18 December 2022 she would not arguable have been in any worse position. It might be argued that at this stage there was no detriment. Nevertheless there was an administrative failure which arguably did leave the Claimant's contractual status in an ambiguous situation. This we find was a detriment.

136. Was this because of the maternity leave? As to the reason for this failure in February 2022, our conclusion is that this was purely an administrative oversight. This failure was not because the Claimant exercised the right to maternity leave. It seems to have been the intention to attempt to obtain the

permission for the extension. As a matter-of-fact the Claimant did receive the extension (albeit without the CS Commissioner's permission).

137. We find that the approaching maternity leave was no more than the occasion of the detriment not the reason why.

January 2023

138. The next question is whether there was a failure in January 2023 once it had become clear to the Respondent that the purported extension over two years was unlawful. Again there was no application to the CS Commissioners. By this stage it would have to be a retrospective application, the two years having elapsed and the Respondent was already in breach of the CS principles.

139. The Claimant has suggested that it would have been embarrassing to the Respondent to reveal to the Commissioners that this case had been mismanaged. She suggests that this is the reason or part of the reason why no application was made. We suspect that there is an element of truth in that interpretation. The matter has been mismanaged.

140. For the Respondent, Marie Gadsden's evidence was that she had never known an application be made to the Commissioners for an extension in circumstances where there was no longer a role in which the person was working, such that the extension would be to the employee's length of service for them to go into a different role without fair and open competition. We have no basis not to accept that evidence. We can see that that would be a problem if employees on STFTA contracts could extend time into another role and thereby avoid a fair and open competition. It would potentially subvert the purpose of the legislation.

141. (The Tribunal has not received evidence that would enable us to make a finding about the likely outcome of an application to the Commissioners. The only evidence we have received about actual application for an extension is the case of Tetra Hale, in which an application was refused.)

142. On balance we accept the Respondent's position which is that they believed that they were constrained by the two year limit and it was not open to them to apply for an extension in circumstances where the Claimant would be transferring into another role. We find that this was the reason why no application was made, not because the Claimant had been on maternity leave.

2.1 Was any detriment done for a reason connected with: her pregnancy or the fact she had given birth or the fact that she took maternity leave?

143. It has been convenient to deal with this question separately under each alleged detriment above. In short the answer is no.

(2) Maternity Dismissal (s.99 Employment Rights Act 1996, reg 20 MPLR Maternity and Parental Leave etc Regulations 1999 (MPLR 1999))

(2.1) Was the reason or the principal reason for the dismissal that the claimant was redundant?

144. The Respondent argues that statutory redundancy could not in any event apply pursuant to section 191 of the Employment Rights Act 1996.

145. Section 191(4)(d) refers to arrangements being equivalent to redundancy. The Respondent's case is that at all times within this case redundancy has been used in a loose way to refer to equivalent circumstances which are not strictly speaking redundancy. Indeed the Claimant was made a payment equivalent to redundancy rather than strictly speaking redundancy pay.

146. We do not find that the reason or principal reason for dismissal was redundancy. While it can be argued that the Claimant's role had been made redundant during 2022, we accept the Respondent's case that the reason that she was dismissed was because it was unlawful to continue to employ her for two years without the permission of the Civil Service Commission.

147. The fact that efforts were being made to arrange alternative roles for the Claimant supports that conclusion. While she was on maternity prior to January 2023 the assumption of the Respondent line management was that she would continue working. While the Claimant's *role* was redundant, they were not intending to make her redundant (or the equivalent for Crown employees). Had it not been for the two-year limit discovered in January 2023 the Claimant would have continued working. In other words it was not the redundant role but the two-year limit which led to termination.

If so:

(2.2.1) During the claimant's maternity leave, was it not practicable by reason of redundancy for the respondent to continue to employ her under her existing contract of employment? (reg 10 MPLR 1999)

148. For the same reasons as above, we do not find that the redundancy was the reason that the Respondent did not continue the Claimant's employment.

(2.2.2) Was there a suitable available vacancy?

149. If, contrary to our finding above, there was a redundancy situation there were roles that it was suitable for the Claimant to go to. The Respondent's case is that there were alternative roles. It would follow therefore that there were suitable alternative vacancies.

(2.2.3) Was the claimant entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer (or successor or associated employer as specified under reg 10(2) MPLR 1999

150. Given our finding above we have not considered this.

(2.3) Did the circumstances constituting the redundancy apply equally to one or more employees? The claimant says Mohammed Wakas, Steve Nasbitt, Penelope Burrell and Julian Anderson were in this situation.

151. None of the comparators identified by the Claimant was in materially the same situation as the Claimant for the reasons identified in Richard Miller's witness statement. By contrast with the Claimant who was on a STFTA, Mr Waqas, Mr Naisbitt were permanent employees. Mr Anderson was permanent employee on a different grade. Ms Burrell was on the fast track programme and only due to be in the team for a year. We find that the circumstances of each of these comparators was materially different.

(2.4) Was the claimant selected for dismissal for a reason connected with: her pregnancy or the fact she had given birth or the fact that she took maternity leave?

152. We do not find that the reason or principal reason for the dismissal was the Claimant's pregnancy, the birth or the fact that she had taken maternity leave. We accept the Respondent's case that the reason for dismissal was that the Respondent believed due to the two year limit that it was unlawful to continue employing her for more than two years without an open and fair competition.

(2.5) Was the claimant unfairly dismissed?

153. There is no freestanding complaint of unfair dismissal given that this has been dismissed at an earlier hearing.

154. We do not find the circumstances above lead to an automatic unfair dismissal, for the reasons given above.

3. Disability

155. The disability of the Claimant's son is conceded by the Respondent.

4. Direct disability discrimination (Equality Act 2010 section 13)

156. The Claimant relies on the disability of her son.

(4.2) Did the respondent deny the claimant's flexible working request?

157. No flexible working request was ever formally made nor did the respondent deny such a request. The factual basis for the claim of disability discrimination is not established.

158. The Tribunal has not dealt with the other issues since this claim cannot succeed.

5. Indirect disability discrimination (Equality Act 2010 section 19)

(5.1) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: A practice of failing to consider an employee's flexible working request.

159. The Claimant has not established the two factual prerequisites to bring an indirect disability discrimination claim. She has not established that in her case the Respondent failed to consider her flexible working request, since she did not ever formally make one. Beyond that she has not established that there was a general practice of such failures which affected other people.

160. For these reasons this claim cannot succeed.

6. Direct sex discrimination (Equality Act 2010 section 13)

161. The Claimant is a female employee and compares herself with a male employee.

162. It is not in dispute that the Claimant was dismissed.

(6.3) Was that less favourable treatment?

163. The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

164. The Claimant confirmed that she relies on a hypothetical male colleague in the same situation.

(6.4) If so, was it because of sex?

165. There is no feature of this case from which we detected that the Claimant's sex was a factor in the way that she was treated, nor are there facts from which we could draw such an inference.

166. To the extent that it might be argued that the Claimant's maternity leave was a factor that could only relate to her as a woman, we have considered the maternity leave at points under the specific legislation above.

167. To reiterate we find that the reason for dismissal was the two year limit as outlined above, the effect of which was exacerbated by the failure of the Respondent to appreciate the two-year limit at the time that the contract was extended in February 2022.

(7) Indirect sex discrimination (Equality Act 2010 section 19)

PCPs

168. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

(7.1.1) A requirement that an employee's short-term fixed term contract should last no longer than two years.

169. The Respondent did operate this PCP, albeit that there was potential to apply for an extension.

(7.1.2) A practice of failing to consider an employee's flexible working request.

170. The Claimant has not established that this was a PCP which applied to herself and others as discussed above.

(7.1.3) A practice of failing to offer alternative vacancies to employees whose contracts were ending unless they were present in the office.

171. Even if the Claimant had established that this occurred in her own case she has not established that this was an PCP which applied or would apply to others.

(7.1.4) A practice of failing to advertise vacancies to employees on leave or otherwise facilitate their acquisition of an alternative role.

172. Even if the Claimant had established that this occurred in her own case but she has not established that this was an PCP which applied to others.

(7.1.5) A practice of failing to seek civil service commission approval to extend or make permanent the contract of employment of an employee on leave that would otherwise end within two years?

173. This is what occurred in the Claimant's case.

174. Is there evidence that this was a wider practice? The Tribunal is not satisfied that there was a wider practice of failing to seek CS Commission approval. Mr Miller's evidence was that there was an attempt to extend in the case of Tetra Hale, who was appointed to the Operational Testing team at around the same time as the Claimant. We have not received any other evidence to suggest that there was a wider practice of failing to make such applications.

Summary on PCPs

175. Only the first PCP set out above has been established (A requirement that an employee's short-term fixed term contract should last no longer than two years).

176. We have considered whether that PCP caused individual and group disadvantage.

(7.4) Did the PCP put female employees at a particular disadvantage when compared with male employees in that female employees are more likely to be on maternity leave and away from the workplace on leave for an extended period?

177. We found that female employees are more likely to be on parental leave and therefore away from the workplace on leave for an extended period. This we can take judicial notice of.

178. We do not find however that the Claimant has proven group disadvantage. Provided that are the employer and employee aware of the 2 year limit **PCP 7.1.1**, should not generally speaking cause a disadvantage.

179. It follows that this claim does not succeed. We have nevertheless gone on to consider the other elements of the claim in case we are wrong about that.

(7.5) Did the PCP put the claimant at that disadvantage?

180. We find that **PCP 7.1.1** above did put the Claimant at a particular disadvantage in the particular circumstances of this case. It resulted in the termination of her employment.

(7.6) Was the PCP a proportionate means of achieving a legitimate aim?

181. Given our finding that there was no group disadvantage, we are only considering this justification defence in the alternative.

182. Was there a legitimate aim?

183. We find that compliance with legislation is a legitimate aim.

The Tribunal will decide in particular:

7.7.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;

184. We have considered that the purpose of the legislation and the principles were described by Simler, P in **Secretary of State for Justice v Betts and others** [2017] ICR 1130 as

> "an important public safeguard to ensure recruitment on an impartial basis of those who are best qualified to serve, and to preserve, the independence of the civil service" [33].

7.7.2 could something less discriminatory have been done instead;

185. Ultimately, we find that the Respondent did not have any choice but to terminate the Claimant's employment in the absence of CS Commissioner approval.

186. We flag again the point that application to the CS commission should have been made back in February 2022, although as noted above we cannot say what the outcome would have been.

187. We did consider whether could conclude that the Respondent might have provided the Claimant with some support to make an application for an open and fair competition? We concluded that the Claimant she knew she had to do this, and in fact she did go to do this. The nature of open and fair competition means that we cannot see that it would be appropriate for the Respondent to give the Claimant active assistance in applying for another civil service role. Viewed from the perspective of other candidates that would no longer be fair.

7.7.3 how should the needs of the claimant and the respondent be balanced?

188. We have nothing to add to our deliberation above under this heading.

Comment

189. While none of the complaints brought succeeded the Tribunal was extremely sympathetic to the Claimant's situation. Through no fault of her own she ended up being placed in an unsatisfactory position. While she did receive both notice pay and an equivalent payment to redundancy pay, this situation did have a real impact on her and she was out of employment for a period of time.

190. It is to be hoped that the Respondent has learned lessons about the use of Short Term Fixed Term Appointments and the appropriate communication to individuals who are under those types of contract about appropriate steps at the end of two year period.

Employment Judge Adkin

23 July 2024

Sent to the parties on:
29 July 2024

For the Tribunal Office: