EMPLOYMENT TRIBUNALS

Claimant: Ms King

Respondent: Capital City College Group

Case Number: 3302020/2023

Heard at: Watford Employment Tribunal **On:** 25,26,27,28 and 29 November 2024

Before: Employment Judge Bartlett, Ms Harris and Ms Johnstone

REPRESENTATION:

Claimant: Mr Naylor (lay representative)
Respondent: Mr Browne (of Counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

Direct Age Discrimination

1. The complaint of direct age discrimination is not well-founded and fails.

Part-Time Workers

2. The complaint of less favourable treatment under the Part Time Workers Regulations 2002 is well founded and succeeds.

Section 1 of the Employment Rights Act

3. This claim would have partially succeeded in relation to s4 of the Employment Rights Act 1996 only. However, as the claimant has not succeeded in respect of any claim listed in Schedule 5 of the Employment Act 2002 by s38 of the Employment Right this claim must fail.

REASONS

Background

4. The claimant has been employed by the respondent since 3 September 2018 under a contract dated 31 July 2018. She has been employed as an hourly paid lecturer (HPL) in the school of ESOL. She remains employed by the respondent.

5. The claimant submitted her claim form on 20 February 2023. The issues to be decided in this case were set out in the summaries from CMRs which took place on 24 July 2023 and 13 October 2023.

6. At an open preliminary hearing on 13 October 2023 Judge Caiden decided that:

    a. the claimant was not a fixed term employee with the meaning of regulation 1(2) of the Fixed Term Employees Prevention of Less Favourable Treatment Regulations 2002

    b. she was employed on a contract of infinite duration with continuity of employment since 3 September 2018.

    c. As a result all of her claims relating to less favourable treatment of fixed term employees were dismissed for want of jurisdiction;

7. A document entitled Case Management Summary signed by judge Caiden and which concerned the public preliminary hearing at which the decision was made that the claimant was not a fixed term worker also recorded that:

contract. As part of this the Tribunal decided that it could only really engage with this argument if it determined if the agreement was incorporated, or not, and it concluded it had been expressly incorporated by virtue of clause 26.2 which stated "26.2 Any changes in the terms and conditions of employment applicable to staff appointed by the Corporation on the terms and conditions set out herein which may be agreed after the date of this Contract between the Corporation and trade unions recognised by the Corporation in respect of such staff shall be incorporated automatically into your Contract of Employment." (p.82 of the bundle provided for use at the Preliminary Hearing). As the point was not fully argued, it raised the issue after judgment to see if there were any observations on this point and also pointed out this may have implications on the complaint of failure to provide statement of particulars of s.4 Employment Rights Act;

The hearing

8. The hearing took place on 25, 26, 27, 28 and 29 November 2024. Due to a previous commitment of the Tribunal, on 27 November 2024 the hearing only took place in the afternoon when we heard submissions.

9. The claimant and Ms Ortanga were called as her witnesses. The respondent called Ms Travene Hartley as its only witness. A witness statement has been relied on from Collen Marshall. Ms Hartley stated that Ms Marshall had left the respondent's employment and indicated that this was the reason why she did not appear. Ms Hartley appeared as the first witness as she was not able to appear at the Tribunal after 26 November 2024. The Tribunal informed the parties that because Ms Marshall had not attended the hearing and had not been subject to cross examination this would reduce the weight that we would give her witness statement and how much weight we gave her witness statement would be for the tribunal to decide. We have decided to give that witness statement limited weight and in any event we find that it is largely concerned with the grievance process.

10. Mr Naylor made an application for amendment of the claim to add what he considered to be a new ground. The Tribunal decided that it did not have jurisdiction to consider the claim that was sought to be added and dismissed the application for the reasons given at the oral hearing.

Application to Amend claim

11. On 19 Nov 2024, 7 days before the substantive hearing was due to commence the claimant made an application to amend the claim to include a claim under Reg 6 of the Part Time workers (Prevention of Less Favourable Treatment) Regulations 2000. The complaint was that the claimant had made a request in writing for a written statement giving particular reasons of the less favourable treatment the claimant considered she had suffered.

12. Mr Naylor is a lay representative and he stated that it was an oversight on his part that this claim had not been included previously. The ET1 included a claim in respect of a similar provision which is Reg 5 of the FTW Regulations as recorded in the CMR List of Issues from 24 July 2023. However, in a preliminary hearing which took place on 13 October 2023 it was determined that the claimant was not a fixed term worker so that claim fell away.

13. Mr Browne made two submissions:

    a. There was no jurisdiction of the Tribunal to hear a complaint relating to Reg 6 of the PTW Regulations.

    b. The respondent was highly prejudiced by the late application such that the application should be refused.

14. In relation to point 1 Mr Brown submitted that the Tribunal's jurisdiction in relation to matters arising under the PTW Regs arose from Reg 8 of those Regulations and Reg 6 was not included in such matters. As a result, there was no cause of action which could be raised as a claim.

15. The Tribunal considered Reg 8 of the PTW Regs, this is entitled "Complaints to employment tribunals etc" and sets out

Complaints to employment tribunals etc.

8.—(1) Subject to regulation 7(5), a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5 or 7(2).

16. Reg 5 concerns less favourable treatment and Reg 7(2) concerns detriment. There is no reference to Reg 6 in Reg 8. There has been no argument that jurisdiction in

relation to Reg 6 is conferred by another legislative provision as is the case for an unfair dismissal connection with the PTW Regs.

17. Therefore, we conclude that the Tribunal does not have jurisdiction to hear a complaint that Reg 6 has been infringed. This means that the claimant cannot add a complaint in relation to Reg 6 of the PTW Regs into her claim as a matter of law. We find that the application to amend falls away.

18. It is useful to consider what Reg 6(3) of the PTW Regs says which is:

> (3) If it appears to the tribunal in any proceedings under these Regulations—
>
> (a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement, or
>
> (b) that the written statement is evasive or equivocal,
>
> it may draw any inference which it considers it just and equitable to draw, including an inference that the employer has infringed the right in question.

19. Despite our findings in relation to the application to amend, it is open to Mr Naylor to make submissions in this regard which is in relation to inferences a Tribunal may draw.

Background

20. The claimant was employed as a lecturer in ESOL from September 1989 at the College of North East London which became part of the respondent until she was made redundant in July 2016. From this date and for a period of approximately two years, she carried out studies at UCL which included training as an early years teacher.

21. She was again employed by the respondent in September 2018 as an hourly paid lecturer (HPL) in the School of ESOL. A HPL is on a zero hours contract. The respondent uses various means of employing lecturers which include as HPLs, permanent salaried lecturers and other positions.

22. As set out below the background of this claim is that the claimant considered that she should have been given a fractional contract which is a part time salaried permanent contract.

The issues

23. The issues were set out in the schedule to the CMR which took place on 13 October 2023 to which the claimant added following that hearing in relation to the

claim in relation to Section 1 of the Employment Rights Act 1996. I have set these out for completeness below.

Time limits / limitation issues

1. Were all of the claimant's complaints presented within the time limits set out in

1.1. section 123 of the Equality Act 2010 ("EQA")

1.2. 1.4. Regulation 8 PTW

1.5. section 11 of the Employment Rights Act 1996 ("ERA")?

2. Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended.

EQA, section 13: direct discrimination because of age.

3. Did the Respondent subject the Claimant the following treatment: from September 2022 onwards refusing to and/or omitting to offer the Claimant a "fractionalised agreement"

4. Was that "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators and/or hypothetical comparators

4.1. Gulshan Isreel;

4.2. Hanane [Surname unknown];

4.3. Maria Haidari (allegedly issued in June 2023);

4.4. Kine [Surname unknown];

4.5. Henriette [Surname unknown].

5. If so, was this because of the claimant's age (her age group being described as 65 and over) and/or because of the protected characteristic of age more generally?

Part I of the Employment Rights Act 1996

6. Did the Respondent fail to provide written statement of particulars (in around September 2018 or at all) that failed to include the following items required by Section 1 ERA.

6.1. the scale or rate of remuneration or the method of calculating remuneration? [Sub-Section 1(4)(a)];

6.2. any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours) [Sub-Section 1(4)(c)].

7. In relation to any alleged collective agreement about fractionalisation entered into around May 2019 (or any other date)

7.1. Was this an agreement which directly affected the terms and conditions of the Claimant's employment? [Sub-Section 1(4)(k)];

7.2. Was the Respondent required to give to the employee a written statement containing particulars of the change [Section 4 ERA];

7.3. If so, did it do so.

Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

8. Is Semra Ozcelik a "comparable full-time worker" within the meaning of Regulation 2 PTW? The Respondent alleges that she is not because: (i) she is not engaged under the same type of contract as the claimant and (ii) she is not engaged in the same or broadly similar work to the claim. The Claimant says Semra Ozelik she is also an ESOL teacher and in the same team as the Claimant.

9. Did the respondent treat the claimant less favourably than Semra Ozcelik as regards the following terms of her contract:

9.1. Payscale

9.2. Sick Pay

9.3. Pension

9.4. Holiday entitlement (and/or holiday pay)

10. If so

10.1. Was the treatment on the ground that the Claimant is a part-time worker ?

10.2. Was the treatment objectively justified. The Respondent relies upon the matters set out at paragraphs 9-11 of its Further Response dated 21 August 2023.

The Law

24. S13 of the Equality Act 2010 sets out the test for Direct Discrimination:

"(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
(5)If the protected characteristic is race, less favourable treatment includes segregating B from others…"

25. By analogy with the approach adopted in disability discrimination (see Williams v Trustees of Swansea University Pension & Assurance Scheme [2018] UKSC 65, [2019] IRLR 306, 'unfavourable' treatment is to be measured against an objective sense of that which is adverse as compared with that which is beneficial. As was held in the EAT by Langstaff P in Williams, *'treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous … Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be*.'

26. In Amnesty International v Ahmed [2009] IRLR 884, [2009] ICR 1450, EAT, Underhill P set out:

"In other cases—of which Nagarajan is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in

such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in James v Eastleigh, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling James v Eastleigh and Nagarajan. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

27. This has been confirmed in a number of subsequent cases including more recently by Linden J in Gould v St John's Downshire Hill [2020] IRLR 863, [2021] ICR 1, EAT(a case of alleged discrimination because of marriage):

"…the logic of the requirement that the protected characteristic or step must subjectively influence the decision maker is that there may be cases where the "but for" test is satisfied – but for the protected characteristic or step the act complained of would not have happened – and/or where the protected characteristic or step forms a very important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the protected characteristic or step itself did not materially impact on the thinking of the decision maker and therefore was not a subjective reason for the treatment. This point is very well established in the field of employment law generally where, for example, an employer may be held to have acted by reason of dysfunctional working relationships rather than the conduct of the claimant which caused the breakdown in those relationships (see e.g. the cases on the distinction between dismissals related to "conduct" and dismissals for "some other substantial reason", such as Perkin v St Georges Healthcare NHS Trust [2006] 617 CA; and the cases in relation to public interest disclosures such as Fecitt & Others v NHS Manchester (Public Concern at Work Intervening) [2012] ICR 372 CA and Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 EAT).

28. S.23 of the Equality Act 2010 sets out the law relating to comparators:

"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

29. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), Lord Scott explained that this means that

"the comparator required for the purpose of the statutory definition of the discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

30. Regulation 6 of the Part-Time Workers (Les Favourable Treatment) Regulations 200 sets out the following:

Less favourable treatment of part-time workers

5.—(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

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

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

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

(a)the treatment is on the ground that the worker is a part-time worker, and

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

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

Burden of Proof

31. S136 of the Equality Act 2010 sets out the burden of proof which applies to discrimination cases:

"(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the

provision."

32. In Igen Ltd v Wong the Court of Appeal approved the guidance given in Barton v Investec Securities Ltd [2003] IRLR 332 concerning the burden of proof in discrimination cases which is that:

"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".
(2) If the claimant does not prove such facts he or she will fail….
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive."

33. In Madarassy v Nomura International plc 2007 ICR 867, CA Lord Justice Mummery stated:

"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."

Findings of Fact and Decision

Age Discrimination

34. *Did the Respondent subject the Claimant to the following treatment: from September 2022 onwards refusing to and/or omitting to offer the Claimant a "fractionalised agreement"*?

35. The respondent's case was that the conditions under which an hourly paid lecturer (HPL) became a salaried worker was called fractionalisation and was covered by a collective agreement between the respondent and UCU. This set out that if an individual worked 432 or more hours per annum averaged over three years, the respondent was obliged to offer them a salaried contract. We had considerable evidence about the hours the claimant was alleged to have worked over various periods and how these hours had been calculated. The respondent provided different calculations for the claimant's hours resulting in a different annualised figure on numerous occasions. Sometimes they took into account sick leave and compassionate leave, etc and other times they did not.

36. The tribunal does not have jurisdiction to hear a claim related to breach of contract and the claim that the claimant met the threshold of 432 hours to be offered the salaried contract but that the respondent failed to make that offer is in essence a breach of contract claim. If the claimant wishes to pursue that claim she would have to do that in the County or High Court courts.

37. We consider that the claimant's age discrimination claim is that she was denied the salaried contract because of her age. This could be put in numerous ways such as that the calculation of the claimant's hours was done in a way that was tainted by age discriminatory or that there was some engineering of the calculation of her hours on age-related grounds so that, or with the effect that, she did not qualify for a salaried contract.

38. We can understand how the claimant's concerns about some form of discrimination arose. We accept that initially the claimant was unaware of the collective agreement and the requirements for somebody to be offered a salaried contract. We accept that the decisions about fractionalization were made around the summer near the end of an academic term so that somebody was fractionalized or given a salary contract during the summer and then came back salaried in September and this may have taken the claimant by surprise. That the claimant was not aware of the fractionalization process and that there was not clear communication throughout the college about how numbers of hourly paid lecturers were becoming fractionalized salaried lecturers is a significant failure of HR. Ms Ortaga's evidence was that HR colleagues had been removed from the individual college sites and that the function had become centralised. It seems that significance reliance was placed on putting policies on the Internet or emails but there was not good communication with staff and in particular HPL's.

39. However, during the process for this employment tribunal claim there has been much more evidence that we have seen that the claimant did not initially. We

recognise that Mr Naylor made various criticisms of the respondent's disclosure however we are satisfied that there is considerable evidence that the fractionalization process was entirely based on whether or not an individual had worked 432 hours per annum over a three-year period. On the respondent's calculations, even though there were many, not a single one of their calculations showed that she met the 432 threshold.

40. We do not accept any argument that there was any age discrimination in deciding what hours were relevant for the 432 hours. The policy was applied universally.

41. We accept Ms Hartley's evidence that even though there were communications between the respondent and the UCU about those employees that were close to the 432 threshold, during the time period in issue in this claim, the respondent did not exercise its discretion once to offer a salaried contract to anyone under the 432 threshold. We do not consider that not exercising a discretion to offer the claimant a fractionalized contract can amount to direct age discrimination in these circumstances.

42. Mr Naylor made submissions that the tribunal should make adverse inferences from the respondent failing to disclose information about the fractionalization process both in the discrimination questionnaire and in the disclosure process for this case. We do not accept that the respondent failed to comply with its disclosure obligations and we have not drawn any adverse inferences as we found the evidence that has been disclosed is consistent, reasonably detailed and comprehensive.

43. Mr Naylor criticised some of the documents in the Bundle as being unreadable because of the small print. This issue was raised by the tribunal. It is regrettable that the respondent did not produce some of the spreadsheets in A3 format so that they were more readable. We accept that Mr Naylor genuinely had difficulties reading these documents. However, it had been open to him to raise this with the respondent a considerable time before the hearing and request copies that he could read, he did not do so. The respondent cannot be criticised for that.

44. Mr Naylor made submissions about the respondent not complying with the Public Sector Equality Duty. These sort of claims are not within our jurisdiction and for completeness we accepted Ms Hartley evidence that a high level equality impact assessment was carried out which did not reveal any adverse impact on protected groups and so no further action was taken. We find that the respondent has provided a table which set out the ages of those offered fractionalisation and we find that there is nothing to suggest that this does not reflect the age profile of the employees.

45. We have found that the claimant has failed to discharge the prima facie burden of proof and even if the claimant had discharged that burden, the respondent has discharged its burden to establish that age played no part in its decision in relation to refusing to offer the claimant a fractionalized agreement.

46. Section1 ERA statement

47. Did the Respondent fail to provide written statement of particulars (in around September 2018 or at all) that failed to include the following items required by Section 1 ERA.

a. the scale or rate of remuneration or the method of calculating remuneration? [Sub-Section 1(4)(a)];

b. *any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours) [Sub-Section 1(4)(c)*].

48. We accept Ms Hartley's evidence that HPLs did not have a pay scale and were instead paid an hourly rate which depend on various factors including qualifications and how difficult it was to recruit in that area. Ms Hartley's evidence was supported by written documentation and we found that compelling. We find that the remuneration rates were set out as an appendix to the contract and so were provided. We accept Ms Hartley's evidence that changes to the pay rates were published on the intranet and that this meets the requirements of s1. We also find that the contract set out that the contract was a zero hours contract. We find that the required terms were included in the written statement of particulars.

49. 7. In relation to any alleged collective agreement about fractionalisation entered into around May 2019 (or any other date)

50. 7.1. Was this an agreement which directly affected the terms and conditions of the Claimant's employment? [Sub-Section 1(4)(k) note this should be s1(4)(j)];

51. *7.2. Was the Respondent required to give to the employee a written statement containing particulars of the change [Section 4 ERA];*

52. In relation to the s1(4)(j) the respondent argued that the collective agreement about fractionalisation did not directly affect the terms and conditions of employment, as it led to an invitation to accept different terms and conditions. We find that the collective agreement imposed an obligation on the employer to do something if certain circumstances arose. This is typical of a contractual term. We find that it did directly affect the terms and conditions because the fractionalisation affected

many terms and conditions. There is no authority on the issue of what directly effects terms and conditions and therefore we consider that it needs to be given a common sense meaning.

53. S4 ERA clearly states that any changes have to be given in writing. The respondent's position was that the claimant was informed via a group wide email but has provided no evidence of this. We prefer the claimant's evidence that she was not provided a written statement of this change. However, by virtue of s38 of the Employment Act 2002, the claimant must also succeed on another issue which falls within schedule 5 of that Act for this claim to succeed. As the claimant has not succeeded in any such claim (the Part Time Workers Regulations are not in Schedule 5) this claim must fail.

54. S1(4)(c) terms relating to conditions relating to hours of work (added after the CMR)

55. We find that the pay rate for team meetings is set out in Appendix 2 and we consider that this requirement has been complied with. We do not find that the written statement is required to set out when meetings with a manager would occur or how often.

56. *S1(4)(d) terms relating to conditions relating to (i) holiday entitlement (added after the CMR)*

57. Mr Naylor's criticism was that a worked example of how to calculate holiday pay was not provided. We find that clause 5 sets out the holiday entitlement, that it is pro rated and some requirements about when it must be taken. We find that the requirements of the Written Statement have been complied with. We also accept the respondent's evidence that changes to the rate or calculation were published on the intranet and that this was compatible with s1.

58. *S1(4)(l) terms relating to conditions relating to any training entitlement (added after the CMR)*

59. This was a change made to the legislation and affected contracts made after 6 April 2020 and so it not applicable to the claimant.

60. <u>Regulation 6 Part Time Workers Less Favourable Treatment Regulations 2000</u>

61. We consider that the claimant's grievance appeal contained a request for a statement under Regulation 6 of the PTW. We note that in cross examination the claimant was unsure and accepted the refusal she referred to related to

fractionalisation. In the grievance appeal meeting she did not raise this issue, it was only revived by the claimant just before the hearing. We have read the request and we consider that it clearly refers to part time workers and we conclude that she did make a request for a written statement and it was not provided. However, we have decided to make no inference in this case. The respondent seemed to be focused on the number of hours and fractionalisation as was the claimant for most of this case. The issue was only raised at the start of this hearing. Overall, we consider that it is just an equitable not to draw any adverse inferences.

62. *Part time Workers - Less Favourable Treatment*

63. *8. Is Semra Ozcelik a "comparable full-time worker" within the meaning of Regulation 2 PTW? The Respondent alleges that she is not because: (i) she is not engaged under the same type of contract as the claimant and (ii) she is not engaged in the same or broadly similar work to the claimant. The Claimant says Semra Ozelik she is also an ESOL teacher and in the same team as the Claimant.*

64.

65. The respondent accepts that the claimant was engaged under the same type of contract as Semra Ozcelik.

66. The issue is whether or not the claimant was engaged in the same or broadly similar work to Semra.

67. The respondent's argument was focused on the submission that the claimant was voluntarily doing work that was beyond the scope of a HPL.

68. Appendix 1 of the claimant's contract of employment set out the key duties of a HPL (which is the role the claimant was employed to do) which are:

    a. Teach

    b. Prepare lessons

    c. Marks student's work

    d. Attend meetings if required

69. The document then sets out a list of work HPL's would "*not normally be expected to*":

You will not normally be expected to:

- Work non-contracted teaching hours on site
- Undertake course leadership responsibilities
- Develop curricula
- Undertake welfare/educational guidance and counselling
- Undertake enrichment activities
- Invigilate
- Participate in professional development
- Attend conferences
- Carry out internal verification
- Attend open days
- Carry out marketing activities
- Interview students
- Participate in enrolment
- Manage and supervise student visits
- Carry out research
- Participate in duty rotas.

70. The contract for the comparator includes the following:

2. Duties (Paragraph 2)

The scope of your teaching duties will include but not be limited to:

(i) Formal scheduled teaching duties as follows: classroom teaching (including teaching in laboratories, studios and workshops), tutorials, observation of the teaching of others (where this is required by the course of study they are following), work based student assessment; invigilation for public examinations, interviewing and enrolment if this is part of the guided learning hours provided directly to students and within the teaching year, open and distance learning and cover for absent colleagues; and

(ii) Management of learning programmes and curriculum development, student admissions, counselling, preparation of learning materials and student assignments, marking of students' work, marking of examinations, educational guidance and counselling (other than timetabled tutorials), management and supervision of student visit programmes, research and other forms of scholarly activity, internal verification, marketing activities, administration and personal professional development.

71. Para 43 of TH's statement sought to address the claimant's claims about the work she carried out. The terms of her statement are what Ms Hartley would expect of a HPL. She stated in oral evidence that she did not know specifically what lecturers did. We find that her evidence was about the general expectations of HPLs but it did not specifically address the claimant's situation. The respondent did not call any other witnesses such as the claimant's manager who could have been expected to provided evidence on what the claimant did and on what basis. Neither did it provide documentary evidence such as appraisals about the work the claimant carried out. Therefore, the respondent has no evidence to dispute the claimant's claims.

72. The claimant's witness statement set out a table which addressed the duties the respondent said were carried out by salaried employees such as the comparator and set out what duties the claimant carried out. We accept the claimant's evidence about the duties she carried out as set out in her witness statement and orally. The claimant was consistent and she gave detailed and knowledgeable answers. She has worked in the ESOL area for over 3 decades, retrained as an

early years teacher and her level of knowledge and experience corresponds with an ability to carry out the duties she said she did.

73. We heard evidence from Ms Ortanga, she had been employed as a manager in the ESOL department until 2018 and then she became a HPL for one year until retiring. She knew the claimant well and we accept that she was a friend of the claimant. Mr Browne questioned Ms Ortanga on para 3 of her witnesses statement putting questions on the basis that her descriptions of a HPL's duties were in direct contradiction to her oral evidence. Ms Ortanga stated to the effect that this was because she had not known what to put in the statement. Whilst we take Mr Browne's point about para 3, we consider that para 3 is setting the scene about what a typical HPL did. We recognise that Ms Ortanga has not worked with the claimant at the respondent for any of the relevant time or for some years and neither had she managed the claimant. We consider that her evidence strayed into evidence of opinion. As none of the procedural requirements and safeguards relating to a witness of opinion have been complied with, we have not given her evidence any weight.

74. We find that the claimant carried out the following duties:

    a. Observing others teaching – the claimant did this as part of mentoring a trainee teacher in 2021/2022

    b. Management of learning programmes and curriculum development She was asked to develop two new courses which she did. She trained staff on the curriculum on 19 October 2022 at a cross college staff development day

    c. Student admissions – to the extent that she progressed her existing students to be admitted on further courses the claimant did this. The respondent has not defined in detail what student admissions means;

    d. Welfare/Educational guidance – we accept the claimant carried out activities related to student welfare as she described them but that these were part of the job of all lecturers including HPLs;

    e. Manage and supervise student visits – in July 2022 she took class trips to Hampstead Heath;

    f. Internal verification – carried out in July 2021 and July 2022

g. Personal professional development – the claimant provided training sessions to colleagues and participated in Professional Development Days at the respondent.

75. We find that these were duties that fell within the duties of the comparator and to that extent were broadly similar.

76. We find that the respondent accepts that these duties are beyond those of a HPL as is recognised in Ms Hartley's witness statement and by an email from Colleen Marshall on 1 February 2023 [at p246] records "*VP/AP at CONEL to investigate claims of substantive work outside of HPL remit by RK – i.e. mentoring, SOW, CPD for peers, new course development*".

77. We find that the claimant did not carry out the following tasks:

a. interviewing students and enrolment. The reference to an open evening is after the claim was submitted and the enrolment was part of most courses to progress to the next level;

b. open and distance learning but it was not application to ESOL

c. counselling– the claimant has not described anything that would fall with in counselling

d. administration – we find that what the claimant identified was part of her tasks as a HPL

e. scholarly research - but we also find that the comparator did not carry out these duties because the claimant's evidence was that scholarly research was not carried at the respondent. We do not accept that the claimant carried out scholarly research as there is no real evidence of this. We accept that she has drafted a phonics book.

78. The submission by Mr Browne is that the claimant was not engaged to carry out these duties because she did them voluntarily.

79. The claimant's evidence was that she agreed with her manager in the summer of 2021 that she would develop two new courses for the School of ESOL entitled "learn to read and write" and "Foundation to pre-entry" and each course has a body of materials which she designed and prepared.

80. Her claims about carrying out these duties during the grievance were not investigated and the respondent has provided no evidence on this issue. The respondent appears to rely on her HPL contract as evidence that she did not have responsibility for drafting the curriculum etc. and therefore, despite doing the work, she was not under an obligation to do so.

81. The respondent did not provide evidence about the discussions between the claimant and her line manager on this issue. The respondent did not challenge the claimant's evidence that she agreed with her manager to do the duties, in particular the curriculum work. In cross examination, the claimant said that her manager initially approached her about the work and the respondent had no evidence to dispute this.

82. We find that there was an agreement between the claimant and her manager that she would prepare the curriculum. The claimant said this in her evidence and the respondent has no evidence to dispute this. The claimant created a curriculum for those courses and for other courses that have postdated this claim and therefore we have not considered them. The respondent relied on her creating the curriculum because no-one else did it, the respondent ran the course and we have no reason not to accept the claimant's evidence that the course used her materials. This means that there was an agreement between the claimant and her manager to do something that the respondent wanted and needed done and then the respondent used the work that the claimant had produced.

83. The claimant accepted that she was not paid for this work. Her evidence was that she only received 3 hours pay for all the extra work she claims she carried out for the respondent. She has not articulated how much time she spent on this extra work

84. The claimant also sought the respondent's agreement that the copyright to her Phonics coursebook rested in her and not the respondent under the terms of the HPL contract on the basis that she had prepared it in her own time. We do not find that this undermines her claim as this reflects the terms of her HPL contract which the Respondent had, at this time, repeatedly said she was subject to.

85. Before 2018 the claimant completed an early years teaching course at UCL at which she studied phonics. She became interested in using phonics for adults. The respondent has submitted that this meant that she had an interest in the area of the new course and she did the work voluntarily.

86. The respondent's argument included a claim that because the courses were in areas of the claimant's expertise and interest she was doing the duties voluntarily. We do not accept that having expertise and skills to do something and having an interest in it makes it voluntary. The only other aspect was that the claimant was not paid for the duties and it seems she was told she would not be paid. We do not accept that denying payment makes something voluntary that would not be otherwise.

87. This is not a case where the claimant went off on a frolick of her own, creating materials of her volition presenting them without notice to the respondent who did not expect them and did not want them. That would have been voluntary and this is very different from the claimant's situation.

88. In these circumstances we find that it cannot be said that the claimant carried out the duties voluntarily and instead we considered that she was engaged, because the arrangement with her employer was a request that the claimant carried out and did those duties.

89. Less favourable treatment

90. We find that the claimant suffered less favourable treatment in relation to pay because, though under the contract on which her comparator is engaged her comparator may receive a lower rate of pay, her comparator is paid for non-teaching duties and therefore the claimant would have been paid for the curriculum duties that she undertook and she was not. We recognise the submission that the comparator may have worked outside her contracted hours too but it still remains that the full time comparator pro rated would have received pay for more hours (6 hours per week for non-teaching duties) resulting in more pay than the claimant received for carrying out broadly similar duties. It is the non-payment of these six hours per week which is the less favourable treatment relating to pay.

91. In relation to sick pay and holiday pay, even pro-rated the comparator benefits from 47 days holiday whereas the claimant benefits from 27 days pro rated. This is clear less favourable treatment. In relation to sick pay, the claimant only benefits from statutory sick pay whereas the comparator has enhanced sick pay. Again, we find that this is clear less favourable treatment. We find that the sole reason for the less favourable treatment is part time status as costs savings is not an acceptable reason for differential treatment. We have not been able to determine another reason put forward by the respondent and therefore we find that there is no justification for this less favourable treatment.

92. In relation to pension, the pension scheme operates on the basis that a fractional amount of annual salary accrues to the scheme and this amount is effectively independent of the employer's contribution. This results in unfavourable treatment because if the claimant had been paid for the same work as the comparator (pro rated) she would have had a large amount of accrual.

93. We find that the claimant has been carrying out the broadly similar work and therefore suffered from less favourable treatment since June 2021 and that this has been ongoing.

Employment Judge Bartlett
4 December 2024

Judgment sent to the parties on:
3 January 2025

For the Tribunal: