



EMPLOYMENT TRIBUNALS

Claimant: Ms A. McGoldrick

Respondent: The Governing Body of Darland High School (R1)
Wrexham County Borough Council (R2)

HELD BY: CVP **ON:** 16th November 2020

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: The claimant represented herself – a litigant in person

Respondent: Mr. K. Ali, Counsel

JUDGMENT

The judgment of the Tribunal is:

1. The claimant's claim that the respondents breached her contract of employment with regard to notice of termination is well-founded and succeeds; the respondents gave the claimant one month's notice of termination when two months' notice was due;
2. The parties said that they would seek agreement on the amount of damages, including pension loss, due to the claimant in consequence of the above judgment; remedy consideration is therefore stayed until a date to be confirmed after 14th December 2020; if neither party writes to the tribunal by 4pm on 14th December 2020 requesting that a remedy hearing is listed the tribunal shall dismiss the claimant's application for a remedy award in consequence of the above judgment on the basis of withdrawal of such application on settlement;
3. The claimant's claim that the respondent failed to pay to her holiday pay due on termination of employment fails and is dismissed.

REASONS

1. The Issues:

1.1. In a situation where the claimant, a teacher, was appointed to teach at Darland High School by R1 under the terms of a contract with the Education Authority (R2) and that engagement was terminated the following issues arose:

1.1.1. Was the claimant's contract one of temporary employment terminable on notice? or

1.1.2. Was the claimant employed on a fixed term contract to terminate on the event of the return to work of a substantive post-holder who was on maternity leave?

1.1.3. What, if any, notice provisions applied to the claimant's contract?

1.1.4. If the claimant was entitled to notice of termination what notice was given and how much, if any, was outstanding at the date of termination of employment?

1.1.5. What damages, if any, are due to the claimant if the respondent breached the contract?

1.1.6. Was the claimant entitled to holiday pay calculated pro rata taking into account fixed term status or was she paid holiday pay per month within her salary?

1.1.7. How much, if any, holiday pay was due but unpaid on termination of employment?

1.2. I resolved the issues save in respect of the amount of any award due to the claimant. The parties submitted that they should be able to agree the sum due to the claimant in respect of the shortfall in notice of dismissal, but they required some time, that was not available today, to discuss pension loss and to agree appropriate calculations. We agreed the terms of paragraph 2 above.

2. The Facts:

2.1. There was no issue as to the relationship between R1 and R2. R2 appointed the claimant as a teacher on behalf of R1. They shall be referred to jointly as the respondent, when appropriate, as there is no issue between them as to acts/omissions, responsibility/liability.

- 2.2. The respondent engages teachers as permanent employees, temporary employees and as fixed term employees. Documentation relevant to employees differentiate accordingly.
- 2.3. On 21st May 2019 C was duly appointed under the terms of a letter dated 21st May 2019 (pages A27 – 31 and again at B29 – B34 in the hearing bundle, to which all further page references refer unless otherwise stated, although I may not always give each page reference for duplicated documents). The letter was headed: “Appointment of Temporary Full-time Teacher Darland High School”; it did not refer to the contract as a fixed-term contract. It provided, amongst other things:
- 2.3.1. The appointment was to cover the maternity leave of a post-holder (referred to below as “the post-holder”);
 - 2.3.2. Cover would start on 1st September 2019 and would end “in the event of the post-holder returning to duties or a change in the circumstances as determined by [R1]”;
 - 2.3.3. Appointment or the offer of such, was conditional upon pre-employment checks;
 - 2.3.4. Terms and conditions of employment would be subject to the Conditions of Service for School Teachers (England & Wales) (“the Burgundy Book”);
 - 2.3.5. Termination provisions were as set out in clause 11 (A30 & B33). R2 reserved to itself, without proviso or any stated contingent basis, the ability to terminate the claimant’s employment “in case of redundancy, misconduct, lack of capability or some other substantial reason” on giving notice. No notice would be required in cases of gross misconduct. Subject to that exception R2 would give whichever notice was longer, either statutory notice or “a minimum of two months’ notice, and in the summer term, a minimum of three months’ terminating at the end of a school term”.
 - 2.3.6. The claimant was to indicate her acceptance by signing and returning a copy of the letter. I was not shown a signed version but there was no issue between the parties that the claimant accepted the appointment and the above terms (and others) without amending the letter.
- 2.4. The Burgundy Book provides certain notice provisions as a fall-back in that any written agreement takes priority; in any event the fall-back provisions mirror clause 11 of the claimant’s contract as summarised above. The Burgundy book provisions did not apply directly but only indirectly as they duplicated the contract.
- 2.5. The claimant performed her role without any apparent hitch as she awaited notice of the substantive post-holders return to work or any change in circumstances as determined by R1 (or indeed the circumstances outlined in

clause 11 summarised at 2.3.5 above) and notice of termination of her employment as and when her placement was to end.

- 2.6. The claimant was paid through the usual payroll monthly as were her permanent salaried colleagues; the basis of calculation of wages was the same too. The claimant was paid 1/12 of a full-time annual salary each month. Those payments covered her earned wages and holiday entitlement as it accrued and as it was taken. As at 4th April 2020 the claimant had been paid for all taken and accrued holidays.
- 2.7. At all times the claimant believed that she was employed on a temporary contract and on the terms above, terminable on notice. She did not understand from the contract or otherwise that her employment would terminate automatically upon the post-holder's return to work. She was not told that the respondent anticipated that this would be the case in advance of the post-holder indicating her return date. All relevant documentation that described her status referred to her being temporary or made no reference to status; I accept her evidence on this point and that the claimant was never described, to her, as a fixed term employee. The claimant's understanding was important to her because she would need to give notice if she wanted to leave employment with the respondent and could not expect an alternative appointment without a reasonable period of advance notice; bearing in mind term times it was important to the claimant that she would have two or three months' notice of termination (depending on the time of year) so that she could secure alternative employment within that time to coincide with the start of the next academic term elsewhere.
- 2.8. The post-holder attended site for "keep-in-touch" days in December 2019. She indicated to her line managers that she was considering returning to work at Easter 2020 (Easter Sunday being 12th April in 2020). She did not provide the respondent with a fixed date for her return and was not obliged to do so at that stage. The claimant was not told the date of the post-holder's anticipated return to work until March 2020.
- 2.9. On 5th March 2020 the post-holder gave formal notice of her intended return to work on 4th April 2020 and the claimant was told this orally on 6th March 2020. The claimant was then told that her employment would end on 4th April and that she would receive written confirmation.
- 2.10. On 10th March 2020 R1 wrote to the claimant under the heading "Post: Teacher (Maternity Cover) School: Darland High School" stating "I refer to the above post and confirm that your last date of employment will be 4th April 2020" and she was thanked, wished well. There was no reference to the occurrence of an event upon which the employment ended or was to end, or to the contract having been a fixed term contract (A38 & B35). Written notice of termination was without explanation. The claimant's understanding was that the post-holder's return to work was a substantial reason for dismissal, absent any change in circumstances decided upon by R1, justifying her dismissal under clause 11 of the contract.

3. The Law:

3.1. The following principles apply in interpreting a contract:

3.1.1. In general words ought to be given their usual, plain meaning;

3.1.2. In general parties are presumed to intend the consequences and implications of agreements reached (absent evidence of deceit or duress);

3.1.3. I ought not imply terms into a contract unless necessary to make sense of a provision or relationship;

3.1.4. Labels attached to contracts are indicative but not definitive of the nature of the provisions or relationship; one ought to consider the actuality;

3.1.5. In interpreting words used, the principle of reasonableness does not apply; that is a statutory construct used in Unfair Dismissal legislation.

3.2. The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (“the Regulations”) at regulation 1 (2) defines a fixed term contract as one that, “under its provisions determining how it will terminate in the normal course, will terminate –

3.2.1. On the expiry of a specific term,

3.2.2. On the completion of a particular task, or

3.2.3. On the occurrence or non-occurrence of any other specific event ...” (other than in circumstances not relevant to this case).

3.3. In deciding whether a contract is really a fixed term contract “The starting point” is to ascertain whether there has been an “express and quite unambiguous statement” in an engagement letter that the employee was being engaged on a fixed term until a specific date, completion of a stated task, or an event (or non-occurrence of a specific event). It ought to be so clear that no notice is required as the end will be apparent and certain; alternatively, it could be said that by expressing the determining feature at the outset (on effluxion of time, task or event) notice has effectively been given at the outset. *Kilraine v Lion Academy Trust* [2020] EWCA Civ 551.

4. Application of law to facts:

4.1. The claimant was told and believed that she was engaged by the respondent as a temporary teacher. She provided her services on that basis and always believed that she would receive two or three months’ notice of termination, depending on the time of year when notice was given (as per her contract).

4.2. In considering the starting point, what the contract says, I note that it says:

4.2.1. At A26 & B29 at paragraph 1:

4.2.1.1. The appointment “will” end, not “shall” end;

4.2.1.2. “in the event of the post-holder returning”, not “on the event of the post-holder returning” or “on” the return; it therefore described circumstances leading to termination rather than defining a date by reference to an event;

4.2.1.3. It went on to add: “or a change in circumstances.....” but gave no details as to what they might be or how she would ever be made aware of them. Significantly this provision was non-specific and indeterminate as to a specific time, task or event. It gave R1 a completely free rein; it gave the claimant no indication of when or why her contract might end or the circumstances in which she might be retained. The claimant would have to look elsewhere in the contract for some guidance on what she could expect and specifically how her contract could be brought to an end, either in the event of the post-holder returning to work or at the behest of the governors (or how and why R1 would perhaps extend employment despite the return to work of the post-holder in reliance on that sub-provision or proviso), or in any other circumstances.

4.2.2. The obvious place for the claimant to look for any certainty as to termination was clause 11 (A30 & B33):

4.2.2.1. This clause effectively cancels the direct effect of the Burgundy Book provisions on termination but repeats the same notice provisions. The Burgundy Book says its notice provisions do not apply if there is such a clause in the contract.

4.2.2.2. Listed at 11 (i) as a ground for dismissal by notice is included “some other substantial reason”. The claimant accepts that the post-holder’s return to work was a substantial reason that would justify her dismissal on notice. It bears out what she believed would be the case (provided R1 did not decide that there had been a change in circumstances) and nothing else in the contract was as clear as that concerning how the relationship would be brought to an end (saving redundancy, incapability, misconduct).

4.3. The contract was so couched with provisions giving the maximum flexibility to the respondent that it falls short of an “express and quite unambiguous” statement of a fixed term.

4.4. The claimant knew that unless the governors decided otherwise, (a change in circumstances), and absent redundancy etc, the respondent would give her notice of dismissal for the substantial reason that the post-holder was returning to work. That was the event (“in the event”) that could lead to

dismissal but the return was not stated to be the event ending the employment (“on the occurrence of an event”).

- 4.5. Absent a fixed term, the claimant was entitled to receive notice in accordance with the contract at clause 11.
- 4.6. The respondent sought to end the relationship on 4th April 2020. That was in the Easter, not Summer, term; the requisite notice was two months’ notice ending on 4th April 2020. Notice ought to have been given to her on 5th February 2020 but it was not given until 6th March 2020. That was a breach of contract with short notice having been given. The claimant is entitled to damages for the period represented by that shortfall. Notwithstanding that written confirmation was due (and sent on 10th March 2020), I am satisfied that oral notice of termination was given to the claimant on 6th March 2020.
- 4.7. The claimant had been paid a monthly salary that did not vary and represented 1/12 of a full-time equivalent salary each month. It was inclusive of the claimant’s holiday pay; she took paid holidays as they arose. The claimant conceded in submissions that she would only be entitled to holiday pay if she was adjudged to be a fixed term employee but not if she was a temporary employee entitled to notice. That is my finding. The holiday pay claim fails.

Employment Judge T.V. Ryan

Date: 17.11.20

JUDGMENT SENT TO THE PARTIES ON 19 November 2020

FOR THE TRIBUNAL OFFICE