EMPLOYMENT TRIBUNALS

Claimant: Mr P Coates

Respondent: Birmingham Metropolitan College Corporation

Heard at: Birmingham (By CVP) **On:** 22, 23, 24, 25 and 26 February 2021

Before: Employment Judge Miller
Ms R Addison
Ms L Wilkinson

Representation

Claimant: In person
Respondent: Mr C Murray (counsel)

RESERVED JUDGMENT

1. The claimant's claims that he was subject to direct discrimination on the grounds of age, sex and/or disability are unsuccessful and are dismissed.
2. The claimant's claim that he was subjected to less favourable treatment on the ground that he is a fixed term employee is unsuccessful and is dismissed.
3. The claimant's claim for unfair dismissal is dismissed. The claimant was not continuously employed by the respondent for at least 2 years so that the Tribunal does not have jurisdiction to hear that claim.

REASONS

Introduction

1. The claimant was employed by the respondent, Birmingham Metropolitan College Corporation, from 5 April 2018 until 22 August 2019 as an employment skills adviser. The claimant's employment was terminated, ostensibly, by reason of redundancy. The claimant started early conciliation on 3 September 2019 and that finished on 3 October 2019. By a claim form dated 2 November 2019, the claimant brought claims of unfair dismissal and discrimination on the grounds of age, disability and sex.

2. In his claim form, the claimant also made reference to working under a fixed term contract.

3. There was a case management hearing on 14 April 2020 before Employment Judge Meichen. At that hearing EJ Meichen identified the issues in respect of the discrimination claims. In each case the discrimination claims were direct discrimination under section 13 of the Equality Act 2010, and the treatment about which the claimant complained was that he was not appointed to the position of business development adviser and was subsequently dismissed.

4. EJ Meichen also made the following orders:

   - that the claimant give reasons in writing why the complaint of unfair dismissal should not be struck out; and

   - that within 14 days of the date the order is made (14 April 2020) the claimant must set out in writing to the respondent and the tribunal a list of the treatment he relied on for any claim under Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. This must include the details of when the treatment occurred, who was involved and what exactly took place.

5. The respondent was given permission to serve an amended response.

6. The claimant provided a further document in response to those orders. There was obviously some uncertainty about the content of that document and/or the matter was not then referred back to a judge so that at the start of the hearing the scope of the claimant's claims under the fixed term employee regulations and the status of his unfair dismissal claim were uncertain.

7. We were therefore required to make decisions on an amendment application from the claimant and to decide whether the tribunal had jurisdiction to consider the claimant's unfair dismissal complaint.

8. For reasons that were given at the time, the claimant's claim of unfair dismissal was dismissed as the Tribunal did not have jurisdiction to consider it.

9. We also considered the claimant's application to amend his claim. Our decision was that the claims the claimant has brought for breaches of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (FTE regulations) were those claims set out in the table at page 33 of the bundle. The claims are brought under regulation 3 and particularly under regulation 3 (1) (b) that the claimant was subject to a detriment in that he was treated less favourably than a comparable permanent employee. The permanent employees against whom the claimant compares himself are Tracee Slater, Paul McCalla and Lucy Cadman.

10. The incidents of alleged less favourable treatment are set out in the appendix to this judgment.

11. The claimant was also ordered at the Case Management hearing on 14 April 2020, to provide the respondent with information in respect of his disability. It appears that the claimant did do that although nothing further happened about that at the time. At the hearing, the respondent agreed that having had the opportunity to consider the claimant's information that he was at all material times and throughout the whole of his employment disabled by reason of a hearing impairment. Specifically that he has difficulties hearing from one ear and hearing things from behind him and that the claimant suffers from tinnitus. The claimant said that the impairment is otosclerosis.

12. Therefore, the issues that we are required to decide are as follows:

    a. Was the claimant treated less favourably by the respondent dismissing him and/or not appointing him to the position of business development adviser than Lucy Cadman, Paul McCalla and/or hypothetical comparators?

    b. If so, was this because of the claimant's age, disability or sex or because of those protected characteristics more generally?

    c. Was the claimant treated less favourably than Lucy Cadman or Paul McCalla as regards the terms of his contract or by being subject to any other detriment as set out in the table in the appendix to this judgment?

    d. If so was that treatment on the ground that the employee was a fixed term employee; and

    e. if so was that treatment justified on objective grounds?

The hearing

13. The hearing was conducted remotely by CVP. There were some technical issues throughout the hearing but we are satisfied that neither party's case was prejudiced by any such issues. The consequence was that the hearing took longer than it otherwise might have done, hence this reserved judgment.

14. We were provided with an agreed bundle of 301 pages and an addendum bundle which included documents that were disclosed very late in the proceedings of 79 pages which was later extended to 92 pages. The latest disclosure was provided on various days of the hearing and was typewritten transcripts of hand written interview notes, the handwritten notes of the claimant's interview for the business development adviser role and a script of the meeting on 4 July 2019. The interview notes were not sent to the claimant until the first morning of this hearing despite being in the possession of the respondent's solicitors for well over a year. The respondent was unable to offer any satisfactory explanation for this other than, effectively, it was overlooked. The script used for the meeting on 4 July 2019 was sent to the claimant on the fourth day of the hearing and required Ms Branch Haddow to be recalled.

15. Notwithstanding this very significant delay we admitted the documents as they were relevant to the issues to be decided and it would not be in the interests of justice not to do so. Because of delays in the proceedings and having to deal with matters referred to previously the claimant had the opportunity to review those documents before giving his evidence. The respondent's explanation for the late disclosure of these documents was, in respect of the interview notes, that they had been sent to the respondent's solicitors and overlooked by them because of changes in fee earners and then, latterly, remote working because of the Covid-19 pandemic.

16. Ms Branch Haddow said that she had not been asked by the solicitors for her script. Neither of these are acceptable reasons and they put the claimant under additional pressure that could have been avoided.

17. The claimant produced a witness statement and gave evidence, and Tracee Slater and Lucy Cadman also provided witness statements and gave evidence on the claimant's behalf.

18. On behalf of the respondent, we were provided with witness statements by, and heard evidence from, Alaco Millard, Operations Director; Suzi Branch Haddow, Head of Sales, and Acting Head of Department; Louise Jones, Deputy Principal, and Ana Ferguson, Human Resources Manager.

Findings of fact

The claimant's contract

19. The claimant was originally appointed under a fixed-term contract providing maternity cover for Lucy Cadman from 5 April 2018, as an Employment Skills Adviser (ESA). We do not know what the proposed end date of that original fixed term contract was but it was agreed that it was fixed term. The claimant said that he experienced difficulties from the outset. There were even problems with the arrangements for his original interview. He turned up for his interview to find that nobody was aware he was being interviewed and another person had the same interview appointment time as he did.

20. At the time he was appointed by Julie Hopkins and Paula Creswell, neither of whom gave evidence. The claimant asked Ms Ferguson about this and although she apologised for the problems the claimant had experienced at the time she had no direct recollection of those problems.

21. Following his initial appointment, the claimant was then given a further fixed term contract taking over from Julie Priestnall on what was described as the ESF Business Elevator contract. It's fair to say that it took a very long time for the claimant's new contract to be confirmed in writing. The claimant said that it took him seven months of chasing before he received written confirmation of his new contract and the respondent did not dispute that. None of the people who gave evidence were employed in positions at that time which meant they were responsible for the delay. They could not account for it, they all said it was inexcusable and they all apologised.

22. We can say no more than that we agree that this was not good enough.

23. The claimant was finally given a written fixed term contract on or around 12 December 2018. That contract comprised standard terms and conditions of employment and a contract schedule, which is a form that is completed and signed. The date on that is 14 December 2018.

24. There is a copy of the standard terms and statement of main terms and conditions of employment in the bundle. The claimant was asked to agree that he received those attached to the contract schedule. The claimant was unable to confirm that that was a copy of the document he received as he could not remember. However, he did not dispute that those were the contract terms; nor did he provide an alternative copy. When asked whether he had kept a copy, he was vague in his response and said he may have had one and might have left it at work.

25. On the balance of probabilities, we find that the standard terms and conditions of employment that are set out from page 84 of the bundle are the terms that applied to the claimant throughout his employment as an ESA.

26. Those included, specifically, the following terms

> 27.2 After the completion of the probationary period, the Corporation may terminate your employment by giving you, in writing, whichever is the greater of:
>
> a) two months' notice; or
>
> b) one week's notice for each complete year of service, up to a maximum of twelve weeks' notice.
>
> …
>
> 27.4 During any period of notice of termination (whether given by you or by the Corporation), the Corporation shall be under no obligation to assign any duties to you and shall be entitled to exclude you from its premises, although this will not affect your right to receive your normal salary and other contractual benefits. If you are required to stay at home during the notice period, clause 20 'Exclusivity of Service' shall continue to apply.

27. The contract schedule for the extended contract dated 14 December 2018 describes the claimant's job title as Employment Skills Adviser. It does not refer to the ESF, the European Social Fund or Business Elevator project.

28. The schedule has a number of boxes that can be completed and next to the box in which it is written "if fixed term contract end date" is recorded 29 August 2019. The claimant agreed that that contract had an end date of 29 August 2019.

29. In the broadest possible terms, the role of ESA was to interact with local businesses and identify ways in which the respondent could work with them to provide training and skills. In an even broader sense, it was a sales role. The ESA's each worked in various, particular sectors although each could work in any sector. It was the respondent's case that the ESA role was

"transactional" and responsive. It predominantly, they said, involved working with existing customers. The claimant said, and we don't understand it to be disputed, that he also used his initiative to generate new work.

30. It was the claimant's case that his ESA contract was intrinsically linked to the ESF Business Elevator project. It is not necessary to go into the detail of what that means but it is apparent that certain types of work, with certain types of employers or in certain areas, attracted funding from the European Social Fund. The respondent contracted with Solihull College to provide work under this contract. They were described as a subcontractor.

31. The claimant said that he spent 100% of his time, or almost 100% of his time, on ESF funded projects. He did not have to complete timesheets to prove how much time he had spent on ESF work. He said that he was named on the ESF contract. We were not shown a copy of the ESF contract but it was not disputed that the claimant was named on the contract. However, Ms Millard said that she was also named on the contract as were other employees of the respondent. Although the claimant was named on the ESF contract, there was no suggestion that the claimant was a party to that contract. The contract must have been between the respondent and Solihull College.

32. Both Ms Millard and Ms Branch Haddow explained how the ESF contract worked. It was described most usefully as a revenue stream for the college rather than providing grant funded posts. It was a match funding arrangement whereby the ESF provided 50% of the funding and the college (by which we think is meant Solihull College) provided 50% of the cost of the work. We understand that the key documents for generating the funding were those called Organisational Needs Assessments (ONA's) which are documents completed by ESAs with client employers.

33. The claimant appeared to accept that this accurately reflected the arrangements as between Solihull, the ESF and the respondent.

34. In May 2019 the claimant had some email correspondence with Mr Michael Burke. Mr Burke was a manager employed by the respondent who had responsibility for managing, amongst other things we understand, the ESF contract. Mr Burke did not have any line management responsibility for the claimant.

35. In the email correspondence in May 2019, the claimant was discussing with Mr Burke the likelihood of a contract extension as part of his involvement on the ESF contract. In the first email in the thread the claimant says

    "Just following on from our recent conversation regarding the likelihood of a contract extension as part of my involvement on the ESF contract. You did mention that this might be extended until either the end of December 2019 or possibly March 2020 and in view of your imminent departure it would be good to have confirmation as to who may be responsible for overseeing this, if for any reason I need to keep HR in the loop, especially so now in view of the current climate and uncertainty within the organisation".

36. Mr Burke's reply is

"Let me pick this back up with Rebecca mate and I'll get back to you, hope that's OK? Ultimately it will be Rebecca so I can pick back up with her next week and then come back to you...."

37. Rebecca is Rebecca Hayes who was in the claimant's line management structure at the time. The claimant responded

"Cheers Mickey,

It's just if I need to make alternative arrangements I need to be putting some feelers out sooner rather than later....

Nudge nudge wink wink"

38. The claimant confirmed that the meaning of this email was that if his was going to end in August 2019 he would have to start looking for other work. This was a perfectly reasonable position to take in the claimant's circumstances.

39. The email correspondence ended with Mr Burke telling the claimant to leave it with him. There is then a further email dated 21 May 2019 from the claimant to Mr Burke which says

"Hi Mickey,

Thanks for confirming that my ESF contract will be to extended until 31/3/20 following your discussion with Rebecca. Good luck in the new role"

40. There is no other email to or from Mr Burke obviously directly related to this email. The reference to 'good luck in the new role' reflected the fact that Mr Burke then or very soon thereafter left the respondent's employment.

41. In our view, these emails do not indicate that Mr Burke had agreed to extend the claimant's contract of employment beyond 29 August 2019. It is clear from the final email from Mr Burke that he needed to speak to Rebecca Hayes, who was in the claimant's line management structure. The respondent's witnesses and the claimant confirmed that Mr Burke had no line management responsibility for the claimant. Further, and Ms Ferguson confirmed that, the decision as to whether or not to extend an employee's fixed term contract would ultimately be with the claimant's line manager.

42. Even if Mr Burke did have, or purport to have, authority to extend the claimant's contract these emails are not evidence that he had. They show that Mr Burke needed to take further steps before there was a contract extension – namely speaking to Ms Hayes.

43. We do not think that the claimant was being disingenuous in sending the email to Mr Burke dated 21 May 2019. It was clear that Mr Burke's areas of responsibility related only to the ESF contract to which the claimant was not directly a party. That contract could be extended and continue over very long periods of time. We think that in all likelihood he did genuinely believe that Mr Burke had confirmed that his contract would be extended but we think it more likely that if there was any such conversation Mr Burke was

referring to extensions of the ESF contract. That was the only thing over which he had any influence.

44. We find that the claimant was, up to the end of his employment with the respondent, employed under a fixed term contract that was due to expire on 29 August 2019.

Restructure

45. From November 2018 and Spring 2019 the respondent undertook a restructuring program to cut costs, although the claimant was not made directly aware of this until 4 July 2019.

46. On 2 July 2019 there was an email exchange between Ms Branch Haddow and Ms Ferguson about the forthcoming restructure in the claimant's Busines Development Team. Ms Branch Haddow indicates, in that exchange, to Ms Ferguson that the claimant is on a fixed term contract until the end of August so is not at risk. Ms Ferguson's reply is that they will need to formally confirm the expiry of the fixed term contract so may be useful to wrap it up somehow.

47. The claimant was not a party to this email correspondence but now relies on it to show that his role was never at risk in the redundancy exercise that was to follow.

48. Ms Branch Haddow said in evidence that in fact she was asking Ms Ferguson whether redundancy applied to the claimant and that subsequently she had a call with Ms Ferguson in which she confirmed that as the claimant was in an ESA post he remained at risk of redundancy as all of those posts were being removed from the structure.

49. It is not obvious that Ms Branch Haddow's email can be read that way but Ms Ferguson's reply is "will confirm advice re Paul Coates as we will need to formally confirm expiry of FTC so may be useful to wrap up somehow".

50. On balance, we read this email exchange as a discussion between Ms Branch Haddow and Ms Ferguson about the proposed restructure. It is clear from Ms Ferguson's response that the decision whether to include the claimant in the redundancy was not, at that point, finally made and we find that this email trail does not show that the claimant's post was excluded from the redundancy exercise.

51. On 3 July 2019, the claimant attended a staff development day at which the future of the college and specifically the recovery plan was discussed. There was no mention of proposed redundancies at this event.

52. Later that day the claimant received an invitation to a directorate meeting the following day. That invitation was sent in the evening after working hours and did not indicate what the meeting was to be about.

First consultation meeting 4 July

53. The meeting on 4 July 2019 was led by Ms Branch Haddow and she was accompanied by Ms Millard. The other attendees were the four ESA's who

were: the claimant, Tracee Slater, Paul McCalla and Lucy Cadman. At this meeting the ESA's were informed that they were being placed at risk of redundancy as a result of the proposed restructure.

54. At the time, the existing structure as far as it applied to the claimant was that there were three Employment Service Operation Managers (ESOMs) who were more senior to the claimant's role of ESA, and subordinate to the claimant's role were two Recruitment Advisers and a Talent Bank Manager (the recruitment team).

55. These roles were being replaced with one Business Development Manager (BDM) which were of a similar level to the ESOMs; 3 Business Development Advisers (BDA) which were of a similar level to ESA's, and 3 Recruitment and Sales Consultants (RSC), who were of a similar level to the recruitment team.

56. The BDA roles were described by the respondent as new roles, different from the ESA roles. They refer to them being transformational, rather than transactional and by this they mean that they would expect business development advisers to seek out new and different sources of revenue from new and different customer employers rather than relying on existing customers and repeat business. The claimant's case was not put on the basis that the BDA and ESA roles were the same so we do not need to make any findings about that but, in any event, he did appear to agree that there were some differences between the roles.

57. Ms Branch Haddow and Ms Millard say that the ESA's were told that their jobs were being deleted. The ESA's and the recruitment team would be able to apply for the BDA and RSC jobs and the ESOMs would be able to apply for all the new jobs including those of the BDM.

58. This means that the seven ESA's and members of the recruitment team would be able to apply for six jobs, whereas the three ESOMs would be able to apply for a total of seven jobs.

59. It is not disputed that the claimant was told that he could apply for an ESA or RSC role. Nor is it disputed that he was told that he could not apply for a BDM role.

60. The claimant asserts that during this meeting he was told that his job was not at risk of redundancy because he was on a fixed term contract but that he could apply for one of the permanent jobs anyway.

61. Ms Slater, Ms Cadman and the claimant all gave evidence to this effect. Ms Slater said that she asked the question in the meeting on 4 July that if the claimant was not at risk of redundancy why was he allowed to apply for one of the available jobs that may prevent them from losing their jobs.

62. At no point in his witness statement, or in the pleadings, does the claimant say who is alleged to have said that he was not at risk of redundancy in this meeting. He says it was 'the respondent', or he 'inferred that', or there was 'an implication' or 'it was clear that' he was not at risk. It was only in the

response to a direct question that he said that it was Ms Millard who said that.

63. There are no notes of this meeting; there is only a script which was produced on the last day of evidence. This script does not include a reference to the claimant being excluded from the redundancy selection process.

64. This was a redundancy consultation meeting. The respondent's witnesses all said that the only reason the claimant had been invited to this meeting was because he was at risk of redundancy.

65. We have considered the email trail on 2 July 2019 and the fact that the claimant's two witnesses say that it was said at this meeting. This is, on the face of it, compelling evidence, but it is inconsistent with the decision to invite the claimant to that meeting and then take him through the subsequent consultation process. It is also inconsistent with the fact that there is no reference to this specific issue in the meeting script.

66. The claimant said that he obtained the email trail from 2 July 2019, in or around August or September 2019, following a subject access request.

67. It was put to the claimant, and we think it likely, that in fact the claimant has had discussions with his witnesses who were at the time his colleagues about the process and is mis-remembering what actually happened. The claimant thought that his contract would be extended because of the potential extension of the ESF contract, he had clearly had problems getting appropriate contract documentation in the past and in a number of other respects the respondent did not deal with this process well. There was a clear communication problem at times and we are not surprised that the claimant reached wrong conclusions.

68. On the balance of probabilities, we find that the claimant was not told at the meeting on 4 July 2019 that his job was not at risk of redundancy.

69. Following the meeting on 4 July 2019, the claimant was given a letter setting out the consultation process for the redundancy exercise.

70. The letter also said "I write to confirm that, regrettably, you are in an area that is affected and that, therefore, you are potentially at risk of redundancy". It also says "this potential redundancy arises as a result of the proposal to remove the role of employment skills adviser from the organisation structure".

71. It is clear, therefore, that in any event by the time the claimant got this letter on 4 July 2019, by email, he was aware that his post was at risk of redundancy.

Individual consultation – 8 July 2019

72. That letter set out a timescale for consultations. There was to be a first individual consultation meeting on 8 July and then a second on 15 July 2019.

73. The claimant attended the first consultation meeting on 8 July with Ms Millard. The note of that meeting records that the claimant confirmed that he understood that his post as an ESA within the business was at risk of redundancy and his current fixed term contract was due to expire in August 2019. However, further on in those notes the claimant raises the question about his ESF contract and says that he had been told by Mickey Burke that it had been extended until December 2019. We note that in the email from May 2019 the claimant was asserting that in fact his contract had been extended until March 2020. The claimant did not accept in cross examination that he had confirmed in the meeting that he knew his post was at risk of redundancy.

74. The notes record that Ms Millard says in that meeting that she would check with HR if there was any record of the claimant's contract being extended and the claimant said that he would also seek to find further information or evidence about that.

75. We think the notes are an accurate record of that conversation. We find that Ms Millard did not in that meeting tell the claimant that his post was not at risk of redundancy. It is clear that there was, in the mind of the claimant at that time, uncertainty whether his contract had been extended or not and he disputed that it was due to end on 29 August 2019. However, in our view it is clear from the notes of that meeting that Ms Millard did not tell the claimant that his post was not at risk of redundancy.

Application and interview

76. The claimant expressed an interest for one of the BDA jobs and his interview was on 11 July 2019. He did not apply for an RSC job.

77. We were taken through some of the notes of the interviews of the claimant, Paul McCalla and Lucy Cadman who all applied for the same BDA role. Tracee Slater also applied for the job but we have not seen any of her interview notes. The selection was undertaken by way of interview and each of the candidates was asked 9 questions.

78. The candidates could score between zero and five for each question: zero being 'did not address question or answered a different question altogether' through to 5 being 'excellent'. The interviews were conducted by Ms Millard and Ms Branch Haddow, and their scores were added together to give a total of an available 90 points.

79. The claimant scored a total of 43 points at that interview, Ms Cadman scored a total of 78 and Mr McCalla scored a total of 84. Subsequently Mr McCalla was offered and took up the role of BDA. Ms Cadman resigned before she found out whether she was successful or not but was subsequently informed that had she not resigned she would have been offered the job. The claimant and Ms Slater were not offered BDA roles.

80. We were taken through a comparison of some of the claimant's answers in interview and the respective answers of Lucy Cadman and Paul McCalla.

81. Specifically, we were referred to questions six and nine in respect of which the claimant was scored one point each by Ms Branch Haddow and one and three points respectively by Ms Millard. These were relied on as key questions which the claimant had scored particularly badly on.

82. In our view, both Ms Cadman and Mr McCalla appeared to provide more detailed and relevant answers than the claimant did. We do not make any finding about whether the claimant, Ms Cadman or Mr McCalla should have scored slightly more or less for each question, but having seen a comparison of the two sets of answers we are satisfied that the reason that Ms Cadman and Mr McCalla scored higher was that they performed better in the interview. More importantly, we accept that Ms Branch Haddow and Ms Millard genuinely considered at the time that Mr McCalla and Ms Cadman provided better answers to the questions in the interview. We accept that the notes of the interviews are genuine records of what was said at the time and the claimant did not challenge this.

83. The claimant asserted by way of cross examination that Mr McCalla was given some preferential treatment that enabled him to score more highly or even that the scores were a fabrication. He brought no evidence to support this and it was denied by Ms Branch Haddow. We note also that the claimant did not make such assertions in respect of Ms Cadman who was giving evidence on his behalf.

84. We reject these assertions. Having considered the evidence of the interviews, in our view the reason that Ms Millard and Ms Haddow gave Ms Cadman and Mr McCalla higher scores was because they genuinely believed that they gave better answers in the interview.

85. On 11 and 12 July 2019 there was an email exchange between Antoinette Morgan, who worked on the ESF contract with Mr Burke, and Ms Branch Haddow. Ms Branch Haddow asked if it was the case that were the ESF project to continue past August, the college would be required to ensure that someone was appointed into a contract for ESF only activity. Ms Morgan said in reply that the Business Elevator project did run until the end of December 2019 rather than August and that the claimant was employed 100% on that project, but she confirmed that the ESF doesn't provide a grant. Confusingly the email says that "we claim hundred percent full salary but ESF programme is a match funded at 50% so if his salary costs were £100 we would draw down £50 ESF". It is still not completely clear to us whether the additional 50% would come from Solihull College or the respondent's other resources but that is not material for these purposes. Despite the claimant's assertions we find that this email does confirm that the ESF contract into which the college entered provided an income stream for the college. The claimant was employed to deliver the work required in order for the college to access this funding stream, but there was nothing to link the duration of the ESF Business Elevator project directly with the duration of the claimant's contract of employment.

Individual consultation – 15 July 2019

86. On 15 July 2019 there was a further individual consultation meeting between the claimant and Ms Millard. The claimant was not accompanied at this meeting and there was no one from HR there either.

87. The claimant accepted that the notes of this meeting were accurate. At that meeting the purported extension of the claimant's fixed term contract was discussed again. Ms Millard confirmed that she had been unable to find anything from Mr Burke to confirm an extension to the claimant's contract and she was still waiting for something from HR about it. She advised the claimant that he would need to provide written evidence of his contract extension as, effectively, she was unable to find anything.

88. The claimant agreed that at that meeting he was also informed that any vacancies at the college would be advertised on SharePoint and the claimant said that he did have access to that.

89. There is nothing in the record of that meeting, which we accept as broadly accurate, to suggest that the claimant was told at that meeting that his job was not at risk of redundancy. In fact the content of the notes is inconsistent with such a suggestion. Under the last point the claimant told Ms Millard that he was on annual leave on 22 July when the outcome meeting was scheduled so it was agreed that it would be rearranged to 23 July 2019. We find, therefore, that the claimant was not told at this meeting that his job was not at risk of redundancy.

90. On 16 July after that meeting Ms Millard wrote to Ms Ferguson to make enquiries about the alleged extension of the claimant's fixed term contract. Specifically, Ms Millard asked HR if Mr Coates leaving on 31 of August would be a cause for concern in the context of the extension of the ESF project and asking, although not in explicit terms, if HR had any information about it. Ms Donna Robertson replied and said "I have a letter on file dated 21.5.18 confirming his post is funded until 31.12.19 however there is no contract to back this up".

91. This communication is consistent with all the other evidence about the status of the claimant's contract. We do not criticise Ms Millard for making these enquiries. She did not immediately know the claimant's contract position and she tried to find out. She also gave the claimant the opportunity to produce his own evidence of a contract extension which he was unable to do. The claimant was critical of the respondent for not knowing his contract status at this point. While we understand this criticism in light of the claimant's understanding of the position, in fact, the respondent (if not Ms Millard personally) <u>was</u> aware of the claimant's contract position, namely that the claimant's fixed term contract was due to end on 29 July 2019. It is simply that the claimant did not agree with this.

92. On 18 July 2019 Lucy Cadman informed the respondent that she had been successful in obtaining another role and effectively took voluntary redundancy.

Interview outcome meeting 23 July 2019

93. On 23 July the claimant attended a meeting with Ms Millard and Ms Ferguson at which he was given the results of his interview for the BDA job. The claimant was told that he was unsuccessful and that he would be served with notice of redundancy. The claimant acknowledges this in his witness statement and says that he found this particularly upsetting. Ms Millard also told the claimant at this meeting that she had been unable to find any evidence of an extension to his fixed term contract past 29 August 2019. The claimant was accompanied by his colleague, Trina Tiernan. The claimant said in cross-examination that the reason he wanted someone with him in the meeting was to provide support and specifically that he was anxious which, he said, affects his tinnitus.

94. In his witness statement the claimant said that he wanted his colleague with him for emotional support and to avoid any ambiguity. We accept the claimant's evidence that he was anxious and needed some support. It was unclear whether the avoidance of ambiguity related to later disputes about what was said so that his colleague would act as a witness or whether he alleges that his hearing was impacted so that he needed assistance hearing what was being said. We conclude, on the balance of probabilities, that it was a combination of the two things but, in light of the claimant's comments about the reason for having a companion at the meeting on 1 August 2019 (below) we think it was more related to the claimant wanting to have a witness, although we accept that the claimant did experience anxiety in and about these meetings.

95. The claimant says that the respondent made his companions feel pressured and anxious in various meetings. Specifically in his witness statement he says (of Ms Tiernan)

> "She was immediately made to feel nervous and intimidated (as was I) as she was asked if she felt comfortable to be here, which made us both feel very nervous and uneasy. This oppressive attitude was also shown towards 2 other colleagues who have supported me in 2 other meetings; namely 29 July (feedback meeting) & the 1 August (handover meeting)".

96. Ms Millard does not give any evidence about this and she was not asked any questions about it in cross-examination. It is not clear on what basis Ms Tiernan was made to feel uncomfortable. The claimant says in his evidence that the fact that she was asked if she felt comfortable to be here was what made her feel nervous and uneasy. In cross-examination when speaking about being accompanied at this meeting, the claimant said that he was feeling unhappy and anxious which is why he needed Ms Tiernan there.

97. In our view, it seems very unlikely that someone would be made to feel uncomfortable by being asked by the manager if they were comfortable to be in a meeting. It may be that Ms Tiernan was anxious about accompanying her colleague to the meeting and certainly the claimant was experiencing a degree of concern. Bearing in mind all of the surrounding circumstances, we think it very unlikely that Ms Millard caused Ms Tiernan to feel uncomfortable at this meeting.

98. The claimant says that he was not given a great deal of feedback at that meeting. Ms Millard said that it was not the purpose of that meeting to provide feedback, merely to tell the claimant the outcome of his interview for the BDA post and, they said, the outcome of the consultation. It is agreed that the claimant was not given copies of his interview record or any other written feedback at that meeting.

99. We prefer the evidence of Ms Millard that the purpose of this meeting was to tell the claimant the outcome of the consultation and his application for the BDA role.

100. At the meeting on 23 July the notes record that the claimant confirmed his awareness of the process to date. Ms Ferguson is recorded as saying that she had been unable to find anything about a contract extension and that without confirmation of the extension, or evidence of the extension, in writing the respondent was unable to pursue that point. The claimant was asked in cross-examination whether he agreed that the note were an accurate record of the conversation to which he replied that he wouldn't have discussed it in that way because Mr Burke couldn't extend his contract, but Mr Burke had given him assurances that it would be extended. This is further evidence, if further were needed, that the claimant's contract had not been extended past 29 August 2019. The claimant himself clearly agreed both that Mr Burke did not have the power to do this and had not in fact done it.

101. The claimant was given four weeks' notice on 23rd July and initially told that he would be expected to work to his notice period. The claimant was much later paid an additional month's wages as a result of the respondent's apparent understanding that the claimant was entitled to two months' notice. We have already found, however, that the claimant's contract was due to end on 29 August in any event.

102. The claimant was also given the right of appeal against the decision to dismiss him for redundancy which he exercised on 25 July. He also indicated in his appeal that he would be submitting a grievance in due course. The letter of appeal does not identify any specific basis for the appeal.

Feedback meting 29 July 2019

103. On 29 July the claimant attended a feedback meeting with Ms Millard and Ms Branch Haddow. The purpose of this meeting was for the claimant to obtain more detailed feedback about his interview for the BDA job. The claimant's concerns about this meeting were that the feedback he received was poorly structured and inconsistent, that he was not given written feedback and he was not given the scorecards from his interview. By scorecards the claimant means the notes of the interviews. The claimant also said that Ms Branch Haddow made Violet, the person who was accompanying him, very uncomfortable by saying "are you okay to be here" and Violet confirmed that she was.

104. It is correct that the claimant was not given any written feedback at that meeting. Both Ms Millard and Ms Branch Haddow said in evidence that they

gave the claimant feedback based on the written feedback that is now included in the bundle and which was provided to the claimant with the letter giving the claimant the outcome to his redundancy appeal. When questioning Ms Millard, the claimant put to her that he was given some quite detailed feedback and Ms Millard said that he was given line by line feedback by Ms Branch Haddow. Ms Branch Haddow also said in cross-examination that she gave detailed feedback to the claimant based on his performance at interview.

105. We find that the claimant did receive detailed verbal feedback at this meeting.

106. In respect of his colleague who accompanied him to the meeting, this was not addressed in cross-examination. However for similar reasons as applied to the previous meeting where the claimant was accompanied by Ms Tiernan, we think it unlikely that Ms Branch Haddow asking Violet if she was okay to be in the meeting would make Violet feel uncomfortable.

Handover meeting 1 August 2019

107. The following day on 1 August 2019 there was a handover meeting. The claimant was notified of this meeting by calendar invitation, with no information about what the meeting would be about, late the day before.

108. The meeting was scheduled for 9:30 AM. Although this was identified as a handover meeting in the invitation, it appears that in fact the purpose of this meeting was to put the claimant on “garden leave”. That is to inform him that he was no longer entitled to attend work or undertake any work for the remainder of his notice but he would be paid.

109. Ms Millard says about this meeting:

> “On 1 August 2019 a handover meeting was arranged with the Claimant. This meeting was chaired by Mrs. Branch Haddow and I was there in a supportive capacity. The Claimant was also accompanied by a colleague, Linda Hall. Mrs. Branch Haddow explained to the Claimant that we no longer required the Claimant to work his notice period. To ensure that the new structure could be implemented efficiently, and to avoid any further stress to the team, the Claimant was placed on garden leave. The Claimant was unhappy with this decision and asked to pause the meeting; he then refused for the meeting to continue”.

110. Ms Branch Haddow says:

> “On 1 August 2019 a handover meeting was arranged with the Claimant, Mrs Millard and I. The Claimant was also accompanied by a colleague, Linda Hall. I explained to the Claimant that we no longer required the Claimant to work his notice period.
>
> The Claimant’s role was sales-related and due to the nature of the role and the requirements of the departments under the new structure, it was not necessary for the Claimant to work his notice period”.

111. These two brief statements do not give any indication of the impact the claimant says that this meeting had on him or, in fact, the other participants and the claimant's colleagues.

112. The claimant gives a somewhat fuller explanation. He says

> "There was no agenda or explanation of what this meeting was about. For clarity and transparency, I again took a colleague with me, Linda Hall. She too was made to feel nervous and uncomfortable, I asked for clarification of what the meeting was about and requested an agenda to which I was told I was now being put on gardening leave. No further reason/explanation was provided. I then requested why this decision had been taken as on the 23 July when I was served notice, I was told I had to work. I then advised that I could not continue with the meeting as I need to seek further advice. Some 15 minutes later I was confronted in full view of the office by Suzie who told me I had 3 options: to continue the meeting, to leave or call Emma Wint in HR. I said I would be happy to so when I had got my own advice and also when I received in writing the reasons why I was now being forced to go on gardening leave. She said she could not do that but repeated 3 times the 3 options that I had. I subsequently phoned Emma Wint in HR who confirmed the process, but she could not justify was I was being placed on gardening leave. I felt bullied and humiliated by this whole process and felt my good character and credibility had been defamed in full view and earshot of staff in an open plan office This was further compounded when I was escorted off the premises by a BMET security guard; Dan Lloyd".

113. In cross-examination, Ms Branch Haddow and Ms Millard broadly confirmed the claimant's chronology of this meeting. Ms Branch Haddow agreed that Mr Coates did in the end agree to speak to HR and then leave the premises but by that time she had already called Mr Lloyd who did accompany the claimant from the premises.

114. The claimant said that he was upset and anxious at being informed he had to leave the premises immediately and wanted to speak to his wife or a friend for some advice/reassurance as he was starting to feel anxious. When nether of those were available, he asked to speak to someone at HR in person as, he said, he would have difficulties doing so on the phone. HR were based on a different site 15 or 20 minutes' drive away.

115. The meeting was initially conducted in a private office downstairs and Mr Coates left the meeting to come upstairs to the open plan office where his desk and his colleagues were. He was followed by Ms Branch Haddow and Ms Millard and the claimant said he felt intimidated by this. He said that having been unable to contact HR directly initially, he started emailing them and his IT access was disconnected in the middle of writing the email.

116. There is no suggestion from anyone that Mr Coates became aggressive or angry during this meeting. Ms Cadman, who was there at the time, described him as distressed and upset and the claimant said that he was feeling anxious.

117. The claimant said that he was not given any explanation for the decision to put him on gardening leave at the time and it was unclear whose decision it

was. At the tribunal, Ms Branch Haddow said that it was her decision, in conjunction with HR, to put the claimant on garden leave. She said that it was for commercial reasons – to prevent the claimant from taking commercially sensitive information and to prevent him taking clients from the college if he got another job in the same sector. Ms Slater was also put on gardening leave ostensibly, the respondent said, for the same reasons. Ms Cadman, who had left, was not put on gardening leave. Ms Cadman went to work in-house as a training and development adviser or manager for a large employer. Ms Branch Haddow said this did not present a commercial risk to the respondent and, in any event, Ms Cadman's customer facing role reduced significantly in her period of notice.

118. In the circumstances, it is difficult to understand why, if these were the reasons for putting the claimant on garden leave, he was not asked to leave and not work his notice immediately, on 23 July 2019. He continued to work, and he says including with customers, for a week after he had been given his notice. The opportunity to protect commercial information, if that were necessary, had been missed. We heard no suggestions and saw no evidence that the claimant actually had taken any commercially sensitive information or any customers form the college.

119. Ms Branch Haddow's explanation was that she was on leave on 23 July and did not return until 29 July 2019. However, Ms Millard was also a director so we do not understand why she could not have taken, or implemented, this decision in Ms Branch Haddow's absence.

120. We were also told that the respondent distinguishes between management and formal meetings, the latter being the sort of meeting at which HR would need to be present, and the former not. Ms Ferguson attended at the meeting on 23 July 2019 when the claimant was given notice, but not the meeting on 1 August 2019 where he was asked to leave the premises and stop working for the respondent. The implication is that, in some way, the meeting of 1 August 2019 was of less significance than the meeting on 23 July 2019. This makes it even harder to understand why Ms Branch Haddow needed to be present to remove the claimant from the premises or why the decision was communicated so much later than the decision to dismiss him.

121. Having regard to the evidence we heard about this meeting, and the process generally, we think that it was handled badly. The claimant had been told he could work his notice then, out of the blue, he was told that he could not work his notice and had to leave immediately. The claimant was understandably upset by this and asked for a pause in the meeting. The respondent insisted in response that Mr Coates could continue the meeting, leave the premises or speak to HR. In the course of trying to email HR the claimant's IT access was cut-off. He then agreed to speak to HR and leave the premises but was still escorted from the premises by security.

122. This compounded the upset to the claimant and impacted on his colleagues who were witnessing this. We recognise that it was also a difficult meeting for Ms Branch Haddow, who said that she had worried about it for a long time afterwards and tried to think of ways she could have handled it differently. The only other thing she could think of was sending everyone

else home. However, the claimant was not angry or violent, he was upset and anxious. We recognise that it was difficult but we think that Ms Branch Haddow over reacted.

123. The claimant said that his difficulties were further compounded by his hearing impairment, which worsened as his anxiety increased. This may be the case, and we have no reason to disbelieve the claimant on this point. However, that is not directly relevant to the claims before us. We need to consider the reasons for the actions of the respondent at this meeting.

124. On balance, and despite the issues we have discussed, we find that the reason that Ms Branch Haddow decided to put the claimant on gardening leave on 1 August 2019 was because she genuinely considered that there was a commercial risk in leaving the claimant at work. Her explanation of the difference in treatment between the claimant and Ms Slater and Ms Cadman is coherent and no evidence was produced by the claimant to show a different reason. We find that the claimant's IT access was disconnected for the same reason. We conclude that the reason the respondent changed its mind between 23 July 2019 and 1 August 2019, or at least appeared to change its mind, must have been because of the intervention of Ms Branch Haddow in Ms Millard's decision. These two people either had a different view of the risk, or Ms Millard simply didn't consider putting the claimant on garden leave. This had a significant impact on the claimant and was poorly handled but we conclude that it came about because of inconsistency or incompetence rather than for any more nefarious reason.

125. We find that the reason Ms Branch Haddow called security was because she could not think of another way to resolve the situation. The reason that the meeting escalated and the claimant became upset and anxious was also because Ms Branch Haddow and Ms Millard did not handle the meeting in a way that successfully de-escalated it. We think that they were trying their best, and it might well be that nothing they could have said or done would have reduced how the claimant felt, or resulted in a different reaction.

126. However, we find that nothing that was said or done at this meeting was done *because* of the claimant's disability, his sex or his age. We also find that it was unrelated to his status as a fixed term employee.

Grievance

127. On 1 August 2019 the claimant sent an email to the respondent's HR email address which was picked up by Ms Ferguson. The claimant complained about his treatment by Ms Millard and Ms Branch Haddow earlier that day and describes it as a humiliating, bullying and intimidating experience. The claimant also made a request for information relating to the redundancy and specifically:

"all correspondence, minutes, paperwork, emails, scorecards, interview questions and model interview answers in relation to consultation meetings and interviews held on 4 July, 8 July, 11 July, 15 July, 23 July and also now today's meeting 1 August. Having taken legal advice, I would also now

request that you forward all date created and date modified/amended stamps for all of these documents, whether word, excel or PDF. In addition to this I now also formally request all information held on file i.e. correspondence and emails in relation to me between HR and the various managers in the business, namely Alaco Millard, Suzie Branch & Rebecca Hayes. I would ask for the same in relation to the ESF contract between HR, Mickey Burke, Antoinette Morgan and Lyndsay Tudor Wright".

128. The claimant does not say in that complaint (which is a wholly understandable one in the circumstances) that he has been treated unfavourably because of his age, sex, disability or fixed term employee status. The claimant does say in this email that he was told that his job was not at risk in the redundancy process.

129. The request for information was dealt with as a request for personal information under data protection rules and Ms Ferguson suggested that the claimant's issues be dealt with as a grievance. We note here that there were delays in providing the information. Generally, data protection issues are outside the scope of the Tribunal's jurisdiction but the notes of the interviews were not finally provided until the first day of this hearing.

130. On 12 August the claimant set out a more formal grievance. This set out a number of issues:

    a. The way he was treated on 1 August 2019

    b. That the claimant should have been excluded from the redundancy process because his contract was extended to 31 December 2019

    c. Complaints about the consultation process

    d. That he had been excluded from the grievance and appeal process by not being given correct information at the correct time

    e. For the first time that he has suffered discrimination because of his age, hearing impairment and gender

    f. Issues about the alleged contract extension and the historic delays in providing his contract in 2018

    g. That he was not given any reason for being put on garden leave

    h. Complaints about previous job applications

131. The grievance was referred to Ms Louise Jones, Deputy Principal, to deal with. Ms Jones also heard the claimant's appeal against his redundancy selection/dismissal.

Appeal hearing

132. The claimant's appeal against his dismissal by reason of redundancy was heard on 20 August 2019 and Ms Jones sent the claimant an outcome letter not upholding the appeal together with the feedback notes created for the meeting on 29 July 2019, on 2 September 2019.

133. The only complaint that the claimant makes in his witness statement about the redundancy appeal is that he was not allowed to access the respondent's full grievance/appeal procedures. In cross examination he also said that the grievance and appeal should not have been heard by the same person.

134. The claimant was given the opportunity to be accompanied at the appeal hearing and was accompanied by Ms Slater. Having heard the evidence of Ms Jones, we consider that the claimant was given the opportunity to make his case at the redundancy appeal meeting. He was given a detailed response.

135. The claimant did not have his interview notes or the feedback documents before or at the appeal meeting. The respondent has not provided any good reason for this. However, in light of the way the rest of the process was handled, we find that this was because of administrative problems or incompetence. There is nothing in any of the documents we have seen from which we conclude that it would be to the respondent's advantage to keep these documents from the claimant and nothing to indicate that any of the decisions (including the decisions not to provide copies of documents) was related in any way to the claimant's age, sex, disability or fixed terms contract status.

Grievance hearing and appeal

136. The claimant's grievance was also heard by Ms Jones on 28 August. Again, the claimant was given the opportunity to be accompanied at the hearing and was accompanied by Ms Slater. The only issues that the claimant raised about this, in answer to questions in cross examination, was that he was not entitled to a full appeal and that Ms Jones heard both the redundancy appeal and the grievance. When cross examining Ms Jones the claimant acknowledged that he had been through the process and obtained an answer but that the process had not been followed from there.

137. We find, therefore, that the claimant's grievance was initially dealt with adequately.

138. Ms Jones sent the claimant a detailed written outcome of his grievance on 4 September 2019 and the claimant appealed against that outcome on 10 September 2019 by email with detailed grounds of appeal sent on 13 September. The claimant raised, again, the fact that he had not received his interview "scorecards" and that he had been told he was not at risk of redundancy.

139. The claimant's complaint about this process was that he was refused a further hearing. He submitted detailed grounds of appeal and further evidence but his appeal was considered on paper. Ms Ferguson's evidence was that this was because by this time the claimant was no longer an employee and the respondent's policy only allowed for a paper hearing for former employees. We were not shown the policy in question. The claimant put it to Ms Jones that a former permanent member of staff had been afforded an appeal hearing. However, there was no evidence of this, even

in the claimant's witness statement, and the claimant did not identify the member of staff and Ms Jones was unable to provide any clarity on this.

140. We prefer the evidence of Ms Ferguson and find that the reason the claimant was not given a further appeal hearing was because it was the respondent's policy not to allow former employees a hearing in person.

141. The claimant received an outcome to his grievance appeal on 3 October 2019.

Other matters

142. In respect of the claimant's age, the claimant was aged 54 at the date of his dismissal Ms Slater was aged around 56 or 57 at the relevant time (a similar age to Ms Millard). Mr McCalla was said to be around 50 and Ms Cadman in her mid to late 30s.

143. None of the respondent's witnesses were able to identify with any precision the likely ages of the ESAs with the exception of Ms Cadman who was obviously younger. Ms Millard expressed surprise that the claimant was in his mid-50s, thinking that he (and Mr McCalla) were 5 to 10 years younger than that but about the same age as each other.

144. We heard no evidence in relation to any alleged treatment of the claimant that it was connected with his age in any way. Similarly, in respect of the allegations of sex discrimination, we heard no evidence in relation to any alleged treatment of the claimant that it was connected with his sex in any way.

The law

Discrimination

145. The law relating to direct discrimination is set out in section 13 of the Equality Act 2010. That says:

(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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim

146. The respondent does not rely on a legitimate aim under section 13 (2) in respect of age discrimination.

147. Section 23 (1) provides

(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.

148. Section 136 provides

(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.

149. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation for the treatment.

150. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of her race.

151. In *Madarassy v Nomura International* [2007] IRLR 246, the Court of Appeal said that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (in this case sex, age or disability) and a difference in treatment. Those bare facts 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.

152. This means that there must be something more than just unfavourable treatment and a difference in status.

153. By virtue of section 4 of the Equality Act 2010, disability, age and sex are protected characteristics. Section 6 defines disability, but it is conceded that the claimant was, throughout his employment, disabled so there is no need to consider that further.

154. Section 11 provides that sex means a man or a woman; and section 5 provides that reference to age as a protected characteristic means age group which includes reference to a particular age or a particular range of ages.

Fixed term Employees (Prevention of Less Favourable Treatment) Regulations 2002

155. Regulation 3 of the regulations provides, as far as is relevant:

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

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

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

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

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

(b) the opportunity to receive training, or

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

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

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

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

(4) Paragraph (3)(b) is subject to regulation 4.

(5) In determining whether a fixed-term employee has been treated less favourably than a comparable permanent employee, the pro rata principle shall be applied unless it is inappropriate.

(6) In order to ensure that an employee is able to exercise the right conferred by paragraph (1) as described in paragraph (2)(c) the employee has the right to be informed by his employer of available vacancies in the establishment.

(7) For the purposes of paragraph (6) an employee is “informed by his employer” only if the vacancy is contained in an advertisement which the employee has a reasonable opportunity of reading in the course of his employment or the employee is given reasonable notification of the vacancy in some other way.

156. Regulation 4 provides:

(1) Where a fixed-term employee is treated by his employer less favourably than the employer treats a comparable permanent employee as regards any term of his contract, the treatment in question shall be regarded for the purposes of regulation 3(3)(b) as justified on objective grounds if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment.

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

157. Regulation 2 defines a comparable employee as follows:

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

(a) both employees are—

(i) employed by the same employer, and

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

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

(2) For the purposes of paragraph (1), an employee is not a comparable permanent employee if his employment has ceased.

158. We were referred to the case of *The Manchester College v Cocliff* UKEAT/0035/10/CEA. In summary, the EAT held at paragraph 14, in discussing the order in which claims under these regulations should be considered:

"The correct order is that a tribunal should first consider the grounds for the less favourable treatment of the fixed-term worker and to decide whether the employee has established that his or her treatment is on the grounds that the employee is a fixed-term employee. It is only if the answer to that question is yes that the tribunal should go on to consider whether the treatment is not justified on objective grounds".

159. In relation to the question of less favourable treatment, at para 36 of *DWP v Webley* [2005] IRLR 288 in the Court of Appeal, Lord Justice Wall held:

"Once it is accepted, as it must be, that fixed-term contracts are not only lawful, but are recognised in the Preamble to the Directive as responding, 'in certain circumstances, to the needs of both employers and workers', it seems to me inexorably to follow that the termination of such a contract by the simple effluxion of time cannot, of itself, constitute less favourable treatment by comparison with a permanent employee. It is of the essence of a fixed-term contract that it comes to an end at the expiry of the fixed-term. Thus unless it can be said that that entering into a fixed-term contract is of itself *less favourable treatment, the expiry of a fixed-term contract resulting in the dismissal of the fixed-term employee cannot, in my judgment, be said to fall within reg. 3(1)*".

160. In respect of detriments more generally, in *MOD v Jeremiah [*1979] IRLR 436 the Court of Appeal held that a detriment exists if a reasonable worker would take the view that the treatment was to his detriment. In many cases it is obvious. In *Shamoon v Chief Constable of the RUC* [2003] IRLR 285,

Lord Nicholls said: "while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so".

161. Regulation 7 (5) – (12) provides

(5) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of paragraph (4)(b) to decide not to act—

(a) when he does an act inconsistent with doing the failed act; or

(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to have done the failed act if it was to be done.

(6) Where an employee presents a complaint under this regulation in relation to a right conferred on him by regulation 3 or 6(2) it is for the employer to identify the ground for the less favourable treatment or detriment.

(7) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—

(a) making a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates;

(b) ordering the employer to pay compensation to the complainant;

(c) recommending that the employer take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

(8) Where a tribunal orders compensation under paragraph (7)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the infringement.

(9) The loss shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the infringement, and

(b) loss of any benefit which he might reasonably be expected to have had but for the infringement.

(10) Compensation in respect of treating an employee in a manner which infringes the right conferred on him by regulation 3 shall not include compensation for injury to feelings.

(11) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) the law of Scotland.

(12) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

162. In respect of regulation 7 (6), where the claimant has shown that he has been subjected to unfavourable treatment the burden moves to the respondent to show the ground for the less favourable treatment. Unlike the case of discrimination under the Equality Act 2010, there is no need for the claimant to prove facts from which the tribunal could conclude that the unfavourable treatment was on the grounds of the claimant's fixed term employee status. A difference in treatment and a difference in status **is** enough to shift the burden of proof in this case.

163. This is not inconsistent with the dicta in *The Manchester College*. Deciding whether the employee has established that his or her treatment is on the grounds that the employee is a fixed-term employee includes the steps set out of establishing unfavourable treatment, establishing fixed-term status and then the respondent failing to show that the reason for the treatment was not because of the claimant's fixed term status (under regulation 7(6)). Once these steps have concluded, the question of objective justification becomes relevant.

Conclusions

164. Considering first the allegations of direct discrimination. The claimant was subjected to less favourable treatment than Lucy Cadman and Paul McCalla. They were offered BDA roles and the claimant was not. Ms Cadman was made redundant but that was at her own request. The claimant was dismissed and Ms Cadman and Mr McCalla were not. Ms Cadman left, but she was not dismissed in the sense of being asked to leave against her will, even if she might have technically been dismissed to allow the payment of a redundancy payment (and we have made no findings about that).

165. The claimant has not, however, proven any facts from which the Tribunal could conclude that the reason for the failure to appoint the claimant to a BDA role and his consequent dismissal were in any way related to his age, his disability or his sex. The reason was, we found, because Ms Millard and Ms Branch Haddow genuinely believed that Ms Cadman and Mr McCalla were the best people for the jobs and that the claimant had not demonstrated his skills and experience well enough in interview to be appointable to the BDA role.

166. As set out above, a difference in status and a less favourable treatment is not enough to reverse the burden of proof under s 136 Equality Act 2010. There was simply no evidence that the tribunal saw from which we could conclude that the reason that the claimant was not appointed to a BDA role and was dismissed for redundancy was in any way connected to his age, his disability or his sex.

167. Further, in respect specifically of disability, we found that Ms Millard, Ms Branch Haddow, Ms Fergusson and Ms Jones, had no knowledge of the claimant's disability. The claimant was clear that he tried very hard not to let his disability impact on his work and he arranged things himself so that it did not. Although it is entirely likely that his colleagues with whom he worked closely on a daily basis were aware of his disability, because the claimant arranged matters so that it did not impact on his work there is no reason why the respondent's directors and HR manager would know about it. The question of whether they had constructive knowledge (ought reasonably to have known) that the claimant was disabled is not relevant for a claim of direct discrimination.

168. For these reasons the claimant's claims of direct discrimination on the grounds of age, sex, and disability are unsuccessful and are dismissed.

169. We do note that the claimant said in evidence that he was disadvantaged in numerous ways during his employment and in the redundancy process specifically because of his hearing impairment. This might have been the case but the claims that we were required to decide were whether the claimant had been subject to direct discrimination only. That is to say that the claimant was dismissed *because of* his disability (or sex or age). This necessarily means that the alleged discriminator must, at least, have had an awareness or belief that the claimant was disabled at the relevant time. There was no claim before us that the claimant had been discriminated against because of something arising in consequence of his disability or that the respondent had failed to make reasonable adjustments or that he had experienced indirect discrimination.

170. Considering now the claimant's claims under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

171. It is uncontroversial that the claimant was employed on a fixed term contract. We heard a great deal of evidence about whether the claimant's contract had been extended beyond 29 August 2019 and we found that it had not. However, ultimately that fact was not directly relevant to the issues to be decided under the Fixed Term Employees regulations.

172. In our judgement the other three ESA's are appropriate comparators under regulation 2 of the Fixed Term Employees regulations. We have found that the claimant was engaged in the same role as the other ESA's and the ESF funding stream not impact materially on the work that he was required to undertake. Alternatively, and in any event, if the claimant was employed in substantially different work from the other ESA's we had nothing to suggest that any other people were undertaking ESF work so that there were no permanent comparators. However, in our view it is clear that the claimant was undertaking the same work as the other ESAs.

173. We consider each of the allegations set out in the table in the appendix.

174. “Respondent stated on numerous occasions that my post was not at risk and I was not in the pool of people at risk of redundancy. Emails also confirm this”. We have found that this did not happen. In any event, even if it did, it is difficult to see how this could amount to less favourable treatment. Where permanent employees are being put at risk of redundancy but a fixed term employee is not being put at redundancy, this is not less favourable treatment than the comparators but more favourable treatment. The claimant was, in fact, treated the same as the permanent ESAs.

175. “Respondent had no objective justification for making me redundant as my post was funded separately from the rest of my team and my fixed term contract was to continue until at least 31/12/2019”.

176. Again, we have found that the claimant’s contract was not extended to 31 December 2019. The claimant was employed under a fixed term contract expiring on 29 August 2019. However, even interpreting this allegation generously, the claimant was not treated less favourably than the permanent ESA’s. The claimant was treated the same as the permanent ESA in that his role was deleted in the same way as theirs and he was invited to apply for a permanent BDA role, which he did. The reason that the claimant was not appointed to a BDA role was because Ms Millard and Ms Branch Haddow genuinely and reasonably believed that he did not demonstrate in interview that he had sufficient skills or experience to undertake that role to the respondent’s satisfaction. Even if this was less favourable treatment, therefore, the respondent has shown under regulation 7 (6) that the reason for the unfavourable treatment was unrelated to the claimant’s status as a fixed term employee.

177. We note also that the claimant was paid additional notice pay, as was Ms Slater, a permanent employee, which brought his payment for notice up to 2 months, even though on reading his contract of employment that was not necessary as his contract was due to expire on 29 August without furtehr intervention.

178. “Respondent failed to liaise with or consult with the funding provider who had no knowledge of my dismissal and could provide no explanation why when they were still funding my post”.

179. On the claimant’s case, no other ESA’s - and certainly not the identified comparators - were engaged under contracts (whether permanent or fixed term) which were or might be contingent upon a contract with an external funder. The claimant, therefore, has failed to identify an appropriate comparator for the purposes of this claim.

180. In any event, however, we have found that the ESF did not fund the claimant’s post. The ESF represented an additional funding stream for the respondent but the claimant’s post was part-funded by other sources. We conclude, therefore, that there was no need for the respondent to consult with the ESF. The respondent has shown that even if the claimant could identify a comparator and the failure to consult was less favourable treatment than was afforded to that comparator, the reason for the failure to

consult was that it was not required. This was not connected in any way to the claimant's fixed term employment status.

181. "After making me redundant the respondent employed a less qualified, less experienced person to do my job. The person selected was already working for the respondent in a permanent role".

182. It is difficult to understand exactly what the claimant means by this allegation. One interpretation can be read as stating that the claimant was dismissed and replaced with a permanent employee so that his dismissal was because of his fixed term status. We have already found that this was not the reason for the claimant's dismissal. Alternatively, this was about the appointment to the BDA role. We have already found that the reason the claimant was not appointed to the BDA role was because the respondent genuinely believed that he had not demonstrated that he was suitable for the role. It was agreed that the claimant and the comparator were employed by the respondent at the same time, although the comparator was employed in a different role. Pursuant to regulation 2, therefore, it appears that he was not an appropriate comparator because as far as we are aware they did not at the time undertake the same, or broadly similar, work.

183. However, even if they were appropriate comparators we have already identified the reason that the claimant was not appointed to the BDA role; namely that Ms Millard and Ms Branch Haddow believed he did not have the necessary skills or experience.

184. "The decision to make me redundant when I was well qualified, experienced and seen as a valuable member of the team in terms of revenue generation does, I believe, constitute less favourable treatment".

185. We have already addressed this. The reason that the claimant was dismissed was because he was not successful in obtaining a BDA role and the reason he was not successful in obtaining a BDA role was because the respondent considered that he had not demonstrated the correct skills or experience for it. The claimant's evidence was that he did not apply for any alternative roles within the respondent even though he was made aware of them. This unfavourable treatment was, therefore, unconnected with the claimant's status as a fixed term employee.

186. "When I compare my treatment by the respondent to permanent colleagues my skill set not fully explored compared to theirs and I was not offered any alternative positions in the college. In contrast, permanent members of staff were encouraged to apply for available posts and received much support in terms of exploring options following their redundancy".

187. We found that the claimant was given a fair interview for the BDA role and his answers were assessed genuinely. There is no evidence to suggest that he was not given the same opportunities as Mr McCalla and Ms Cadman in interview. As addressed above, the claimant was given information about alternative roles with the respondent but he declined to apply for any of them.

188. The claimant was not, therefore, subjected to unfavourable treatment in respect of this allegation because of his fixed term contract status.

189. “I was never provided with the ‘scorecards’ for the interview I attended for one of the new posts, whilst permanent staff were given copies of their scorecards and detailed interview feedback. I therefore did not understand why I had been made redundant when up to this point all performance data/feedback given to me had been excellent”

190. The claimant was given feedback so there was no reason why he could not understand why he was unsuccessful in interview. The claimant said in cross-examination that he was given detailed feedback. None of the comparator permanent employees requested their “scorecards”. The claimant was not therefore treated less favourably than comparator employees in respect of this allegation.

191. “The respondent excluded me from being able to apply for the more senior posts available in the new structure when I had the necessary skills and experience to be eligible and this action by the respondent constitutes less favourable treatment”

192. The claimant was excluded from applying for the BDM role. However, so were all the other ESA’s who were the permanent comparators. The claimant was not, therefore, treated less favourably than the comparator permanent employees in the same position.

193. “The respondent selected me for redundancy on the basis that as a fixed term employee they believed my rights were considerably less than those of a permanent employee and perceived that I would not be in a position to object to their decision. This was apparent throughout their treatment of me during meetings and how they spoke to me in front of other staff. It is also apparent in their failure to allow me to access the respondent’s full grievance/appeal procedures or to engage with ACAS”

194. Again, there is no evidence to support this allegation at all. The reason that the claimant was selected for redundancy was because all of the ESA posts were deleted and the claimant was unsuccessful in obtaining a BDA post. This was unrelated to his status as a fixed term employee.

195. In respect of the grievance appeal process, we found that the respondent had a policy of refusing to allow in-person hearings for grievance appeals where the employee concerned was no longer employed by the respondent. There is no reason to think that any of the other ESA’s would have been treated differently, but in any event there is no evidence that any of them exercised their right to appeal against a grievance after the termination of their employment. The claimant was not, therefore, subject to less favourable treatment than any comparator and there is no provision in the Fixed Term Employees regulations for hypothetical comparators. In respect of the allegations about conciliation and settlement, we rightly had no evidence about this and the allegation did not appear to be pursued by the claimant.

196. “After challenging the respondent about the lawfulness of the procedures used to manage the redundancy process itself, I was then placed on garden leave. When others complained about the procedures in a similar way to myself, they were offered non-disclosure agreements (settlements/compromises) or changes to the proposed structure”.

197. The claimant was placed on garden leave, but so was Ms Slater who was the only permanent comparator employee who was dismissed after failing to secure a BDA role. There is no evidence that the claimant complained about the lawfulness of the redundancy procedures prior to 1 August 2019. He raised his grievance that same day after being put on garden leave. The respondent’s explanation for putting the claimant on garden leave was for reasons of commercial sensitivity. We found that the respondent did not handle this process well. In fact, they handled it badly. However, despite this, we think that Ms Branch Haddow did genuinely believe that she made the decision to put the claimant on garden leave for reasons of commercial sensitivity. This is supported by the removal of the claimant’s IT access (which was also handled badly).

198. While we think that the claimant was wholly justified in feeling upset and distressed by the decision to put him on garden leave and the way in which that was done, we have found that this was unconnected with his status as a fixed term employee. This conclusion is supported by the fact that Ms Slater, who is a permanent employee, was also put on garden leave.

199. In respect of the allegations about settlement agreements, again, we rightly heard no evidence about this and it was not pursued by the claimant.

200. “The respondent treated me publicly in a bullying, intimidating manner and I wish to claim my treatment falls under the category of suffering “any other detriment” as per regulation 3(1) Fixed-term Employees Regulations. It has had a significant, long-lasting impact on me. They also made my companions feel pressured and anxious in various meetings”

201. Insofar as this applies to the way in which the claimant was removed from the respondent’s premises on 1 August 2019, the claimant was treated less favourably than any of the other ESA’s, including Ms Slater, who was also put on garden leave the same day.

202. However, we have found that the reason the claimant was treated so badly was unconnected with his status as a fixed term employee; it was because Ms Branch Haddow, effectively, made mistakes in the way that she responded to the claimant becoming upset. In our view, this was simply a case of a manager struggling to deal with a difficult situation. It was unconnected with the claimant’s status as a fixed term employee.

203. Consequently the claimant’s claims that he was subject to unfavourable treatment under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 are unsuccessful and are dismissed.

204. We conclude by saying that we understand why the claimant brought his claims. Although there was no evidence to support the particular claims of discrimination and less favourable treatment, the respondent did not handle

this process as well as it might. It was extremely rushed and the communication was poor. The decision to put the claimant on gardening leave came out of the blue after the claimant had been told he could work his notice and no clear explanation appears to have been given to the claimant at the time. It is hardly surprising that the claimant felt that he was being treated thoughtlessly.

205. The respondent has also added fuel to the claimant's fire by failing to provide the requested documents firstly in good time, then secondly, at all until the first morning of the hearing. Although those documents in the end appeared innocuous, one can easily understand why a continual unexplained failure to provide relevant information might make someone suspicious.

1308107/2019

Signed by: Employment Judge Miller

Signed on: 16 March 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Appendix

List of alleged less favourable treatment under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002

Date:	**People involved:**	**Treatment which took place:**
4,8,15 July 19	Alaco Millard, Michael Burke, Lyndsay Tudor Wright- witnessed by T Slater, L Cadman, P McCalla	Respondent stated on numerous occasions that my post was not at risk and I was not in the pool of people at risk of redundancy. Emails also confirm this.
21/5/18 & 12/12/18, emails 21/5/19 & 12/7/19	Michael Burke Lyndsay Tudor Wright, Antoinette Morgan Alaco Millard	Respondent had no objective justification for making me redundant as my post was funded separately from the rest of my team and my fixed term contract was to continue until at least 31/12/2019.
June /July 2019	Alaco Millard	Respondent failed to liaise with or consult with the funding provider who had no knowledge of my dismissal and could provide no explanation why when they were still funding my post.
Post advertised internally and externally on 5/8/19- appointed existing member of staff Oct 2019	Alaco Millard, Suzi Branch Haddow	After making me redundant the respondent employed a less qualified, less experienced person to do my job. The person selected was already working for the respondent in a permanent role.
Original interview records 12/3/18- probationary review 17/5/18, 12/7/18 & 25/1/19	Alaco Millard, Suzi Branch Haddow	The decision to make me redundant when I was well qualified, experienced and seen as a valuable member of the team in terms of revenue generation does, I believe, constitute less favourable treatment.

June /July 2019	Comparators	When I compare my treatment by the respondent to permanent colleagues my skill set not fully explored compared to theirs and I was not offered any alternative positions in the college. In contrast, permanent members of staff were encouraged to apply for available posts and received much support in terms of exploring options following their redundancy
23/7/19 25/7/19 1/8/19 – appeal & grievance has still not provided this information	Alaco Millard, Suzi Branch Haddow, Louise Jones	I was never provided with the 'scorecards' for the interview I attended for one of the new posts, whilst permanent staff were given copies of their scorecards and detailed interview feedback. I therefore did not understand why I had been made redundant when up to this point all performance data/feedback given to me had been excellent.
4/7/19- excluded from pool able to apply	Alaco Millard, Suzi Branch Haddow	The respondent excluded me from being able to apply for the more senior posts available in the new structure when I had the necessary skills and experience to be eligible and this action by the respondent constitutes less favourable treatment.
4/7/19 23/7/19 , 29/7/19 & 1/8/19	Companions at meetings- L Hall V Williams, T Tiernan	The respondent selected me for redundancy on the basis that as a fixed term employee they believed my rights were considerably less than those of a permanent employee and perceived that I would not be in a position to object to their decision. This was apparent throughout their treatment of me during meetings and how they spoke to me in front of other staff. It is also apparent in their failure to allow me to access the respondent's full grievance/appeal procedures or to engage with ACAS.

1/8/2019	A Millard, S Branch Haddow J Clay, C Alderwick	After challenging the respondent about the lawfulness of the procedures used to manage the redundancy process itself, I was then placed on garden leave. When others complained about the procedures in a similar way to myself, they were offered non-disclosure agreements (settlements/compromises) or changes to the proposed structure.
23/7/19 1/8/2019	A Millard, S Branch Haddow	The respondent treated me publicly in a bullying, intimidating manner and I wish to claim my treatment falls under the category of suffering “any other detriment” as per regulation 3(1) Fixed-term Employees Regulations. It has had a significant, long-lasting impact on me. They also made my companions feel pressured and anxious in various meetings