EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs Elizabeth Sharp	AND	Plympton Academy

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 5 and 6 February 2018

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mr T Slater
Mrs E Uppington

Representation

For the Claimant: Miss L Williams, Law Student
For the Respondent: Mr D Leach of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. In this case the claimant Mrs Elizabeth Sharp, who was dismissed by reason of redundancy, claims that she has been unfairly dismissed. She also claims that she had a fixed-term contract and was wrongfully dismissed in breach of that contract, and that her dismissal was an act of discrimination on the ground of her age, and less favourable treatment by reason of her fixed-term status. She also asserts that the respondent failed to afford her relevant statutory rights during her period of notice. The respondent contends that the reason for the dismissal was redundancy, and that the dismissal was fair, and denies the claims.

2. We have heard from the claimant, and we have heard from Ms Lisa Boorman and Ms Teresa Lakeman on behalf of the respondent.
3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent Plympton Academy is an academy school formerly known as Ridgeway School in Plympton, Plymouth, and is a company limited by guarantee. It is a mainstream secondary education school with approximately 730 pupils ranging from 11 to 18 years of age. The claimant Mrs Elizabeth Sharp was born on 10 April 1954. She was employed as a Teaching Assistant from 1 September 2011 until her dismissal by reason of redundancy on 10 November 2016. She was aged 62 at the time of her dismissal.
5. In early 2011 the claimant started working with a child with learning difficulties to whom we shall refer as Student H in a local primary school. In September 2011 Student H moved up to secondary school, and moved to Ridgeway School, now the respondent Academy. The claimant moved to the respondent with Student H at that time. Her letter of appointment dated 12 July 2011 offered the claimant a temporary appointment as a teaching assistant, initially on a 16 hours per week contract, which was increased shortly thereafter to 21 hours a week. The letter stated: "This post will be temporary as it is for the provision of teaching assistant support for [Student H]. Please be aware that this post will terminate when [Student H] leaves Ridgeway School and may be adjusted according to the funding received for [Student H.]" The letter also stated: "Full details of the post will be contained in the Statement of Particulars (Contract), which will be sent to you as soon as it has been finalised by our new providers, due to our recent Academy status." The claimant was recorded on a computerised personnel form within the respondent's organisation as a fixed term employee.
6. The claimant was then issued with a written contract of employment dated 18 July 2011. Its provisions included the following: (Clause 8) "Your employment is temporary and is expected to continue for the period of time [Student H] is a student at Ridgeway School;" (Clause 40) "Your employment may be terminated by you or the governing body giving to the other one month's written notice"; and (Clause 41) "Where statutory entitlement is greater than this then you will be entitled to receive the statutory notice."
7. From 2011 the claimant supported Student H on a one-to-one basis when required within the classroom setting. However, her role began to change to that of a teaching assistant working with a full range of students within the specialist unit along with other teaching assistants, in other words her role varied from being specifically linked to Student H. From 2012/2013 the claimant continued to assist Student H, along with other students, and equally other teaching assistants helped out with Student H and the other students. The claimant was therefore no longer assigned to Student H alone.
8. In June 2015 there was a possibility that Student H might leave the respondent Academy, and the claimant emailed her line manager Mr Edmonds to enquire, if Student H left, whether she would have to leave her employment. She also acknowledged at this stage that "Since he has been based in ESP support has been shared out amongst us all, as with all our other students." In the event Student H stayed on at the respondent Academy and the claimant's employment continued.
9. By this time the respondent was facing financial difficulties. In 2016 the respondent made several support staff redundant. Ms Lisa Boorman, from whom we have heard, had been appointed Principal of the respondent with effect from January 2016. She tried to tackle the respondent's serious financial difficulties and the respondent's then Business Manager left the respondent's employment on 20 June 2016. Immediately thereafter Ms Boorman recruited Ms Theresa Lakeman, from whom we have also heard, as the Academy Business Director. Her predecessor had not submitted an appropriate budget forecast and she joined the respondent unusually in the middle of the summer holidays on 1 August 2016 in order to assist in tackling the financial difficulties.

10. It became clear to Ms Boorman and Ms Lakeman that an immediate action plan was required to manage the critical financial position. A number of cost saving measures were introduced, but without savings in staff expenses these would not have been sufficient. Ms Boorman and Ms Lakeman accordingly made detailed recommendations to the respondent's Governing Body to commence a redundancy process within certain subject areas and roles.
11. On 25 August 2016 the Governing Body approved plans for extensive redundancies. The respondent was facing a budget deficit of £2.2 million. The respondent recognises a number of trade unions and called an emergency JCC meeting with the trade union representatives on 31 August 2016. The trade unions were informed that the statutory collective redundancy consultation provisions were triggered and that the Secretary of State had been notified. Ms Boorman also held a meeting with all staff on 1 September 2016. The main proposal was to reduce the number of Teaching Assistants and Technicians to 10 staff which was likely to involve at least nine redundancies. The proposed timetable envisaged completion of both collective and individual consultation by the end of September 2016.
12. The relevant documents were sent to all staff by email on 2 September 2016. These were the budget consideration paper; a draft Staff Profile Form for all support staff and teaching assistant staff; the draft timetable for the redundancy process; and a copy of the respondent's Redundancy Policy. Staff were also specifically invited to discuss any matters with Ms Boorman. On the same day letters to all relevant staff were issued informing them that they were at risk of redundancy. Again there was a specific invitation to discuss any matters arising. There was then a further meeting with the trade unions on 12 September 2016 at which a scoring matrix was discussed and agreed. The trade unions made a number of suggestions and amendments were made to accommodate their suggestions.
13. At this time the claimant raised an enquiry about the status of her contract. She asked whether she would be exempted from the process effectively on the basis that she had a fixed term contract to assist with Student H. By letter dated 13 September 2016 Ms Boorman confirmed that she would not be exempted and that her role would be placed in the pool for selection for redundancy. She explained that the respondent's legal advice was that the original appointment had not guaranteed that her employment had to continue as long as Student H remained at the Academy. Effectively it had been an expectation but not a guarantee. The claimant did not raise any challenge or objection to the proposed scoring mechanism which was to be used to select employees for redundancy.
14. As part of the process staff were required to complete a Staff Profile setting out in detail their skills, experience and qualifications, together with details of any continuing professional development undertaken, and any "positive contribution to the wider life and ethos of the school". The claimant met with Ms Boorman on 8 September 2016 to discuss her individual Staff Profile Form, and she completed and submitted her Staff Profile form on 16 September 2016.
15. The process of scoring and selection was undertaken by a panel of three senior managers, namely Ms Boorman, Ms Lakeman and Ms Langmead. During this scoring and selection process the names and ages of the staff being scored had been redacted and were not available to the panel. The panel allocated scores and rankings of the relevant staff members and made recommendations to the Governing Body.
16. The claimant was notified of her provisional selection for redundancy by letter dated 26 September 2016. That letter advised her of her right of appeal. Ms Boorman was away for three days and the claimant says that she did not appeal because she did not have information as to her scores from Ms Boorman. This did not stop one other employee from putting in an appeal at the same time, and in any event the claimant did ask for a meeting with Ms Boorman to discuss her scores which took place on 30 September 2016. Following this meeting the claimant did not submit an appeal. Formal notification of redundancy was given to the claimant by letter dated 10 October 2016. In accordance with her written contract of employment the claimant was given one month's notice. The

claimant subsequently made the point that after five years' service she should have received five weeks' notice, with which the respondent agreed, and the respondent has now paid her the balance.

17. The Teaching Assistants who were subject to the selection process had a range of scores from 12 to 35.5. Out of 16 Teaching Assistants the claimant scored joint 9th with 24.5 points. The claimant and six others were selected for redundancy. Five Teaching Assistants were retained with scores between 29.5 and 36. Three Technician roles were retained in the PE, performing arts, and science departments, which were departments in which the claimant was not qualified to assist.
18. The claimant asserts that five employees were over the age of 55 and three of these, or 60%, were made redundant. The claimant also asserts that none of the youngest five employees who were under age 25 were selected for redundancy, and that generally if a candidate was aged over 50 it was far more likely that that candidate would have been selected for redundancy.
19. The claimant also asserts now that she was not provided with sufficient First Aid Training because of her status as a fixed-term employee and that this had a negative impact on her scores thus adversely affecting the process which resulted in her redundancy. We accept the respondent's evidence that the First Aid Training was provided to staff, but was more likely to be offered to those staff who were most likely to need it, for instance those teaching sports. The respondent denies that the claimant requested and was refused any First Aid Training, and denies that other employees in a comparable position to the claimant were provided with First Aid Training when the claimant was not. The claimant has not provided details of any alleged true comparator in these circumstances and accordingly we accept the respondent's evidence in this regard.
20. The claimant also complains that there were two employees who had only recently commenced employment before the redundancy process was started. These were an IT Technician, and a Teaching Assistant in the PE department. We accept the respondent's evidence that these two employees were engaged before the respondent realised how difficult their financial circumstances really were, and their appointment cannot be said to undermine the critical need for significant financial savings which included the redundancy programme. We also accept the respondent's evidence that they could not offer the claimant the PE Teaching Assistant role because she was not sufficiently qualified, and also that it was appropriate for the respondent to exclude the IT Technician from the selection process, because he had been specifically recruited to the position and there was no one else suitably qualified to undertake it.
21. Finally we deal with the claimant's assertion that she was refused a request whilst under notice of redundancy to take time off to look for alternative work. The claimant originally claimed that she had requested Ms Boorman for time off which had been refused. Ms Boorman has always denied that she had received any such request. In her evidence before this tribunal the claimant now suggests that the request was made to her line manager Mr Edmonds. What appears to have happened is that there was a non-pupil training day during the period of the claimant's statutory notice. A number of the Teaching Assistants who were under notice of redundancy did not wish to attend that training day. The claimant, as well as other colleagues, had asked Mr Edmonds to confirm that they did not need to attend. He agreed to ask Ms Boorman, who thought that the training was worthwhile and that it would be a useful addition to the training records for employees seeking alternative employment. Mr Edmonds reported back that the teaching assistants including the claimant were required to attend the training as suggested. We also accept the respondent's evidence that on other occasions employees had asked for time off in connection with seeking alternative employment during their notice period and that this had been granted.
22. In these circumstances we are not satisfied on the balance of probabilities that (i) the claimant asked the respondent to take reasonable time off during her working hours in order to look for new employment or to make arrangements for training for future employment, and that (ii) this specific request was refused.
23. Having established the above facts, I now apply the law.

24. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").
25. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish".
26. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
27. We have considered section 52 of the Act which provides: 52(1): An employee who is given notice of dismissal by reason of redundancy is entitled to be permitted by his employer to take reasonable time off during the employee's working hours before the end of his notice in order to - (a) look for new employment, or (b) make arrangements for training for future employment.
28. The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("The 2002 Regulations") provide as follows. Regulation 1(2) defines "fixed-term contract" as a contract that, under its provisions determining how it will terminate in the normal course, will terminate - (a) on the expiry of a specific time, (b) on the completion of a particular task, (c) [age related retirement – not relevant]… and Regulation 3(1) provides that 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.
29. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is age, as set out in sections 4 and 5 of the EqA.
30. As for the claim for direct discrimination, under section 13(1) of the EqA 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. Under s13(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.
31. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
32. We have considered the cases of; King v Eaton Ltd [1996] IRLR 199; Williams v Compair Maxam Ltd [1982] IRLR 83 EAT; Safeway Stores v Burrell [1997] IRLR 200 EAT, Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. Lavarack v Woods of Colchester [1967] 1 QB 278 CA; Lockwood v DWP [2013] IRLR 941 CA; Preddy v Bull [2013] 1 WLR 3741 SC; Allen v National Australia Group Ltd UK/EAT/0102/03; Igen Ltd and Ors v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC; We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
33. We deal first with the claim for direct age discrimination. The claim will fail unless the claimant has been treated less favourably on the ground of her age than an actual or hypothetical comparator was or would have been treated in circumstances which are the

same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been selected for redundancy and dismissed.

34. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board.
35. In this case the names and ages of the staff being scored were not available to the three members of the panel who conducted the scoring until after that scoring had taken place. The claimant's case has been presented on the basis that those who were made redundant tended to be older than those who were not. No aged-based criterion has been identified which creates any correlation between the disadvantage of being dismissed for redundancy, and age. The selection matrix involved several different criteria none of which can be said to be related to age, and other people over the age of 50 were not made redundant.
36. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct age discrimination fails, and is hereby dismissed.
37. We now deal with the claimant's contractual claims. In the first place the claimant asserts that she had a fixed term contract and that it could not be terminated on one month's notice (or statutory notice if longer) before such time as Student H was no longer a student at the respondent Academy. She claims damages beyond the expiry of the five weeks' notice which has been paid by the respondent. We reject that claim. We do not find that the contract was a fixed term contract under normal contractual principles because the provisions of clauses 40 and 41 made it clear that the contract could be terminated on one month's notice, or statutory notice if longer. It is well established that the value of any contractual claim is limited to the minimum contractually payable, and the respondent has already discharged its liability for five weeks' notice in that regard.
38. The second contractual claim is a claim in respect of alleged less favourable treatment which relies upon the application of The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("The 2002 Regulations"). The claimant can only rely on these Regulations if she has a fixed term contract as defined. This requires (in this case) a contract that, under its provisions determining how it will terminate in the normal course, will terminate - (a) on the expiry of a specific time, or (b) on the completion of a particular task. We do not accept that the claimant's contract meets this definition. When she initially commenced employment with the respondent it was envisaged that she would work with Student H whilst he was still at the school, but given the express notice provisions in her written contract there was never any guarantee of this. In any event the relationship changed between 2012 and 2016 so that the claimant became one of a team of Teaching Assistants looking after a number of different students. Other Teaching Assistants helped out with Student H, who was not looked after exclusively by the claimant. Equally she assisted her team colleagues in looking after other students. When Student H reached an age where he might have left the school the claimant was sufficiently concerned about this to check with her line manager Mr Edmonds. He confirmed that her employment would not come to an end in the event that Student H left, and the claimant was retained within the team (albeit in circumstances where Student H decided to remain).
39. We cannot find in these circumstances that the claimant was employed under a contract which was necessarily due to terminate on the expiry of a specific time, or on the completion of a particular task. Accordingly we find that the claimant was not a fixed term

employee for the purpose of the 2002 Regulations. In these circumstances we dismiss her claim that the alleged failure to offer First Aid Training and to mark her redundancy score negatively as a result amounted to less favourable treatment in breach of the 2002 Regulations.

40. We deal next with the claimant's claim that she has been denied her statutory right for time off during her notice period. For the reasons explained above in our findings of fact, we are not satisfied on the balance of probabilities that the claimant (i) asked the respondent to take reasonable time off during her working hours in order to look for new employment or to make arrangements for training for future employment, and that (ii) this specific request was refused. We therefore find that she did not make a request in accordance with the provisions of section 52 of the Act, and this complaint is therefore dismissed.
41. Finally, we turn to the claimant's unfair dismissal claim. In the first place we find there was a genuine redundancy situation which was clearly caused by the respondent's financial difficulties. The requirements of the respondent's business for employees to carry out work of a particular kind significantly diminished. The claimant's dismissal was wholly attributable to this redundancy situation.
42. The consultation procedure adopted by the respondent was both collective and individual. The respondent was concerned to comply with its statutory consultation requirements and held JCC meetings with its recognised trade unions. The respondent also held individual consultation meetings with the affected employees, including the claimant. That consultation was meaningful and relevant. The trade unions were able to influence the process which resulted in an agreed selection matrix and procedure. The affected employees including the claimant were sent all relevant documents and encouraged to discuss the selection process if they had any questions or concerns. The claimant met with Ms Boorman on three occasions by way of individual consultation (1, 8 and 30 September 2016) before the claimant was given formal notice of her redundancy.
43. The selection criteria adopted by the respondent and agreed by the Trade unions were fair and reasonable and capable of objective assessment. The claimant did not object to them during the selection process. The panel of three senior managers who undertook the selection process deliberately redacted names and ages of candidates to seek to ensure that no obvious or unconscious bias affected their decision making.
44. The claimant's selection (as one of seven selected from 16 candidates) cannot be described as unreasonable or capricious. The respondent considered the possibility of alternative employment but the respondent did not have the qualifications necessary to retain her employment at the expense of others who may have had shorter service, and there were no new appointments which the respondent was seeking to fill.
45. The candidates were all afforded the right of appeal. The claimant says that she could not appeal because Ms Boorman was away and she did not have her scores, so did not know what to appeal against. However that did not stop one other employee from submitting an appeal, and the claimant could have done if she wished, particularly after 30 September 2016 when she had met with Ms Boorman to discuss her scores.
46. It is not for the tribunal to substitute its view for that of the respondent or to re-score the redundancy selection process. There was detailed collective and individual consultation; an agreed selection process; full disclosure of all relevant information to affected employees; a fair and reasonable selection process which was capable of objective assessment; the right of appeal against selection; and for the reasons explained above the process was not tainted by discrimination.
47. We find that the claimant's dismissal was clearly attributable to a genuine redundancy situation, and that the respondent acted reasonably in treating it as a sufficient reason for dismissing the claimant in accordance with equity and the substantial merits of the case. Put another way the selection and dismissal of the claimant cannot be said to be outside the band of reasonable responses which were open to the respondent when faced with these facts.
48. Accordingly we also dismiss the claimant's unfair dismissal claim.

49. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 22; a concise identification of the relevant law is at paragraphs 24 to 32; how that law has been applied to those findings in order to decide the issues is at paragraphs 33 to 48.

Employment Judge N J Roper

Dated: 6 February 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23rd February 2018

.....

.....

FOR THE TRIBUNAL OFFICE