2016/11

# Less favourable treatment over a series of fixed term contracts is sufficiently linked to amount to a 'series of similar acts' despite no continuity of employment (UK)

**CONTRIBUTOR** Helen Coombes*



## Summary

The Employment Appeal Tribunal ('EAT') held that a university lecturer's complaints of less favourable treatment over a series of fixed term contracts were sufficiently linked to amount to 'a series of similar acts' and therefore could fall within the time limit of three months for bringing a claim in the Employment Tribunal.

## Background

Under Regulation 3 of the Fixed-term Employees Regulations 2002 and Regulation 5 of the Part-time Workers Regulations 2000 (which implement the Fixed-term Workers Directive (99/70/EC) and the Part-time Workers Directive (97/81/EC)), eligible employees and workers are protected from less favourable treatment. The appropriate comparator is a full-time worker or a permanent employee performing the same or similar work.

Under Regulation 7(2)(a) of the Fixed-Term Employees Regulations (and an identical provision in the Part-Time Workers Regulations), claims for less favourable treatment must be brought within three months of the date on which the alleged detriment occurred. However, where the less favourable treatment occurs as '*part of a series of similar acts or failures comprising the less favourable treatment*', the claim must be brought within three months of the last act of the series.

## Facts

Dr Ibarz taught at Sheffield University between 2004 and 2013, and was engaged on a new fixed-term contract for each semester he worked. There were gaps between each fixed term contract to allow for the university holiday period when his services were not engaged. Dr Ibarz sought to bring claims for less favourable treatment as a result of his status as a fixed-term worker and a part-time employee for the entire duration of the nine-year period. The less favourable treatment complained of related to holiday pay arrangements, pension access, salary and hours.

The Employment Tribunal determined that Dr Ibarz was an employee of Sheffield University when he was teaching under the separate contracts but this did not amount to continuous employment as there were no arrangements with Dr Ibarz during the holiday periods. On this basis, the Employment Tribunal held that Dr Ibarz's claims for less favourable treatment were only in time in relation to his final fixed term contract between February and May 2013. The alleged detriments in regard to the contracts he had signed between 2004 and 2012 were found to be out of time as they were outside of the three month limit. Interestingly, the claimant did not attempt to argue that there was a 'just and equitable' reason to extend the time limit, under a provision in both sets of Regulations that permits a complaint to be considered even if it is brought out of time if 'in all the circumstances of the case' the Tribunal considers it is 'just and equitable' to do so. This may be because the earliest claims dated back to 2004 and there was no good explanation for such a lengthy delay in bringing the claims.

The Tribunal held that Dr Ibarz's series of fixed-term contracts were not capable of constituting '*a series of similar acts*'. Given this finding, the Tribunal did not go further and consider if the University's consistent application of rules, policies and practices (as applied across all of Dr Ibarz's contracts) constituted '*a series of similar acts*'. Dr Ibarz did not seek to challenge the Tribunal's finding about the lack of continuity of employment.

* Helen Coombes is an Associate at Lewis Silkin LLP: www.lewissilkin.com.



doi: 10.5553/EELC/187791072016001001012

However, Dr Ibarz did appeal the Tribunal's determination that he was out of time to bring the vast majority of his claims.

## Judgment

The EAT held that the Tribunal had erred in law by finding that the succession of fixed term contracts did not fall within the meaning of a 'series of similar acts'. The EAT found that the Tribunal should have considered whether or not the University's application of rules, practices, schemes or policies throughout the entire nine year period of engagements comprised a series of similar acts, irrespective of the fact that Dr Ibarz's engagements were separate contracts.

The EAT considered that the Tribunal had misinterpreted the case of *Arthur – v – London Eastern Railway* [2006] EWCA Civ 1358. The Tribunal had mistakenly decided that because there was a series of separate fixed-term contracts without any continuity of employment, the consistent application of the rules, policies and practices throughout the separate contracts was not capable of falling within the definition of 'a series of similar acts'.

The case was remitted to the Employment Tribunal to consider whether or not the alleged less favourable treatment had amounted to 'a series of similar acts or failures'.

## Commentary

Further clarification of what can constitute 'a series of similar acts' for the purposes of time limits under the Regulations is a welcome decision. Employers need to be aware that they do not have the option of hiding behind non-continuous employment to provide them with relief from claims for less favourable treatment. The case should also act as a warning to employers that older complaints of less favourable treatment could fall within the jurisdiction of the Tribunal if they can be said to be a 'series of similar acts'.

The case is also a prompt for employers who employ both permanent, full time staff and those on less typical temporary or part-time arrangements to ensure that they treat both sets of staff equally to avoid the Tribunal in the first place.

**Subject:** Fixed-term discrimination

**Parties:** Ibarz v University of Sheffield

**Court:** Employment Appeal Tribunal

**Date:** 7 May 2015

**Case number:** UKEAT/0018/15/JOJ [ UKEAT 0018_15_2306]

**Publication**: http://www.employmentappeals.gov.uk/Public/Upload/15_0108fhwwATDM.doc



doi: 10.5553/EELC/187791072016001001012