



EMPLOYMENT TRIBUNALS

Claimant: Mr M Treharne

Respondent: NHS Wirral Clinical Commissioning Group

Heard at: Liverpool **On:** 16 and 17 December 2020

Before: Employment Judge Horne

Representatives

For the claimant: Mr J Buckle, solicitor

For the respondent: Mr S Brockwicz-Lewinski, counsel

Judgment was sent to the parties on 5 February 2021. The claimant requested written reasons on 18 February 2021. Accordingly the following reasons are provided.

REASONS

Introduction

1. The heading to these reasons is marked, “Code V”. This means that the hearing took place on a remote video platform. Neither party objected to the format of the hearing.

Issues

2. By a claim form presented on 18 May 2020, the claimant raised a single complaint of unfair dismissal contrary to section 94 of the Employment Rights Act 1996 (“ERA”). The dismissal was said to be unfair under section 98.
3. At the start of the hearing, the parties helpfully e-mailed a written list of issues to the tribunal. We briefly discussed them before I began to hear the evidence. The issues for me to decide, as I identify below, are derived partly from the parties’ agreed list and partly from our discussion. I have altered the wording slightly to reflect the statutory language more closely.
4. It was common ground that, as a matter of law, the claimant had been dismissed. This was the case whether the claimant’s contract of employment was for a fixed term (as the respondent contended) or was deemed to be a permanent contract. The purportedly fixed-term contract had not been renewed, which qualified as a dismissal under section 95(1)(b) of ERA. If the correct legal position was that it

was a permanent contract, the respondent had terminated it under section 95(1)(a) by making clear to the claimant that his employment would come to an end on the expiry of the alleged fixed term.

5. The issues for me to decide were as follows:
 - 5.1. Could the respondent prove the sole or principal reason for the claimant's dismissal?
 - 5.2. Was that reason some other substantial reason (SOSR) of a kind such as to justify the dismissal of employee holding the position which the claimant held?
 - 5.3. If so, did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant? The claimant's greatest criticism of the reasonableness of the decision concerned the recruitment of an employee into the permanent role of Chief Finance Officer, and the parties' arguments were helpfully focused around that particular criticism.
6. The parties agreed that, before determining these issues, the tribunal ought to decide a separate issue which was relevant, in particular, to the respondent's alleged reason for dismissal. The issue was this: was the claimant deemed to be a "permanent" employee under regulation 8 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("FTE")? For the sake of convenience, I refer to this issue as the "permanent status issue".
7. We discussed the legal test by reference to which the permanent status issue should be determined. It was undisputed that, by the time of his dismissal, the claimant had been continuously employed for at least four years under a succession of fixed-term contracts. The parties also agreed that this fact, by itself, was not enough to confer permanent status, because the tribunal was also required to consider the question of objective justification. Everyone was of the same view about *when* justification was necessary – the critical date was 9 March 2017, which was the time when the claimant's fixed-term contract had been renewed. The thing the parties could not agree about was *what* precisely the respondent needed to justify. What was the action under scrutiny? The claimant's case was that the respondent needed to justify the decision to renew the contract at all, and also needed to justify the length of the new fixed term. The respondent disagreed. According to the respondent, the particular treatment requiring justification was the fact that the renewal was *on a fixed-term basis*, as opposed to being on a permanent basis. I had to decide, as a matter of interpretation of regulation 8, which was the correct legal test.
8. The respondent argued that employment under a fixed-term contract was justified as a means of achieving three legitimate objectives:
 - 8.1. "continuity"
 - 8.2. "job security" and
 - 8.3. "complying with the requirements of NHS England".
9. Further issues would have arisen in relation to the claimant's remedy if the claim had been successful. As it turned out, I decided not to determine any remedy issues, except for one, which seemed to me to be straightforward. The issue concerned the calculation of the claimant's basic award, had his dismissal been unfair. One of the determining factors in basic award is the length of an employee's continuous employment. In this case, the claimant had been employed in other NHS

organisations prior to 1 February 2016. The parties disagreed about whether those periods of employment should count towards the claimant's continuous employment with the respondent for basic award purposes. The claimant confirmed that his case was *not* that continuity was preserved by section 218(2) (business transfer) or by section 218(8) (health service employers). Rather, he argued, his previous employment had been for one or more "associated employers" within the meaning of section 218(6). I had to decide whether or not the claimant's previous employer and the respondent were associated employers.

Evidence

10. I considered documents in a 203-page bundle, together with a diary extract and recruitment policy, sent separately to me by e-mail. I did not read every word on every page. Rather, I concentrated on those documents to which the parties drew my attention either in witness statements or orally at the hearing.
11. The respondent called Mr J Develing and Mr S Banks as witnesses. The claimant gave oral evidence on his own behalf. All three witnesses confirmed the truth of their written statements and answered questions.

Facts

12. The claimant has worked in various roles within the NHS for nearly 40 years. His background is financial management.
13. The respondent is a Clinical Commissioning Group within the National Health Service (NHS). It has the responsibility for commissioning healthcare for the population of Wirral.
14. To make sense of the issues that arise in this claim, it is necessary to have a basic understanding of the respondent's governance structure. The following summary is, no doubt, somewhat over-simplified.
15. Essentially, the respondent is a member organisation made up of approximately 50 GP practices. Its constitution establishes the Governing Body with a designated Chair. It also requires the respondent to have certain executive officers. One of these is the Accountable Officer. At all relevant times until 2017, the Accountable Officer was Mr Jonathan Develing, whose role was often described as "Chief Executive" or "Chief Officer". Another mandatory position is the Chief Finance Officer. From 2013 until 2016 that role was held by Mr Mark Bakewell.
16. The respondent operates within the statutory framework of the NHS. The respondent is answerable to the National Health Service Commissioning Board ("the National Board"), now known as NHS England. Under the National Health Service Act 2006, NHS England has the power to issue statutory directions which the respondent must follow.
17. At some point after 2013, Mr Bakewell took up a secondment to a project known as Wirral Vanguard. This left an interim vacancy for the Chief Finance Officer role. The respondent began a recruitment process to appoint an interim replacement. As part of that process, the job was advertised to external candidates.
18. The recruitment pack for the role was accompanied by a letter from Mr Develing. The letter stated,

"...following the successful secondment of our substantive Chief Finance Officer I am looking to recruit to this post on an interim basis." The

appointment will be 2 years in the first instance with the potential for an extension to be considered.”

19. Included within the pack was a statement of the respondent’s values and standards to be expected in public life. It emphasised the importance of openness and transparency in decision-making.
20. At the time the role was advertised, the claimant was employed by Bridgewater Community Healthcare NHS Foundation Trust. He saw the respondent’s advertisement and decided to apply. He performed well at interview and was given a conditional offer of employment dated 8 January 2016. The proposed terms and conditions of that offer were summarised in a table. One row of that table read, “Status of Post: Fixed term – 2 years”. A longer paragraph, headed, “Tenure”, stated,

“As discussed during your interview process this fixed term role is required by the CCG to cover the statutory post of Chief Finance Officer, for which the current post holder is on secondment... At the end of the secondment period it is expected that the substantive post holder will return to the CCG and as such the requirement to cover this role using a fixed term contract will no longer be required. As such we can confirm in advance that should you remain in this post until this time then your termination will be [for] some other substantial reason...”
21. Following satisfactory background checks, the claimant was given a final offer letter dated 1 February 2016 and started employment the same day. The letter contained a draft contract of employment, which stated, at clause 1.0:

“Your appointment is fixed term and will...end on 31 January 2018.”
22. The same termination date was given at clause 8.0.
23. On 4 February 2016, the claimant signed a New Starter Form which provided that his contract end date was 4 February 2018.
24. When the claimant started, Mr Develing told the claimant that he did not expect that Mr Bakewell would return. There is a dispute about whether Mr Develing also said that the claimant’s employment would be made permanent upon Mr Bakewell’s departure. I did not find it necessary to resolve that dispute. This is because, even if Mr Develing did make that comment, it was obviously just warm words. Neither the claimant nor Mr Develing could reasonably have understood Mr Develing to be overriding the clear terms of what had been agreed in writing. On the claimant’s own evidence, he did not understand Mr Develing to be committing the respondent to granting a permanent extension to the contract. The claimant knew that, if he were ever to be appointed to the Chief Finance Officer role on an indefinite basis, Mr Develing would have to “run a process”, by which he must have meant a recruitment process.
25. Mr Develing’s interactions with senior colleagues were relatively informal. He avoided scheduled, minuted one-to-one meetings. Rather, he would approach individuals such as the claimant and ask them if they had a minute to discuss the topic at hand.
26. In about August 2016, as predicted, Mr Bakewell left the respondent’s employment and began working for another CCG.

27. Separately, during 2016, NHS England became concerned about the respondent's budget deficit and aspects of the respondent's governance. It may well be that the claimant played his part in drawing these concerns NHS England's attention. I do not need to make any finding about what the claimant did or did not tell them. What is important is that, acting on those concerns, NHS England decided to issue statutory directions to the respondent. The directions were issued under cover of a letter dated 23 February 2017 from Ms Clare Duggan, NHS England's Director of Commissioning Operations. In her letter, Ms Duggan summarised one of the directions in this way:

"These Directions mean that no appointments can be made by the CCG to the ... Executive Team ... without the involvement and prior approval of NHS England. Please send to me the details of any current or imminent vacancies that fall within these parameters ... We will then agree with you how to handle the filling of any subsequent vacancies."

28. The direction itself was issued in the name of the NHS Commissioning Board. For all relevant purposes it was consistent with Ms Duggan's summary. It is common ground that the role of Chief Finance Officer was one of the roles within the Executive Team for which prior NHS England authority was a mandatory condition of appointment. Neither the direction, nor Ms Duggan's summary, drew any distinction between substantive or interim appointments, or between permanent and fixed-term contracts.

29. NHS England renewed the statutory direction on 16 August 2018. The direction relating to the appointment of senior executives was expressed in the same terms as it had been previously.

30. In about February or March 2017, Mr Develing gave notice to the respondent that he was resigning and moving to another CCG. With the approval of NHS England, the respondent appointed Mr Simon Banks to be the replacement Chief Officer and Accountable Officer. Mr Banks' formal start date was 1 April 2017. Initially, Mr Banks worked for both the respondent and Halton CCG. He started working exclusively for the respondent on 8 May 2017.

31. Before Mr Develing left the respondent, he made arrangements for handing over responsibility to Mr Banks. These arrangements included making provision for Mr Banks to inherit an executive team. That led him to think about the claimant's future in the organisation. Quite what was going through Mr Develing's mind at that time, and the extent to which he discussed it with the claimant, is a matter of some controversy, to which I will return. There is also a dispute about what if any discussions Mr Develing had internally with colleagues and with NHS England about the claimant's future employment. What is clear, however, is that, on 8 March 2017, the claimant and Mr Develing agreed that the claimant's contract of employment should be extended until 31 January 2020. The agreement was recorded on an Assignment Change Form which they both signed. The form contained a field headed, "Reason for Change", but that field was left blank.

32. At the time the contract was extended, the claimant still had just under 10 months to go until his original fixed-term contract was due to expire.

33. The claimant continued to carry out his role, as he did before, except that he now reported to Mr Banks. It is undisputed that he worked satisfactorily, and without any concerns ever being written down or formally raised about his performance.

The claimant describes his performance record as being “unblemished”, and that label may well be more accurate, but I did not find the difference to be significant enough to have to make a decision about it.

34. On 6 November 2017, the claimant signed a further Assignment Change Form, which was countersigned by Mr Banks. Like the version previously signed by Mr Develing, this form recorded an agreement to extend the claimant’s contract until 31 January 2020. And, like the previous version, this form was silent as to the reason for the extension.
35. In April 2018, the respondent issued a revised Recruitment and Selection Policy and Procedure. There is no evidence to suggest that the revised policy marked any significant change in approach from the original version. Paragraph 5.5 of the Policy stated:
- “5.5 The CCG uses the NHS Jobs Website to advertise, in the first instance, all of its vacancies...
- All vacancies will be advertised externally on NHS Jobs... In exceptional circumstances hosts may be advertised as internal only...”
36. In November 2018, the Chair of the respondent’s Governing Body announced her retirement. She was replaced by Dr Paula Cowan, who had been the Medical Director. This was not welcome news for the claimant, whose working relationship with Dr Cowan had been strained. Dr Cowan took up the chair on 1 July 2019.
37. On 15 July 2019, Mr Paul Edwards, Director of Corporate Affairs, spoke to Mr Banks about the future of the claimant’s role. By this time, the claimant’s contract had just over 6 months left to run. Mr Edwards summarised the discussion in an e-mail sent later that day, copied to Dr Cowan. Redundancy was quickly discounted as a possibility, because the respondent would always need a Chief Finance Officer. This left two options:
- 37.1. The first option was to extend the claimant’s fixed-term contract again. Mr Edwards noted that NHS England would have to approve that step because of the legal direction. He also observed that an extension would mean that the claimant “would have a ‘claim’ on that role”. This was a recognition that, if his contract was extended, the claimant would be entitled to regard himself as a permanent, substantive, employee.
- 37.2. The second option was to seek the approval of NHS England for a substantive Chief Finance Officer post. In that event, Mr Edwards said, “there is an argument to go to advert, as this changes the nature of the role and makes it different to the initial advert which was 2 year fixed term.”
38. On 15 July 2019, Mr Banks told the claimant that Dr Cowan wanted to advertise his role externally. The claimant was shocked and argued back. He pointed out that he had a legal right to the role given the length of his contract.
39. On 31 July 2019, Mr Banks e-mailed a number of stakeholders including NHS England. (By this time, NHS England had merged with NHS Improvement, but I refer to the combined agencies as NHS England for simplicity.) In particular, he e-mailed Mr Jonathan Stephens, NHS England’s North West Regional Director of Finance and Mr Graham Unwin, NHS England’s Regional Director of Performance and Improvement. Mr Banks’ e-mail set out Mr Edwards’ two options. Both Mr

Stephens and Mr Unwin agreed on the second option: make the role substantive and advertise it externally.

40. Mr Banks spoke to the claimant again on 3 or 4 September 2019 and told him that the substantive Chief Finance Officer role was going to external advertisement. The conversation was quickly followed by an undated letter reminding him that his employment under the fixed-term contract would terminate on 31 January 2020. The letter observed that NHS England had agreed to the previous extension of his contract.
41. In due course the substantive role was advertised with a closing date of 7 October 2019. The details of the role, as advertised, were the same as for the interim role, with the obvious exception that the new role would be substantive and the contract open-ended. The substantive role also carried increased remuneration.
42. The claimant applied for the role. He was one of four candidates shortlisted for interview. Amongst the other four was Mr Mark Chidgey.
43. On 7 November 2019, the claimant asked for clarification of who would be on the interview panel. He was informed that the panel would include Mr Stephens of NHS England and Mr Mark Greatrex, the Finance Director of a local NHS Trust. The claimant expressed his satisfaction.
44. On 11 November 2019, all candidates were informed that the panel would not only include those two individuals, but also Mr Banks, Dr Cowan and Ms Lesley Doherty, a member of the Governing Body. The claimant did not ask for Dr Cowan or anybody else to step down from the interview panel.
45. The interviews took place on 14 November 2019. Each interview followed the same format, which was created with help from the NHS Commissioning Support Unit. The claimant does not advance any criticisms of the format, or the way in which interview questions were asked. Each panel member scored the candidates on their answers. The claimant received the second-highest total score. Mr Chidgey emerged as the successful candidate. Not only was his aggregate score higher than that of the claimant, but every panel member gave Mr Chidgey a higher score. As the claimant himself put it, "Mr Chidgey did better on the day."
46. On 15 November 2019, Mr Banks informed the claimant that his application was unsuccessful. The claimant was naturally disappointed and told Mr Banks that he would be taking advice. He added that he was "here until January". He continued to attend work and carry out his responsibilities professionally.
47. The claimant instructed solicitors, who wrote to Mr Banks on 28 November 2019. Their letter described the termination of the claimant's employment as "blatantly unfair" and expressed the view that it was "clear that there is no desire for [the claimant] to continue in employment with [the respondent]". Having taken advice, Mr Banks replied on 5 December 2019. Beside refuting the accusation of blatant unfairness, Mr Banks expressed an intention to "work with you in the period up until 31 January 2020 to see if there is any alternative employment that you may be interested in or suitable for." Correspondence passed to and fro, in which Mr Banks and the claimant's solicitors politely but firmly debated the merits of the claimant's proposed claim. In January 2020, the claimant opened up the campaign on a different front, by escalating the dispute to Mr Stephens at NHS England and to the Chair of the Audit and Remuneration Committees.

48. In an undated letter sent in January 2020, Mr Banks informed the claimant that there was no alternative employment available for him.
49. During December 2020, Mr Banks became increasingly concerned that there might be a gap in cover following the claimant's departure on 31 January 2020. Mr Chidgey was not in a position to start in post until he had served a long notice period. In December 2020, Mr Banks took the decision to appoint Mr John Doyle as Interim Chief Finance Officer with effect from 3 February 2020. Before reaching this decision, Mr Banks thought about offering the claimant a short extension to his contract so as to bridge the gap until Mr Chidgey arrived. On advice from Human Resources, he took the view that this course would expose the respondent to a legal risk, in that the claimant would be considered a permanent employee. He also doubted whether the claimant's heart was really in the job, now that the substantive role had been awarded to somebody else.
50. The claimant's last day of employment was 31 January 2020, the day his contract expired. At no point did he ask for any temporary extension.
51. Before turning to the relevant law, I return to the contentious factual issue of why Mr Develing renewed the claimant's fixed-term contract. My ability to find the facts is hampered by the lack of contemporaneous evidence of Mr Develing discussing his reasons with the claimant, other colleagues, or NHS England. The claimant told me that Mr Develing did not discuss the proposed extension with him before he signed the Assignment Change Form. This strikes me as unlikely. The claimant was a Chief Finance Officer. If he did not know why he was being asked to sign a two-year extension to his contract, it is probable that he would have asked.
52. I did not make a finding about whether or not Mr Develing discussed the proposed renewal with anyone from NHS England. I did not find it necessary to do so. This is because, in my view, it is unthinkable that NHS England would have approved of Mr Develing appointing the claimant to the Chief Finance Officer post on a substantive basis, at that time, without the role being advertised externally. That was the expressed position of both Mr Unwin and Mr Stephens in July 2019, and it was consistent with the respondent's revised recruitment policy issued in 2018. This was not an exceptional circumstance calling for departure from the usual requirement that roles should be advertised. It is not an exceptional situation for a substantive role to become vacant whilst a fixed-term employee is in post on an interim basis. The claimant himself recognised whilst giving evidence that for Mr Develing to have slotted him into a permanent role would have been unfair. As the claimant also acknowledged, such a step would have been contrary to the respondent's commitment to transparency. It would, as the claimant further conceded, have run the risk of narrowing the pool of applicants for the substantive post, because better candidates might have been put off applying in the initial recruitment process, thinking that the role was for a fixed term only.
53. I accept Mr Develing's evidence that, in any event, he did not want to start recruiting a substantive Chief Finance Officer when he was just about to leave. Mr Develing recognised, as did the claimant in his oral evidence to me, that it would be much better to let Mr Banks choose who the substantive Chief Finance Officer should be, as they were going to have to work together. This of course, begs the question of why Mr Develing chose to extend the claimant's contract at all. He could simply have left it to Mr Banks to decide what to do. Mr Banks would have had between 1 April 2017 and 31 January 2018 either to run a recruitment process

or to seek approval for an extension to the claimant's fixed-term contract. In my view, the most likely explanation for Mr Develing agreeing to extend the claimant's contract is that he thought he was doing the claimant a favour. Effectively he was tying Mr Banks' hands to provide the claimant with an additional two years' job security.

Relevant law

Unfair dismissal

54. Section 98 of ERA provides, so far as is relevant:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

- (a) the reason (or, if more than one, the principal reason) for the dismissal and
- (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

...

(4) Where the employer has fulfilled the requirements of subsection (1), 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.

55. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

56. Where the employer has allowed a fixed-term contract to expire, it is not enough for a tribunal to find that the reason for dismissal was the expiry of the contract. Expiry and non-renewal of the contract is the dismissal itself, rather than the reason for it. The employer must prove the sole or principal reason for the contract not being renewed: *Tansell v. Henley College Coventry* UKEAT 0238/12. Where, however, the fixed-term contract was for a genuine purpose which was known to the employee, and the employer proves that that purpose has ceased to be applicable, those facts are capable of constituting some other substantial reason: *North Yorkshire County Council v. Fay* [1985] IRLR 247.

57. Where some other substantial reason is proved, the fact that a fixed-term contract has expired does not absolve the employer from the requirement to act reasonably. The employer has to make a reasonable decision about whether or not to renew the contract. There are no special rules for this category of case: the employer has acted reasonably or unreasonably falls to be determined in accordance with the statutory language. Just as with other potentially fair

reasons, when applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. As authority for these propositions, see *Royal Surrey County NHS Foundation Trust v. Drzymala* UKEAT/0063/17.

Permanent status of fixed-term workers

58. Regulation 8 of FTER provides, relevantly,

“(1) This regulation applies where—

(a) an employee is employed under a contract purporting to be a fixed-term contract, and

(b) the contract mentioned in sub-paragraph (a) has previously been renewed or the employee has previously been employed on a fixed-term contract before the start of the contract mentioned in sub-paragraph (a).

(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if—

(a) the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and

(b) the employment of the employee under a fixed-term contract was not justified on objective grounds—

(i) where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;

(ii) where that contract has not been renewed, at the time when it was entered into.

(3) The date referred to in paragraph (2) is whichever is the later of—

(a) the date on which the contract mentioned in paragraph (1)(a) was entered into or last renewed, and

(b) the date on which the employee acquired four years' continuous employment.

59. Regulation 8 of FTER is the domestic implementation of Directive 99/70/EC which required member states to prevent abuse of successive fixed-term contracts. That this was the purpose was also emphasised in *Duncombe v. Secretary of State for Children etc* [2011] UKSC 14, in which Lady Hale SCJ also decided that regulation 8 does not require the employer to justify the overall length of fixed-term employment.

60. The question of objective justification under the Directive was considered in *Adeneler v Ellinikos Organismos Galaktos* C-212/04, [2006] IRLR 716. In that case, the Court of Justice of the European Union held that there must be specific factors relating in particular to the activity in question and conditions

under which it is carried out; moreover, there must be a genuinely temporary need and justification must not be used to permit what is in reality the need for permanent coverage.

61. The Secretary of State for Business, Energy and Industrial Strategy has issued guidance on the justification of successive fixed-term contracts. According to the Guidance, treatment is justified if it:

61.1. Is to achieve a legitimate objective, such as a genuine business objective,

61.2. Is necessary to adhere to that objective, and

61.3. Is an appropriate way to achieve that objective.

62. A legitimate objective does not necessarily have to have been in the mind of the decision-maker at the time of the act which the employer seeks to justify. If, however, the employer did not address their mind to that objective at the time, the tribunal is entitled to take a sceptical view of the objective's importance.

63. I can now return to the area of legal disagreement identified in my initial discussion of the issues. What, exactly, does the employer have to justify? On this question I prefer the respondent's interpretation of regulation 8. The employer has to justify the employment of the employee under a fixed-term contract, as opposed to a permanent contract. There is no need for the employer to justify its decision to renew the contract in the first place, or to justify the particular length of the fixed term in the renewed contract. I reach this view for two reasons:

63.1. In my view the respondent's interpretation is the more natural fit with the wording of regulation 8(2)(b). The employer must justify "employment under a fixed-term contract". This was plainly intended by the legislator to mean something different from the actual contract under which the employee was employed. The employee's actual contract is carefully defined in regulation 8(1)(a). That definition is specifically repeated in regulation 8(2). If it had been Parliament's intention that the employer should justify the terms of the actual contract, I would have expected the draftsman to have referred to it using the same definition.

63.2. The Directive, and *Duncombe*, tell us what mischief regulation 8 was designed to tackle. The regulation is aimed at preventing abuse of successive fixed term contracts in what is, in reality, permanent employment. It was not meant to tell employers how long the employment should last, or to regulate the length of particular contracts.

Continuous employment

64. Section 218(6) of ERA provides as follows:

"(6) If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is associated employer of the first employer—

(a) the employee's period of employment at that time counts as a period of employment with the second employer, and

(b) the change of employer does not break the continuity of the period of employment."

65. Section 231 defines an “associated employer” as follows:

“For the purposes of this Act any two employers shall be treated as associated if-

- (a) one is a company of which the other (directly or indirectly) has control, or
 - (b) both are companies of which a third person (directly or indirectly) has control;
- and 'associated employer' shall be construed accordingly.”

66. The word, “company” is not defined in ERA. Mr Brochwicz-Lewinski submitted that the definition in section 231 is nevertheless settled. He drew my attention to *Gardiner v. London Borough of Merton* [1981] 2 QB 269, CA, where Griffiths LJ observed, in relation to the same definition in section 153(4) of the Employment Protection (Consolidation) Act 1978:

“The Act does not contain a definition of 'company', but I read it as meaning 'limited companies' as did Mr Justice Slynn in *Wynne v Hair Control* (1978) ICR 870, and I am satisfied that a local authority is not a 'company' within the meaning of s.153(4).”

67. In my view this passage is part of the *ratio decidendi* (the part of the court’s reasoning that is binding in future cases) of *Gardiner*. Free from authority I would in any event have agreed. It appears to me that, if Parliament intended the word “company” to be interpreted widely enough to include NHS bodies such as clinical commissioning groups, there would have been no need for section 218 to make specific provision for those bodies.

Conclusions

Permanent status issue

68. I start with the permanent status issue, whilst reminding myself that the determinative issues in this case remain those under section 98 of ERA.

69. The permanent status issue depends entirely on the justification defence, which, the parties agree, falls to be considered at the time of the renewal of the claimant’s fixed-term contract in March 2017.

70. In my self-direction on the law, I have now identified the thing that the respondent is required to justify. It is not the length of the new fixed term. Nor is it the decision to renew the contract in the first place. What has to be justified is the fact that the renewed contract was fixed-term as opposed to permanent.

Objectives

71. One point that is worth noting at this stage is that, by the time of renewal, the original reason for limiting the contract duration had disappeared. The reason why the Chief Finance Officer post was originally limited to two years was because the substantive role holder, Mr Bakewell, was on secondment and might return. Once it was clear that Bakewell was not coming back, that particular obstacle to the claimant’s permanent status was swept away. But that does not mean that the respondent had to make the claimant’s role permanent.

72. The respondent puts forward three objectives that were served by continuing fixed term status. The labels for the objectives, in my view, are not particularly helpful here. What matters is the substance of the parties' underlying arguments.

Continuity

73. "Continuity" can mean a number of things in the context of this case. One meaning is avoiding a change of Chief Finance Officer. If that is what continuity means, it could not justify maintaining the claimant's status as fixed-term. The respondent would have a better chance of keeping the same Chief Finance Officer for longer if they made his contract permanent.

74. Continuity could, alternatively, mean keeping the Chief Finance Officer in post at a time of business change, namely the departure of Mr Develing and the imminent arrival of Mr Banks. But if that was the objective, it would be achieved whatever the status of the claimant's renewed contract. It would make no difference to continuity (in that sense) whether the claimant's new contract was permanent or merely extended for a further term. Either way, the claimant would be the Chief Finance Officer for more than 10 months following Mr Banks' arrival.

75. What I understood the respondent's real argument to be was that "continuity" meant effective succession planning. It was desirable that the new Accountable Officer should have the freedom to choose his own team. There was good sense in giving Mr Banks a free hand in choosing who his substantive Chief Finance Officer should be, rather than inheriting a substantive incumbent who had been appointed just before he arrived. That this objective was legitimate is uncontroversial: see paragraph 51. As I have indicated, this objective does not explain why Mr Develing renewed the claimant's contract in the first place, but that is not what the respondent has to justify.

76. In my view, in order to achieve a proper succession, it was necessary and appropriate for the claimant's contract – if it was extended at all – to be extended on a fixed term, rather than a permanent basis. The respondent would succeed in its justification argument on the strength of this objective alone.

Job security

77. I regard the "job security" objective as something of a red herring. It cannot justify the claimant's fixed-term status. The claimant would get more job security from a permanent contract than from a fixed-term extension.

78. Of course, Mr Develing did not have to renew the claimant's contract at all. His offer of an extension gave the claimant more job security than he would have had if Mr Develing had done nothing. Renewal of the contract also gave the claimant more job security than he would have had if Mr Develing had begun a recruitment process for the substantive role: there was no guarantee that the claimant would get the job and, if someone else were recruited to the substantive role, the claimant's employment would in all probability have ended on 31 January 2018. Both these arguments miss the point. They justify the decision to renew the contract in the first place. They do not, as regulation 8 requires, justify the fact that the renewed contract was fixed-term as opposed to permanent.

79. What Mr Brochwicz-Lewinski was really arguing, both in cross-examination and his closing submissions, was that a fixed-term extension was the only possible way of giving the claimant any job security beyond January 2018, because, in March

2017, slotting the claimant into a permanent contract was out of the question. This was because of the constraints of NHS England's statutory direction and because the respondent's commitment to open recruitment would have necessitated an external advertisement for any substantive post. If that is correct, it was those constraints, and not the objective of job security, that justified the fixed-term (as opposed to permanent) status of the renewed contract.

NHS England

80. As I have just mentioned, one of the constraints within which the respondent operated was the statutory direction given by NHS England. It was undeniably legitimate for the respondent to comply with that direction.
81. I have not made a finding about whether or not Mr Develing consulted NHS England at all about the renewal, or what if anything NHS England said in response. This leaves open the possibility that the respondent may have breached the statutory direction in any event, since the direction did not distinguish between interim and substantive appointments. But the objective of complying with NHS England's direction would still be served by limiting the claimant's extension to a fixed term. It would be a worse transgression of the statutory direction to make an unauthorised substantive appointment than to make an unauthorised fixed-term one. As I have found at paragraph 52, NHS England, whatever they might have thought of a fixed-term extension, would not have entertained any notion of awarding of a permanent contract to the claimant without an external competition.
82. I also consider that it is appropriate, at this stage, for me to take into account the other constraint that I have mentioned, namely the commitment to open recruitment. This constraint derived not from NHS England, but from the respondent's own policy and values. Although the respondent did not expressly set out this constraint in its list of legitimate objectives, the respondent impliedly held open recruitment up as an objective in its arguments under the heading of "job security".
83. It is plainly legitimate for an organisation to set itself a rule, only to be departed from in exceptional circumstances, that all roles be advertised externally. For the reasons also given at paragraph 52, making the claimant's role substantive in March 2017 would have defeated that objective.
84. I must now ask myself whether a fixed term, as opposed to permanent, renewal of the contract was necessary and appropriate as a means of achieving the objectives of open recruitment and of complying with NHS England.
85. The claimant argues that these objectives could and should have been achieved a different means. Instead of renewing his contract on a fixed term, the respondent should, he contends, have "run a process" to recruit into the substantive role. His case is that, had the substantive role been advertised in March 2017, he would have stood a much better chance of successfully being picked for the role. This was because, by then, Dr Cowan had not yet been appointed as Chair of the Governing Body.
86. In my view, this argument does not make it any harder for the respondent to justify the renewal of his contract on a fixed-term basis. First, it is an attack on the decision to renew his contract at all, which, at the risk of repetition, is not what the respondent has to justify. Second, it does not get around the independent justification based on the succession planning objective (see above). Moreover, it

is by no means certain that the claimant would have secured the substantive role in open competition with external candidates, even in March 2017. One only has to look at what actually happened when the substantive role was advertised in 2019. It was not just Dr Cowan who thought Mr Chidgey had outperformed the claimant at interview; all the rest of the panel thought so too.

Conclusion on permanent status issue

87. For the reasons I have given, at the time of the renewal of the claimant's fixed-term contract in March 2017, the continued employment of the claimant on a fixed term contract was objectively justified. This meant that regulation 8 had no effect on the validity of the term limiting the contract's duration. In other words, on the date of termination of the claimant's employment, his contract was still a fixed-term contract.

Reason for dismissal

88. My finding about the reason for dismissal starts from that same premise. I am satisfied that the reason for the claimant's dismissal was that the claimant's fixed term contract in the role of Chief Finance Officer had expired. The contract was not renewed because its purpose had disappeared. The respondent had decided that the role should be held on a permanent basis and that the substantive post-holder should be selected following an external recruitment process. This was a substantial reason of a kind such as to justify dismissing an employee in the interim position of Chief Finance Officer.

89. In case my conclusion on the permanent status issue is wrong, I have also made a finding about the reason for dismissal in the event that the claimant was – as a matter of law – a permanent employee. In that event, the reason for dismissal was that the respondent had decided to make the claimant compete against external candidates in order to stay in his role.

90. Such a reason would often be regarded as being an unfair reason to dismiss an employee. It will only be in a rare case that an employer can fairly tell an employee to step aside because someone better has come along. In the circumstances of this case, however, the recruitment of Mr Chidgey to the substantive role was a reason of a kind such as to justify dismissal of an employee in the claimant's role. The respondent was a public body. The claimant's role was one of the most senior in the organisation. The respondent's values and recruitment policy committed it to open recruitment. In my view, that meant that, when an interim role was being converted into a substantive role, the respondent would rightly be expected to advertise the role externally. It would go against those values, and the policy, if the respondent were to let the claimant drift from an interim into a substantive role by operation of regulation 8 of FTER, without making a conscious decision about whether or not the claimant was the most suitable person for the job. The claimant had already been through a recruitment process once, but that did not mean that he should not be expected to do so again when the role was made substantive. As the claimant accepted in evidence, the pool of candidates for the substantive role could be greater, because candidates might have been put off applying for the interim role by its time-limited duration.

Reasonableness

91. I must therefore consider whether the respondent acted reasonably or unreasonably in treating its reason as sufficient to dismiss the claimant.

92. I start on the footing that I was right to decide that the claimant was a fixed-term employee.
93. When approaching the reasonableness or otherwise of the decision, I must take into account the respondent's size and administrative resources. The respondent is made up of about 50 GP practices. Although I did not have evidence about the number of people directly employed by the respondent, I took it to have considerable resources available to it.

Decision to advertise the substantive role

94. The first aspect of the reason for dismissal which requires scrutiny is the decision to advertise the substantive role of Chief Finance Officer. I have already indicated my view that a decision had to be made one way or the other. For the reasons I have given, the respondent could not be expected simply to let the claimant become the permanent role holder by default.
95. The respondent argues that, once it is established that a decision had to be made, that decision was effectively taken out of the respondent's hands by NHS England. I would not go quite so far. Mr Banks was in a position to influence the decision of Mr Stephens and Mr Unwin by the way in which he framed the question. He could, as the claimant points out, have positively argued the case for a further extension of the claimant's interim role, or for the CCG to be allowed to make an exception to its usual recruitment policy and do away with the requirement to advertise. But it would be setting the bar too high for the respondent to require him to take that course. Put another way, it was reasonably open to Mr Banks to present the options neutrally to NHS England in the way that he did. Once Mr Stephens and Mr Unwin had made their decision clear, there was little else the respondent could do but to advertise the substantive post.
96. One of the claimant's arguments is that Mr Develing had effectively promised the substantive role to him in 2016, so it was unreasonable to open it up to competition in 2019. By the time the evidence had concluded, however, that argument had effectively disappeared. The claimant always knew that Mr Develing was never in a position to make such a promise, and that if the role was made substantive the respondent would have to run a recruitment process.

Method of selection for the substantive role

97. In my view, the respondent acted reasonably in selecting Mr Chidgey for the substantive role in preference to the claimant. The interview process was fair and transparent. With one exception, the claimant did not suggest otherwise. The exception related to the make-up of the panel. He argues that Dr Cowan should not have been included, because of her strained working relationship with the claimant. In my view, it was more than reasonably open to the respondent to include Dr Cowan on the panel. She was the Chair of the Governing Body. A decision on recruitment of the Chief Finance Officer would inevitably need to be taken by the most senior members of the organisation. The claimant had been informed that Dr Cowan would be on the interview panel, and he did not object. If there was any risk that Dr Cowan might be biased against the claimant, the respondent put sensible measures in place to guard against that risk by including another member of the Governing Body, a representative from NHS England and an external panel member.

Alternative employment

98. Once it had been fairly decided that Mr Chidgey should be the substantive Chief Finance Officer, it was inevitable that the claimant could not remain employed by the respondent for any substantial period of time beyond the expiry of his fixed term. The respondent only needed one Chief Finance Officer. No other senior roles were vacant. The best the claimant could hope for was a temporary extension to his fixed term until Mr Chidgey was ready to start in post.
99. I have considered whether or not the respondent should have offered the claimant a short-term extension instead of engaging Mr Doyle to cover that gap. If that were my decision to take in Mr Banks' place, I would have given the claimant first refusal. It would have softened the impact of the non-renewal of his contract. The claimant continued to attend work for the remainder of his contract period even when he knew that he was going to be replaced. There is no reason to think that he would have failed to carry out his duties if his contract had been extended for a few weeks more. Mr Banks had been advised that a further extension might expose the respondent to liability for unfair dismissal, but I cannot see why this would be so. There would be an obvious justification for the extension of the claimant's contract for a strictly limited period pending Mr Chidgey's arrival.
100. I must not, however, substitute my view for that of the respondent. Mr Banks had another reason for not offering the claimant any extension. He thought that the claimant's heart would not be in the job. That reason was defensible. By the time Mr Banks took the decision to engage Mr Doyle, the claimant had already instructed solicitors and, although the correspondence was polite, it indicated a deep sense of grievance and mistrust over the respondent's motives. Moreover, it was reasonably open to Mr Banks to wait and see if the claimant asked for an extension. The claimant never did.

Impact of permanent status

101. I now revisit these arguments against a hypothetical scenario in which I determined the permanent status issue in favour of the claimant. In that scenario I would still have found that the respondent acted reasonably in treating the recruitment of another person to the role of Chief Finance Officer as a sufficient reason to dismiss the claimant. As I see it, the analysis of reasonableness is not greatly altered by the question of whether or not, as a matter of law, the claimant became a permanent employee on the last day of his employment. Even if the respondent should have known that the contract of their interim Chief Finance Officer was going to become permanent under regulation 8, it was still reasonably open to them to consult NHS England on the question of whether the claimant should be made to compete for his role. Having been given the instruction that the role should be opened up to external advertisement, the respondent had little choice but to follow that instruction.

Overall conclusion on fairness

102. Stepping back, I have reached the conclusion that, whatever the outcome of the permanent status issue, the sole or main reason for the claimant's dismissal was some other substantial reason of a kind such as to justify dismissing an employee holding the role of Chief Finance Officer. I have identified two such reasons, depending on which way the permanent status issue should be decided. Whichever of the two reasons it was, the respondent acted reasonably in treating that reason as a sufficient reason to dismiss the claimant.

103. The dismissal was therefore fair.

Continuous employment

104. For the reasons I have given in paragraph 67, the respondent and Bridgewater Community Healthcare NHS Foundation Trust were not associated employers because they were not companies. The claimant's employment with Bridgewater cannot therefore be reckoned as part of his continuous employment with the respondent. Had I found the dismissal to be unfair I would have calculated the claimant's basic award on the basis that the claimant's continuous employment with the respondent began on 1 February 2016.

Employment Judge Horne

23 April 2021

SENT TO THE PARTIES ON

4 May 2021

FOR THE TRIBUNAL OFFICE