EMPLOYMENT TRIBUNALS

Claimant: Dr M Millington

Respondent: Hywel Dda University Local Health Board

Heard at: Remotely, by video **On:** 10 and 11 May 2022

Before: Employment Judge S Moore
Mrs M Walters – Non legal member
Mr C Lovell – Non legal member

Representation
Claimant: Ms Twomey, Counsel
Respondent: Mr Walters, Counsel

RESERVED JUDGMENT

1. The claimant's claim under regulation 6 of the Fixed Term Employees (Prevention of less Favourable Treatment) Regulations 2002 that he has been subjected to a detriment does not succeed and the claim is dismissed.

2. The claimant's claim under regulation 9 of the Fixed Term Employees (Prevention of less Favourable Treatment) Regulations 2002 seeking a declaration that he is a permanent employee of the respondent does not succeed and is dismissed.

REASONS

Background and introduction

1. The ET1 was presented on 17 September 2021. The claimant brought two claims under Regulation 6 and Regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("the FTE Regulations").

2. The Tribunal heard the case wholly remotely, on video on 10 and 11 May 2022.

3. The tribunal heard evidence from the claimant and from the respondent; Dr Lloyd and Ms B Griffiths. There was an agreed bundle of 332 pages. The decision was reserved.

Issues

4. At the outset of the hearing the tribunal had a preliminary discussion with the representatives. It was confirmed that the list of issues in the bundle was agreed. This provided as follows:

The Claimant brings two claims:

A claim under regulation 9 of the Fixed Term Employees (Prevent of Less Favourable Treatment) Regulations 2002 seeking a declaration that he is a permanent employee of the Respondent.

A claim under regulation 6 of the Fixed Term Employees (Prevent of Less Favourable Treatment) Regulations 2002 that he has been subjected to a detriment on one or more of the grounds specified in paragraph (3) of the said regulations.

THE DECLARATION CLAIM

It is accepted that:
The Claimant is employed as a consultant under a fixed term contract commencing on 13 May 2013.

The Claimant has been continuously employed by the Respondent as a consultant under a series of fixed-term contract for a period of four years' or more.

THE ISSUES

At the time of the last renewal of the fixed term contract i.e. 14 July 2021 was the employment of the Claimant as a consultant under a fixed term contract objectively justified? If so, then the contract is a valid fixed term contract. If not, then the Claimant is entitled to a declaration that he is a permanent employee.

In determining the above issue the tribunal will have to determine whether the Respondent had a legitimate aim. The Respondent will contend that it did i.e. to ensure compliance with legislation i.e. The National Health Service (Appointment of Consultants) (Wales) Regulations 1996 and/or the Respondent was planning a reorganisation of the CAHMS which would make the service more resilient (thereby removing the need for any consultant post in Ceredigion).

If one or more of the above were legitimate aims was the issue of a fixed term contract a proportionate means of achieving one or more of those aims?

THE DETRIMENT CLAIM

THE ISSUES
Is the Respondent's failure to provide the Claimant with a permanent contract of employment as a consultant a detriment under regulation 6 of the aforesaid regulations?

If so, was the Claimant subjected to the detriment on one or more of the grounds set out in regulation 6(3) (a) or (b) of the aforesaid regulations?

If the Claimant was subjected to a detriment when was the alleged detriment imposed?

If the alleged detriment was imposed outside the statutory limitation period as set out in regulation 7 of the aforesaid regulations is it just and equitable to

extend the time for making the complaint to the tribunal?

5. Partway through the cross-examination of Dr Lloyd, Ms Twomey informed the Tribunal that the list of issues was no longer agreed insofar as the relevant date for Regulation 9 claim was no longer agreed to be 14 July 2021. We return to this below under our conclusions.

Findings of fact

6. We make the following findings of fact on the balance of probabilities.

7. The respondent is a health board that is responsible for delivering NHS Wales services in mid and West Wales to approximately 384,000 people. The respondent operates in a largely rural geographical across three Welsh counties namely Pembrokeshire, Carmarthenshire and Ceredigion.

The National Health Service (Appointment of Consultants) (Wales) Regulations 1996 ("the appointment of consultant regulations").

8. These regulations set out a prescribed statutory process for the appointment of substantive (permanent) consultants via an Advisory Appointments Committee ("AAC"). It is a legal requirement that all employing authorities in Wales comply with the regulations (there are mirror regulations in England). The regulations apply to appointments to consultant posts on the staff of an authority in Wales except appointments which are exempt appointments. The regulations exist as a safeguard ensuring that consultant appointments are made via the most stringent appointment process.

9. They specify a prescribed process for advertising a proposed appointment, constitution of the committee, the selection by the committee and appointment by authority. The only exemption to this regulatory appointment process is in respect of exempt appointments which are set out in regulation 5. Regulation 5 (1) (c)[1], provides as follows:

5.—(1) An appointment is an exempt appointment if the person appointed is—
….
(c) a person whose employment in a post is to be for an initial period not exceeding six months
—

(i) pending the appointment of a permanent post holder,
(ii) where the permanent holder of that post is unable to carry out his duties by reason of illness or because of other absence, or
(iii) where the Authority considers for some other reason that such an appointment is necessary,

and in each case in respect of whom any further period of employment in that post is to be for a period not exceeding six months and to be subject to prior consultation with the relevant college and to the satisfactory performance of the duties of the post during the initial period;

10. Locum NHS consultants are exempt appointments under Regulation 5 (c). There are limitations to these exempt appointments as the regulations provide that the initial period of employment should not exceed six months and even then the requirements in 5 (c) (i) – (iii) still need to be satisfied. If the appointment needs to be extended beyond six months, the health board

[1] We only set out the relevant part of Regulation 5

are required to consult with the relevant college and then it should only be extended for a further maximum period of six months.

11. The tribunal heard from Ms Griffiths, Senior Medical Workforce Manager for the respondent about this exemption. The respondent admits that traditionally within their health board, college permission is not always obtained and local contracts are extended beyond the period prescribed in the regulations. Ms Griffiths told the tribunal this is common practice across other organisations in Wales and is a matter that the Welsh government is fully aware of.

12. Dr Lloyd is the respondent's Associate Medical and Clinical Director for Mental Health and Learning Disabilities and the Clinical Lead Specialist for CAMHS (child and adolescent mental health services). He joined the health board in 2013 as a senior consultant in CAMHS. The respondent has historically and continues to experience significant and long standing issues recruiting consultant psychiatrists as well as other clinical staff. The post, currently occupied by the claimant as a locum consultant, has been vacant since prior to 2013. It had previously been filled by a mixture of agency consultants and locum consultants. It is intended that there should be a substantive consultant psychiatrist heading each of the services across the health board area but the respondent has not been able to achieve this for many years due to recruitment difficulties. At this current time there is only Dr Lloyd and one other substantive consultant in post within the respondent's CAMHS service (as well as the claimant in his locum role).

13. The claimant is a highly respected experienced consultant psychiatrist who has been employed by the respondent on a series of fixed term contracts since 13 May 2013. He retired from his substantive consultant psychiatrist post in 2011 having taken his pension some years previously. From 1975 to 2011 he was a consultant child and adolescent psychiatrist latterly at the central North West London NHS Foundation Trust. Thereafter, the claimant worked in a number of different locum consultant psychiatrist roles all of which were part-time. He applied to and was appointed the fixed term locum consultant in the CAMHS service within the respondent with effect from 13 May 2013. The initial appointment was for three months. His place of work is Bronglais Hospital in Aberystwyth and he was employed to undertake six sessions per week. The claimant's family home is in High Wycombe. Prior to the Covid-19 pandemic, the claimant commuted from his home to Aberystwyth on a Monday morning staying two nights in a hotel then travelling back home mid week after he completed his six sessions.

14. The claimant accepted at the time he was appointed as a locum consultant he was not interested in the substantive position. He also accepted that the respondent's goal all along was to appoint a substantive post and he was initially content to continue as a locum until that time.

15. The claimant's contract was subsequently extended every three months with no circumstances of note until October 2014. On 28 October 2014 Ms Griffiths asked Dr Lloyd if he required her to seek panel extension for the claimant from 1 December 2014 (this is the college approval referenced under Reg 5 (c) of the appointment of consultant regulations). She informed Dr Lloyd that the claimant's fixed term contract could not be extended to any later than February 2015 "otherwise he will have gained employment rights", referencing the claimant reaching a period of two year's continuous service.

Discussion took place between Dr Lloyd and the claimant around the end of November 2014. We accepted the claimant's evidence that Dr Lloyd informed the claimant that that his contract would not be renewed because he was nearing two years service and in doing so he would accrue employment rights. The claimant was disappointed by this and sent an email to Angela Lodwick who is the head of service on 14 December 2014. The claimant references his discussion with Dr Lloyd advising he had not taken any offence at the proposed termination and proposing that he signed a legal document that he would not require employment rights albeit he stated he trusted he would be treated properly and fairly as had been the case so far. The claimant was clear in this email that this arrangement would suit both the respondent and the claimant.

16. Ms Lodwick evidently took advice from Ms Griffiths. In an email dated 30 December 2014, Ms Griffiths stated:

"He has been on a succession of fixed term contracts since 13th May 2013 so would not accrue employment rights until May 2015.

We have slightly more scope with Locum Consultants as the only way they can be appointed on a permanent basis is though a statutory process. A redundancy situation is unlikely as the service requirement is that the post is essential to maintain the service and therefore the aim is substantive recruitment.

I would advise that you actively advertise on a substantive basis and in the meantime discuss with Libby and Dr Kloer as to the risks of exceeding the 2 years fixed term basis. In this case I would advise that the risk of a claim for unfair dismissal are low as Dr Millington is already a retired Consultant and well aware that we are looking to appoint to the post on a substantive basis. It is also my understanding that there are no performance concerns.

Following a discussion around this with Libby and Dr Kloer, if you decide to proceed and extend the contract beyond May 2015 then I would advise that you meet with Dr Millington to outline the situation that we are looking to appoint on a substantive basis. The documentation that then goes forward to him need to be very very clear and ensure we have a notice period. I would be more than happy to view any draft letters."

17. The claimant wrote a further email to Dr Lloyd an extract of which he set out in his email to senior directors on 21 January 2015. Dr Lloyd stated:

"We are in the process of completing the JD for a substantive Consultant and we currently have a NHS Locum Consultant in post to cover the Ceredigion vacancy. This post has been historically very difficult to recruit to for a variety of reasons, however we are considering a variety of creative options to make the post more attractive. In the meantime we have a retired Consultant that delivers a sound service in Ceredigion and he is willing to continue in this NHS Locum role until we successfully recruited a Substantive Consultant.

The current issue is that if we extend his NHS Locum contract past May 15 he is entitled to employment rights. Dr Millington is fully aware of the situation and the HB position re extending the contract beyond May 2015. He has made it very clear that he has no intention to seek / action any employment rights if the HB grant a further extension. I enclose a recent email from Dr Millington setting out his position:

"In the meantime I have obtained the BMA's advice. They say long term locums can be a problem, as we have found out. They believe, however, flexibility is possible, if there is trust and goodwill on all sides. A legally binding agreement to forgo employment rights is not ruled

out, and also a break in continuity of service has been another solution. At first 3 months was suggested, but she did not rule out 1 month, again with the proviso of requiring goodwill by all concerned. The Industrial Relations Officer I spoke too was xxxxx in the BMA Cardiff Office-029-2047-xxxx, and she seemed very approachable if you thought it might be helpful if you also checked the possibilities with her."

In order to maintain the service provision, avoid a lengthy vacant post and expensive agency cost, I suggest that I meet with Dr Millington to outline the situation and draft a letter with the support of Bethan to ensure the HB covered all areas."

18. Dr Lloyd emailed Ms Griffiths on 21 January 2015 and informed Ms Griffiths that he had decided to extend the claimant's contract beyond the May 2015 date and that he would also actively seek to recruit a substantive consultant. Dr Lloyd referenced the need to embark on this route as the alternative (securing an agency locum) would be much more expensive and the potential of securing an appropriate qualified agency locum was very low.

19. On 12 April 2015 the claimant sent a further email to Dr Lloyd in which he had drafted a form of words purporting to forfeit his employment rights that would be reached at two years. The claimant again quoted he had sought advice from the BMA on this proposal and advised they had suggest a break in service as "an additional safeguard". Eventually, on 11 May 2015 the respondent agreed to this proposal and Dr Lloyd was authorised to agree by the Head of Medical Staffing, albeit with some reservations on the basis it was "low risk". Dr Lloyd therefore emailed the claimant on 15 May 2015, as follows:

"We note and accept the content of your email that sets out your informed position and decision with regards to forfeiting the employment rights as set out in your comprehensive email enclosed".

20. Ms Griffiths told the Tribunal that she had reservations and concerns about this arrangement and she had never experienced any doctor openly offering to waive employment rights in return for a continuation of a fixed term contract. She made two assumptions at that time as to the claimant's reasons. Either he was so keen for the fixed term arrangement to continue or he was so reluctant to go through the AAC process or it was a combination of both. Her concerns were addressed to a degree when she saw thew wording of the email the claimant had himself drafted offering to waive these rights.

21. It is axiomatic that the claimant's proposed waiver of his employment rights had no legal basis nonetheless we find in light of the correspondence above, it was proposed by the claimant with the apparent knowledge and approval of the BMA in an attempt to seek a solution that was beneficial to both parties yet at the same time circumvent the appointment of consultant regulations.

22. Following this, the claimant's fixed contract continued to be extended every three months. From 21st of October 2016, the contract extension letter confirmed that the claimants employment would be extended pending the appointment of a substantive consultant at which point his contract would end.

<u>Recruitment issues</u>

23. During this period, the respondent continued to try and recruit substantive permanent consultants into the vacant posts within the health board.

24. We heard evidence from Dr Lloyd, which we accepted, that nationally there is a huge shortage of consultant psychiatrists, particularly those that specialise in child and adolescent mental health. As a result consultant roles in CAHMS are notoriously difficult to recruit into. Dr Lloyd has tried repeatedly during his tenure to recruit substantively to a consultant post in the Ceredigion area without success.

25. The post of locum consultant in CAHMS was advertised on four occasions between 18 November 2016 on 19 May 2017 and no applicants applied for the post. Dr Lloyd explained that they usually recruited for locum consultant posts in the first instance because consultants prefer to come in on a locum contract to see if they want to settle into the new role. Further, the respondent has learned through years of trying to recruit permanently into the consultant roles that if they work with locum colleagues to support them into a substantive role through the AAC panel process this generally proves more successful than trying to recruit to a substantive consultant from advert.

26. Dr Lloyd also gave some information on recent recruitment attempts to the role of locum consultant in early intervention of psychosis. It was advertised on eight occasions between October 2020 and August 2021 with zero applicants. The substantive post in CAHMS early intervention was advertised between 19th of December 2017 and 18 March 2018 and again there were no applicants for this post. In addition to the respondent's advertisements on the NHS Jobs website (which is the medium for advertising all NHS jobs) and medical publications, they have also undertaken targeted recruitment campaigns overseas, actively explored the Medacs and finder fee agencies yet to no avail.

27. It should be noted that throughout this period at no time did the claimant apply for any of the substantive posts.

Events after March 2020

28. In March 2020 the country entered into a national lockdown. The claimant was in the shielding category and from that date began to work remotely from home.

29. On 23 July 2020, the claimant's employment adviser, Ms Dixon, of the British Medical Association ("the BMA") wrote to the respondent on the claimant's behalf to discuss issues surrounding his contract. By this point the claimant had been employed in successive fixed contracts for a period of seven years and no substantive consultant had been appointed. The email raised a number of issues. The claimant had continued to work from home it being some three months into the Covid-19 pandemic. The email focused in the main on issues over the claimant's annual leave, expenses, job plan and the number of sessions the claimant had been working in particular a reduction from 6 to 5 in February 2017. Ms Dixon also raised the following:

"As he is an employee who has been continuously employed on successive fixed-term contracts for four years or more, he would have automatically achieved permanent status."

30. Dr Lloyd replied on this particular issue that the claimant should recall he formally wrote to the health board to state that he was aware of the permanent status, however he did not require this to be applied to himself and hence this was not applicable to his fixed term contract extension beyond four years.

31. On 11 September 2020, Ms Dixon replied to Dr Lloyd. In this email she stated that she was aware that the claimant may have previously indicated that he wished to remain on fixed term contracts. She explained that he was not aware of the principles of the FTC regulations and that permanency was automatic once an employee reached four years service. She repeated her request for the claimant to be issued with a permanent contract.

32. On 14 September 2020, Dr Lloyd emailed the claimant regarding the vacant substantive posts. He referenced the claimant being aware that they were progressing the two substantive consultant posts and that on numerous occasions they had been advertised both by the substantive and NHS locum route and to date the claimant had not shown an interest in either in terms of the full-time positions. Dr Lloyd drew the claimant's attention to the advertisements for the full-time NHS locum consultant post and substantive posts which would be advertised soon and asked him to inform him if he would be interested.

33. The claimant did not reply until 11 October 2020. He queried why the post needed to be full-time and acknowledged that over the recent years he had been broaching the possibility of a modest reduction in hours. He went on to say that in normal times a full-time commitment could not realistically be a consideration for him but in the "new normal" just a possibility (referencing remote working). He acknowledged that in the advertisements for full-time posts he had noted frequently the rider that part-time jobs applicants would be welcomed. He asked whether or not that provision would be added to the job specification. He went on to suggest a candidate for a job share and sought Dr Lloyd's views. The claimant also observed that he believed he was working (remotely) full time in any event.

34. Dr Lloyd replied the following day. The respondent had had to engage agency locum cover at this point as the claimant was unable to attend the site due to being assessed as very high risk if exposed to Covid. Dr Lloyd told the claimant they could not continue without a medical presence on site. He explained that due to the immense service pressure they needed to have clinicians that could offer face-to-face interventions. He confirmed the post-holder needed to be on site with some remote working but explained they could not continue with no medical presence on site. It was made clear to the claimant that post needed to be mainly on site and also 10 sessions per week. He asked the claimant to confirm if he would be interested in the Locum Consultant role with these conditions.

35. Dr Lloyd followed this up with an email on 15 October 2020 advising the claimant that he was interviewing the doctor that afternoon who was not looking for a job share arrangement. He asked the claimant to confirm whether he was interested in the 10 session post with the understanding that most of it needed to be on site due to reasons previously set out. He also advised that he had followed up on the suggestion of the individual put forward by the claimant as a job share but that this individual was not

interested in this post.

36. In a further email dated 16 October 2020, the claimant told Dr Lloyd that the minute it was safe for him to return to base would be welcomed with relief by him to as even the best of homeworking was a very poor substitute for physical presence. He told Dr Lloyd he remained hesitant over the renewed search for full-time locum and reluctant to reach a final decision until he was able to have the full details of the advertised post. He requested such further details. Dr Lloyd replied the same date. Dr Lloyd was evidently surprised at the claimant's request for the details of the post commenting that he had always been asking for full-time consultant and for the last 2 to 3 years, the claimant had consistently been requesting a reduction in sessions and had showed no interest in attending extra sessions or the substantive post. He emphasised that in terms of the advertisement, the Pembrokeshire post was open to all and in the relevant medical journals. Dr Lloyd stressed that he was happy to discuss by Teams the 10 session requirement, central on site working and the robust Covid 19 procedures in place.

37. The claimant was asked under cross examination whether he recalled a number of conversations between him and Dr Lloyd regarding the substantive positions where he had informed Dr Lloyd he was not interested. The claimant told the Tribunal he did not recall these discussions.

38. We find that there were such discussions between the claimant and Dr Lloyd (that the claimant was not interested in a substantive post) because they are corroborated and referenced in Dr Lloyd's email and there was no rebuttal by the claimant. Further, Ms Dixon acknowledged as much in her email set out above at paragraph 31.

39. There followed further email exchanges between Dr Lloyd and the claimant. There was evidently a difference in opinion between the two concerning the claimant's continued non-attendance on site. Dr Lloyd set out on a number of occasions why he considered there needed to be attendance at the base/hospital. He referenced being able to respond to acute emergencies that could be dealt with remotely. He also referenced the need for a senior presence on site and responsiveness when working remotely to be able to attend the base/hospitals in the event of an emergency or crisis. He also explained that they were still progressing agency cover for the claimant due to significant operational challenges they were facing which had been escalated to the board to ensure transparency in relation to the current demands on services that was outstripping their capacity. He emphasised he was unable to support 10 session remote working for any consultant in any of the service they were operating due to operational demands and risks.

40. The claimant evidently disagreed and considered that he could carry out 10 sessions purely remotely. He considered that that Dr Lloyd should have been less likely to be contacted for advice intervention as he had been working every day and he disputed that Dr Lloyd been contacted to step in and offer clinical support due to the claimant's continued remote working.

41. On 23 October 2020, the claimant was assessed by the respondent

occupational health consultant. He assessed the claimants risk of Covid 19 complications should he contract the disease as “very high risk” with a score of seven on the All Wales Covid 19 workforce risk assessment tool. He strongly recommended that the claimant should work from home.

42. On 22 December 2020, Ms Dixon wrote to Ms Griffiths on behalf of the claimant and formally requested that he be issued with a permanent contract having achieved permanent status in accordance with the FTC regulations. Ms Dixon wrote further on 29 January 2021, requesting a written statement of variation to the claimant’s fixed term contract to confirm he was a permanent employee. Ms Griffiths accepted that she did not reply to Ms Dixon’s subsequent chasing emails until 15th of April 2021 due to the pressures of the Covid 19 pandemic. Ms Griffiths told the tribunal that at that period the health board took the decision to divert all resources to support frontline staff. Some of the normal work undertaken by HR was delayed as a decision was taken to maintain clinical services and protect patient safety.

43. In her reply of 15 April 2021, Ms Griffiths informed Ms Dixon that they were unable to make the claimant permanent in a locum role as there was a statutory process to follow for the appointment of consultants (referencing the appointment of consultant regulations).

44. It was put to Ms Griffiths in cross examination that the reason the respondent failed to provide the claimant with a statement of variation requested by Ms Dixon was because they believed the claimant had waived his employment rights in 2015 and he should not have been allowed to go back on that waiver. This was the initial reason provided by Dr Lloyd in his email set out at paragraph 30. Ms Griffiths did not accept this contention. She agreed that the claimant had tried to waive his rights but maintained that the reason he could not simply be made a permanent employee was because he had not applied for and gone through the regulatory procedure to become a substantive consultant. We balanced what Dr Lloyd had first said against Ms Griffith’s subsequent explanation of 15 April 2017 and her witness evidence on this point. This was corroborated by what she had told Dr Lloyd as far back as 2014 (see paragraph 16). Further, it was in our view inherently more plausible that the respondent’s reason for not agreeing to make the claimant permanent was the desire to adhere to the appointment of consultant regulations rather than a mischievous or malicious intent to punish the claimant for going back on his waiver. Ms Griffiths knew that the waiver was problematic and had been concerned about it at the time it was drafted by the claimant. For these reasons we find that the reason the claimant continued to be employed on a fixed term contract was that he could only be appointed to a permanent position via the regulatory process and he had not applied for any such role to trigger that procedure.

45. The claimant says that although he understands a formal process must be followed for the appointment of consultants this is not what he was asking for. He is simply requesting that his contract be converted to that of permanent employee in accordance with the FTC regulations. In his answers to cross examination the claimant was frank when he was asked how this could work, given the statutory requirement for the appointment of a permanent consultant. He agreed it was indeed a dilemma and that was the advice he had been given by the BMA (that he should be made a permanent employee).

46. The claimant was asked why he had not ever indicated he would be prepared to go through the regulatory process to become a substantive consultant. The claimant said this was because he had not been asked and also that he knew perfectly well the respondent wanted a full time consultant so he concluded a part time consultant would not be acceptable. He was asked why he had not raised this and explained he considered it would have been inappropriate and impertinent to tell the respondent what to do. He agreed he did not open that conversation nor was he approached to say the respondent would discuss part time and the responsibility and onus was on both parties yest the conversation was not initiated by either.

47. Thereafter, and continuing to date an impasse was reached as the claimant considers that he is able to undertake his duties working remotely and has continued to do so due to various health reasons and concerns about returning to work due to Covid. Dr Lloyd remains of the view that physical presence on site is required. The claimant has continued to work from home apart from one or two sessions.

Proposed restructure of CAMHS

48. The respondent relies upon what they say was a planned reorganisation of the CAHMS as one of their legitimate aims.

49. Due to the ongoing difficulties the respondent has experienced in recruiting to the consultant posts, Dr Lloyd was asked by the health board to explore alternative workforce solutions to address what they consider to be a recruitment crisis. In other areas of the service the respondent has developed a structure whereby advanced nurse practitioners and non-medical prescribed roles are brought in as an alternative to a consultant led structure.

50. Dr Lloyd wrote to the claimant about this on 26 May 2021. At this point the respondent was experiencing substantial increase in referrals and the crisis team was at full capacity. The respondent had engaged a locum consultant to cover on-site face-to-face medical presence in Ceredigion. He informed the claimant that they would be commencing staff consultation period in order to consult regards the proposed organisational change proposal "OCP".

51. The draft OCP document was sent to the claimant on 17 August 2021.

52. Dr Lloyd was asked about the proposal under cross examination. He accepted that the proposal was on pause and gave a number of reasons. Firstly that he considered it not appropriate to progress due to this Tribunal and further that the claimant had experienced a period of poor health and the respondent considered it to be inappropriate to continue until the claimant was back at work reintegrated into the team at which point they intend to fully launch the OCP. Dr Lloyd accepted under cross examination that he had not directly informed the claimant that the OCP was being delayed due to concerns over his health as he thought that this would be obvious. It was put to Dr Lloyd that the same reasons why it had been difficult to recruit a substantive consultant in Ceredigion would apply to recruiting an advanced nurse practitioner as proposed in the OCP. Dr Lloyd did not accept this he cited other examples where they had implemented

this structure across Ceredigion in the last five years including advanced nurse practitioner appointments.

53. The Law

54. Regulation 6 of the FTC Regulations provides:

6 Unfair dismissal and the right not to be subjected to detriment

(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(2) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, of his employer done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are—

(a) that the employee—

(ii) (i) brought proceedings against the employer under these Regulations;
(iii) (ii) requested from his employer a written statement under regulation 5 or regulation 9;
(iv) (iii) gave evidence or information in connection with such proceedings brought by any employee;
(v) (iv) otherwise did anything under these Regulations in relation to the employer or any other person;
(vi) (v) alleged that the employer had infringed these Regulations;
(vii) (vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations;
(viii) (vii) declined to sign a workforce agreement for the purposes of these Regulations, or
(ix) (viii) being—
(1) (aa) a representative of members of the workforce for the purposes of Schedule 1, or
(2) (bb) a candidate in an election in which any person elected will, on being elected, become such a representative,
(x)
(xi) performed (or proposed to perform) any functions or activities as such a representative or candidate, or

(b) that the employer believes or suspects that the employee has done or intends to do any of the things mentioned in sub-paragraph *(a)*.

(4) Where the reason or principal reason for dismissal or, as the case may be, ground for subjection to any act or deliberate failure to act, is that mentioned in paragraph (3)*(a)*(v), or *(b)* so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the employee is false and not made in good faith.

(5) Paragraph (2) does not apply where the detriment in question amounts to dismissal within the meaning of Part 10 of the 1996 Act.

55. A detriment will exist if by reason of the act or acts complained of a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he thereafter had to work. An unjustified sense of grievance cannot amount to a detriment but it is not necessary to demonstrate some physical or economic consequence **(Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).**

56. Regulation 7 (time limits) provides:

7 Complaints to employment tribunals etc.

(1) An employee may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 3, or (subject to regulation 6(5)), regulation 6(2).

(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—

(a) in the case of an alleged infringement of a right conferred by regulation 3(1) or 6(2), with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them;
(b) in the case of an alleged infringement of the right conferred by regulation 3(6), with the date, or if more than one the last date, on which other individuals, whether or not employees of the employer, were informed of the vacancy.

[(2A) Regulation 7A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (2).]

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2)*(a)*—

(a) where a term in a contract is less favourable, that treatment shall be treated, subject to paragraph *(b)*, as taking place on each day of the period during which the term is less favourable;
(b) a deliberate failure to act contrary to regulation 3 or 6(2) shall be treated as done when it was decided on.

(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.

57. Regulation 8 provides:

8 Successive fixed-term contracts

(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—

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

(iii) (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.

58. Regulation 9 provides:

9 Right to receive written statement of variation

(1) If an employee who considers that, by virtue of regulation 8, he is a permanent employee requests in writing from his employer a written statement confirming that his contract is no longer fixed-term or that he is now a permanent employee, he is entitled to be provided, within twenty-one days of his request, with either—

(a) such a statement, or
(b) a statement giving reasons why his contract remains fixed-term.

(2) If the reasons stated under paragraph (1)*(b)* include an assertion that there were objective grounds for the engagement of the employee under a fixed-term contract, or the renewal of such a contract, the statement shall include a statement of those grounds.

(3) A written statement under this regulation is admissible as evidence in any proceedings before a court, an employment tribunal and the Commissioners of the Inland Revenue.

(4) If it appears to the court or tribunal in any proceedings—

(a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement, or
(b) that the written statement is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw.

(5) An employee who considers that, by virtue of regulation 8, he is a permanent employee may present an application to an employment tribunal for a declaration to that effect.

(6) No application may be made under paragraph (5) unless—

(a) the employee in question has previously requested a statement under paragraph (1) and the employer has either failed to provide a statement or given a statement of reasons under paragraph (1)*(b)*, and
(b) the employee is at the time the application is made employed by the employer.

59. We were referred to the following authorities.

60. In **Kücük v Land Nordrhein-Westfalen [2012] ICR 682** the CJEU held that a German law stating that to replace one permanent employee with another on a fixed-term contract was not contrary to the Directive. In this case the claimant had been employed for 11 years under a total of 13 successive fixed-term employment contracts, to cover temporary leave granted to other employees. Although the assessment of the objective reason put forward must refer to the renewal of the most recent employment contract concluded, the existence, number and duration of successive contracts of that type concluded in the past with the same employer may be relevant in the context of that overall assessment. The mere fact that a need for replacement staff may be satisfied through the conclusion of contracts of

indefinite duration does not mean that an employer who decides to use fixed-term contracts to address temporary staffing shortages, even where those shortages are recurring or even permanent, is acting in an abusive manner.

61. In **Adeneler v Ellinikos Organismos Galaktos C-212/04 [2006] IRLR 716**, the ECJ held that the use of successive fixed-term contracts was precluded where the justification advanced for their use is solely that it is provided for by a general provision of statute or secondary legislation of a Member State. On the contrary, the concept of 'objective reasons' within the meaning of that clause requires recourse to this particular type of employment relationship, as provided for by national legislation, to be justified by the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out.

62. The FTC Regulations were considered by the Supreme Court in **Duncombe v Secretary of State for Children, Schools and Families [2011] IRLR 498.** In this case, the claimant was a teacher employed by the Secretary of State to work in European schools under a treaty established to educate children of staff working in EC institutions. The maximum period of secondment was nine years. The claimants sought a declaration under Regulation 9 (5) that they were permanent employees. The Supreme Court held that the nine year rule was objectively justified. The Directive and the framework agreement are directed at discrimination against workers on fixed-term contracts in what was in reality an indefinite employment. It may be a desirable policy that fixed-term contracts be limited to work, which is only for a limited term, and where the need for the work is unlimited, it should be done on contracts of indefinite duration. That may even have been the expectation against which the Directive and the framework agreement were drafted. But it is not the target against which they were aimed. Employing people on single fixed-term contracts does not offend against either the Directive or the Regulations. The United Kingdom could have chosen to implement the Directive by setting a maximum number of renewals or successive fixed-term contracts, for example by limiting them to three. It could equally have chosen to implement the Directive by setting a maximum duration to the employment, for example by limiting it to nine or 10 years in total. It is readily understandable why the alternative route of requiring objective justification after four years was taken: this is more flexible and capable of catering for the wide variety of circumstances in which a succession of fixed-term contracts may be used.

63. Further, it was not the nine year rule that required justification, but the use of the latest fixed-term contract bringing the total period up to nine years. The latest renewal or successive contract has to be justified on objective grounds.

Conclusions

The detriment claim

64. The detriment relied on was the respondent's failure to provide the claimant with a permanent contract of employment as a consultant.

65. We firstly consider whether this claim was presented in time under regulation 7 (2). This provides that an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning in the case of an alleged infringement of a right conferred by regulation 3(1) or 6(2) with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them. Under regulation 7 (4),for the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2)*(a)* a deliberate failure to act contrary to regulation 3 or 6(2) shall be treated as done when it was decided on.

66. We consider that as the claim was advanced as a failure to provide the claimant with a permanent contract, that was an omission claim and as such the time point fell to be determined under Regulation 7 (4) b) as a deliberate failure to act.

67. The claimant must have been aware that the respondent were not going to issue him with a permanent contract at the latest by 15 April 2021 as this is when Ms Griffiths informed his BMA representative of the respondent's position. This gives a primary limitation date of 14 July 2021.

68. The claimant commenced the early conciliation procedure on 13 July 2021 and the certificate was issued on 19 August 2021. The claim was presented on 17 September 2021. As such this claim was presented in time.

69. We considered that a failure to provide the claimant with a permanent contract could amount to a detriment as a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he thereafter had to work namely the continuing uncertainty of the short, fixed term renewals that the lack of a permanent contract gave rise to.

70. Turning now to the question as to whether the claimant was subjected to the detriment on one or more of the grounds set out in regulation 6(3) (a) or (b). The claimant had not pleaded which of those grounds he relied upon. Mr Walters submitted that there was a complete absence of any assertion by the claimant in his evidence that the reason the respondent had failed to provide the claimant with a permanent contract was anything other than the reasons put forward by the respondent. Further that nothing was put to the respondent's witnesses that they were operating under a hostile animus other than the legitimate reasons they had advance for not granting a permanent contract.

71. Ms Twomey submitted that the "grounds" were that the claimant had requested from his employer a written statement under regulation 5 or regulation 9 when Ms Dixon wrote to the respondent on 22 December 2020 and again on 29 January 2021 (see above at paragraph 42). It must therefore follow that the claimant is complaining about decisions taken to renew his fixed term contract after this date. She further submitted that she had put to Ms Griffiths in cross examination that the reason Ms Griffiths did not provide the written statement of variation requested by Ms

Dixon was that she considered the claimant had waived his employment rights in 2015.

72. We made a finding of fact (see paragraph 44) accepting the respondent's reasons as to why the claimant was not offered a permanent contract. These reasons were that the respondent had to comply with the Appointment of Consultant Regulations. Ms Griffiths evidently believed and still does believe that the respondent cannot "bypass" those Regulations and simply appoint the claimant to a permanent consultant role and we accepted her evidence that that was the reason. We do not consider there are any grounds to conclude that the claimant was not offered a permanent contract because Ms Dixon had made a request for a written statement under Regulation 9.

73. We decline to draw an inference on the basis that the statement provided by Ms Griffiths on 15 April 2021 was outside the 21 days provided for under Regulation 9 (1). We accepted that the reason it was provided late was due to the extreme pressure the respondent was under due to the Covid-19 pandemic at that time.

74. For these reasons, the claimant's claim under Regulation 6 fails.

<u>The declaration claim</u>

75. The agreed list of issues set out that we needed to consider objective justification at the time of the last renewal of the fixed term contract (14 July 2021). This date was specified as it was the last renewal date that had fallen at the time the ET1 was presented on 17 September 2021.

76. Despite having agreed this list of issues, Ms Twomey later informed the respondent and the Tribunal partway through Dr Lloyd's cross examination that this was no longer agreed. Ms Twomey submitted that the relevant date on which the tribunal should consider whether employment of the claimant under a fixed term contract was justified on objective grounds should be 1 April 2022 which was the latest renewal date of the contract. Ms Twomey relied upon the regulations to argue this point. In particular Ms Twomey relies on regulation 8 (3) (a) which provides:

> **(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.**

77. Ms Twomey suggested that an ordinary plain application of the language in regulation 3 (a) must mean that the relevant date is when the contract was last renewed which was 1 April 2022. She submitted that the statute does not say the words "prior to issuing an ET claim". If the tribunal did use the dates suggested by the respondent which was 14 July 2021 we would be adding extra words into a statute that do not exist.

78. We respectfully did not agree with Ms Twomey's contentions as regards to the date where we should consider whether the contract was last renewed.

We agreed with Mr Walters that this must be the date of the last renewal prior to the issue of the claim. The Tribunal determines the claim before them. The Tribunal cannot determine claims based on facts that have arisen since the claim was presented unless there is an application to amend or new claim as presented. To attempt to do so would be an attempt to hear ever-changing factual circumstances potentially and it would be akin to making decisions and judgments on a bed of sand.

79. We therefore consider that the relevant date at which we must consider the claimant's claim under Regulation 9 is 14 July 2021. Under **Kücük** we must assess the objective reason with reference to the renewal of the most recent employment contract concluded as well as having regard also to the existence, number and duration of successive contracts of that type concluded in the past.

80. In any event, we note that the legitimate aims remain the same regardless as to which date is considered. We acknowledge that the proportionate means could differ depending on the date of the assessment but do not find they do so in this case for the reasons set out below we do not think the proportionality considerations change between July 2021 and April 2022.

81. We now turn to our conclusions as to whether the employment of the claimant under a fixed term contract was justified on objective grounds.

First legitimate aim – compliance with the National Health Service (Appointment of Consultants) (Wales) Regulations 1996

82. This is not a case where there are competing statutory obligations. The appointment of consultant regulations do not specifically seek to circumvent the FTC Regulations (as was the case in **Adeneler).** There is a route to appoint a fixed term consultant to a permanent substantive role, via the regulatory process.

83. Ms Twomey accepted in principle that compliance with a statute is a legitimate aim. Her submissions were in the main based on the principle that the respondent had not achieved this by proportionate means.

84. There are legitimate public policy reasons behind the appointment of consultant regulations. They provide for a regulated procedure for appointing NHS Consultants who are the most senior doctors operating with the NHS. We had no hesitation is accepting that both compliance with this legal obligation and the public policy reasons for these particular regulations amounts to a legitimate aim.

Proportionality – discussion and conclusions

85. Ms Twomey made a number of persuasive submissions in respect of proportionality.

86. Firstly that it cannot be proportionate to rely on legislation when the respondent is "cherry picking" the part of the regulations upon which they want to rely and breaching other parts. This is in reference to the respondent's acceptance that they have not complied with regulation 5 (c) by extending locum contracts beyond the maximum six months and not

securing college approval.

87. Mr Walters submitted that "two wrongs do not make a right" in relation to the respondents acceptance that they are extending contracts beyond the six months and without college approval. We did not have any evidence as to why the respondent did not seek college approval latterly as there was evidence they had been doing so in the earlier years of the claimant's extensions. The explanation for continuing to extend beyond the six month limit was that it was absolutely necessary to maintain the service.

88. We agree that the respondent's non compliance with regulation 5 does not negate the legitimate aim provided for in the other parts of the regulations governing the appointment of consultants to substantive positions. We heard compelling and extensive evidence about the difficulties the respondent has had in recruiting consultant psychiatrists to a permanent posts. This was the reason for failing to comply with regulation 5 of the appointment of consultant regulations. In our judgment this does not change or derogate the legitimate aim behind the appointment process for substantive appointments neither does it erode the proportionate means by way that aim was achieved.

89. Secondly, Ms Twomey submitted that the aim behind the regulations (patient welfare issues requiring a regulatory appointment procedure of the most senior doctors within the NHS), was being achieved as the claimant had been doing the job satisfactorily for nine years and the regulations made no material difference to further the purpose in these circumstances. Accordingly the rolling extensions to the claimant's contract are not proportionate.

90. This initially seems an attractive argument as by retaining the claimant on such an extensive period of fixed term contracts, it could be argued that the aim has not been achieved by the appointment process itself which is the aim relied upon by the respondent. Is this sufficient to therefore conclude that the practice of the rolling extensions was not a proportionate means of achieving that legitimate aim? We conclude that the answer to this question must be in the negative.

91. The claimant's case on this particular issue is that the appointment of consultant regulations are not applicable as he is not requesting to be made permanent in a locum role (paragraph 16 and 17 of the grounds of complaint). He says that he does not have to be appointed under these Regulations and the respondent should simply make his existing role permanent. We were unable to accept this contention. It must follow that the outcome would be that if we made such a declaration, the claimant would be a "permanent locum" as the restriction of the duration of the contract would have no effect. In reality this would mean that that the appointment of consultant regulations would be circumvented as this would not be an appointment under any of the exemptions.

92. Whilst we acknowledge that the claimant has had a lengthy period of extensions, **Duncombe** cautions against this being the primary objection. We must consider whether the respondent is achieving their legitimate aim by proportionate means. In our judgment the respondent has shown they are achieving that legitimate aim with the ongoing renewal of the claimant's fixed term contract as there is no proportionate alternate, other than to

disregard the regulations themselves. We agree there can be no "hybrid" arrangements that does not derogate the appointment of consultants regulations and we do not consider a derogation to be proportionate.

93. Thirdly, Ms Twomey submitted it is also not proportionate to keep employing the claimant on 3 month contracts with "no end in sight". The claimant has actively suggested solutions to allow him to be appointed such as the remote working full time and job share arrangements. She suggests that a proportionate means would have been to create a part time position to have enabled the claimant to apply, going through the AAC procedure, submitting the service had survived with a part time consultant for 9 years.

94. In our judgment this is a submission that must be rejected. Firstly, again, the focus should not be solely on the number or length of renewals but whether at the time of the last renewal the employment of the claimant on a fixed term contract was objectively justified. Secondly, the respondent should not have settle for the service "surviving".

95. Whilst this is not a case primarily about whether the role of consultant psychiatrist could be done remotely or part time, or both, we accepted Dr Lloyd's evidence as to why in his clinical and professional opinion, the respondent needed a physical presence at the hospital where these young people are being treated. We do not think the claimant advanced any serious case that he would be prepared to apply for the substantive post on a part time basis with the physical presence at the hospital required. It cannot be a proportionate means to create a post of which the claimant had no intention of fulfilling. It was clear to the Tribunal that the claimant only became interested in the possibility of a full time position when in his view it could be done remotely, but that was not what the respondent required or needed to deliver the service safely and effectively.

96. The position at as 14 July 2021 was that the respondent required a full time consultant to be physically present on site most of the time. We find that the claimant was not prepared to comply with these requirements. The claimant wanted a part time role and he wanted to work remotely. He had no desire or intention to apply for the substantive full time post that was available which would have enabled his appointment in accordance with the statutory requirements. We wish to be clear this is in no way a criticism of the claimant who had very understandable reasons for not wanting to return to a physical presence at the hospital. However in these circumstances, the retention of the claimant on a fixed term contract as at this date was a proportionate means of achieving the first legitimate aim relied upon.

<u>Second legitimate aim - the reorganisation of the CAHMS which would make the service more resilient (thereby removing the need for any consultant post in Ceredigion).</u>

97. At the time of the renewal of the last fixed erm contract on 14 July 2021 was the employment of the claimant under a fixed term contract objectively justified for the above reason?

98. We firstly consider whether the proposed reorganisation of CAHMS could amount to a legitimate aim. This reorganisation proposed the removal of the

claimant's post, with a restructure to create a more resilient service.

99. Ms Twomey submitted that the proposal was nothing more than a well thought out possibility, evidenced by the failure of the respondent to follow it through.

100. We did not agree with this contention. We conclude that there was a genuine proposal to reorganise CAHMS which is on hold for Dr Lloyd's stated reasons that is a combination of these proceedings and the claimant's ill health and (physical) absence from work. We considered the criticism levelled at Dr Lloyd for not progressing this proposal somewhat unfair given his stated reasons. We find that the aim – to achieve a more resilient service was legitimate and credible given the almost decade long difficulty in recruiting a consultant to lead the service. We can quite see how the respondent started to look at alternative structures in order to deliver the service needed to the children and adolescent population within their care especially in light of the pressures on the services.

101. In our judgment it was also proportionate to employ the claimant on a fixed term contract at the time of the last renewal on 14 July 2021 given the plan to reorganise the service. We cannot envisage how it could have been proportionate to do otherwise, that is employ the claimant on a permanent contract when there is a proposal, albeit on hold, to delete that very position.

102. For these reasons, the claimant's claim under regulation 9 does not succeed.

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Employment Judge S Moore

Date: 27 May 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 13 June 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche