



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Cheryl Lobo

**Respondent:** University College London Hospitals NHS Foundation Trust

**Heard at:** London Central (final hearing in public via CVP)

**On:** 7-8 July 2022  
21 July 2022 (in chambers)

**Before:** Judge Brian Doyle

**Representation:**  
Claimant: Mr Rad Kohanzad, Counsel  
Respondent: Ms Eleena Misra, Counsel

## RESERVED JUDGMENT

The Tribunal declines to make a declaration under regulation 9 as to the claimant's rights under regulation 8 of the Fixed-term Employees (Less Favourable Treatment) Regulations 2002 as the respondent has demonstrated that the claimant's employment under a fixed-term contract was justified on objective grounds under regulation 8(2)(b). The claim is thus not well-founded and it is dismissed.

## REASONS

### Introduction

1. This is the reserved judgment with written reasons following a two days final hearing conducted in public, but remotely via the Cloud Video Platform (CVP).
2. The hearing commenced at 12 noon on the first day on 7 July 2022. The Tribunal dealt with a matter concerning the relevance of some documents, which it resolved in favour of admitting the documents so that their relevance could be considered as part the hearing of evidence. Those documents related to a grievance process and to an interview process. In the event, the significance of these documents to the question in hand proved not to be central.

3. The Tribunal then adjourned to undertake guided reading of the witness statements and relevant documents. The hearing of evidence commenced at 3.00pm on the first day and concluded at 2.55pm on the second day. The Tribunal then heard oral submissions supplementing both counsels' written skeletons. It reserved its judgment at the close of the second day at 4.30pm on 8 July 2022.
4. The production of this reserved judgment by the judge has been delayed by a short illness. The judge considered the reserved judgment in chambers on 21 July 2022.

### **The claim**

5. Drawing from the final paragraphs of the claimant's witness statement, the claim might perhaps be best understood in the following way.
6. The claimant was employed as a Locum Consultant Breast Surgeon a series of fixed term contracts. She acquired four years' continuous service on 22 February 2020. She seeks a declaration under regulation 9(5) of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 to the effect that she is a permanent employee of the Trust under the Regulations.
7. The Royal College of Surgeons *Locum Surgeons Principles and Standards* [85] states that the term Consultant Surgeon is well known and carries significant weight. For this reason, the College standard is that only Surgeons on the specialist register, and hence eligible and appointable for substantive Consultant posts, can be appointed to locum Consultant positions. Locum Consultants are subject to the same pre-employment checks as substantive Consultants: immigration, fitness to work, immunisations, criminal record disclosures, professional qualifications, appraisal and revalidations. Locum Consultants, like substantive Consultants, are subject to revalidation, annual appraisals and continuous professional development (CPD) requirements. The person specification for both the claimant's Locum role in 2016 [20-121] and the Substantive role in 2021 [348-349], are very similar, and the management and audit section is exactly the same for both essential and desirable criteria for both posts.
8. The fact that the Trust interviewed the claimant for the substantive Breast Consultant Surgeon role, and is now advertising the post, suggests that there is no objective justification for not making her permanent. The 'future shape and needs of the [Breast] service' have been established and there is a need for a Consultant Breast Surgeon (the role that she is carrying out).
9. Any concerns over the claimant's performance, or performance during the interview on 10 September 2021, do not fit within the rubric of the objective justification defence set out in domestic and European case law and BIS guidance. It cannot be properly argued that refusing to make her permanent is both necessary and an appropriate way of achieving whatever supposed objective the Trust have in mind.

10. In any event, the claimant says, she carries out all the same duties as her substantive Consultant colleagues. There is no distinction in their job plans; they are all subject to the same appraisal, revalidation and CPD requirements; they all have a Responsible Officer, equal participation in MDT, governance, audit and day-to-day training of juniors and nurses; their weekly work is documented on Medirota, and they all had named theatre lists, named clinics, dedicated SPA time, and are all invited to the regular Consultant operational meetings. There are no meetings where only substantive Consultants are invited and not the claimant.
11. In addition, she is the Breast Lead for the London Sarcoma Service, Lead of the screening pathway and Co-Chair of the Proton Beam and Cancer Development Board, which evidences her managerial, leadership and governance experience and skills. Some of her substantive Consultant colleagues have no specific leadership or managerial/governance responsibilities.

### **The evidence**

12. The claimant, Miss Cheryl Lobo, gave evidence on her own behalf, supported by a witness statement.
13. The Tribunal also received witness statements from Dr Sandra Strauss (Clinical Sarcoma Lead) and Dr Sophie Pattinson (Consultant Breast and General Radiologist; Breast Radiology Clinical Lead). It was agreed that their evidence would be treated as uncontested evidence. They were not called to confirm the contents of their witness statements. Their evidence addressed the claimant's managerial and leadership experience.
14. The Tribunal heard evidence from Dr Tim Hodgson, Consultant in Oral Medicine and Honorary Associate Professor, supported by his witness statement. He was appointed Medical Director of the Specialist Hospitals Board in November 2019 and joined the Board as an Executive Director in January 2020. He first met the claimant in February 2020. The claimant reports to the Divisional Clinical Director for Women's Health, but she is accountable to Dr Hodgson as Medical Director.
15. Dr Hodgson addressed the National Health Service (Appointment of Consultants) Regulations 1996, as amended (the AAC Regulations) and why the Trust has adopted the recruitment process set out in the AAC Regulations (the AAC process) for the appointment of all substantive consultants. He explained the different requirements of a locum consultant and a substantive permanent Consultant appointed through the AAC process. He gave evidence as to why there is a current need for a substantive 10 PA Consultant in the Breast Service and what this role will involve.
16. The Tribunal also heard evidence from Ms Nicola Winn, supported by her witness statement. Ms Winn has worked for the Respondent since June 2016. She is the Divisional Manager: Women's Health Division UCLH since July 2019. As a Divisional Manager, she has joint responsibility and accountability with the Clinical Director for the Division (currently Mr Stuart Lavery) for service delivery across Women's Health. She gave evidence as to the

respondent's Breast Service and its review, as well as her involvement with the management of the claimant's fixed term contract.

17. In terms of her involvement with the claimant, and managing her fixed term contract, Ms Winn initially provided support for one of her team, General Manager Ms Katrina Hughes, who had been looking after the claimant's fixed term contracts, supporting the clinical lead at that time. Ms Winn subsequently acted as a pastoral support for the claimant from December 2019 onwards, whilst she was preparing to return to work from sick leave, and currently continue to act in this capacity. She has been undertaking this role in consultation with Stuart Lavery since he joined the Division in December 2020. When Ms Hughes left the post of General Manager, Ms Winn took over the general management of the claimant's fixed term contracts to ensure continuity while managers were changing.
18. The Tribunal had before it a bundle of documents in electronic form, which after additions made during the hearing, comprised 958 numbered pages (and an index of *i-v* pages) plus a copy of a Grievance Outcome Report. References to the bundle appear above and below in square brackets [ ].

#### **The claimant's submissions**

19. This account of the claimant's submissions draws upon counsel's written skeleton, as supplemented by oral submissions.
20. The claimant seeks a declaration pursuant to regulation 9(5) of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the Regulations) to the effect that she is a permanent employee of the respondent.
21. The claim is advanced on the basis that the claimant has been employed by the respondent as a Consultant Breast Surgeon on a series of fixed-term contracts from 22 February 2016 to date. By virtue of regulation 8 of the Regulations, having been employed for successive, continuous fixed-term contracts for more than four years, she is said to be a permanent employee unless the respondent is able objectively to justify not making the claimant permanent. The question for the Tribunal is whether the respondent's refusal to put the claimant on a permanent contract is objectively justified.
22. On the question of justification, the claimant describes the respondent's case (paragraphs 5 and 11 of its grounds of resistance) as being that it is objectively justified in not making the claimant permanent because: (i) it requires a substantive, permanent breast consultant post; (ii) the substantive post has additional managerial responsibilities to that of the claimant's; (iii) the claimant is unable to carry out the substantive post because she lacks the management skills; and therefore (iv) until the substantive post has been recruited to, it requires the claimant's contract to be extended. The claimant says that the respondent appears to rely on the claimant's purported lack of management skills for not appointing her to a permanent role. However, it is argued, objective justification cannot turn on the question of whether the claimant is or is not a good manager.

23. The claimant submits that the respondent relied upon the legitimate aim of the provision of a safe, efficient and fully functioning Breast Service. It contends that keeping the claimant in a locum, as opposed to a permanent, position is a proportionate means of achieving that legitimate aim. That is, it needs to keep the claimant on a fixed-term contract, and cannot make her permanent, because doing so would undermine its aim of ensuring a safe, efficient and fully functioning Breast Service.
24. This argument is said to be misconceived. In the grounds of resistance at paragraph 15, the respondent appears to have misdescribed the question of justification to be one that asks whether it is proportionate to keep the claimant on a fixed-term contract until the respondent employs a permanent consultant. If one pauses for a moment, it is obvious that that is not the appropriate question. If the legitimate aim is the provision of a safe, efficient and fully functioning Breast Service, then the question for the Tribunal is whether keeping the claimant on a fixed-term contract is a proportionate means of achieving that aim. The question is not whether it is proportionate to keep the claimant on a fixed-term contract whilst the Trust appoints a permanent replacement. It is unclear whether this misdescription is deliberate or simply an error in thinking.
25. The claimant's case is put in this way. The claimant has been employed by the respondent for nearly six and a half years as a locum consultant breast surgeon, purportedly on a series of fixed-term contracts. The claimant acquired four years' continuous service on 22 February 2020. As well as her Consultant Breast Surgeon responsibilities, the claimant is the Breast Lead for the London Sarcoma Service, which has resulted in the respondent being nationally recognised for this specialism in Breast Services. The claimant was also appointed Co-Chair of the Proton Beam and Cancer Development Board by the Chair of the respondent to raise monies for the new hospital.
26. The claimant says that, on 20 September 2019, the respondent attempted to terminate the claimant's contract with notice, to avoid the claimant obtaining permanent employee status. The claimant appealed this decision on 7 October 2019, and the decision to dismiss was successfully overruled following an appeal hearing on 25 November 2019. The claimant's employment was extended to 31 August 2020. However, the respondent advised that the claimant would not achieve permanent status, as they believed that continuation of the fixed term contract was objectively justified. The respondent argued that their justification was that a review/reconfiguration of the "future shape and needs of the [Breast] service" was required before permanent appointments could be made. They maintained this position for each subsequent fixed term contract renewal until the most recent renewal in December 2021.
27. The claimant's solicitor wrote to the respondent on 12 February 2021 to raise concerns regarding a campaign of race and sex discrimination, harassment and victimisation, as well as fixed-term employee detriment to which she had been subjected. The letter also advised that it was formal notice of the claimant's request, under Regulation 9 of the Regulations, for a written statement confirming that she was a permanent employee. On 12 March 2021, the respondent replied advising that it did not consider that the claimant

could be confirmed as a permanent employee. It stated that it was satisfied that there continued to be a clear objective justification for continuation of the claimant's fixed term contract. The respondent stated that its legitimate aim was the provision of a safe, efficient and fully functioning Breast Service. To achieve this aim, the respondent advised that they were undergoing a reconfiguration of the Breast Service, with other Trusts involved, to establish the skills mix required for the Breast Service; and therefore, the requirement to retain the claimant on a fixed term contract was to ensure that the Breast Service could continue to function, pending the outcome of the reconfiguration review.

28. The claimant's case is that, between February 2020 and March 2021, the respondent's position as to objective justification was that it was in the middle of a merger and could not, therefore, make the claimant's position permanent until the outcome of the review. No documentation has been disclosed regarding this "service review", and the respondent appears to be relying on the business case [429], which relates to the consultant post at UCLH and not the overall service, with the Whittington Hospital.
29. It is said that, on 15 April 2021, the claimant met with Liz O'Hara and Tim Hodgson (Director of Workforce and Medical Director Specialist Hospitals Board respectively), where she informed them that she knew the Whittington Hospital had appointed a substantive consultant. They said they did not know anything about it. On 7 May 2021 the claimant again met with Liz O'Hara and Tim Hodgson to discuss the fact that the Whittington Hospital (a hospital the respondent was due to merge its Breast Service with) had advertised for, and appointed, a substantive Breast Consultant. This appointment had been approved by the respondent on 24 February 2021, which appeared to be inconsistent with its stated position (on 12 March 2021) that the claimant could not be confirmed as a permanent employee until the reconfiguration review had completed.
30. The point of note here, it is argued, is that the respondent did not bring the matter to the claimant's attention. One would have thought it was duty-bound to do so. Furthermore, internal correspondence suggests that on 25 January 2021, Tim Hodgson asked Stuart Lavery to create another job which had to be different to the claimant's – suggesting that the respondent's case that the substantive role is different to her role is not made in good faith. During this discussion it was agreed that the claimant could apply, and would be ring-fenced for, a substantive Consultant Breast Surgeon role, via an AAC panel process, with the respondent.
31. On 23 June 2021, the claimant's fixed term contract was further extended for an additional three months. The claimant applied for the substantive Breast Consultant role in July 2021 and an interview was scheduled for 10 September 2021. The claimant had concerns about the impartiality and composition of the interview panel. Whilst those concerns do not form part of the claimant's complaint before the ET, they are relevant to both the question of the justification proffered and the respondent's contention that the claimant did not have sufficient managerial skills to be appointed to the role. On 10 September 2021, the AAC Panel interview took place. On 13 September 2021, Stuart Lavery (Divisional Clinical Director) called the claimant and explained to her

that she had been unsuccessful at interview, due to alleged underperformance at the interview, namely, that she had not satisfied the respondent's values of teamwork and improving and was thus "unappointable".

32. On 1 October 2021, Nicola Winn (Divisional Manager) wrote to the claimant, to advise that the respondent would be re-advertising the substantive Consultant role externally and that the claimant's fixed-term contract would be extended until a substantive appointment was made. Ms Winn maintained that there was an objective service-based reason to continue the claimant on a fixed-term contract. On 5 October 2021, the claimant wrote to the respondent requesting formal confirmation from the respondent of her permanent status, in accordance with regulation 9 of the Regulations, as the needs of the service had now been identified, and there was therefore no ongoing objective justification to continue to regard her as a fixed-term employee. On 22 October 2021, the respondent's solicitors responded stating that the respondent's objective justification was that the respondent required a Breast Surgeon to support its surgical offering until a substantive appointment could be made, which was justification for maintaining the claimant on a fixed-term contract.
33. On 2 December 2021, the respondent confirmed that the claimant's fixed-term contract would be extended for a further 6 months, terminating on 30 June 2022. The respondent intended to dismiss the claimant on 30 June 2022 (a week before this Tribunal hearing), but it refrained from doing so following a threat of injunctive proceedings in the High Court.
34. The claimant asserts that the respondent's case is misconceived. Regulation 8 provides that where a fixed-term employee has been continuously employed (either under single fixed-term contract or a series of such contracts) for four years or more and is then re-engaged on a fixed-term contract without continuity of employment between the old and the new contract(s) being broken, the new contract will have effect as a permanent contract unless the employer can show that it had objective grounds for continuing to engage the employee under a fixed-term contract.
35. Regarding justification in such circumstances, the guidance by BIS (now BEIS) suggests adoption of the EC law test that the employer must show that: (i) they have a legitimate objective, for example a genuine business objective; (ii) it is necessary to adhere to that objective; and (iii) it is an appropriate way to achieve that objective. The notion of objective justification in this context is similar to objective justification in the context of indirect discrimination. An employer must establish a legitimate aim and the means that they seek to implement that aim must be both necessary and appropriate ways of doing so.
36. That test has been expanded on by the ECJ in *Adeneler v Ellinikos Organismos Galaktos: C-212/04* [2006] IRLR 716 to hold that it requires the presence of specific factors relating, in particular, to the activity in question and the conditions under which it is carried out. The unequal treatment must be justified by the existence of precise and concrete factors, characterising the employment conditions to which it relates, in the specific context in which it occurs, and on the basis of objective and transparent criteria in order to ensure that the unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that

purpose (see also *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud: C-307/05* [2007] IRLR 911 ECJ para 58, applied in *Gaviero v Conselleria de Educacion e Ordenacion Universitaria de la Xunta de Galicia: C-444/09* [2011] IRLR 504 ECJ para 55).

37. Although the assessment of the objective reason put forward must refer to the renewal of the most recent employment contract entered into, the existence, number, and cumulative 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 (*Kücük v Land Nordrhein-Westfalen* [2012] ICR 682 ECJ). *Kücük* makes it clear that the need to cover staff shortages may in principle constitute an objective reason justifying the continued use of fixed-term contracts, even if temporary cover is required on an ongoing basis. However, the ECJ also emphasised that the renewal of fixed-term contracts in order to cover the need for permanent staff (as opposed to the need for replacement staff) is not justified under Clause 5(1)(a) (see paragraphs 36-37).

38. The commentary in *Harvey on Industrial Relations and Employment Law* Division A1 queries the result of *Kücük*:

“The question must be whether the same result would be reached on those facts in this jurisdiction. On the one hand, this is an ECJ decision based on principle. On the other hand, unlike Germany, the UK has adopted a dual approach to justification, not just requiring objective justification, but also setting that in the context of the primary ‘four year’ rule. It may be that on these facts a tribunal here would take the view that this is just the sort of extensive re-use of fixed-term contracts that reg 8 is meant to bar, with any claimed need for temporary cover wearing a little thin after four years.”

39. In *Pérez López v Servicio Madrileño de Salud (Comunidad de Madrid)* [2016] ICR 1168, Spanish law permitted the successive renewal of fixed-term contracts in the health sector to ‘ensure the provision of certain services of a temporary, auxiliary or extraordinary nature’. The ECJ held that this could not be relied on by the Spanish authorities to justify the successive renewal of a nurse’s fixed-term contract to cover needs that were fixed and permanent. While temporary replacements were inevitable in a large public sector service, such as healthcare, the claimant’s successive appointments did not appear to cover simple temporary needs.

40. More generally, *Harvey* goes on to state:

“An example of such justification might be where the position is of a short-term nature and has funding only for that period provided by an external source (‘hot money funding’). On the other hand, however, arguments based on, for example, convenience or past practice are unlikely to satisfy the requirement for justification... In general, the assumption might be that the justification defence is meant to be narrow and not resorted to too easily.”

41. Turning to the facts of the case, the claimant argues that, in the grounds of resistance at paragraph 15, the respondent appears to have misdescribed the question of justification to be one that asks whether it is proportionate to keep the claimant on a fixed-term contract until the respondent employs a permanent consultant. The claimant’s position is that the respondent’s case is misconceived. When one properly sets out the question to be asked – Is it



necessary and appropriate to keep the claimant on a fixed-term contract to ensure the provision of a safe, efficient, and fully functioning Breast Service? – it is clear that the question is absurd. It suggests that the respondent needs to keep the claimant on a fixed-term contract to ensure Breast Service functions safely and efficiently. It is not clear that the respondent has understood that is the proper way to phrase the question. Had they posed the question in such terms, it is unlikely that they would be resisting this claim.

42. The claimant submits it is not necessary to keep the claimant on a fixed term contract to ensure the safe and efficient functioning of the Breast Service. The Breast Service would run just as well if the claimant were employed on a permanent contract. In addition, the claimant has, in effect, been covering a permanent need for a consultant oncoplastic breast surgeon. The permanent need can be seen from the fact that the claimant has been employed for six and a half years in the role and the respondent wants to replace the claimant with a permanent, substantive role. The fact that the respondent interviewed the claimant for the substantive Breast Consultant Surgeon role, and is now advertising the post, suggests that there is no objective justification for not making the claimant permanent. The “future shape and needs of the [Breast] service” have been established and there is a need for a Consultant Breast Surgeon (the role that the claimant is carrying out). There has always been such a need and continues to be such a need. The claimant has been employed on successive fixed-term contracts to cover the need for permanent staff, which is not justified (*per Küçük v Land Nordrhein-Westfalen*).
43. As for the need for managerial skills and the claimant’s managerial skills, the suggestions that the permanent role needs management experience, and that the claimant does not have sufficient management skills, are said to be specious. There are five oncoplastic surgeons in the Breast Service, including the claimant. Only one of them (other than the claimant) has managerial responsibilities. It cannot, therefore, be a requirement of a permanent, substantive, consultant oncoplastic surgeon to carry out any managerial functions.
44. Similarly, the fact that management is not intrinsic to the substantive role can be seen by looking at the job descriptions for the substantive post [643-661]. Under the heading “The Role & Responsibilities” – there are four sub-headings Direct Clinical Care Activities, Research, and Education and Training and Clinical Governance, and other duties and obligations. Management is not a function of the role. That is fortified by the fact that no Programmed Activities (PAs) are dedicated to it [654]. If the Trust considered that management was a significant part of the role, they would have dedicated a PA or two to it. They have not.
45. Similarly, in the 2016 locum advert and 2021 substantive advert, the Roles and Responsibilities section in both adverts is the same. Furthermore, the need for managerial skills was not cited until respondent’s letter of 10 March 2022. However, after the substantive interview on 13 September 2021, the reason cited for refusing to make the claimant permanent was a lack of values of teamwork and improving. The written feedback from on 1 October 2021 was lack of focus and clarity in responding to interviewers’ questions. Those perennially shifting goalposts must be seen in the context of Tim Hodgson

asking Stuart Lavery to create another job which had to be different to the claimant's. The exit strategy was to create a post which was different to the claimant's so that the respondent could justify not giving the claimant the role and then to dismiss the claimant. The respondent's case and rationale should be seen in this light. The respondent's case that the substantive role is different to her locum role is not made in good faith.

46. Furthermore, *Locum Surgeons: Principles and Standards* published by Royal College of Surgeons provides that, for a locum consultant surgeon to be appointed, they need to be appointable in the substantive post. That alone suggests that the claimant has the requisite skills to carry out the permanent, substantive role.
47. The respondent appears to rely on the claimant's purported lack of management skills for not appointing her to a permanent role. The claimant's primary position is that this is a legal red herring and invites the Tribunal into error because objective justification cannot turn on the question of whether the claimant is or is not a good manager. If the claimant is not a good manager, the appropriate course of action for the respondent was to provide the claimant with training and then performance manage her if she did not improve.
48. In any event, the suggestion that the claimant does not have the requisite management skills is unfounded. The assertion is based upon: (i) the claimant's performance during an interview (rather than in the six and a half years of her employment); and (ii) an interview where the two clinical members of the panel should never have sat on the panel because of their lack of independence. The Trust's own report into the claimant's grievance (where she raised, inter alia, the lack of independence of the two clinical members of the panel) found that it was well-known that one of the members held negative views about the claimant and did not respect her clinical opinions and, in relation to the other, that it was understandable that the claimant would feel that he was biased against her.
49. The claimant has undertaken numerous managerial positions within the respondent with no concerns being raised as to her management skills and no performance management on the subject. The claimant has been the Breast Lead of the London Sarcoma Service (the largest Sarcoma Service in Europe), the Breast Lead of the screening pathway at UCLH, the Audit Lead and the Operational Lead. The suggestion that the claimant does not have sufficient managerial skills, based on one interview (where the two clinical members should never have sat on the panel), in the context of a surgeon that has carried out numerous managerial roles over the last six and a half years without any criticism as to those skills, is one the respondent should be embarrassed to make.
50. Furthermore, it is understood that in the claimant's most recent interview, whilst the Claimant was not appointed to the role (because other candidates were preferred), every panel member interviewing her considered that she was appointable – meaning that she had, amongst other things, sufficient managerial skills.
51. In the circumstances, the Tribunal is invited to declare that the claimant is a

permanent employee.

**The respondent's submissions**

52. This account of the respondent's submissions draws upon counsel's written skeleton, as supplemented by oral submissions.
53. By an ET1 presented on 14 December 2021 [2-19], the claimant seeks a declaration under regulation 9(5) of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the Regulations) that she is a permanent employee of the respondent. No other remedy is sought. The claimant contends that, by virtue of Regulation 8, she became entitled to permanent employee status with effect from 22 February 2020 having acquired four years' continuous service as at that date (presumably in reliance on the regulation 8(3)(b) limb). The claimant completed early conciliation prior to presenting her claim. No issue as to limitation arises on the basis that there is no claim of detrimental treatment.
54. The respondent contends that, to seek a declaration from the Tribunal under regulation 9(5), it is necessary for the claimant to have requested a written statement of variation under regulation 9(1) and for the employer to have either failed to provide a statement or to provide a statement of reasons. It is also necessary for the claimant to be an employee "at the time the application is made". This is as set out in regulation 9(6). In the ET1, the claimant does not set out the date on which such a request was made and/or refused, but this is set out in her witness statement at paragraphs 36 to 38.
55. By its ET3 at [22-33], the respondent denies that the claimant is entitled to a declaration that she is a permanent employee. Simply, its position is that the use of a fixed term contract is objectively justified (see regulation 8(2)(b)). The respondent takes no issue with the date upon which the claimant would in principle acquire permanent employee status. A claim for a declaration under regulation 9(5) appears not to be caught by the limitation provisions of regulation 7, but it requires the employment to be ongoing at the date of determination (in the respondent's submission); alternatively, at presentation.
56. The claimant's contract was due to end on 30 June 2022 on expiry of a fixed term. However, the Tribunal need not now determine this potentially jurisdictional issue as, upon threat of an injunction application, the respondent has pragmatically agreed to undertake not to terminate or give notice to terminate the claimant's employment before the earlier of (a) the Tribunal's judgment in this matter, or (b) 30 September 2022. As such, the claimant will be an employee of the respondent at the time of the hearing of the claim on 7 and 8 July 2022 and is likely also to be in employment when the Tribunal determines it
57. The respondent submits that it had the legitimate aim of providing a safe, efficient, and fully functioning Breast Service and that it was appropriate and necessary to engage the claimant on a fixed term contract because: (i) the Breast Service should not be left under-staffed where this is avoidable, as this would be both inappropriate and unsafe for the patients it looks after; (ii) it would be disproportionate and inefficient to terminate the claimant's fixed term

contract and recruit a new consultant on a fixed term contract for an interim period (including to support its surgical offering until such time as a substantive appointment is made); and (iii) there is a clear need for the Breast Service to recruit a permanent substantive Consultant pursuant to the AAC Regulations which entail a rigorous selection procedure from a pool of suitably qualified candidates.

58. This is, accordingly, a proportionate means of pursuing a legitimate aim and is a service-focussed decision and not one that is personal to the claimant, evidenced by the fact that she has been given a fair opportunity to apply for the substantive post (and take part in an interview). The respondent does not wish to denigrate the claimant's skills and the valuable service she has provided to the respondent as a Locum Consultant Breast Surgeon, including during the acute phases of the pandemic. It is grateful to her for this. However, it is not for the Tribunal to assess the claimant's individual performance or to second guess how she may have performed in interview, as this is not pertinent to the legal issue in contention.
59. Accordingly, the Tribunal has a very narrow issue to determine which is whether the use of the latest fixed-term contract is objectively justified within the meaning of Regulation 8(2)(b). The respondent submits that the question is to be determined as at the date that the declaration is sought: that is, at the point of presentation of the ET1 or, alternatively, as at the date of the hearing, having regard to the latest extension to the fixed term. This is consistent with the language of regulation 9 which speaks of current employment status.
60. As for the factual matrix, the respondent relies on the evidence of Ms Nicola Winn, Divisional Manager in the Women's Health Service (and formerly Deputy Divisional Manager); and of Dr Tim Hodgson, Consultant in Oral Medicine, Honorary Associate Professor and Medical Director.
61. In the respondent's account of the facts, the claimant has been employed by the respondent as a Locum Consultant Breast Surgeon on a series of fixed-term contracts commencing on 22 February 2016, the latest of which appears at [638- 640] and [642]. That contract would have expired on 30 June 2022 but for the undertaking referred to above.
62. In 2019, before the claimant was eligible to acquire permanent status pursuant to the Regulations, the respondent began a process of review of its Breast Service as to its current and future needs, structure, and partnerships, alongside the breast services provided by other NHS trusts in the North Central London (NCL) area. One issue in contemplation was decreasing the number of Consultants leading the service and increasing the number of posts below Consultant level: for example, specialty doctors and trainees.
63. During this time, the respondent had need of the clinical skills and cover of a Locum Consultant Breast Surgeon pending its decision as to the structure of the Breast Service once the review had concluded. The claimant provided valuable assistance to the respondent in this role, which was under the auspices of a fixed-term contract. The claimant was not required to undertake the managerial or research duties ordinarily expected of a substantive Consultant Breast Surgeon and was not required to be appointed through the

process set out in the NHS (Appointment of Consultants) Regulations 1996 (AAC Regulations), which the respondent adopts (see paragraphs 6-9 of the Rider to the ET3 at [31]).

64. The review was completed in May/June 2021, at which point it was identified that a substantive and permanent Consultant Breast Surgeon role was required. It took longer than expected, partly due to the impact of the Covid-19 pandemic on the respondent NHS Trust. The review process continued (see, for example, [243-254] in May 2020) and culminated in a proposal in June 2021 that there should be a new full-time substantive Consultant Breast Surgeon post within the respondent's service: [374-382], [383-402]. The business case was set out, after some review and modification, in July 2021: [425-432]; paragraph 12 of the witness statement of Nicola Winn.
65. In July 2021, the respondent gave the claimant the opportunity to apply for the permanent substantive Consultant Breast Surgeon role, which it ringfenced for her in the first instance: [436- 437]. She applied and was interviewed on 10 September 2021, but she was unsuccessful. That post has now been advertised and a competitive AAC Regulations process has been completed. For the avoidance of doubt, the claimant was interviewed under the AAC Regulations process so, had she been successful, there would have been no impediment to her appointment to the 10PA Consultant post based on the recruitment methodology. Had the claimant been successful she would have been appointed to the new full-time substantive and permanent Consultant Breast Surgeon role, and it is not the case that her locum post would simply have been "rebadged". That locum post would have ended as previously indicated and it would not have been re-filled, as the need for sessions (the claimant was undertaking 6 PAs) would be subsumed into the 10PAs for the substantive post.
66. That the claimant was offered the chance to be interviewed for this post on a ring-fenced basis was fair in all the circumstances and a show of good faith on the part of the respondent, which recognised she had been working for the Trust for some time and deserved to be considered for the substantive post.
67. As to the legal matrix, the respondent accepts that the claimant has the right to seek a declaration pursuant to regulation 9. It does not take any point on limitation on account of its construction of the Regulations, which appear to place no time limit on bringing such a claim for so long as the employment continues. The legal test for the Tribunal to consider is whether the use of a fixed-term as opposed to permanent contract of employment (the latest of which appears at [638-640] and [642], subject only to the undertaking recently agreed) is objectively justified, to use the language of regulation 8(2)(b).
68. In its archived guidance, the Department of Trade & Industry (DTI) suggested that to meet the test of objective justification, the use of a fixed term contract would have to be to achieve a legitimate objective and should be both necessary and appropriate:

"What might be objective justification for fixed-term contracts beyond the 4-year period?"

Fixed-term contracts may be renewed beyond the 4-year period provided the renewal

is objectively justified. This renewal will be justified on objective grounds if it can be shown that the use of a further fixed-term contract –

- is to achieve a legitimate objective, for example a genuine business objective
- is necessary to achieve that objective
- is an appropriate way to achieve that objective.

Employers and representatives of employees may agree objective reasons for the renewal of fixed-term contracts as part of a collective or workforce agreement. For example, the employers and union or other representatives of professional sportspeople, actors or other employees where it is the traditional practice for employees to work on fixed-term contracts may agree, in a collective or workforce agreement, that the nature of the profession or work should be regarded as an objective reason for renewing fixed-term contracts.”

69. The respondent ventures that there is no reason why the well-established jurisprudence in the field of indirect discrimination ought not also to assist the Tribunal in approaching the question of objective justification given that one might see fixed term working status as a form of characteristic protected in a different piece of legislation in which a balance must also be struck between the rights of the employer and employee. This is supported by the fact that the Regulations implemented Council Directive 99/70 and the Framework Agreement on Fixed-Term Work the purpose of which is to “improve the quality of fixed-term work by ensuring the principle of non-discrimination” and “establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships”.

70. The respondent submits that a legitimate aim in respect of putative discrimination need only correspond to a real business need. There is no requirement at all that it should have any social policy aims or wider public interest (except in relation to age discrimination which is not engaged here).

71. A legitimate aim is not sufficient; proportionate means must be adopted to pursue it. The test is whether it is appropriate and reasonably necessary. In *Homer v Chief Constable of West Yorkshire Police* [2012] ICR 704, SC, Lady Hale stated (paragraph 20):

72. "It is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement ... Some measures may simply be inappropriate to the aim in question ... A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate ..."

73. In *Hardy and Hansons Plc v Lax* [2005] ICR 1565, CA, the task with which the Tribunal must grapple was summarised helpfully in paragraph 32 which makes the cogent point that it is not for an employer to show that no other proposal is possible, but rather that the proposal (here the use of a fixed-term contract) is justified objectively notwithstanding any discriminatory effect. This requires the Tribunal to consider the reasonable needs of the employer in making its own judgment. The test is not one of a range of reasonable responses, however.

74. The assessment of the objective reason is by reference to the most recent renewal of the contract, but it is open to the Tribunal to have regard to the

history of renewals in the past: *Kücük v Land Nordrhein-Westfalen* [2012] ICR 682, CJEU (see paragraphs 40 to 41).

75. In *Duncombe v Secretary of State for Children, Schools, and Families* [2011] ICR 495, SC, Lady Hale in her leading judgment concluded that the application of what was described as a nine-year rule under specific regulations pertaining to teachers working in European schools could easily be justified on an objective basis, noting that the complaint was about the fixed term nature of the employment rather than the use of successive contracts for up to nine years. Had the teachers been employed under a single fixed term contract for nine years this would not have offended against the Regulations. It was the latest fixed term contract that needed to be the focus of any argument on objective justification (paragraph 25).
76. If the Tribunal determines that the claimant did become a permanent employee then, aside from making a declaration to that extent, it has no power to make any other declaration and regulation 9 provides no warrant to go further than regulation 8(2), that is, to declare that the provision of the contract that restricts duration shall be of no effect. Insofar as the claimant seeks a declaration in any wider terms, including as to whether the locum status of her contract is affected, this would be an invitation to fall into an error of law.
77. Counsel for the respondent submitted that there can be no sensible challenge to the legitimate aim pursued by the respondent, which must be an aim shared by the claimant, at least in part. There is no cogent evidence that this is a false or disingenuous aim.
78. As at the date that the latest fixed-term contract was due to expire and was renewed, the respondent knew that the service review, which took into account how it would work with other neighbouring NHS Trusts in North London, was finally complete, and that it needed to appoint a substantive Consultant Breast Surgeon on a 10PA (standard) contract which would be on a permanent basis now that the period of uncertainty caused by the review was at an end.
79. It was appropriate and necessary to appoint such a Consultant under the rigorous AAC Regulations and the claimant was interviewed under these, but, unfortunately, she was not successful. The respondent has every right to seek the best person for the job through a prescribed process that all NHS Trusts follow so far as it is aware.
80. It was appropriate and necessary to secure the provision of clinical services to meet the needs of patients pending the appointment of the substantive Consultant and to use a fixed term contract for a Locum Surgeon (that is, the claimant) to do so. This was especially the case given the likely short-term duration of any gap in appointment. The process was in part held up by the claimant's internal complaints that she was not simply given the substantive post. It was appropriate and necessary to resolve those matters internally. The claimant cannot reasonably argue that the respondent should have hired different surgeons under a series of fixed-term contracts or that it should not have secured sufficient clinical and surgical provision for its patients. With hindsight, had the parties known how long the review would take, perhaps a

single fixed-term contract could have been agreed at the outset, but it is hardly surprising that that level of certainty was not possible.

81. The use of a fixed-term contract in the claimant's case has been through consultation between the parties in a period of flux and was neither abusive nor discriminatory in all the circumstances. It has been beneficial for both parties to know where they stand and the respondent has been transparent with the claimant throughout and maintained its position that her contract is pending the service review and agreement as to the way forward for the Breast Service, as well as being fixed-term and not permanent in nature. The claimant has been equally vocal (as is her absolute right) about her needs and desire to balance her lifestyle in a way that suits her. One cannot assume that the use of a fixed-term contract is *per se* abusive.
82. The respondent submits that the claimant ought not to be the subject of a declaration as to her rights under 8(2) of the Regulations as the respondent has demonstrated objective justification for use of a fixed term contract applying the appropriate and necessary test. Moreover, if the Tribunal does make a declaration under regulation 9, as stated above, it can go no further than regulation 8(2) provides in any event. That would mean that the claimant had permanent employee status as a Locum Surgeon. It is notable that she had already acquired the right not to be unfairly dismissed and had a contractual notice period, and it is unclear why this declaration has been pursued in all the circumstances given it does not materially enhance the claimant's position and she has already been given the chance to apply for the substantive post.

### **Findings of fact**

#### *General background*

83. The claimant's case in part questions why she cannot be slotted into a substantive Consultant role that the Trust is currently recruiting to and which she believes she is covering, entirely, on a locum basis. To appoint to a substantive Consultant role, the Trust must follow the stringent process prescribed by the AAC Regulations; and the locum role and the substantive Consultant role are not the same.
84. The AAC Regulations require non-Foundation Trusts to conduct a competitive interview process for substantive Consultant posts. The requirements of this process are that a specific and approved job description is drafted; the post is advertised nationally; and the interview is conducted by a specifically selected panel, the panel members being defined by the AAC Regulations [773-775]; and the interview conducted in an equitable manner, such that the strongest candidate(s) is/are appointed.
85. The process is rigorous and transparent because the appointment of a medical Consultant is a very difficult decision and very different to the appointment of any other grade of medical staff. Consultants are the most senior members of the clinical team and have ultimate clinical responsibility and accountability for all team members and their actions. The process allows candidates to demonstrate their suitability for appointment to a senior clinical



post. It also helps Trusts ensure the highest level of patient care because only the most suitable and able doctors are appointed to these senior roles. The process identifies suitability in four domains: clinical skills; teaching; research and management/leadership with attention to UCLH Trust values of safety, kindness, team work and improvement.

86. Locum Consultant appointments not exceeding 6 months (with a maximum extension of 12 months) are exempted from the AAC Regulations [771]. The claimant's fixed term contract has been renewed beyond 12 months, but she has not been appointed through an AAC process. There is no evidence of her being successfully appointed to a Consultant post through such a process in any other Trust.
87. The respondent Trust is a Foundation Trust. It is not obliged to follow the AAC Regulations. However, it follows best practice. It has taken a corporate decision to follow the Regulations for governance reasons which are underpinned by its focus on ensuring the highest clinical standards and patient safety. The Trust has its own specific process for AAC panels [295]. It follows Department of Health best practice guidance [786].
88. It is also seeking to make its process more robust and more aligned with current expectations of medical practice and services and team cohesion by implementing an "AAC plus" process for all substantive Consultant appointments. The additional requirements being implemented are: two hours pre-interview online psychometric testing using three different assessment tools of shortlisted candidates; and a stakeholder panel interview prior to the main interview where members of the team the prospective Consultant will be working are given the chance to make an assessment. The psychometric tests allow the main panel to adapt its questioning of the candidates to best test candidates' suitability. In terms of the stakeholder interviews, the main panel only receives feedback about this once they have carried out the main interview and after each panel member has given a summary of the candidates' performance in interview. The information on stakeholder performance is presented to panel to aid final decision making.
89. What these additional assessments give the Trust is a more rounded picture of the candidates' personality and fit within the team. Team cohesion is important for patient safety, and this is taken on board in the recruitment processes. Additionally, a substantive Consultant appointment is potentially long-term, and it is important for both the Trust and the candidate that a fair and well-informed decision is made.
90. None of the substantive Consultants at the Trust have been appointed without at least evidence of them having been appointed either in this Trust or another Trust through an AAC process. Dr Hodgson was not aware of any other FT in London which does not use the AAC process for its substantive consultant appointments.
91. If the respondent Trust was a non-Foundation Trust, it could apply under the AAC Regulations for prior consent of the Secretary of State to not openly advertise a permanent consultant post [773]. If such approval is given, a formal panel must still be convened with the membership defined by the AAC

Regulations to assess the candidate's suitability for the role. The respondent Trust used its Foundation Trust discretion to mirror this exception in the claimant's case because she had worked for the Trust for a long time. To ensure as fair a process in relation to its management of her, the Trust wanted to give her the opportunity to demonstrate her capability to be appointed to the substantive Consultant post without open competition. Following the Trust's clear governance rules, it did set up an AAC panel. The claimant was given executive coaching for the panel interview to help her perform as best as possible, which was unusual. She attended an interview for the role in September 2021. She was not successful in her application and the Trust did not appoint her. She has reapplied for the role in open competition. She has twice previously applied for similar substantive Consultant roles in the Trust. She was not appointed to the roles she applied for.

92. The locum Consultant role is fundamentally a service delivery clinical role, the purpose of which is for the person appointed to see patients for new appointments surgery and follow up, working within a multidisciplinary team. Typically, the Trust appoints locum Consultants to cover temporary service gaps such as transition periods whilst a service is being re-configured (it is said that this is what the Trust did with the claimant) or a period of planned leave of substantive colleagues such as sabbaticals or maternity leave. It uses the locum Consultant role to maintain a clinical service with senior doctor presence.
93. The contracts used for locum Consultants are the same as for the substantive Consultants. This is for administrative ease. The actual difference in what they do and are expected to do is reflected in the day-to-day practice. A locum Consultant will contractually rarely have more than 1 SPA (Supporting Professional Activity) built into their weekly Job Plan. This SPA allows time in their working week to complete tasks such as mandatory training, job planning, appraisal preparation, attending clinical meetings and professional learning. Substantive Consultants have a significantly larger number of SPAs (1.5 to 2.5) in their weekly job plan. This allows them time in the working week to undertake the wider managerial/governance work that is expected of the substantive Consultants, including audit, governance, internal/external meetings to discuss service performance and strategy, and leadership role duties if they have this responsibility. In addition, teaching and research takes place in these SPAs. The number of SPAs will vary according to the role that the substantive Consultant is carrying out and the team they are working in.
94. Locum Consultants are not expected to carry out this wider managerial/governance work nor are they encouraged or given the opportunity to do so. Dr Hodgson commented on the claimant's statement that she carries out the Sarcoma Lead role within the Breast Service. This is not a role she has been given or is expected to undertake. It is not a role that is actively recognised in the Trust or the Service. It is something she has personally created from a perceived need. What the role means in practice is that the claimant undertakes the surgical procedure of removing the sarcoma growth from a patient's breast or chest wall as designated by sarcoma MDT. While overall sarcomas are a rare tumour, only a small proportion affect the breast or chest wall, there being around 10 presenting patients under care at any given time. The claimant happens to have done more of this procedure

than others. However, she is simply carrying out a procedure which is part of the duties of her clinical role. This is not a leadership role of the nature asked of substantive Consultants to undertake. Where substantive Consultants undertake a clinical lead role they are in charge of junior doctors, they drive the strategy and service improvement in a particular area and engage in meetings with the clinical director and the medical director about this. In the Breast Service there is a single clinical lead and the claimant has never undertaken this role and is not expected to.

95. The locum Consultant is not expected to carry out job planned formal teaching or research as part of the role. However, this is a focus of the substantive Consultant role. The Trust is a major teaching hospital and research centre. When it appoints substantive Consultants it does so on the understanding that they will progress this aspect of the role as well. Again, the degree to which they do so depends on the nature of the actual role and the team. The claimant has no demonstrable record in either area.

96. The substantive Consultant role that the Service needs is a 10 PA role. PA's are programmed activities. Each PA is 4 hours. The PAs include the SPAs described above. A full-time substantive Consultant carries out 11 PA's per week. The 10 PA substantive breast Consultant role will absorb and replace the locum Consultant role that the claimant is undertaking, specifically all the clinical duties. The claimant currently works 6 PAs per week.

97. The substantive role will also undertake a wider managerial gap that is much needed in the Trust. The Trust is in ongoing dialogue with the Whittington Hospital regarding joint Breast Service provision and the substantive Consultant will be expected to further move this dialogue forward. Additionally, they will need to engage in wider strategic meetings/discussions within the North Central London Trust area to again drive forward service improvement. Another area they will need to engage in is teaching and research. Teaching is something that the Service has lacked because of lack of resource due to meeting patient demand. This has resulted in the Trust having active trainees removed from its team as they could not be supported, which is detrimental to the service. The Trust needs to re-build this, and the substantive Consultant appointed will be expected to engage in this. The job description for the 10 PA substantive post is at [705] and shows that there is an expectation of 2 SPAs to be incorporated into the job plan to allow for management, governance and teaching elements to take place.

98. The substantive Consultant role and the locum role that the claimant is undertaking are different. The Breast Service does not require a permanent employee carrying out the role the claimant is currently carrying out – that is, “a permanent locum consultant”.

#### *The Breast Service and its review*

99. The Breast Service at the Trust provides a comprehensive breast service for patients in the North Central London area. It specifically focuses on the diagnosis, treatment, and care of all stages of breast cancer and all benign breast conditions. It also offers second opinions for patients who are concerned about their diagnosis and/or treatment plan. In terms of structure,

from a clinical perspective, there are currently four substantive Consultants who work either full-time or part-time. The claimant also works as a Locum Consultant on a part-time contract. Under consultant level, there is one speciality doctor and three clinical fellows (Speciality Trainee 3 level).

100. The Breast Service review was in contemplation from 2019 onwards for two key reasons: internal personnel changes and wider external strategic demands from the North Central London (NCL) Trust network. The internal changes were caused by several factors, including the retirement of one of the senior Breast Consultants, as well as reduction in NHS commitments of other members of the team. There was a need to consider general team planning at consultant level against the Trust's patient and service demands.
101. The external NCL strategic demands were created in part because the service being provided by the Trust at that time, and its neighbouring Trust (the Whittington), was recognised as being sub-scale. The Trust needed to think about how both services could work together to provide a joint service offering in some manner, thereby creating strength and resilience. Alongside this was consideration by the Trust as to whether the current balance of Consultant capacity compared to junior capacity was the best model for service provision or whether a larger junior doctor workforce led by fewer Consultants could work better. The situation with these internal and external considerations drove the need to review options more widely and form a view as to what the most suitable clinical workforce make up would be [139-141].
102. The review took much longer than anticipated because of the COVID-19 pandemic. Given the clinical and management pressures that the pandemic placed, not only on the Trust, but on the NHS, energies were focused on getting through the day-to-day challenges. All non-essential matters, including this review, were paused. However, during the pandemic, the Trust did recruit several junior doctors on fixed term contracts to help cover service needs. This gave it a chance to test out a modified service model to see how it would work, albeit in atypical circumstances.
103. The review was picked up in late 2020/early 2021 and completed in late Spring 2021. By this stage, on the external NCL front, the Trust had established a Multi-Disciplinary Team (MDT) function with the Whittington, and this is ongoing and continuing to progress. The MDT is a forum where health professionals from various specialisms meet to discuss specific patients and clinical issues to ensure that a holistic approach to diagnosis and treatment is used before determining a final plan for the patient. One of the substantive Consultants has a joint post with the Whittington. The Trust continues to work with the Whittington on the "joint service journey".
104. The Review concluded that the Service needed to maintain a balance of Consultant capacity in addition to a level of junior doctor capacity. This was to deliver the necessary workload considering that there is certain work that only Consultants can do, and Consultant oversight of other tasks is required. This led to the creation of the substantive 10 PA Consultant role which will absorb the Locum role that the claimant is currently undertaking. This substantive 10 PA Consultant role is a UCLH Trust role and not a joint post with the Whittington based on identified capacity needs at this time. The Trust

was only able to come to a clear conclusion regarding both internal and external workforce needs once all aspects of the Breast Service review had been completed as they were clearly interlinked [374-377, 404-423, 425-432].

105. For the avoidance of any doubt, the Tribunal does not accept the claimant's contention that there was in fact no "review". The review is not perhaps evidenced in the way that might be expected: terms of reference, identification of those undertaking the review, an agreed timescale for report, regular meetings appropriately diarised, formal agendas, notes and minutes, and so on. Yet what emerges from the witness and documentary evidence is a review process that resulted in a business case that went through a number of iterations, from which eventually emerged, in the difficult circumstances described, a decision to recruit to a substantive consultant position.

*Management of the Claimant's fixed term contract*

106. While the review was being undertaken and during the pandemic, the claimant's Locum Consultant post was renewed pending the outcome of the review. There was considerable clinical work that needed to be undertaken. Without the claimant's locum role, the Trust would have been understaffed and would not have been able to provide a safe and fully functioning Breast Service. However, it was not possible to make a clear business case to recruit to cover a clinical need on a permanent basis until it was clear exactly what the service need was from a clinical staffing perspective, both for current purposes and for the longer term.

107. Furthermore, it would not have made practical sense for the Trust to terminate the claimant's fixed term contract, and then simply recruit another individual on a further potentially short fixed-term contract pending the outcome of the review and clarification of what the clinical staffing needs were, given the uncertainty on timescales. During the height of the pandemic, the Trust needed every clinical resource available because so many staff were absent with COVID-related sickness. This provided further justification in these circumstances to continue with the claimant's fixed term contract to support the Trust through this crisis. The claimant had the advantage of knowing the Trust and the systems. The Trust recruited junior doctors on fixed term contracts to support clinical service need as well, but it still needed clinical cover at Locum Consultant level.

*The claimant's employment history*

108. The claimant qualified from Imperial College School of Medicine. She undertook higher surgical training in the London Deanery. She was awarded a CCT in general surgery with a sub-specialty interest in breast surgery. She is a fellow of the Royal College of Surgeons and a member of the Association of Breast Surgeons.
109. The claimant started her employment with the respondent on a fixed term contract as a Consultant Oncoplastic Breast Surgeon on 22 February 2016. This was and is her first position as a Consultant. She was appointed by an Appointments Committee. She was initially appointed for a fixed term contract of 1 year. The relevant Guidance says that Locum appointments are exempt

from the AAC process provided the employment is for an initial period not exceeding six months and any extension for a maximum period of a further six months is subject to a satisfactory review by the Trust and to consultation with the relevant College [806].

110. In her role as a Consultant Oncoplastic Breast Surgeon, the claimant has fulfilled the values of the Trust; and she has followed the guidance of GMC Good Medical Practice. As an experienced Consultant in a high performing unit, she specialises in the management of all aspects of breast disease with the emphasis on survivorship. The claimant can perform all oncoplastic procedures as Lead Surgeon and Trainer. She has not undertaken and does not intend to undertake private work outside the NHS.
111. The claimant set up the breast screening service pathway 6 years ago. She is the Breast Lead for the London Sarcoma Service. She leads on planning the service; managing the delivery of the service, which includes establishing pathways for operational efficiency and better patient experience; co-ordinating teams across two Trusts, including sarcoma oncologists and specialist nurses, breast surgeons and cancer nurse specialists, plastics surgeons, histopathologists and radiologists; and management of key performance indicators with running of national and local audits. She was appointed Co-Chair of the Proton Beam and Cancer Development Board in 2020. She has an active role in fundraising and in staff wellbeing.
112. The claimant's fixed term contracts were renewed for a year for the first 2 years, then 6 months, and subsequently a further year until 31 August 2019. The Trust's Management of Fixed Term Contracts Guidance for Managers states that Locum Consultant appointments should be limited to 2 years. This Guidance also states that it is not good practice to keep an individual on a fixed term contract for a lengthy period and this would not be normal practice within the Trust [117]. The NHS Executive guidance advises that consultant locum appointments be made for no longer than 6 months. Posts may be extended by a further 6 months subject to a satisfactory review by the Trust and in consultation with the College [86].
113. On 30 May 2019 Massimiliano Cariati (Consultant Oncoplastic Breast Surgeon and Clinical Lead) offered the claimant a 12 months extension to her fixed term. He encouraged her to believe that he would assist her to obtain a substantive post.
114. On 31 May 2019, the claimant emailed Mr Cariati and Katrina Hughes (General Manager, Women's Health) seeking confirmation of the extension of her contract. The Unit was planning to employ another locum Consultant, in addition to the claimant, which concerned her. She did not want the Unit to employ another locum Consultant and then to dismiss her on the basis that there was not sufficient work. Mr Cariati replied that "our plan is that your contract will be renewed, particularly in view of the forthcoming reduction in WTE Consultant body."
115. The claimant met with Mr Cariati and Ms Hughes on 25 June 2019. She was told that the Trust were reviewing the business case to look at the service; that they did not anticipate any issues in extending her contract for a year; and that

they were fully committed to doing so; but that they had to follow the process; and that they could offer her a 3 months extension in the interim. The claimant responded explaining that she was concerned that the Unit was still advertising for another locum role whilst they were only offering her a 3 months extension. The claimant's view was that the business case did not need to be changed as they continued to reduce outsourcing, although not as much as previously anticipated [128-129].

116. On 21 August 2019, while she was on a period of post-operative sick leave, the claimant telephoned Ms Hughes and was advised that the Unit could only offer her a 3 months extension. She told Ms Hughes that she would not want to come back for a 3 months extension to her contract. She did not understand why the Trust were advertising for another 1-year locum Consultant post when they had not sorted out her post.
117. The claimant spoke to Mr Cariati on 23 August 2019 and explained that she would not be returning if all she was being offered was a 3 months extension to her contract. He acknowledged that with another Consultant (Jenny Gattuso) retiring, the Unit needed to keep the status quo in terms of the number of Consultants. He reassured her that she would be offered a one-year extension. The claimant emailed Ms Hughes on 26 August 2019 to accept that offer.
118. Ms Hughes replied on 29 August 2019. She stated that the claimant would have to take a two weeks break in service if the Unit was going to offer her a 1-year extension. The claimant declined a two weeks break in service.
119. She returned to work on 2 September 2019. An informal meeting was arranged with Mr Cariati and Ms Hughes on 3 September 2019 to discuss the claimant's contract. She was accompanied by Julian Price (BMA Adviser) [71-75].
120. During the meeting the 12-months extension to the contract with a two weeks break in service was withdrawn. The claimant was again offered a 3 months extension to her contract. She refused. Mr Cariati stated that the Trust/Division were working to establish a partnership with the service at the Whittington Hospital with the aim of developing one joint service and a single MDT (Multi-Disciplinary Team). The plan in the interim period was to extend the claimant's contract for a further period, but that this would result in her contract reaching 4 years continuous service and the position becoming permanent, which was not in keeping with the service requirements.
121. The claimant expressed her view that the service requirements had not changed; that discussions regarding the amalgamation of the service between the Trust and the Whittington Hospital had been ongoing for some years; and that discussions about her contract should have taken place 3 months earlier. She pointed out that 2 weeks earlier a second Consultant had been employed. She questioned why her role had not been continued in the context of the requirements for an additional Consultant. The claimant felt that all the Consultants' job plans should have been considered prior to recruiting an additional Consultant in keeping with the Trust's Job Planning framework, which states that "...each time a new consultant post is approved (and prior to advertisement), the opportunity should be taken to review job plans of all

consultants within the department" [735].

122. At the end of the meeting, the BMA Adviser summarised the points for Ms Hughes to consider, as follows. The Trust should honour the offer of a 12 months extension to the fixed term contract. The treatment of the claimant was detrimental in terms of her fixed term contract status. There was possible discrimination on the grounds of gender. The arrangements in relation to the fixed term contract were all foreseeable. The Trust had sufficient time to sort out the contract. Any decision made should not cause the claimant to suffer an unreasonable detriment.
123. On 20 September 2019 Ms Hughes advised the claimant that her fixed term contract would not be renewed. The Trust was giving the claimant formal notification of termination. The date of termination would be confirmed following a further meeting [149-150].
124. The claimant appealed this decision on 7 October 2019 [78-82]. She requested that her dismissal be rescinded and that she be offered a 1 year's extension to her contract with no break in service.
125. Nicola Winn (Division Manager, Women's Health) was due to hear the appeal. The claimant raised concerns about this. Felicity Hunter (Division Manager, Paediatrics) was then appointed as Chair of the appeal. The claimant made representations that her appeal should be heard by someone more senior than the decision-makers. Ben Morrin (Director of Workforce) was then appointed to hear the appeal.
126. The appeal hearing took place on 25 November 2019. The claimant was accompanied by Lettie Smythers (Senior BMA Adviser) [159-169]. Mr Cariati set out the management case. Both sides provided their summing up and arguments. Mr Morrin adjourned his decision.
127. On 11 December 2019 Mr Morrin provided his decision. He stated that he had no doubt that the Breast Service needed a review and that collaboration in a joint service with the Whittington Hospital was being worked on. Therefore, the Service was not able to increase the permanent Consultant workforce. He stated that the process followed with regards to the ending of the fixed term contract could have been timelier and more clearly communicated. As a result, he proposed that the Trust extend the fixed term contract to 31 August 2020. However, he stated that the Trust felt that the extension of the fixed term contract was objectively justified and therefore the claimant would not automatically become a permanent employee on 22 February 2020, although an application from her would be welcome for any permanent opportunities that arose [188-191].
128. Following a telephone discussion with Ms Hughes regarding an extension to the fixed term contract on 22 June 2020, Ms Hughes wrote to the claimant to confirm that her contract had been extended to 28 February 2021. She stated that this was due to additional time being required for the Breast Service review, because of the impact of the Covid-19 pandemic [205- 206].
129. The claimant replied on 23 June 2020 that she did not agree in December



2019 nor at that time that there was objective justification for her being on a fixed term contract. She considered herself to be a permanent employee.

130. Ms Hughes replied on 25 June 2020 that she noted the dispute in relation to the contract, but that the Trust did not consider the claimant to be a permanent employee; that they believed that there was objective justification for the fixed term contract; and that their position had been made clear on this [209].
131. On 10 December 2020 the claimant's contract was subsequently extended again until 28 August 2021 [261-262].
132. On 25 January 2021, an email exchange took place between Tim Hodgson (Medical Director) and Stuart Lavery (UCLH Divisional Clinical Director, Women's Health). The claimant was unaware of this exchange. Dr Hodgson stated that in his opinion the claimant was "unsubstantive" and had never demonstrated the capability of substantive appointment. He continued that if the team was to move to 5 Consultants they would need to advertise and recruit to the 5th post, which would need to be different to the post the claimant was occupying presently. He suggested that it could be an increase or decrease in the number of PAs working on specific days, and if not, the Trust would need to support "an exit strategy" [824].
133. In the claimant's opinion, this had nothing to do with service needs and was just "politics". Her view is that it also demonstrates that the Trust's real reasons for terminating her contract had nothing to do with a service review or the objective justification that they have asserted. If Dr Hodgson had any concerns over the claimant's performance in her six and a half years of employment, he had not raised them with her.
134. Separately, four of the male Consultants in the Breast Service team made several complaints against the claimant and another female colleague, Joanna Franks. These were investigated under the Trust's Raising Concerns process. Whilst the investigators found that there was significant disharmony amongst the team, they also determined that there was no evidence to support the concerns about the claimant's practice. However, in Point 8.8 of the investigation report, the investigators warned the Trust that, if her employment was not sorted, one or all four of the male Consultants were likely to bring legal action against the Trust.
135. The claimant's solicitors at the time wrote to Liz O'Hara (Interim Workforce Director) on 12 February 2021 to raise concerns regarding a campaign of race and sex discrimination, harassment, and victimisation against the claimant, as well as fixed term employee detriment to which she had been subjected. The letter also advised that it was formal notice of the claimant's request under Regulation 9 of the Fixed-Term Employee (Prevention of Less Favourable Treatment) Regulations 2002 for a written statement confirming that she was a permanent employee [224-229].
136. Ms O'Hara replied on 12 March 2021 and denied that any discrimination had taken place. She also stated that the claimant had not been subject to any fixed term detriment.

137. With regards to permanent status, Ms O'Hara advised that the Trust did not consider that the claimant could be confirmed as a permanent employee, as they were satisfied that there continued to be a clear objective justification for continuation of her fixed term contract [234-238]. She stated that the Trust's legitimate aim was the provision of a safe, efficient, and fully functioning Breast Service. To achieve this aim, Ms O'Hara advised that they were undergoing a reconfiguration of the Breast Service, with other Trusts involved, to establish the skills mix required for the Breast Service; and, therefore, the requirement to retain the claimant on a fixed term contract was to ensure that the Breast Service could continue to function, pending the outcome of the reconfiguration review.
138. Ms O'Hara implied that the Trust could offer the claimant the title of "Permanent Locum Consultant", as she stated that the claimant would not be entitled to adopt the title of fully accredited substantive Consultant, as she would not have been appointed through the AAC Consultant appointment process. The claimant understands that the Trust, as a Foundation Trust, is not required to comply with the AAC Regulations, although they have advised they do so as a matter of course.
139. The claimant met with Ms O'Hara and Dr Hodgson on 15 April 2021 to discuss the fact that she had found out that the Whittington Hospital (who were providing a joint Breast Service with UCLH) had advertised for, and appointed, a substantive Breast Consultant [315-318]. The appointment had been approved by the Trust on 24 February 2021 by Stuart Lavery in an email to Chetan Bhan (Whittington Divisional Clinical Director). The claimant had not been advised of this post nor provided with an opportunity to apply for it. This was inconsistent with the Trust's stated position (on 12 March 2021) that she could not be confirmed as a permanent employee until the reconfiguration review had completed.
140. Ms O'Hara and Dr Hodgson stated that they had not been aware of the substantive Breast Surgeon appointment at the Whittington. The claimant found this strange given their senior roles, and the fact that Ms O'Hara had written to her solicitors on 12 March 2021 that there was a continued objective justification, as they did not know "the needs of the service". In her view, to approve a substantive appointment at the Whittington there must have been a service review, but (in her view) it transpired that there was no service review.
141. At a further follow up meeting with the claimant on 7 May 2021, Ms O'Hara and Dr Hodgson said they would advertise a substantive Consultant Breast Surgeon role that would be ring-fenced for the claimant. They suggested that this appointment process would be around 6 weeks and would be completed before the school summer holidays. Dr Hodgson offered the claimant coaching sessions to help with the interview, which she accepted
142. On 23 June 2021, the claimant met with Nicola Winn to discuss the recruitment process for the substantive Breast Consultant post and an extension of her contract. Ms Winn explained that the post had been ring-fenced for the claimant, as agreed, but that the business case had yet to be finalised and approved through the appropriate channels. As a result of the delays in the business case being approved and convening an AAC panel, Ms

Winn stated that the Trust would like to extend the claimant's fixed term contract by a further 3 months from the end of August 2021 to the end November 2021 to ensure plenty of time [326]. The claimant accepts that a business case exists, but not that service review has been carried out.

143. From the Trust's perspective, the extension of the claimant's contract until 30 November 2021 was predicated on the hope or expectation that by that time the recruitment process would have been completed. The rationale behind extending the contract was about ensuring that the Trust was able to continue to provide a functioning Breast Service from a clinical perspective. At this time, it was critical that it did so because it was under considerable scrutiny regarding meeting cancer detection and resolution targets. It needed to keep all clinical hands on deck. It had not previously been possible to make a business case to recruit a permanent substantive Consultant and it did not make practical sense to recruit another fixed term locum [436].
144. The extension to the claimant's contract was confirmed in a letter dated 8 July 2021. Ms Winn advised that the claimant's employment with the Trust would terminate on 30 November 2021 to allow for completion of the service needs review and recruitment process [383-384]. The claimant replied on 14 July 2021 reiterating her position that she considered herself to be permanent and that her position had not changed [385].
145. The claimant applied for the substantive Breast Consultant role on 29 July 2021 [406, 410-412, 652-666]. The role and responsibilities for the substantive Breast Consultant role are at [339-340]. These appear to be the same as the role and responsibilities for the role that the claimant applied for in 2016 [112-115]. In the claimant's view, she meets, and had met, the various responsibilities for a substantive Breast Consultant role.
146. The claimant chased for an update for a date for the interview and make-up of the AAC panel on 17 and 20 August 2021. Ms Winn replied that Recruitment were still working on availabilities for the panel, but that the provisional date for the interview was 10 September 2021 [403-406].
147. The claimant received her formal invitation to the interview on 2 September 2021. The interview date was confirmed as 10 September 2021 [469-472]. The claimant had concerns about the impartiality and composition of the interview panel. She lodged a complaint under the Trust's Employee Led Complaint (ELC) process about this.
148. The AAC Panel interview took place on 10 September 2021. The claimant went into the interview knowing that two members of the Panel – Mr Cariati and Rebecca Roylance – in her view did not want her to work at the Trust, as she was aware that they had expressed this view to several colleagues.
149. The claimant had concerns about the conduct of the interview. On three occasions during the interview, the claimant was asked about conflict with colleagues in her department. The first was early on by Mr Cariati. Ms Roylance questioned the sarcoma surgery the claimant did and her actual involvement and the simplicity of the surgery as she had done with colleagues pre-interview. The claimant was questioned about academic groups that were apparently part

of the network. Post-interview the claimant found out that they were only part of one hospital set up only 3 months prior with no invitation to other Trusts in the network. In addition, the claimant believes, some questions were turned against her. She was asked about an organisational mistake. When she responded with an operational example, the interview notes read – personal mistakes not discussed. The claimant concluded that she had been set up to fail.

150. The claimant was notified in a telephone call from Stuart Lavery on 13 September 2021 that she had been unsuccessful at interview, due to alleged underperformance at the interview. Mr Lavery informed the claimant that she had fulfilled the Trust's values of kindness and safety, but did not fulfil the Trust's values of teamwork and improving
151. The claimant then emailed Mr Lavery to request written feedback and scores with breakdowns for the psychometric test, presentation, and interview. On 15 September 2021, she also asked for copies of the interview notes [498-499]. Copies of the interview notes and scores were provided to her by Louisa Batchelor (HR Business Partner) on 17 September 2021 [500-547]. The claimant did not receive written feedback despite requesting it on two further occasions. It seems probable that Mr Lavery provided feedback to Ms Batchelor about the claimant's interview on 1 October 2021, but this was not in turn provided to the claimant [551-552].
152. On 1 October 2021, Ms Winn wrote to the claimant to advise that the Trust would be re-advertising the substantive Breast Consultant role externally, and that her fixed term contract would be extended until a substantive appointment was made. Ms Winn maintained that there was an objective service-based reason to continue the claimant's continued employment on a fixed term contract [549-550].
153. The claimant wrote a letter before action to Ms O'Hara and Dr Hodgson on 5 October 2021 requesting formal confirmation of her permanent status, in accordance with Regulation 9 of the Regulations, as the needs of the service had now been identified, and there was therefore no ongoing objective justification to continue to regard her as a fixed-term employee. She invited them to review their decision so that an amicable solution could be achieved [553-555].
154. The claimant received a letter from the Trust's solicitors on 22 October 2021, in response to her letter dated 5 October 2021. They reiterated the Trust's legitimate aim. They advised that, whilst it was accepted that the review of the Breast Service was almost complete, the Trust required a Breast Surgeon to support its surgical offering until a substantive appointment could be made, and this was the justification for maintaining the claimant on a fixed term contract [556-559].
155. It appeared to the claimant that the Trust's justification had now changed. Their previous reasons had fallen away as the service review had apparently been completed. The Trust were now saying that they required a substantive Breast Consultant role. The claimant was confident that she was more than capable of fulfilling that role and had done so since 2016. In her assessment,

the only difference between her locum role and the substantive role was the appointments process – the substantive role was appointed by an AAC panel, and the locum role by an Appointments Committee. The claimant's view was that her locum fixed term contract was completely different to locums who are appointed via an agency.

156. On 4 November 2021, Mr Lavery emailed the Consultant Breast Surgeon group, including the claimant, regarding the current challenges facing the Breast Surgery Service. One Consultant, Petros Charalampoudis, had taken compassionate leave and was on sabbatical leave for up to 12 months. Mr Cariati had stepped down as Clinical Lead. One of the junior doctors had resigned, with potential resignations from two others. The team was short-staffed, and this was now on the risk register. Mr Lavery sought views on proposed solutions and also the outstanding issues relating to appointing a MDT Lead, Clinical Lead and Clinical Representative at the monthly NCL Breast Tumour Working Group [567-568].
157. The claimant attended an urgent operational meeting for Breast Surgeons on 5 November 2021. She was asked to chair the MDT meeting on 9 November 2021. She also undertook additional clinical work and patients to support the team and Service.
158. A meeting with Ms Winn to discuss the claimant's ongoing contract had to be rearranged a couple of times because of urgent clinical and operational work. However, they managed to meet on 30 November 2021. The claimant was accompanied by her BMA Adviser, Lettie Smythers.
159. Ms Winn referred to her letter dated 1 October 2021. She set out the Trust's position regarding the extension to the claimant's fixed term contract. She referred to previous extensions; the claimant's unsuccessful interview for the substantive Consultant Breast Surgeon post; and that the Trust would be opening the recruitment process more widely to include external candidates, but that it had not yet made the advert live. Ms Winn stated that pending the appointment of the substantive Consultant in the Breast Service, the Trust wanted to continue to engage the claimant as a locum Consultant on a fixed term contract. The Trust's continued position was that the claimant was not a permanent employee of the Trust because there was an objective service-based reason for her continued employment on a fixed term contract, as reflected in their view of this issue at all previous renewal dates.
160. The BMA Adviser argued that the claimant was a permanent employee and did not accept that there was an objective service-based reason for her continued employment on a fixed term contract. However, the claimant was prepared to consider a further extension, provided it was no less than 6 months, as she would like to plan her life and needed a defined period with certainty about the timeframe, subject to review. The BMA Adviser also raised the fact that the claimant was entitled to 3 months contractual notice.
161. The claimant outlined the additional clinical and management work she was undertaking in the current circumstances in the Breast Service. The Trust had been unable to recruit for Petros Charalampoudis's absence. She made Ms Winn aware that referral rates had increased significantly for two reasons. The

breast screening service, which had not been running through the pandemic, was now up and running. They were working at three times the capacity to catch up. They were seeing three times more breast cancer patients. In addition, the women who were too anxious to come to hospital to investigate their breast lumps were feeling a little more relaxed about coming into hospital. This delay in attendance meant they were seeing more advanced cancers.

162. At the end of the meeting, it was agreed that Ms Winn would consider the points that had been raised and would update the claimant on the Trust's position.
163. On 2 December 2021, Ms Winn wrote to the claimant to confirm those discussions and the fact that she could offer an extension of 6 months to the current contract. She stated that to provide contractual 3 months' notice she would plan to meet the claimant in March 2022 [92-594].
164. On 15 December 2021, Ms Winn wrote to the claimant again to confirm the 6 months extension to her contract, with a new termination date of 30 June 2022. Ms Winn again referred to continued confirmation that the claimant was not a permanent employee because there was an objective service-based reason for her continued employment on a fixed term contract [596]. In the claimant's opinion, this was even though the Breast Service were struggling to manage patients in a timely manner, as there were not have enough Consultants, and referral rates had increased significantly.
165. On 28 February 2022, the claimant had a discussion with Rob Carpenter (Breast Clinical Lead). She raised concerns about the appointment of a full-time Consultant Oncoplastic Breast Surgeon when the ELC process and Tribunal processes were not complete. In a later email, Rob Carpenter said that he had spoken to Stuart Lavery about the claimant's concerns and that she should contact HR to register her concerns [604]. The claimant replied the same day asking for the plan with her post. She copied in Ms Hughes and Dr Hodgson.
166. Rob Carpenter replied on 1 March 2022 to say that he had not been advised regarding the claimant's job. He said that his advice for the present and future was based on his experience and the existing Breast Unit staff/PAs, and current projected workload/research/training and development needs. The claimant thanked him for this response and stated that she was surprised that he had not been advised about her job when planning for additional appointments. She would wait to hear from Division and HR with the relevant information [601-604].
167. The claimant emailed Ms Hughes and Dr Hodgson on 7 March 2022. She referred to her emails of 28 February and 2 March 2022, which they had been copied into. She asked for specific information on what role was going to be recruited to and the timeframe for recruitment. She stated that she was very concerned about this development. She referred to the fact that she had had to issue a claim in the Employment Tribunal for a declaration of permanent status
168. The claimant cited her claim arguments "...that the fact that the Trust interviewed the Claimant for the substantive Breast Consultant Surgeon role and are now advertising the post suggests that there is no objective justification

for not making the Claimant permanent. The 'future shape and needs of the [Breast] service' have been established and there is a need for a Consultant Breast Surgeon (the role that the Claimant was carrying out)". Further "that if there is a need for a permanent Consultant Breast Surgeon, there cannot be an objective justification for not making the Claimant a permanent employee..." The claimant argued that recruiting now for a Consultant Breast Surgeon role further undermined the Trust's argument of objective justification. She had yet to see the Trust's defence. However, she asked for an explanation of the basis for this, in view of the recent development that the substantive Consultant role had been advertised before completion of the ELC and Tribunal processes had been completed [599-600].

169. At a Consultant Meeting on 8 March 2022, Rob Carpenter said there had been sign off from Dr Hodgson for a 10 PA job. This job was in addition to everyone in the room, including the additional Consultant PAs undertaken by Petros Charalampoudis and, in his absence, a locum starting in May 2022 to cover his sabbatical. The claimant had also been covering some of Petros Charalampoudis's theatre sessions and seeing his patients to help.

170. Ms Winn responded to the claimant's email to Ms Hughes and Dr Hodgson on 10 March 2022 (erroneously dated 2021). She stated that the requirement for a substantive permanent Consultant Breast Surgeon had been established through the Breast Service review that was undertaken over the last few years; and that there was a pressing need to recruit to this substantive Consultant role as soon as possible to recover and sustain performance of the Breast Service against cancer performance targets [607-608]. In the claimant's assessment, the idea was and is to recruit a substantive permanent Consultant Breast Surgeon and then to dismiss her.

171. Ms Winn continued that the role required both clinical and managerial/governance skills and was "entirely different" to the predominantly clinical focus of the locum Consultant post that the claimant was currently undertaking. This appears to be the first time that managerial/governance skills were mentioned as criteria for the substantive Consultant role. Ms Winn stated that the Trust had made a corporate decision, for governance reasons, to ensure that all substantive permanent Consultants were appointed through the AAC process, which was not required for locum Consultants. The claimant regarded this as being contrary to the Trust's Management of Fixed Term Contracts, Guidance for Managers [165]. Ms Winn stated that the Trust did not consider that the claimant would be able to simply "step into" the substantive Consultant post without satisfying the AAC process, and that the claimant had not been successful in her application for the ring-fenced post.

172. Ms Winn repeated the Trust's asserted objective justification for the continuation of the claimant's fixed term contract. She stated that it would be entirely inappropriate and unsafe to leave the reviewed Breast Service understaffed where this was avoidable through the continuation of the claimant's contract. She expressed the view that it was inefficient and disproportionate to terminate the fixed term contract and then recruit a further and entirely new fixed term locum. The claimant had not proposed that. Ms Winn also confirmed that she was aware of the claimant's ELC complaint about the AAC panel interview in September 2021, but the Trust would not halt the

recruitment process to wait for the outcome of the ELC. She advised that the advert would be posted in the next few days with a view to a substantive appointment being made from 1 July 2022. She did not invite the claimant to reapply for the substantive Consultant role (although she did not dissuade her from doing so either).

173. Ms Winn concluded that, as agreed at the meeting on 30 November 2021, she would arrange a meeting with the claimant at least one month prior to formally issuing her with termination of her fixed term contract on 30 June 2022. However, Ms Winn had stated in her letter dated 2 December 2021 that she would meet with the claimant in March 2022 to discuss the termination of the fixed term contract, but she had not done so.
174. In the minutes of the Umbrella Governance Meeting on 15 March 2022, Rob Carpenter stated that the Trust had shortlisted candidates for a full-time extra Consultant. In the claimant's view, this supported the discussions had on 8 March 2022 that the substantive Consultant post would be in addition to the Consultants already in the Breast Service, including the claimant's post [611].
175. On 16 March 2022, the claimant wrote to Ms Winn in response to her letter of 10 March 2022 [633-634]. She pointed out that Ms Winn's letter had not answered her question about why Rob Carpenter had said that there would be an additional 10PA Consultant Breast Surgeon for the Service. The claimant sought further clarification of the substantive Consultant post being advertised.
176. The claimant stated that Ms Winn's letter and the Trust's ET3 had both said that the permanent post that she applied for, and which was now being advertised externally, was "entirely different" to her role. This was said to be because it had additional management responsibilities. Moreover, the main reason she was unsuccessful in her application was because she did not demonstrate the requisite management skills. This was the first time the claimant had been told this. She was concerned that the Trust was attempting retrospectively to justify not appointing her to the substantive role.
177. The claimant also argued that there was no material distinction between a locum and substantive role, save that one is on a fixed term contract. The claimant performed the same duties and responsibilities as her colleagues in substantive roles, including in relation to management. There was no distinction in their job plans. They were all subject to the same appraisal, revalidation and CPD requirements. They all had a Responsible Officer, equal participation in governance, audit and day-to-day training of junior doctors and nurses. She referred to Stuart Lavery's recent response to her contribution to the Breast Unit workforce crisis, where he stated: "I've appreciated your constructive contribution and creative ideas".
178. The claimant further explained that she did have management experience. This included the fact that she was Breast Lead of the London Sarcoma Service. She was appointed by the Sarcoma Service with approval from Stuart Lavery. She was the Breast Lead of the screening pathway at UCLH, and she had been appointed by Stuart Lavery. She was appointed the Co-Chair of the Proton Beam and Cancer Development Board by Baroness Neuburger (UCLH Chair). Although she did not specifically mention this in her letter, for the last



six and a half years the claimant also had other management roles, including Audit Lead and Operational Lead.

179. The claimant was aware that at least three of her Consultant colleagues, (Joanna Franks, Massi Cariati and Petros Charalampoudis) did not currently have management or lead roles with the Trust. She asked for clarification on whether the additional management responsibilities were set out in the job specification for the role she had applied for, as she could not see any reference to “additional management responsibilities”. She also asked why, on receipt of her application in which her managerial experience was set out, it was not raised that she lacked the managerial experience for the role, rather than be invited to an interview; and where she had been told that the main reason she did not get the job was due to a lack of management skills, as she could not see this in her feedback. The verbal feedback from Stuart Lavery that she had received on 13 September 2021 stated that she lacked the Trust's values of teamwork and improving. In the written feedback from Stuart Lavery of 1 October 2021 (which was not sent to her) [604] there is no mention of lack of teamwork and improving values, or reference to lack of management skills. It is more about the fact that her answers lacked focus and clarity
180. Regarding the advertisement of the substantive Consultant post, the claimant referred to the Trust's job planning framework guidelines 2022-23. These stated that each time a new Consultant is post is approved (and prior to advertisement), the opportunity should be taken to review job plans within the speciality/department. The claimant explained that their job plans were due for renewal that month (March 2022) and that two Consultants had requested to reduce sessions. Rob Carpenter had said that he would undertake a job planning process to look at current working practices, to consider alternatives to deliver high quality services, and these changes were to be built into the new job plans. She questioned whether the Trust were planning on advertising before this job planning process without knowing the current needs of the service. She also requested details for the new role which she would apply for, subject to her ELC challenge to her previous application.
181. The claimant concluded that she was very concerned about the timing of the termination of her employment before the ELC and Tribunal processes had been dealt with. She argued that both processes would be rendered unfair if this was to happen. She requested that no decision in relation to the termination of her employment would be made until both the ELC and Tribunal complaint processes had concluded.
182. Ms Winn wrote to the claimant again on 22 March 2022 (dated 2021 in error) [537-639]. She stated that she did not agree that she had failed to answer the claimant's questions about the substantive Consultant post. She advised that the Trust required a substantive permanent 10 PA Consultant Breast Surgeon, which would replace the locum role the claimant was currently undertaking. She also stated that the Consultant meeting with Rob Carpenter was informal, and not minuted, and that “there may have been some confusion in the conversation relating to available jobs”.
183. Ms Winn repeated that there had always been a material difference between locum Consultant and substantive Consultant roles. She had set out these key

differences in her letter of 10 March 2022. The locum Consultant role was primarily focused on clinical work and the substantive Consultant role was/is a combination of clinical and management/governance work; and significantly, there was also a different appointments process used for each. She stated that it was not appropriate to debate what work the claimant had or had not been undertaking in her current role at this stage. In the claimant's belief it was wholly appropriate to discuss the work that she had been undertaking as it evidenced that she was/had been undertaking management/governance work. Ms Winn continued that it was also not appropriate for her to respond to the questions the claimant had asked about the additional management responsibilities for the substantive Consultant role, as she said that these were clearly linked to the ELC complaint and the Tribunal claim, and both those processes would consider the issues that the claimant had raised in detail.

184. With regards to job planning, Ms Winn stated that these would be scheduled in the coming weeks and months, but that the Trust had to advertise the substantive Consultant role at that time, based on the demands on the Service. Ms Winn said that the claimant could reapply for the substantive Consultant role. She provided a link to the advert. In the claimant's view, if she did not have the managerial skills, how could she reapply? In her assessment, there were no new managerial skills in this job/person specification compared to the job/person specification for her locum appointment in 2016.
185. Ms Winn advised that her letter of 10 March 2022 had confirmed the intention of the Trust to terminate the claimant's fixed term contract on 30 June 2022, consistent with her letter of 15 December 2021. She stated that the reason for termination would be "some other substantial reason". She would be sending out a notice of termination and arranging a meeting with the claimant shortly, at a mutually convenient time, given that the claimant was on sick leave at that time. It does not appear that Ms Winn did arrange a meeting or send a termination letter.
186. On 8 April 2022, the claimant wrote again to Ms Winn to respond to the ongoing issues regarding her employment and the Trust's intention to terminate her contract [640-642]. She stated that she did not agree with Ms Winn's comments about the Consultants Meeting with Rob Carpenter. He had stated that the new substantive Consultant role was in addition to the current roles, and he had taken notes throughout the meeting. The claimant requested a copy of these notes. These notes have not been provided to her.
187. With regards to the differences between her role and the new substantive Consultant role, the claimant pointed out that in her letter of 10 March 2022 Ms Winn had stated that the new role was "entirely different" to her role due to additional management duties. However, in Ms Winn's letter of 22 March 2022, this changed to there being a "material difference" between the roles, referring specifically to a significant difference in the appointments process (which is not relevant to the substance of the roles). The claimant continued that she had set out her view that in practice there is no material difference between a locum role and a substantive role. These purported additional management duties were not made clear to her when she applied for the role in 2021. Neither was the fact that, as Ms Winn now said, she did not get the role because of her lack of management experience.

188. The claimant challenged Ms Winn's comment that it was not appropriate to discuss this issue. She stated that she believed that it was appropriate because it directly related to her proposed dismissal. Whether there was an overlap with the ELC/ET process (which she did not necessarily accept) did not prevent Ms Winn from responding to her questions on this point, particularly when her employment could be terminated before these processes concluded. She stated that if the roles are not "entirely different", then the rationale for dismissing her did not stand, and the answers to her questions would be highly relevant to the question of whether the roles were different. She repeated the questions she had previously made in relation to the additional management responsibilities in her letter of 16 March 2022.
189. The claimant continued that, even if her contract were to be terminated, she believed that this was a redundancy situation, and that she should be placed in a redundancy pool with the four other Consultants in her department, because they all did the same jobs. She detailed that they all performed the same duties; there was no distinction in their job plans; they were all subject to the same appraisal, revalidation and CPD requirements; they all had a Responsible Officer; equal participation in MDT, governance, audit and day-to-day training of juniors and nurses; their weekly work was documented on Medirota; they all had named theatre lists, named clinics, dedicated SPA time; and were all invited to the regular Consultant operational meetings. She stated that there were no meetings where only substantive Consultants were invited and not her. The claimant asked Ms Winn to clarify why she had not been placed in a redundancy pool with the other Consultants. If the reason was that they did a different role to her, she requested that Ms Winn specifically state the differences she said existed between their roles, and that she should provide (anonymised) annual and weekly job plans for the other four Consultants in the department.
190. The claimant also sought clarification of what would happen if she was dismissed before the Employment Tribunal or ELC processes had concluded, and her complaints were upheld regarding the recruitment process in 2021 and/or the Tribunal found that she should be given permanent status. She concluded her letter by making a data subject access request for documents and correspondence containing her personal data.
191. Ms Winn acknowledged the claimant's letter of 8 April 2022 on 12 April 2022. She then sent her a more detailed response on 21 April 2022 [665-667]. She stated that she had spoken with Rob Carpenter about the Consultant's Meeting on 8 March 2022. His recollection was as set out in her letter of 22 March 2022. The notes taken were personal notes. but nothing in there dealt with this issue.
192. Ms Winn continued that it was not helpful to debate the meaning of the phrases "material difference" and "entirely different". She maintained that there was a difference between the claimant's role as a locum Consultant and the substantive Consultant role, which she had set out in previous correspondence. She stated that she had referred to "management/governance work" and "management/governance skills" in previous correspondence. All substantive Consultants had a degree of management and/or governance work as part of their contractual requirements, although she acknowledged that this may not

have been specifically spelt out in the job description for the 10 PA role that the claimant applied for. She stated that locum Consultants do not have this expectation. If they do undertake any such work, it is not because they are contractually obliged to do so. The reasons for the claimant's non-appointment to the 10 PA role were not relevant to the current debate, which formed part of the ELC process.

193. Ms Winn stated that the termination of the claimant's employment was not a redundancy situation. The substantive Consultant role would replace her locum Consultant role, with management and governance work. Therefore, the end of her current fixed term contract on 30 June 2022 would be for some other substantial reason, arising from a review of the Breast Service, and she would not be providing copy annual or weekly job plans.
194. With regards to the dismissal before the ELC and Tribunal processes had concluded, Ms Winn said that she was not managing either process, and she would consider and action any recommendations arising from the ELC outcome in relation to the recruitment process for the 10 PA role as appropriate. In relation to the data subject access request, she advised that this had been passed to Louise Batchelor to deal with. The claimant has been told that these will not be made available to her until 8 July 2022. She had requested 4 July 2022 as these documents may be relevant to her Tribunal claim, but this has been declined.
195. The claimant did apply for the substantive Consultant Breast Surgeon role in April 2022. She attended an interview on 8 June 2022. There were two other candidates. She had been advised that the outcome of her interview would not be known until the end of June 2022, which was also the date that the Trust intended to terminate her employment. She was told at the start of the interview by the Chair that the outcome would be shared the same day or as soon as possible. Stuart Lavery telephoned her on 10 June 2022 and informed her that the outcome would be given by the end of the month, but he hoped it would be sooner. As at the date of the Tribunal hearing, she has not heard the outcome. She regards this as highly unusual behaviour from an AAC panel. She told the Tribunal that she understood that she had been regarded as "appointable".
196. On 3 May 2022 the claimant was informed that her ELC had not been upheld. The Trust concluded that they had an objective justification for extending/renewing her fixed term contract at each stage. There was insufficient evidence to find that there was a lack of impartiality or that it was not appropriate for Massi Cariati or Rebecca Roylance to form part of the AAC panel. There was no evidence that the interview process was conducted unfairly, or that interviewers conspired [831-832].
197. The claimant appealed the decision on her ELC on 27 May 2022 [833-838] on various grounds, which are set out in her witness statement. It is not necessary to set out those particulars here. The claimant attended her ELC appeal hearing on 21 June 2022. The outcome is awaited.

**Relevant legal principles<sup>1</sup>**

198. The relevant law applicable in this claim is derived from the EU Fixed-term Work Directive (99/70) as implemented in Great Britain by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Among other things, the law is designed to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. The Government has provided both original guidance (the BERR guidance) and current guidance on the Regulations.
199. The Regulations apply to fixed-term employees – that is, any employee who is employed under a fixed-term contract (regulation 1(2)). It is agreed that the Regulations apply to the claimant and to the claim. It is not necessary to explore the concepts of “employee” or “fixed-term contract” further. Nor is it necessary to look at classes of employee who are specifically included or excluded in the Regulations.
200. As the commentators note, it is not uncommon for employers to use successive fixed-term contracts as an alternative to permanent employment, denying such employees certain rights that they would be entitled to if they were employed on a permanent basis. As a result, the Directive aimed to limit the use of successive fixed-term employment contracts by requiring Member States to introduce one or more of the following measures: (1) objective reasons justifying the renewal of such contracts or relationships; (2) a maximum total duration of successive fixed-term employment contracts or relationships; and/or (3) the number of renewals of such contracts or relationships.
201. To that end, regulation 8 of the Regulations provides that an employee on a fixed-term contract will be regarded as a permanent employee if all the following circumstances apply: (1) the employee is currently employed under a fixed-term contract and that contract has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the current contract (regulation 8(1)); (2) the employee has been continuously employed under fixed-term contracts for four years or more (regulation 8(2)(a)); and (3) at the time of the most recent renewal — or, where the contract has not been renewed, at the time that the contract was entered into — employment under a fixed-term contract was not justified on objective grounds (regulation 8(2)(b)). A renewal includes an extension.
202. Where the above conditions apply, the provisions in the contract that restrict its duration will cease to have effect and the contract will be regarded for all purposes as being a contract of indefinite duration. The date from which the fixed-term employee becomes a permanent employee is whichever is the later of the date on which the current contract was entered into or last renewed, or the date on which the employee acquired four years’ continuous service (regulation 8(3)). An initial fixed-term contract could be for a term of four years or more without being caught by this provision. However, where a

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<sup>1</sup> This account draws upon the commentary in *Atypical and Flexible Working* (IDS Employment Law Handbooks, Volume 1) Chapter 2; and *Harvey on Industrial Relations and Employment Law* Division AI [156]-[181] and Division R (annotations to regulations 8 and 9 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002).

first fixed-term contract lasts for four years or more and is then renewed, the second contract will be regarded as permanent, unless the use of a further fixed-term contract can be objectively justified.

203. An employee who considers that she is a permanent employee because of regulation 8 may make an application to the Tribunal for a declaration to that effect (regulation 9(5)). Such an application can only be made if: (1) the employee is employed by the employer at the time she makes the application; (2) she has previously requested a written statement from the employer under regulation 9(1) confirming that she is now a permanent employee; and (3) the employer has either failed to provide such a statement or has made a statement giving reasons why the contract remains fixed term (regulation 9(6)). In practice, the application of this provision can give rise to difficulties of continuity of employment where there have been breaks in the sequence of contracts, but such difficulties do not in fact arise in respect of this claim or this claimant.
204. Regulation 8(2) permits the renewal or extension of a fixed-term contract beyond the four-year period where this is justified on objective grounds. It is generally agreed that this requires an approach to the concept of objective justification compatible with other areas of discrimination law. That means that the use of a further fixed-term contract should be: (1) aimed at achieving a legitimate objective; (2) necessary to achieve that objective, and (3) an appropriate way to achieve that objective. The assessment of the objective reason put forward must refer to the renewal of the most recent employment contract entered into. Nevertheless, the existence, number and cumulative 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. See: *Küçük v Land Nordrhein-Westfalen* [2012] ICR 682 ECJ.
205. The ECJ in *Adeneler v Ellinikos Organismos Galaktos* [2006] IRLR 716 held that the fact that national legislation authorises the use of successive fixed-term contracts is not in itself objective justification. Here “objective reasons” meant precise and concrete circumstances characterising a given activity which in that context justify the use of such contracts. The authorisation of the use of fixed-term contracts in a general and abstract manner by statute without specific justification does not meet those criteria.
206. In *Duncombe v Secretary of State for Children, Schools and Families* [2011] ICR 495, the Supreme Court gave guidance on objective justification under the Regulations. In that case, the claimants were complaining about the fixed-term nature of their employment rather than about the use of successive fixed-term contracts that make up that employment. Lady Hale observed that the Directive and the Regulations were only concerned with the prevention of discrimination against workers on fixed-term contracts and the abuse of successive fixed-term contracts. What had to be justified was the use of the latest fixed-term contract in question. In *Duncombe*, the use of a fixed-term contract could be “readily justified” by the existence of a separate rule seconding the claimants from their permanent employment elsewhere for no longer than nine years. The case of *Adeneler* (above) was not relevant.
207. Fixed term contracts are often used as a means of providing temporary or

locum cover. As confirmed in *Kücük* (above), the need to cover staff shortages may in principle constitute an objective reason justifying the continued use of fixed-term contracts, even if temporary cover is required on an ongoing basis. Where an employer has a large workforce, it is inevitable that temporary replacements will frequently be necessary due to employees being on sick, parental, maternity or other leave. In these circumstances the temporary replacement of employees could constitute an objective reason justifying the use of successive fixed-term contracts. This may also be compelling where national legislation justifying the renewal of fixed-term contracts also pursued recognised social policy objectives (such as pregnancy and maternity protection and reconciling professional and family obligations). Such objectives may be met by using successive fixed-term contracts to provide temporary cover.

208. However, *Kücük* also emphasises that the renewal of fixed-term contracts in order to cover the need for permanent staff (as opposed to the need for replacement staff) is not justified. The renewal of successive fixed-term contracts must be intended to cover temporary, as opposed to permanent, needs. Nevertheless, the mere fact that the need to cover temporary personnel shortages could be met by hiring permanent staff (even where those shortages are recurring or even permanent) did not mean that an employer who uses successive fixed-term contracts is acting in an abusive manner. To hold that a fixed-term worker must be moved onto a permanent contract where an employer has a permanent need for replacement staff would go beyond the objectives of the Directive and would disregard the discretion left to Member States when implementing it into national law.

209. This issue also arose in the cases of *Mascolo and others v Ministero dell’Istruzione, dell’Università e della Ricerca Case C-22/13*; *Russo v Comune di Napoli Case C-63/13*; and *Napolitano and others v Ministero dell’Istruzione, dell’Università e della Ricerca Case C-418/13*. The ECJ confirmed that a national law allowing the use of successive contracts to cover temporary needs could be justified, subject to the temporary nature being “specifically verified” in the particular circumstances. However, where the operation of such a law in practice leads to the misuse of successive contracts, it would not be justified. The Italian law at issue permitted the engagement of teachers on a series of successive fixed-term contracts to fill vacant posts pending the completion of a competitive selection process for tenured staff. While that reason was capable of providing objective justification, the ECJ held that the practical application of the law meant that it fell foul of the Directive. The period required for teachers to be granted tenure was “variable and uncertain”, being dependent upon both the state’s financial capacity and public authority discretion.

210. The question was met again in *Pérez López v Servicio Madrileño de Salud (Comunidad de Madrid)* [2016] ICR 1168 ECJ. Here Spanish law permitted the successive renewal of fixed-term contracts in the health sector to “ensure the provision of certain services of a temporary, auxiliary or extraordinary nature”. The ECJ held that this could not be relied on by the Spanish authorities to justify the successive renewal of a nurse’s fixed-term contract to cover needs that were fixed and permanent. While temporary replacements were inevitable in a large public sector service, such as healthcare, the

claimant's successive appointments did not appear to cover simple temporary needs. The ECJ observed that the use of temporary contracts in the Spanish health service was "endemic". The ECJ acknowledged that national legislation allowing authorities to create permanent posts could constitute an effective remedy against the abusive use of temporary contracts. However, it appeared that the permanent posts created were being filled by appointing fixed-term staff, with no limitation on the duration of appointments or the number of renewals, thus perpetuating the workers' precarious situation.

211. A fixed-term employee who considers that she is a permanent employee because of regulation 8 may request in writing from the employer a written statement confirming that this is the case. The employer must then, within 21 days of the request, provide written confirmation that the employee's contract is to be regarded as permanent or, alternatively, provide a statement giving reasons why his or her contract remains fixed term (regulation 9(1)). If the reasons given by the employer as to why the employee's contract remains fixed term include an assertion that there are objectively justifiable grounds for the use or renewal of a fixed-term contract, the employer must provide a statement of those grounds (regulation 9(2)). Note the provisions of regulations 9(3) and 9(4).

212. As to the Tribunal's powers, note *Huet v Universite de Bretagne Occidentale C-251/11* [2012] IRLR 703 CJEU. There is no formal obligation on a member state to stipulate that the permanent contract that the employee goes on to after a set time must be in identical terms to the previous fixed-term contracts. The state must ensure that the conversion to a permanent contract is not subject to material changes in a way that is overall unfavourable to the employee. British because regulation 8(2)(a) states that the effect of conversion is only to render ineffective the specific clause in the contract which limits its duration. This means that all the other clauses simply remain in being, giving the employer no scope for alterations.

### **Discussion and conclusion**

213. It may be helpful to begin by the Tribunal reminding itself (and the parties) what this case is not about and what the limits of the Tribunal's jurisdiction and powers are.

214. This case is not about the claimant's working relationship with the other Consultants in the Breast Service team. It is not about her internal relationship with those who managed her or administered her contractual relationship with the Trust, such as Mr Lavery, Dr Hodgson, Mr Carpenter, Ms Hughes or Ms Winn. It is not about the substance or the process in relation to complaints made against the claimant by some other Consultants, or grievances that she in turn raised, or decisions taken at first instance or on appeal about decisions to terminate her fixed term contracts or as to the length of extension or the conditions of extension (including proposing breaks in continuity of service). It is not about whether the claimant was or was not encouraged to apply for a substantive Consultant post or whether the decision not to appoint her to such a post was correct or otherwise. It is not about the fairness of that appointments procedure or about her grievance in relation to that. It is not about whether the claimant has been treated unlawfully or unfairly or



detrimentally, whether because of her race or sex or fixed term status. It is not about whether the claimant does or does not have managerial and leadership experience and skills.

215. Of course, quite properly, all those matters have been explored to some degree in the evidence, not least because the claimant's case is not simply that the decision to refuse to treat her as a permanent employee was not one that is objectively justified, but because she says that was a decision that was not taken in good faith. To that extent, those matters about which this case is not directly concerned assume some indirect significance in testing the respondent's good faith and/or examining its objective justification defence.
216. What this case is about is whether, all other things being equal, the Tribunal can declare under regulation 9 that the provisions in the contract that restrict its duration will cease to have effect and the contract will be regarded for all purposes as being a contract of indefinite duration because the conditions in regulation 8 of the Regulations apply. The key to that question – because all the other conditions are met – is whether at the time of the most recent renewal of her employment under a fixed-term contract that decision was or was not justified on objective grounds.
217. The Tribunal's jurisdiction goes no further. Its powers are limited to making a declaration or not making a declaration of the kind required by regulation 9 by reference to regulation 8. The Tribunal has no power to say that the claimant should be appointed to a substantive Consultant's post. Its power, if it exercises it, is to declare that the claimant's present contract as a Locum Consultant Breast Surgeon shall cease to be a fixed term contract, but that in all other respects its terms and conditions remain unchanged. She would thus remain a Locum Consultant Breast Surgeon on the same salary and subject to the same number of PA's, but without an artificial fixed term attaching to that contract or that post.
218. Much energy has been (perhaps understandably) expended in this case in trying to establish that the claimant has a track record of management and leadership experience. The respondent's witnesses have sought to question that, particularly as Dr Hodgson did not recognise some of the labels that the claimant attached to her experience as reflecting duties or responsibilities that were expected of a locum consultant or had been the subject of an expressions of interest exercise or to which the claimant had been appointed or assigned (as opposed to the claimant herself seeking out these responsibilities). In the final analysis, however, the Tribunal is satisfied that the claimant has carried out these duties or responsibilities, either as a matter of fact or as part of her agreed job plan, and that is supported by the documentary evidence and the uncontested evidence of Dr Strauss and Dr Pattison.
219. Nevertheless, the futility of the exercise in attempting to establish that position is demonstrated by the Tribunal's acceptance of Dr Hodgson's evidence that the demonstration of management and leadership skills was to be established in interview and under questioning, and not by retrospective reference to a candidate's *curriculum vitae*. In the Tribunal's experience, that is now often the way in requisite skills are tested. It seems that the claimant

was unable to demonstrate those skills in the process in which she was being assessed, even though no doubt she had those skills and had been practising them in the various roles that by one means or another she had been discharging.

220. The Tribunal accepts also that it matters very little whether at any given time the other (substantive) Consultants were discharging management and leadership responsibilities. It accepts Dr Hodgson's explanation that such responsibilities are shared and rotated, and that at any given moment in time some Consultants will have such duties, while others do not. The Tribunal is satisfied that the Trust was entitled to expect that successful candidates for a substantive Consultant post could demonstrate propensity for or experience in management and leadership and could do so in "real time" in an interview process rather than simply as a matter of record on an application form or in a *curriculum vitae*.

221. Yet none of this really matters if one accepts, as the Tribunal does, that management and leadership responsibilities were not inherently a part of a Locum Consultant's duties. Dr Hodgson gave a perfectly acceptable and credible explanation of that. It does not matter that the claimant failed – in her perspective, unfairly – to satisfy a panel or appointments committee selecting candidates for a substantive consultant's post that she had management and leadership potential. The issue here is not whether she should have been appointed to a substantive post – and the Tribunal notes that an employer is entitled to set the bar for appointment as actually higher than a candidate simply being "appointable" – but whether her fixed term contract should have been regarded as permanent (or, at least, no longer fixed term).

222. Thus to a large extent much of the evidence concerned with whether the claimant should have been appointed to a substantive position (and whether the process involved was unfair in some way) is a distraction – unless, which is the claimant's case, it evidences a lack of good faith on the part of the respondent Trust when making a decision in relation to her fixed term contract as a Locum Consultant as to whether that contract and that position should henceforth cease to be fixed term.

223. Standing back from the evidence and findings above, the Tribunal is not satisfied that the respondent has acted with a lack of good faith. The claimant most emphatically does not say that there was bad faith – just a lack of good faith. It is possible to conclude that the complaints against the claimant, her grievances and the appointments process could have been handled better. The composition of the appointments panel is one such glaring example. However, that is insufficient, without more, to conclude that the respondent was acting throughout or at relevant points with an absence of good faith. The evidence and findings counter-balance any such impression – such as the encouragement given to her to apply for the substantive post; the ring-fencing of that post for her in the first instance; and the provision of coaching for her.

224. That leaves the Tribunal with the central question and the only question that it can answer.

225. The claimant is an employee currently employed under a fixed-term

contract. That contract has previously been renewed or she has previously been employed on a fixed-term contract before the start of the current contract. The claimant has been continuously employed under fixed-term contracts for four years or more. ***At the time of the most recent renewal, was employment under a fixed-term contract justified on objective grounds?*** If the answer to that question is in the negative, then an employee on a fixed-term contract will be regarded as a permanent employee and the provisions in the contract that restrict its duration will cease to have effect and the contract will be regarded for all purposes as being a contract of indefinite duration. If the answer is in the affirmative, then no declaration can be made in the claimant's favour and the *status quo* remains.

226. Given the mischief at which the Regulations are directed, and given the employment history of the claimant recounted above, the respondent's objective justification defence is subjected to scrutiny with some care on the part of the Tribunal. The use of a further fixed-term contract should be aimed at achieving a legitimate objective; necessary to achieve that objective; and an appropriate way to achieve that objective. That assessment relates to the renewal of the most recent employment contract (*Duncombe*). Nevertheless, the Tribunal also has regard to the existence, number and cumulative duration of successive contracts of this type concluded in the past between the respondent and the claimant as part of its overall assessment (*Kücük*).

227. The fact that the Regulations themselves implicitly authorises the use of successive fixed-term contracts is not in itself objective justification (*Adeneler*). "Objective reasons" mean precise and concrete circumstances characterising a given activity which in that context justify the use of such contracts.

228. Fixed term contracts are often used as a means of providing temporary or locum cover. The need to cover staff shortages may in principle constitute an objective reason justifying the continued use of fixed-term contracts, even if temporary cover is required on an ongoing basis (*Kücük*). Where an employer has a large workforce, it is inevitable that temporary replacements will frequently be necessary due to employees being unavailable for a variety of reasons. In these circumstances the temporary replacement of employees could constitute an objective reason justifying the use of successive fixed-term contracts.

229. However, the renewal of fixed-term contracts to cover the need for permanent staff (as opposed to the need for replacement staff) is not justified (*Kücük*). The renewal of successive fixed-term contracts must be intended to cover temporary, as opposed to permanent, needs. Nevertheless, the mere fact that the need to cover temporary personnel shortages could be met by hiring permanent staff (even where those shortages are recurring or even permanent) did not mean that an employer who uses successive fixed-term contracts is acting in an abusive manner. The Regulations are aimed at the misuse of fixed term contracts.

230. The Tribunal has paid particular attention to the case of *Pérez López*. It is a case with some similarities to the present case. The successive renewal of fixed-term contracts in the health sector could not be relied on to justify the

successive renewal of a nurse's fixed-term contract to cover needs that were fixed and permanent. The Tribunal recognises that temporary replacements are inevitable in a large public sector service, such as healthcare. In the present case, have the claimant's successive appointments appeared to cover simple temporary needs or not? In *Pérez López* the use of temporary contracts in the Spanish health service was "endemic". It appeared that the permanent posts created were being filled by appointing fixed-term staff, with no limitation on the duration of appointments or the number of renewals, thus perpetuating the workers' precarious situation.

231. The Tribunal has been alert to that possibility here. No data or evidence of a statistical nature was put before the Tribunal. The claimant's case was viewed entirely in isolation. No comparative material was put into evidence. The Tribunal asked Dr Hodgson about the degree of use of locum consultants. He answered as best he could, without being on notice of the question, that the use of locum consultants was highly variable and perhaps more so at present than at any other time. Nevertheless, on the evidence before the Tribunal, it does not appear that the use of locum contracts in this Trust and in relation to consultants generally or within any particular service is "endemic". There is no suggestion that locum contracts are typified as being without limitation on duration or number of extensions. There is no evidence of abuse or misuse, or of precarity.

232. Standing back again, has the respondent established an objective justification to not treating the claimant's locum contract as no longer fixed term? What is the respondent aiming to achieve by way of a legitimate objective? Is it necessary to achieve that objective? Is it an appropriate way to achieve that objective?

233. The respondent describes its objective justification in this way. It had the legitimate aim of providing a safe, efficient, and fully functioning Breast Service. It was appropriate and necessary to engage the claimant on a fixed term contract because: (i) the Breast Service should not be left under-staffed where this is avoidable, as this would be both inappropriate and unsafe for the patients it looks after; (ii) it would be disproportionate and inefficient to terminate the claimant's fixed term contract and recruit a new consultant on a fixed term contract for an interim period (including to support its surgical offering until such time as a substantive appointment is made); and (iii) there is a clear need for the Breast Service to recruit a permanent substantive Consultant pursuant to the AAC Regulations which entail a rigorous selection procedure from a pool of suitably qualified candidates. See paragraphs 5 and 15 of the ET3 [31 and 32-33].

234. The claimant, through her counsel, takes issue with the framing of the objective justification in that way. It is said that this is misconceived. The submission is that the question of justification is misdescribed. The respondent is said to be asking the wrong question: whether it is proportionate to keep the claimant on a fixed-term contract until the respondent employs a permanent consultant? The question, the claimant says, should be: if the legitimate aim is the provision of a safe, efficient and fully functioning Breast Service, then is keeping the claimant on a fixed-term contract a proportionate means of achieving that aim.

235. The Tribunal does not agree. It is for the respondent to identify its objective justification. It is not for the claimant or the Tribunal to reconstruct it. It will stand or fall on its own terms. In any event, the way in which the claimant seeks to frame the question artificially ignores the circumstances, context and background of this workplace and this employer.
236. The Tribunal accepts the respondent's submission that, as at the date that the latest fixed-term contract was due to expire and was renewed, the respondent knew that the service review, which took into account how it would work with other neighbouring NHS Trusts in North London, was finally complete, and that it needed to appoint a substantive Consultant Breast Surgeon on a 10PA standard contract which would be on a permanent basis now that the period of uncertainty caused by the review was at an end.
237. Again, the Tribunal agrees that it was appropriate and necessary to appoint such a Consultant under the AAC Regulations. The claimant was interviewed under these conditions, but she was not successful. The respondent was entitled to seek the best person for the job through a prescribed process that all NHS Trusts follow. Note that the claimant was not being interviewed to decide whether her locum contract should be made permanent or treated as no longer fixed term. She was being interviewed for appointment to a substantive post. The Tribunal keeps clearly in mind the distinction between locum and substantive posts, between temporary and permanent posts, between fixed term and open-ended appointments, and between part-time and full-time contracts.
238. Moreover, the Tribunal concurs that it was appropriate and necessary to secure the provision of clinical services to meet the needs of patients pending the appointment of the substantive Consultant and to use a fixed term contract for a Locum Consultant Surgeon to do so, especially given the likely short-term duration of any gap in appointment. The delays in the review process had occurred largely because of and during the pandemic. The delays in the appointments process were then in part due to the claimant's internal grievances or complaints. The Tribunal cannot accept that the claimant should simply have been given the substantive post. Even if there is a common minimum threshold for appointment as a locum or substantive consultant, it does not follow that the respondent was required to appoint the claimant to the substantive post regardless of her performance in a selection process.
239. It is unreasonable to consider that the respondent should have hired different surgeons under a series of fixed-term contracts or that it should not have secured sufficient clinical and surgical provision for its patients. A single fixed-term contract could have been agreed at the outset, with hindsight, but that presupposes a level of certainty about the review that was not possible.
240. The use of a fixed-term contract in the claimant's case had been the subject of mutual consultation. The Tribunal agrees that it was neither abusive nor discriminatory in all the circumstances. The respondent's position that the claimant's contractual position was conditional upon the service review and agreement as to the way forward for the Breast Service, as well as being fixed term and not permanent in nature, has been clear and transparent throughout.

**Decision**

241. The Tribunal accepts the respondent's submission that the claimant ought not to be the subject of a declaration as to her rights under 8(2) of the Regulations as the respondent has demonstrated objective justification for use of a fixed term contract applying the appropriate and necessary test.
242. The Tribunal declines to make a declaration under regulation 9 as to the claimant's rights under regulation 8 of the Fixed-term Employees (Less Favourable Treatment) Regulations 2002 as the respondent has demonstrated that the claimant's employment under a fixed-term contract was justified on objective grounds under regulation 8(2)(b). The claim is thus not well-founded, and it is dismissed.

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Judge Brian Doyle

**DATE: 21 July 2022**

JUDGMENT SENT TO THE PARTIES ON

22/07/2022

FOR THE TRIBUNAL OFFICE

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