Neutral Citation Number: [2024] EAT 91

Case No: EA-2022-000872-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 June 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MS CHERYL LOBO **Appellant**

- and -

UNIVERSITY COLLEGE LONDON HOSPITALS NHS FOUNDATION TRUST

Respondent

- -
- -

RAD KOHANZAD (instructed through direct access) for the **Appellant**
ELEENA MISRA KC (instructed by DAC Beachcroft LLP) for the **Respondent**

Hearing date: 23 May 2024

- -

JUDGMENT

SUMMARY

FIXED TERM REGULATIONS

The Employment Tribunal did not err in law in holding that the continued employment of the claimant under a fixed-term contract as a locum Consultant Breast Surgeon on its last renewal was justified on objective grounds.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of an Employment Tribunal, Judge Brian Doyle, sitting at London Central (video hearing via CVP) from 7-8 July 2022, and in chambers on 21 July 2022. Judgment was sent to the parties on 22 July 2022.

2. The claimant was employed by the respondent as a Locum Consultant Breast Surgeon under a series of fixed-term contracts. She acquired four years' continuous service on 22 February 2020. The claimant sought a declaration under regulation 9(5) of the **Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002** ("**FTR**") that she had become a permanent employee of the respondent. In the circumstances of this case the claimant would have become a permanent employee unless her continued employment under a fixed-term contract was justified on objective grounds.

The law

3. As the **FTR** are a little off the beaten track, I will start with a brief overview of the relevant law. The **FTR** were considered by the Supreme Court in **Secretary of State for Children Schools and Families v Fletcher, Duncombe v Secretary of State for Children Schools and Families** [2011] UKSC 14, [2011] I.C.R. 495. Baroness Hale set out the somewhat unusual facts:

> 1. We are concerned with the employment, by the Secretary of State for Children Schools and Families, of teachers to work in the European Schools. These are schools set up to provide a distinctively European education principally for the children of officials and employees of the European Communities. The Staff Regulations, made by the board of governors pursuant to the Convention defining the Statute of the European Schools, limit the period for which teachers may be seconded to work in those schools to a total of nine years (or exceptionally ten). This is made up of an initial probationary period of two years, and a further period of three years, which is renewable for a further four years.
>
> 2. The principal question before us is whether these arrangements can be objectively justified as required by the *Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002*. This was the measure chosen by the United Kingdom to implement *Council Directive 99/70/EC* concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L175, p 43) ("*the Fixed-term Directive*"). The effect of regulation 8 is that a successive fixed-term contract is turned into a permanent employment unless the use of such a contract can be objectively justified.

4. Baroness Hale considered the origin and operation of the **FTR**:

> 9. It is important to understand that the Fixed-term Directive is not directed against fixed-term contracts as such. It has two more specific aims, set out in recital (14):
>
> > "The signatory parties … have demonstrated their desire to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships."
>
> Those two purposes are spelled out in clause 1 of the annexed Framework Agreement. Clause 4 goes on to deal with the "principle of non-discrimination" and clause 5 deals with "measures to prevent abuse":
>
> > "1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, member states, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships."
>
> 10. The preamble and general considerations in the Framework Agreement recognise that "contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers" and also that they "contribute to the quality of life of the workers concerned and improve performance". But they also recognise that "fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers" and that they "are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers". But the substantive provisions of the Framework Agreement do not attempt to define the circumstances in which fixed-term employment is acceptable. Instead they concentrate on preventing or limiting the abuse of successive fixed-term contracts, the abuse being to disguise what is effectively an indefinite employment as a series of fixed-term contracts, thus potentially avoiding the benefits and protections available in indefinite employment.
>
> 11. When implementing clause 5 of the Framework Agreement, the United Kingdom chose a mixture of options (a) and (b). Regulation 8 of the Fixed-term Regulations deals with "Successive fixed-term contracts":
>
> > "(1) This regulation applies where—(a) an employee is employed under a contract purporting to be a fixed-term contract, and (b) the contract mentioned in sub-paragraph (a) has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the contract mentioned in sub-paragraph (a)."

Thus the regulation only applies to a fixed-term contract where there has been at least one previous fixed-term contract or to a fixed-term contract which has been renewed. It continues:

> "(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if—(a) the employee has been continuously employed under the contract mentioned in paragraph (1)(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and (b) the employment of the employee under a fixed-term contract was not justified on objective grounds— (i) where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed; (ii) where that contract has not been renewed, at the time when it was entered into.
>
> "(3) The date referred to in paragraph (2) is whichever is the later of—(a) the date on which the contract mentioned in paragraph (1)(a) was entered into or last renewed, and (b) the date on which the employee acquired four years' continuous employment."

12. Thus there is no need for objective justification for the current (that is, renewed or successive) contract unless and until the employee has been continuously employed for four years. But once he has, the latest renewal or successive contract has to be justified on objective grounds. Otherwise the contract will automatically be transformed into a contract of indefinite duration. As such it will still, of course, be terminable by whatever is the contractual notice period on either side.

5. Baroness Hale dealt with the main issue in the appeal, in short order:

> 23. The teachers' complaint is not against the three or four periods comprised in the nine-year rule but against the nine-year rule itself. In other words, they are complaining about the fixed-term nature of their employment rather than about the use of the successive fixed-term contracts which make it up. But that is not the target against which either the Fixed-term Directive or the Regulations is aimed. Had the Secretary of State chosen to offer them all nine-year terms and take the risk that the schools would not have kept them for so long, they would have had no complaint. Employing people on single fixed-term contracts does not offend against either the Directive or the Regulations.
>
> 24. This is therefore the answer to Mr Giffin's attractive argument: that fixed-term contracts must be limited to work which is only needed for a limited term; and that where the need for the work is unlimited, it should be done on contracts of indefinite duration. This may well be a desirable policy in social and labour relations terms. It may even be the expectation against which the Directive and Framework Agreement were drafted. But it is not the target against which they were aimed, which was discrimination against workers on fixed-term contracts and abuse of successive fixed-term contracts in what was in reality an indefinite employment. It is not suggested that the terms and conditions on which the teachers were employed during their nine-year terms were less favourable than those of comparable teachers on indefinite contracts.

> 25. It follows that the comprehensive demolition by the employment tribunal of the arguments for the nine-year rule is nothing to the point. It is not that which requires to be justified, but the use of the latest fixed-term contract bringing the total period up to nine years. And that can readily be justified by the existence of the nine-year rule. The teachers were employed to do a particular job which could only last for nine years. The Secretary of State could not foist those teachers on the schools for a longer period, no matter how unjustifiable either he or the employment tribunals of this country thought the rule to be. The teachers were not employed to do any alternative work because there was none available for them to do.
>
> 26. The *Adeneler* case [2006] ECR I-6057 is not in point. That concerned a national rule which provided a general "get-out" from the requirements of the Directive. It is not a question of whether the Staff Regulations "trump" the Directive. There is no inconsistency between them. The Staff Regulations are dealing with the duration of secondment, not with the duration of employment. In those circumstances it is questionable whether there is any duty of co-operation between the member states. It appears that the board of governors did not see any conflict between the Staff Regulations and the Directive.
>
> 27. This is scarcely surprising. The United Kingdom could have chosen to implement the Directive by setting a maximum number of renewals or successive fixed-term contracts, for example by limiting them to three. It could equally have chosen to implement the Directive by setting a maximum duration to the employment, for example by limiting it to nine or ten years in total. It is readily understandable why the alternative route of requiring objective justification after four years was taken: this is more flexible and capable of catering for the wide variety of circumstances in which a succession of fixed-term contracts may be used. Unless a very short maximum total had been chosen, it is more favourable to employees than the alternatives. But the fact that the alternatives would have been equally acceptable ways of implementing the Directive is yet another indication that the target is not fixed-term employment as such.

6. The test for objective justification has been considered in a number of cases. In **Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud** [2007] IRLR 911 the Court stated:

> … that concept requires the unequal treatment at issue to be justified by the existence of precise and concrete factors, characterising the employment condition 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 that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.

7. That approach is consistent with the guidance provided by BEIS, which suggests that the employer must establish 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.

8. Although it is the renewal of the most recent fixed-term contract that must be objectively justified, the number and cumulative duration of the previous fixed-term contracts with the employer may be relevant to the overall assessment of objective justification: **Kücük v Land Nordrhein-Westfalen** [2012] ICR 682.

The facts

9. The respondent is an NHS Foundation Trust. It operates a Breast Service. The claimant worked under a series of fixed-term contracts as a Consultant Breast Surgeon in the Breast Service from 22 February 2016. She was described by the respondent as a "locum". The claimant worked part-time; 60% of full-time hours.

10. In 2019, the respondent commenced a review of the Breast Service, alongside similar services provided by other NHS Trusts in North Central London. The process was delayed by the Covid pandemic.

11. The claimant acquired four years' continuous service on 22 February 2020.

12. By 2021, the respondent had decided that it would appoint a "substantive" Consultant Breast Surgeon. As a NHS Foundation Trust, the respondent is not required to adopt the process set out in the **National Health Service (Appointment of Consultants) Regulations 1996** ("the AAC process"), but it chooses to do so, as do other London NHS Foundation Trusts. The AAC process requires that a specific and approved job description is drafted; the post is advertised nationally; the interview is conducted by a specifically selected panel; the panel members being defined by the AAC Regulations; and the interview is conducted in an equitable manner, such that the strongest candidate is appointed. The respondent adopts an enhanced version of the AAC process called "AAC plus". The Employment Tribunal held that:

> 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.

13. Locum Consultant appointments not exceeding 6 months (with a maximum extension of 12 months) are exempted from the AAC Regulations.

14. In 2021, the respondent ringfenced the substantive Consultant Breast Surgeon post for the claimant. The Employment Tribunal held:

> 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. [emphasis added]

15. The claimant attended an interview for the substantive Consultant Breast Surgeon role in September 2021. She was not successful in her application. The Employment Tribunal recorded that the claimant had twice previously applied for similar substantive Consultant roles in the Trust but was not appointed to the roles she applied for.

16. The Employment Tribunal made a series of findings of fact about the differences between the claimant's locum role and that of a substantive Consultant Breast Surgeon:

> 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".

17. After the claimant had been unsuccessful in her application for the substantive Consultant Breast Surgeon role, it advertised nationally. The claimant applied again. The interview took place after the claimant had made her claim to the Employment Tribunal. In his skeleton argument for the Employment Tribunal hearing Mr Kohanzad stated:

> 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.

18. This was not a matter about which the Employment Tribunal heard evidence or made findings of fact. It does not appear to have been asserted at the Employment Tribunal that the claimant should have been slotted into the substantive Consultant Breast Surgeon role when it was advertised nationally.

The conclusions of the Employment Tribunal

19. The Employment Tribunal started by stating what the case was not about, while noting the claimant's contention that the respondent had not acted in good faith:

> 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**. [emphasis added]

20. As is clear from that passage, the claimant contended that disputes between her and the other consultants was an important factor in the process that resulted in her not being appointed to the substantive Consultant Breast Surgeon role.

21. The Employment Tribunal then went on to state what the case was about:

> 216. What this case <u>is</u> 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.** [emphasis added]

22. The Employment Tribunal set out the limited nature of the decision to be made under the **FTR**:

> 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. [emphasis added]

23. The Employment Tribunal next considered the relevance of the claimant's asserted management experience:

> 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). [emphasis added]

24. The Employment Tribunal moved on to consider the assertion that the respondent had not acted in good faith:

> 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**. [emphasis added]

25. The Employment Tribunal then considered the relevant authorities and the purpose of the **FTR**:

> 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 Lópezi*. 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 Lópezi* 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**. [emphasis added]

26. The Employment Tribunal then considered the question it had to ask in deciding whether the continued employment of the claimant under a fixed-term contract was justified:

> 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.** [emphasis added]

27. Finally, the Employment Tribunal concluded that the respondent had established justification:

> 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 shortterm 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.

Overview

28. The Employment Tribunal made careful and detailed findings of fact. There was an

impeccable direction as to the law. The Employment Tribunal then thoroughly analysed the proper application of the law to the facts to determine the issues. That does not preclude the possibility of an error of law, but it does mean that an appellate tribunal should be slow to conclude that there is such an error and should not engage in an over-fastidious review of the reasoning of the Employment Tribunal.

29. I can readily see that if the term "locum" meant no more than fixed-term and "substantive" meant no more than "permanent"; i.e. the same role but without the time limitation; it might have been difficult for the respondent to justify the decision to maintain the claimant on a fixed-term contract while recruiting to the permanent role. The fact that the same contracts were used for the locum and substantive roles, that the claimant did, in fact, carry out some roles additional to those that would be generally expected of a locum and the context, in which some of the claimant's colleagues did not get on with her, provided support for the claimant's case. Those factors were analysed by the Employment Tribunal. However, for the reasons I have set out above in some considerable detail, the Employment Tribunal concluded that the substantive role was truly a different role to the locum role that the claimant undertook. While it is hard not to feel some sympathy for the claimant, who had been thought sufficiently able to carry out the locum role for many years, but then was not appointed to the substantive role; and to wonder whether interpersonal relations in the department were at play, I have to remember that I am at one stage removed. The factual decision was for the Employment Tribunal. It is extremely hard for the claimant to challenge that decision, made after detailed consideration of the evidence, unless she can establish an error of law in the analysis of the Employment Tribunal. We shall now turn to the question of whether the grounds of appeal establish such an error.

Ground 1 The EJ erred in his phrasing of the correct legal question to be asked.

30. The claimant contends that because the respondent identified its legitimate aim as providing a safe, efficient, and fully functioning Breast Service, the analysis should have been limited only to considering whether keeping the claimant on a fixed-term contract was justified on objective grounds

as a means of achieving that aim. The claimant contends that had she "been placed on a permanent contract, the Breast Service would have been just as safe and efficient as it would have been had she remained on a fixed-term contract."

31. The Employment Judge rejected this contention and stated that it was "for the respondent to identify its objective justification". While it is for the respondent to identify the legitimate aim and to explain the means that it adopted to achieve that aim, it is for the Employment Tribunal to assess what circumstances are relevant to the assessment of objective justification. I consider that it overstates the position to say that it is for the respondent to "identify its objective justification". However, I consider that the secondary analysis of the Employment Tribunal is persuasive. The Employment Tribunal stated that the manner in which the claimant sought "to frame the question artificially ignores the circumstances, context and background of this workplace and this employer". The Employment Tribunal accepted the respondent's assertion that there was a "clear need for the Breast Service to recruit a permanent substantive Consultant pursuant to the AAC Regulations". It rejected the claimant's contention that the process was a sham. The Employment Tribunal found as fact that the claimant's role was genuinely different to the substantive role. The respondent had decided to move away from using fixed-term contracts to appoint a permanent employee, but to a different role to that of the claimant. This decision to appoint to a different permanent role was accepted by the Employment Tribunal to provide the context in which a decision was taken to renew the claimant's fixed-term contract to ensure it continued to achieve its legitimate aim, of providing a safe, efficient, and fully functioning Breast Service, in the intervening period. The Employment Tribunal found that there genuinely was a time-limited requirement that was appropriately filled by extending the claimant's fixed-term contract. The limit on the duration was fixed by the recruitment process for the substantive permanent role, rather like the duration of the final fixed-term contracts in **Duncombe** were fixed by the maximum period of 9 years for which teachers at the European school could generally be engaged. The Employment Tribunal held that the respondent had no requirement for a permanent locum Consultant Breast Surgeon because it was accepted that the

substantive role genuinely was a different role to that undertaken by the claimant.

32. The claimant contends that the choice of the UK to adopt a hybrid approach to justification in the **FTR** means that once an employee has been employed for four years on a fixed-term contract, that has been renewed at least once, "Regulation 8(2) creates a rebuttable presumption of permanence unless the employer can justify on objective grounds not making the employee permanent". I am not sure that the concept of a "rebuttable presumption" adds anything of substance. The Employment Tribunal clearly looked to the respondent to establish that the continued employment of the claimant at the time of the last renewal of the fixed-term contract was justified on objective grounds, and found as a fact that it was.

33. I do not consider that there was any error of law in the approach the Employment Tribunal adopted to the question whether the respondent's decision to continue to employ the claimant on a fixed-term contract pending the appointment to the substantive role was justified on objective grounds.

Ground 2 EJ erred in allowing the Respondent's terminology of "locum" and "substantive" to emasculate the Regulations.

34. At heart, this ground asserts that the term "locum" meant no more than fixed-term and "substantive" meant no more than permanent; and that the jobs were essentially the same. If that had been the case, I can see the argument that the regulations cannot be sidestepped by renaming the fixed-term and permanent varieties of the same job. The assessment of whether the jobs were substantially different involved a factual determination. The Employment Tribunal decided that the roles were genuinely different. I do not consider there was any error of law in the determination of the Employment Tribunal.

Ground 3 The EJ erred in treating the fact that locum and substantive roles were "different" as being determinative and failed to weigh the extent of the difference when considering whether the Respondent's conduct was justified

35. I do not consider that on a fair reading of the Judgment the Employment Tribunal merely found that the claimant's role was "different" to that of the substantive role, in the sense of there being

some minor differences. I consider it is clear that the Employment Tribunal analysed the extent of the differences and concluded that they were sufficiently different roles that the new role was not a continuation of the claimant's locum role. The new role requires a greater level of management, teaching and liaison with other NHS Trusts than the role the claimant undertook. That was a factual determination for the Employment Tribunal. I do not consider that the decision was perverse.

Ground 4 The EJ erred in failing to address the Claimant's case as to a lack of good faith and/or his conclusion on the subject of good faith is not Meek compliant given the evidence before him

36. This essentially is a perversity challenge. The Employment Tribunal was entitled to reject the argument that the respondent was not acting in good faith for the reasons that it gave. The Employment Tribunal referred to an email of 25 January 2021, sent by Dr Hodgson to a colleague, that spoke of creating a different role to that of the claimant and, in the alternative, to an exit strategy being required. The Employment Tribunal also took account of the fact that individuals who were on the interview panel were antagonistic to the claimant. The Employment Tribunal weighed these matters against the facts that the claimant was encouraged to apply for the substantive role, the post was ring-fenced for her and she was provided with coaching prior to the interview. I do not consider that the decision that the respondent did not demonstrate a lack of good faith is perverse. The reasoning of the Employment Tribunal was more than sufficient.

Ground 5 After the submission of her ET1, the Claimant applied for the role of a substantive consultant oncoplastic breast surgeon and was found to be appointable. She was not given the role because the Respondent considered other candidates outperformed her during the interview. The EJ did not directly address the question of whether the Claimant should have been given that role rather than it having been given to the best candidate.

37. This was not a claim that was before the Employment Tribunal. It postdated the claim, there was no amendment to add it as a claim and it was not specifically addressed in evidence. When

permitting this ground to proceed Judge Stout stated that "the claimant will need at least to produce the claimant's witness statement and/or notes of evidence will be required". These steps have not been taken. I do not consider that this ground sets out a legitimate challenge to the decision of the Employment Tribunal.