

Tribunal decision on successive use of FTCs exceeding four years' service and objective justification

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Cheryl Lobo v University College London Hospitals NHS Foundation Trust

Ms Lobo was employed by the Trust as a Locum Consultant Breast Surgeon under a series of fixed-term contracts (FTCs). She argued that after 4 years' continuous service under successive FTCs, she should be considered a permanent employee and she sought a declaration from the Employment Tribunal (ET) to this effect.

Employment Tribunal (ET) decision

The ET was tasked with determining whether the continued employment of Ms Lobo under an FTC was justified on objective grounds under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the FTR). Under section 8 of the FTR, an employee employed continuously under an FTC or a series of FTCs for a continuous period of four years or more may be declared a permanent employee if the use of an FTC is not justified on objective grounds at the time it was last renewed or, where it has not been renewed, when it was entered into.

The ET initially ruled that the Trust had provided sufficient objective justification for continuing Ms Lobo's FTC rather than transitioning to a permanent contract. The justifications cited by the Trust were:

1. The Trust was conducting a comprehensive review of its departmental service, which necessitated flexibility in staffing to accommodate potential changes in service delivery.
2. The Trust had decided to appoint a substantive (permanent) Consultant Breast Surgeon through its "AAC plus" process, emphasising that the responsibilities of this role were not inherently part of the Locum Consultant's duties.

In making its decision, the ET focused on whether the renewal of Ms Lobo's FTC was objectively justified at the time of the most recent renewal, rather than examining broader issues of fairness, discrimination, or the suitability of Ms Lobo for a permanent position.

Appeal and EAT ruling

Ms Lobo appealed the ET's decision, arguing that the objective justification provided by the respondent was insufficient and that she should be deemed a permanent employee. However, the EAT upheld the ET's decision, finding that the Trust had provided a legitimate business rationale for maintaining the fixed-term status, which aligned with regulatory and business requirements.

Conclusion

The EAT ruling affirmed that, provided there is a legitimate business objective, the renewal of an FTC beyond 4 years' continuous service can be justified on objective grounds. This case highlights the necessity for employers to provide solid justifications for employment decisions, particularly concerning the use of FTCs.

Key requirements to succeed in an objective justification argument:

1. Demonstrate a legitimate business rationale: provide clear reasons related to operational needs such as project-specific roles or temporary replacements.
2. Show proportionality and necessity: provide that the FTC is the most appropriate and least discriminatory method to achieve the business objective.
3. Ensure consistency and fairness: apply the criteria for FTCs uniformly across the organisation to avoid discrimination.
4. Maintain evidence and documentation: keep detailed records of the decision-making process, including business rationale and consultations.
5. Comply with regulations: be aware of the threshold for objective justification (four years of continuous service) and review contracts accordingly.

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