APPROVED **[2021] IEHC 346**

THE HIGH COURT

2020 No. 195 MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 46 OF THE WORKPLACE RELATIONS ACT 2015

AND IN THE MATTER OF THE PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT 2003

BETWEEN

MAURICE POWER

APPELLANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 June 2021

INTRODUCTION

1. This judgment concerns the scope of the Protection of Employees (Fixed-Term Work) Act 2003. One of the objectives of the Act is to prevent abuse arising from the use of successive fixed-term contracts of employment. The legislation provides that a person who has been employed, without objective justification, on successive fixed-term contracts with an aggregate duration of in excess of four years shall be deemed to be

employed under a contract of indefinite duration. The issue for determination in this judgment is whether an *existing* employee of an organisation, who fulfils a more senior role within the organisation on a temporary basis, is excluded from the benefit of the legislation.

2. The issue arises in the following way. An existing employee of the Health Service Executive ("***the Employer***") had been appointed to a more senior post as an interim measure, pending the post being filled on a permanent basis following a formal recruitment process. In the event, this interim measure remained in place for more than four years. Were the legislation to be applicable, the Employee would, in principle, be entitled to assert a right to remain in the more senior post pursuant to a contract of indefinite duration. It would be open to the Employer to resist this asserted right by establishing that there were objective grounds justifying the use of fixed-term contracts for an aggregate duration in excess of four years.

3. The Employer submits that the legislation is never applicable in the case of an *existing* employee, who fulfils a more senior role on a temporary basis, precisely because such an employee already has the benefit of permanent employment within the organisation. Such an existing employee has a contractual entitlement, on the conclusion of the temporary appointment, to revert to their original permanent position on the terms and conditions of employment applicable to that position.

4. In response, the Employee submits that the objective of the legislation would be subverted were a public sector employer to be permitted to utilise successive fixed-term contracts merely because a worker had permanency in respect of a *lesser* role within the organisation.

5. The dispute between the parties ultimately came before the Labour Court. In its determination of 5 August 2020, the Labour Court dealt with the question of the

applicability of the Protection of Employees (Fixed-Term Work) Act 2003 as a threshold issue. The Labour Court concluded that the Employee did not have standing (*locus standi*) to pursue his claim in circumstances where he is a permanent employee, employed on a contract of employment of indefinite duration by the Employer.

6. It became unnecessary, therefore, for the Labour Court to consider the Employee's claim any further. In particular, the Labour Court's determination does not address the question of whether there were objective grounds justifying the use of fixed-term contracts for an aggregate duration in excess of four years.

7. The matter now comes before the High Court by way of a statutory appeal against the determination of the Labour Court. The appeal is an appeal on a point of law pursuant to section 46 of the Workplace Relations Act 2015. The procedure for such appeals is prescribed under Order 105 of the Rules of the Superior Courts.

LEGISLATIVE REGIME

Overview

8. The Protection of Employees (Fixed-Term Work) Act 2003 ("***the Act***") regulates the use of fixed-term contracts of employment. The Act gives effect to Council Directive 1999/70/EC on fixed-term work ("***the Fixed-Term Work Directive***"). As discussed presently, there is an obligation on this court, as a national court of a Member State, to interpret the domestic legislation, to the fullest extent possible, in light of the wording and the purpose of the Fixed-Term Work Directive.

9. The Fixed-Term Work Directive, in turn, gives effect to the Framework Agreement on Fixed-Term Contracts concluded on 18 March 1999 between the General Cross-Industry Organisations ("***the Framework Agreement***"). The Framework Agreement has been annexed to the Directive.

10. The stated purpose of the Framework Agreement is:

    (a) to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination; and

    (b) to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

11. These twin purposes are reflected under the Protection of Employees (Fixed-Term Work) Act 2003 as follows. First, the principle of non-discrimination is given effect to under section 6 of the Act. This section provides that a fixed-term employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a "comparable permanent employee" (as defined). Section 10 provides that an employer shall inform a fixed-term employee in relation to vacancies which become available to ensure that he or she shall have the same opportunity to secure a permanent position as other employees.

12. Second, safeguards against the abuse of successive fixed-term contracts of employment have been introduced under section 9. This section provides, in relevant part, that where a fixed-term employee is employed on two or more continuous fixed-term contracts, then the aggregate duration of such contracts shall not exceed four years. This prohibition does not apply, however, where there are "objective grounds" justifying the renewal of a contract of employment for a fixed term.

13. The combined effect of sections 9(2) and 9(3) is that a person who has been employed on successive fixed-term contracts with an aggregate duration of in excess of four years, *without objective justification*, shall be deemed to be employed under a contract of indefinite duration. (The parties were agreed that section 9(1) is in the form of a transitional provision, regulating circumstances where a person had already been

employed on a fixed-term contract as of the date of the commencement of the Act on 14 July 2003).

14. The nature of a "contract of indefinite duration" is not expressly described under the Act. Section 9(3) simply provides that any contractual term which purports to contravene the four-year threshold shall have no effect, and the contract concerned shall be *deemed* to be a contract of indefinite duration. This implies that the terms and conditions of the contract of indefinite duration will be the same as those of the fixed-term contract which it replaces, save for the obvious difference that the offending condition defining the fixed-term of the contract will have been invalidated.

15. This understanding of the nature of a contract of indefinite duration is consistent with the approach of the Court of Justice. The Fixed-Term Work Directive does not lay down a general obligation on the Member States to provide for the conversion of fixed-term contracts of employment into contracts of indefinite duration. Where, however, a Member State has chosen to do so, then the conversion of fixed-term employment contracts into an employment contract of indefinite duration must not be accompanied by material amendments to the clauses of the previous contract in a way that is, overall, unfavourable to the person concerned when the subject-matter of that person's tasks and the nature of his functions remain unchanged. (Case C-251/11, *Huet* at paragraph 46).

16. The concept of a contract of indefinite duration does not imply that the employee's contract of employment cannot ever be terminated. Rather, the same principles as applicable to any contract of employment apply. At common law, a contract of employment is subject to termination at will. An employer can dismiss an employee, even a permanent employee, for any or no reason, by giving reasonable notice. The common law position is ameliorated by legislation. An employee may seek to challenge the fairness of their dismissal by bringing a statutory claim pursuant to the Unfair

Dismissals Act 1977 (as amended). However, the principles governing such a statutory claim would be the same irrespective of whether the employee had the benefit of a deemed contract of indefinite duration or not. (*Power v. Health Service Executive* [2019] IEHC 462, at paragraph 76).

17. Put otherwise, an employee who has transitioned from a succession of fixed-term contracts to a contract of indefinite duration is in no stronger a position vis-à-vis dismissal or redundancy than an employee who had been employed from the outset on a conventional contract of employment with no end date. The significance of deeming a fixed-term contract to be a contract of indefinite duration is simply that an employer can no longer lawfully terminate the contract of employment by dint of the occurrence of the specified contingency. A claim for unfair dismissal is no longer excluded under section 2(2) of the Unfair Dismissals Act 1977 (as amended) once the objective condition specifying the fixed-term is invalidated.

Scope of the legislative protections

18. The dispute between the parties in the present case centres on the scope of the Protection of Employees (Fixed-Term Work) Act 2003. The scope of the Act is constrained by the statutory concept of a "fixed-term employee". Unless a complainant can establish that they come within this concept, they cannot benefit from the Act.

19. Before turning to consider the provisions of the domestic legislation in detail, it should be explained that the scope of the Framework Agreement itself is described, under clause 2(1), as applying to fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State. The Framework Agreement thus allows each individual Member State to define the terms "employment contract" or "employment relationship" in accordance with its own national law and practice. This discretion is preserved under recital 17 of

the Fixed-Term Work Directive. Nevertheless, the discretion granted to the Member States in order to define such concepts is not unlimited. Such terms may be defined in accordance with national law and practices on condition that they respect the effectiveness of the Fixed-Term Work Directive and the general principles of EU law. (Case C-103/18, *Sánchez Ruiz*, paragraph 109).

20. The Irish State has chosen to implement the Fixed-Term Work Directive as follows. The entitlement to the benefit of the protections under the Protection of Employees (Fixed-Term Work) Act 2003 is predicated on the complainant qualifying as a "fixed-term employee". A "fixed-term employee" is defined as follows.

> "'fixed-term employee' means a person having a contract of employment entered into directly with an employer where the end of the contract of employment concerned is determined by an objective condition such as arriving at a specific date, completing a specific task or the occurrence of a specific event but does not include—
>
> (a) employees in initial vocational training relationships or apprenticeship schemes, or
>
> (b) employees with a contract of employment which has been concluded within the framework of a specific public or publicly-supported training, integration or vocational retraining programme;"

21. The term "contract of employment" is, in turn, defined as follows.

> "'contract of employment" means a contract of service whether express or implied and, if express, whether oral or in writing but shall not include a contract whereby an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971 and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract);"

22. The term "permanent employee" is defined as meaning an employee who is <u>not</u> a "fixed-term employee".

23. The statutory protections afforded under the Protection of Employees (Fixed-Term Work) Act 2003 cannot be waived by an employee. Section 12 states that a provision in

an agreement shall be void insofar as it purports to exclude or limit the application of, or is inconsistent with, any provision of the Act. It does not matter, therefore, that some of the contracts of employment entered into between the parties in the present proceedings purport to exclude the application of the Act.

24. This anti-avoidance provision ensures that the domestic legislation complies with the requirements of the Fixed-Term Work Directive. The Court of Justice has held that to deprive fixed-term workers of the protection of the Framework Agreement on the sole ground that they freely consented to the conclusion of successive fixed-term employment relationships would completely deprive clause 5 of the Framework Agreement of all effectiveness. This is because the objective of the Framework Agreement is based implicitly, but necessarily, on the premiss that workers, as a result of their position of weakness vis-à-vis employers, are likely to be victims of an abusive use, by employers, of successive fixed-term employment relationships, even though they freely consented to the establishment and renewal of those relationships. (Case C-103/18, *Sánchez Ruiz*, paragraphs 110 to 114).

Procedure for claiming redress

25. The procedure prescribed for claiming redress under the Protection of Employees (Fixed-Term Work) Act 2003 is to present a complaint to the Director General of the Workplace Relations Commission. The complaint will be determined in accordance with Part 4 of the Workplace Relations Act 2015, with the nature of the redress prescribed under section 14 of the Act of 2003. The complaint is heard initially by an adjudication officer. An adjudication officer may do any of the following:

(a) declare whether the complaint was or was not well founded;

(b) require the employer to comply with the relevant provision of the Protection of Employees (Fixed-Term Work) Act 2003;

(c) require the employer to reinstate or reengage the employee (including on a contract of indefinite duration); or

(d) require the employer to pay to the employee compensation of such amount (if any) as the adjudication officer considers just and equitable having regard to all of the circumstances, but not exceeding two years' remuneration in respect of the employee's employment.

26. There is a right of appeal against the adjudication officer's decision to the Labour Court. The Labour Court may affirm, vary or set aside the decision of the adjudication officer.

27. Thereafter, there is a right of appeal to the High Court on a point of law against the determination of the Labour Court, pursuant to section 46 of the Workplace Relations Act 2015. There is no appeal to the Court of Appeal, but a dissatisfied party may petition the Supreme Court for leave to appeal in accordance with Article 34.5.4° of the Constitution of Ireland.

FACTUAL BACKGROUND

28. There is no disagreement between the parties as to the factual background leading up to the present proceedings. Indeed, it had not been necessary for the Labour Court to hear any oral evidence.

29. The agreed facts are recited in the Labour Court's determination as follows (at page 2 thereof).

> "The Appellant is employed by the Respondent as a permanent pensionable employee since July 1999. He was appointed as the Chief Financial Officer of the Saolta University Healthcare Group, a unit of the Respondent, in January 2012 and occupied that role at the date of the hearing of the Court.
>
> It is common case that the Appellant, at the invitation of the Respondent, took up the role of Interim Group Chief Executive, Saolta University Healthcare Group on 5th October 2014. On 20th November 2014 the Respondent wrote to the Appellant

> confirming his appointment on a temporary basis until 31st March 2015 or until the role was filled on a permanent basis whichever occurred sooner. He was also advised in that letter that when his temporary role as Group Chief Executive ceased, he would revert to his '*substantive terms and conditions as a permanent employee of the Health Service Executive*'.
>
> The Appellant was advised by letter dated 7th May 2015 that his appointment was extended until 31st December 2016. He was subsequently advised in December 2016 that his appointment as interim Group Chief Executive was being extended until 31st December 2017. He was advised again in January 2018 by the Respondent that his appointment was extended to the end of 2018.
>
> In September 2018 the post of Group Chief Executive for a five-year term was advertised in a competition administered by the Public Appointments Service on behalf of the Respondent. The Appellant was an unsuccessful candidate in that competition
>
> The Appellant resumed his position as Chief Financial Officer of the Saolta Group in September 2019."

30. The Employee's complaint is that he became entitled to remain in the post of group chief executive, pursuant to a contract of indefinite duration, by virtue of his having been employed in that post under successive fixed-term contracts with an aggregate duration of in excess of four years. On his analysis, the right to a contract of indefinite duration would have arisen in October or November 2018. (This is so notwithstanding that the Employee did not formally assert this entitlement until 14 January 2019).

31. It is instructive, therefore, to consider the attitude of the Employer at the time. The National Director of Human Resources of the Health Service Executive wrote to the Employee on 14 November 2018. The letter, in relevant part, reads as follows.

> "As you are aware, the Public Appointments Service (PAS) is currently undertaking a recruitment competition to fill a number of Hospital Group Chief Executive Office (CEO) positions, including the CEO position which you currently hold in the Saolta University Health Care Group. Your fixed-term appointment in this role is due to expire on the 30th December 2018, which is prior to the expected completion date of the fore-mentioned PAS competition.
>
> I am therefore writing to you to extend your employment with the Health Service Executive as CEO of Saolta University Health Care

> Group. Your employment under the terms of this appointment commences on the 31st December 2018 on a fixed-term whole-time basis for the purpose of providing cover for the duration of time that it takes PAS to complete the selection process and the successful candidate taking up the CEO position in Saolta University Health Care Group. Your employment under the terms of this contract will terminate when the successful PAS appointees take up the CEO post.
>
> Upon the termination of this contract, you shall revert to your substantive permanent position on the terms and conditions of employment applicable to that position or an alternative permanent position at the same grade.
>
> The Unfair Dismissals Act 1977 - 2005 shall not apply to the termination of this appointment, consisting only of the fulfilment of the said purpose."

32. It is evident from this letter that, at this point in time at least, the Employer understood the Employee to be employed under *successive* contracts of employment. The Employer also understood that these contracts of employment would *terminate*, and that the Employee's *employment* under the terms of these contracts of employment would *terminate* upon his reverting to his substantive permanent position.

33. The stance adopted by the Employer for the purposes of these proceedings is entirely different. It is now said that there was only ever one ongoing contract of employment between the parties. No proper explanation has ever been provided for this *volte face*.

34. Finally, for the sake of completeness, it should be explained that the Employee is pursuing parallel plenary proceedings against the Employer (*Power v. Health Service Executive* High Court 2019 No. 1637 P) ("***the plenary proceedings***"). The statement of claim in the plenary proceedings was delivered on 4 December 2019. A variety of reliefs are claimed including, *inter alia*, damages for breach of contract of employment; a declaration that the Employer has acted contrary to its obligations of trust and confidence arising from the parties' employment relationship; and a declaration that the Employer has acted and is acting contrary to the requirements of the Fixed-Term Work Directive.

35. The High Court (Allen J.) refused an earlier interlocutory application, made in the context of the plenary proceedings, for orders restraining the Employer from appointing a replacement group chief executive. The reserved judgment was delivered on 26 June 2019, *Power v. Health Service Executive* [2019] IEHC 462. The outcome of the interlocutory application turned on an analysis of the interaction between the respective jurisdictions of the Workplace Relations Commission/Labour Court and the High Court, and, in particular, the jurisdiction, if any, of the High Court to make interim orders in aid of the statutory process. The judgment is not, therefore, immediately relevant to the issues which arise in the present proceedings.

LABOUR COURT'S DETERMINATION

36. The Labour Court delivered its written determination on 5 August 2020 ("***the decision under appeal***"). The Labour Court held that the scope of the Protection of Employees (Fixed-Term Work) Act 2003 is confined to those employees whose relationship with their employer is coterminous with the fixed-term contract under which they are employed. An existing employee, who reverts to their substantive grade and whose employment continues at the end of a fixed-term assignment, does not enjoy the protection of the Act.

37. The Labour Court further held that an employee could not be both a "permanent employee" and a "fixed-term employee". See page 8 of the decision under appeal as follows.

> "The Appellant in the within Appeal accepts that at all material times he was employed by the Respondent as a permanent employee and consequently employed on a contract of employment of indefinite duration. However, he also maintains that he was for a time during the same period a fixed term worker employed on a succession of fixed term contracts of employment by the Respondent. These contentions are irreconcilable. This is not a case of the Appellant being employed in two different capacities at the same time by the

> same employer. The appellant in the within appeal was employed by the Respondent in only one capacity at any one time. At no material time was his employment with the Respondent at risk or under threat."

38. The Labour Court summarised its conclusions as follows (at page 9).

> "In the within matter the Appellant's link with his employer is, self-evidently, the permanent employment relationship created and maintained by the contract of employment entered into by him and the Respondent prior to his taking up an appointment on a fixed term basis as interim Group Chief Executive and under the terms of which contract he returned to the role of Chief Financial Officer in 2019. That conclusion is all the more inescapable having regard to the fact that the Appellant's employment was at no time at risk arising from the termination of his fixed term appointment to the role of interim Group Chief Executive.
>
> The Court concludes that at all material times the Appellant was employed as a permanent employee, employed on a contract of employment of indefinite duration by the Respondent. The Court consequently concludes that the Appellant does not have locus-standi to maintain the within appeal. The Court's conclusion in this matter accords with the jurisprudence of this Court on the scope of the Act as regards its application to employees who hold permanent contracts of employment with employers against whom they seek the protection of the Act as fixed term employees."

APPEAL TO THE HIGH COURT

39. The Employee brought an appeal against the Labour Court's determination pursuant to section 46 of the Workplace Relations Act 2015. The appeal came on for hearing before me on 8 June 2021.

40. The parties were agreed that the issues arising on this appeal are not ones in respect of which the High Court is required to show any deference to the findings of the Labour Court. No contested issue of fact arises, and, indeed, the Labour Court had not been required to hear any oral evidence. The issues arising comprise questions of law, concerning the interpretation of the relevant provisions of the Protection of Employees (Fixed-Term Work) Act 2003, and the correct characterisation of the employment

relationship between the parties. For the reasons explained in cases such as *Health Service Executive v. Sallam* [2014] IEHC 298 (at paragraphs 18 and 21), these are matters of law and do not attract deference.

41. More generally, and as counsel for the Employee correctly observes, the recent ruling of the Supreme Court in *Zalewski v. An Adjudication Officer* [2021] IESC 24 may have implications for the extent of curial deference to be shown to the Labour Court. The Supreme Court in *Zalewski* held that decision-making under the Workplace Relations Act 2015 represents the exercise of limited functions and powers of a judicial nature in accordance with Article 37 of the Constitution of Ireland. The rationale for curial deference is that the relevant decision-maker has a specialist expertise which the court does not possess. This rationale does not apply to the same extent, if at all, where the decision-maker is itself exercising functions and powers of a judicial nature.

DETAILED DISCUSSION

ORDINARY AND NATURAL MEANING OF DOMESTIC LEGISLATION

42. The resolution of the dispute between the parties turns largely on a question of statutory interpretation, namely what is meant by the concept of a "fixed-term employee". The starting point for the consideration of this question must be the domestic legislation itself, i.e. the Protection of Employees (Fixed-Term Work) Act 2003. It will, of course, also be necessary to consider the provisions of the Fixed-Term Work Directive. Nevertheless, the first matter to be addressed is the ordinary and natural meaning of the domestic legislation.

43. The concept of a "fixed-term employee" is defined as follows under section 2 of the Act. (The exclusions are not immediately relevant, and have been omitted).

> "'fixed-term employee' means a person having a contract of employment entered into directly with an employer where the end of the contract of employment concerned is determined by an objective condition such as arriving at a specific date, completing a specific task or the occurrence of a specific event […]"

44. The parties are in disagreement as to the meaning to be attributed to the phrase "the end of the contract of employment concerned". On the Employer's analysis, the contract of employment is synonymous with an enduring employment relationship. It follows, on this analysis, that it is only where the *employment relationship* itself will be brought to an end on the occurrence of the relevant contingency that a fixed-term contract can be said to exist.

45. This reflects the approach taken by the Labour Court. The Labour Court held that a complainant's *employment* must be coterminous with the expiry of a fixed-term or fixed-purpose contract of employment. An existing employee, who reverts to their substantive grade and whose employment within the same organisation continues at the end of a fixed-term assignment, is said not to qualify as a "fixed-term employee".

46. With respect, I cannot agree with the foregoing analysis. It does not accord with the ordinary and natural meaning of the statutory language. The term "contract of employment" is defined under section 2 of the Act as meaning a contract of service whether express or implied, and, if express, whether oral or in writing. It is thus directed to the *agreement* between an employer and employee, i.e. the terms and conditions which govern the employment relationship at any particular time. When the definition under section 2 speaks of the end of "the contract of employment concerned", it is referring to the end of a contract of service. This reference occurs in the context of legislation the very purpose of which is to regulate *successive* contracts of service between the same employer and employee. It is inherent in the scheme of the legislation that an ongoing employment relationship can be regulated by a series of consecutive contracts of service. Section 9 of the Act expressly envisages that an employee may provide continuous service under successive contracts of employment, i.e. successive contracts of service.

47. It is incorrect, therefore, to say that a "contract of employment" (as defined) should be interpreted as meaning an enduring employment relationship. The two things are not necessarily coterminous. An individual may be employed by the same organisation in a series of different posts, each subject to its own terms and conditions as specified in a consecutive series of contracts of employment. Such an individual will nevertheless have had *continuous service* with the employer throughout the overall period, albeit under a number of contracts.

48. The rules governing the ascertainment of the period of service of an employee, and whether that service has been continuous, are set out under the Minimum Notice and Terms of Employment Acts 1973 to 2001 (as applied by section 9(5) of the Protection of Employees (Fixed-Term Work) Act 2003). It is expressly provided that service of an employee in his employment shall be deemed to be continuous unless that service is

terminated by (a) the dismissal of the employee by his employer, or (b) the employee voluntarily leaving his employment. Put otherwise, the termination of one contract of employment and the commencement of another does not affect continuity of service. An employment relationship is not synonymous with any particular contract of employment.

49. On the agreed facts of the present case, for example, a further contract of employment was entered into between the parties in January 2012 upon the Employee's promotion to the position of chief financial officer. This is so notwithstanding that there was already a longstanding employment relationship between the parties, with the Employee having been employed by the organisation in other roles since as long ago as 1999.

50. In summary, therefore, on its ordinary and natural meaning, the definition of "fixed-term employee" merely requires that the end of the contract of employment concerned is determined by an objective condition. It does not require that this must also have the consequence that the employment relationship is brought to an end. A contract of employment may qualify as a fixed-term contract notwithstanding that the relevant employee continues in the employment of the organisation thereafter, whether by transitioning to a further contract or reverting to an earlier one.

51. Finally, for the sake of completeness, it is necessary to refer briefly to an argument advanced on behalf of the Employer by reference to section 14 of the Act. (The relevant provisions have been summarised at paragraph 25 above). As I understood the argument, it is said that the language used to frame the statutory remedies indicates that there can never be a right to restoration of employment under a specific contract or in a specific post. An employer is only ever required to "reinstate" or to "reengage" the employee (including on a contract of indefinite duration). It is said that these words imply that the complainant is *no longer employed* within an organisation. Such remedies can have no

application to an employee, such as Mr. Power, who remained in employment within the relevant organisation at all times.

52. With respect, this argument necessitates attaching an artificial meaning to the word "reinstate". On its ordinary and natural meaning, this word signifies the restoration of a person to their former position or privileges. The word "reinstate" is apt to describe the restoration of an existing employee to a more senior position which they had formally occupied. This is precisely the nature of the remedy which Mr. Power seeks, i.e. to be restored to the position of group chief executive. Unlike the word "reengage", the notion of reinstatement is not necessarily confined to a person who has previously been dismissed from an organisation and is now being re-employed or re-hired.

53. It is not legitimate to "read across" the definitions from the Unfair Dismissals Act 1977 (as amended) to the Protection of Employees (Fixed-Term Work) Act 2003 in circumstances where the two Acts do not fall to be construed together. It is entirely unsurprising that the terms as used under the former legislation contemplate re-employment or re-hiring, given that that legislation is concerned exclusively with *dismissal* from employment. It does not follow that the word "reinstate" should not be given its ordinary and natural meaning under the latter legislation.

54. Moreover, the Employer's argument is also inconsistent with the nature of a "contract of indefinite duration" as discussed in detail at paragraphs 14 to 17 above.

55. At all events, this argument as to the implications of section 14 of the Act is not one which features in the Labour Court's decision under appeal, and was only advanced for the first time in oral submission in this court.

FIXED-TERM WORK DIRECTIVE

56. Having considered the ordinary and natural meaning of the domestic legislation, it is next necessary to have regard to the provisions of the Fixed-Term Work Directive. This court, as with any other national court of a Member State, is under a general obligation to interpret domestic legislation, to the fullest extent possible, in the light of the wording and the purpose of European Law including, relevantly, Directives.

57. The application of this interpretative obligation to the Fixed-Term Work Directive is somewhat nuanced. This is because the Directive allows Member States themselves to define terms—which have not been defined under the Framework Agreement—in conformity with national law or practice. This is subject to the proviso that the definitions in question must respect the content of the Framework Agreement.

58. Crucially, the terms "employment contract" or "employment relationship" are not defined under the Framework Agreement. Indeed, clause 2(1) of the Framework Agreement itself expressly envisages that those terms fall to be defined in law, collective agreements or practice in each Member State.

59. As properly acknowledged by the Employer in its written legal submissions (at §57), it is a matter for the domestic legislature to define the category of workers which qualify for protection.

> "Thus, the definition of 'fixed term employee' is a matter for the Oireachtas. The meaning of who is a 'fixed-term worker' for the purpose of the Directive is itself dependent on whether a domestically defined employment relationship exists. Absent an arbitrary exclusion of a category of workers from the scope of protection of the Directive national law will apply."

60. The Court of Justice has held that the Framework Agreement applies to all workers providing remunerated services in the context of a fixed-term employment relationship linking them with their employer, provided that they are linked by an employment

contract or relationship *within the meaning of national law*. (Case C-103/18, *Sánchez Ruiz*, paragraph 108).

61. The Member States thus have discretion to define the concepts of "employment contract" or "employment relationship" in accordance with national law and practice. Nevertheless, the discretion granted to the Member States in order to define such concepts is not unlimited. Such concepts may be defined in accordance with national law and practices on condition that they respect the effectiveness of the Fixed-Term Work Directive and the general principles of EU law (Case C-103/18, *Sánchez Ruiz*, paragraph 109). The concepts must not be defined in a manner that results in the arbitrary exclusion of a category of persons from the benefit of the protection provided by the Framework Agreement (Case C-157/11, *Sibilio*, paragraphs 42 and 51).

62. The Court of Justice has delivered a number of judgments finding that Member States have purported to define these terms too narrowly, so as to exclude categories of workers arbitrarily. By contrast, the contention advanced by the Employer in the present proceedings is that an interpretation which would include workers who have a right to revert to their original permanent post would be too broad. It is further contended that the objective of the Fixed-Term Work Directive is to provide minimum protections to promote stability in employment status as a whole, not to confer specific (or enhanced) contractual benefits on persons who are already permanent employees. (See Employer's written submissions at §75).

63. With respect, this contention misunderstands the nature of the constraint placed upon the Member States. The constraint upon a Member State's discretion is that it may not prescribe an overly exclusive definition. There is nothing in either the Fixed-Term Work Directive or the Framework Agreement which precludes a more inclusive definition. Indeed, the Framework Agreement expressly states, at clause 8(1) thereof, that Member

States and/or the social partners can maintain or introduce *more favourable provisions* for workers than set out in the Agreement.

64. It follows, therefore, that even if the Employer is correct in saying that the objective of the Fixed-Term Work Directive is merely to promote stable employment with an employer, irrespective of the terms and conditions of that employment, a Member State would nevertheless be entitled to define an employment contract in such a way as to include an employee who has a right to revert to their original post upon the ending of their fixed-term contract of employment. This is something which is well within the discretion afforded to a Member State under the Fixed-Term Work Directive.

65. For the sake of completeness, however, I should record that I do not accept that the objectives of the Fixed-Term Work Directive are as narrow as contended for by the Employer. It should be recalled that the Framework Agreement has two stated purposes, as follows:

    (a) to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination; and

    (b) to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.

66. It is necessary to consider both of these objectives in assessing the implications of a bright-line rule which would exclude an employee, who has a right to revert to their original post, from the protections of the Fixed-Term Work Directive. This is because the same qualifying criteria applies to both sets of protections afforded under the Directive. If an employee does not qualify as a fixed-term worker, then they are denied all of the benefits of the Directive.

67. Put otherwise, the logic of the Labour Court's approach is that an employee, with a right to revert, is to be denied not only the possibility of claiming a contract of indefinite

duration, they are also to be precluded from relying on the principle of non-discrimination. One consequence of this would be that an employee, who has a right to revert to their original post, would not be legally entitled to be informed about vacancies which become available within the organisation. This would mean that an employee, who might have been acting up in the more senior role for many years, would not have a legal entitlement to be notified of a recruitment process in respect of the very post which he or she has been occupying on an interim basis. This would be inconsistent with the objective of the Fixed-Term Work Directive that all workers have the same opportunity to secure permanent positions.

68. Another consequence is that an employee who is acting up could be discriminated against in respect of terms and conditions such as, for example, pension entitlements. Such an employee would have no redress were their pension entitlements to be calculated by reference to the (lower) salary applicable to their basic post, rather than that applicable to the senior post in which they are employed. Again, such an outcome would not be consistent with the objectives of the Fixed-Term Work Directive, nor more generally with the principle of non-discrimination in EU law.

69. Turning now to the second stated purpose of the Framework Agreement, it is difficult to reconcile the contention that the objective is merely to promote stable employment *simpliciter*, irrespective of the terms and conditions of that employment, with the case law in respect of the obligation to provide effective measures to prevent and, where relevant, penalise the abuse of successive fixed-term employment contracts. This is illustrated by the case law in respect of contracts of indefinite duration. The Court of Justice held in Case C-251/11, *Huet* that where domestic law provides for the conversion of fixed-term employment contracts into an employment contract of indefinite duration, the conversion must not be accompanied by material amendments to the clauses of the

previous contract in a way that is, overall, unfavourable to the person concerned. The rationale for this approach is explained as follows at paragraph 44 of the judgment.

> "[…] if a Member State were to permit the conversion of a fixed-term employment contract into an employment contract of indefinite duration to be accompanied by material amendments to the principal clauses of the previous contract in a way that is, overall, unfavourable to the employee under contract, when the subject-matter of that employee's tasks and the nature of his functions remain unchanged, it is not inconceivable that that employee might be deterred from entering into the new contract offered to him, thereby losing the benefit of stable employment, viewed as a major element in the protection of workers."

70. This passage makes a direct connection between the clauses, i.e. the terms and conditions, of the previous contract, and the benefit of stable employment. This indicates that the objectives of the Fixed-Term Work Directive go beyond simply ensuring that an employee is entitled to be employed within an organisation irrespective of the role, but is also concerned with the nature and quality of that employment.

71. Finally, the logic of the Employer's position, *reductio ad absurdum*, is that an employee could be employed in the more senior post under an infinite number of successive fixed-term contracts, provided only that the employee has the right to revert to their original, more junior post. This would be so irrespective of how great the disparity is between the two posts in respect of salary and other terms and conditions. It would not matter, for example, that the terms and conditions of the more junior post were so unattractive that there is no likelihood that the employee would actually revert to that post on the cessation of the more senior post. It would also be irrelevant that the employee might only have previously occupied the more junior post for a matter of weeks. The bright-line rule is so blunt that it would apply even where the supposedly permanent post is illusory.

72. It also follows, on this logic, that it would be permissible to use fixed-term contracts indefinitely to meet the *permanent staffing needs* of an employer. This is difficult to reconcile with the judgment in Case C-103/18, *Sánchez Ruiz*, at paragraphs 75 to 80.

73. Having regard to these considerations, the bright-line rule contended for on behalf of the Employer would undermine the effectiveness of the Fixed-Term Work Directive. The Directive envisages that there be a measured assessment of whether the use of successive fixed-term employment contracts gives rise to abuse. This requires consideration not only of the aggregate duration of such contracts, but also an examination of whether their use is objectively justified. The approach adopted by the Labour Court—and endorsed by the Employer—is too crude. This approach applies, without distinction, to a spectrum of scenarios. As counsel for the Employee correctly observed, the shutting out of claimants at the threshold precludes potential abuses being brought to light.

74. On the correct interpretation of the Fixed-Term Work Directive, the existence of a contractual right to revert to one's original post in an organisation, on the terms and conditions of employment applicable to that post, is no more than a *factor* to be considered in deciding whether the successive use of fixed-term contracts is objectively justified. It is not a bar to pursuing a complaint that there has been a breach, and having that claim adjudicated upon.

75. In summary, there is nothing under the Fixed-Term Work Directive which requires an interpretation of the domestic legislation different from that arising on the ordinary and natural meaning of the words.

ARTICLE 267 REFERENCE NOT NECESSARY

76. For the sake of completeness, it should be explained that there was some discussion at the hearing before me as to whether it is necessary to make a reference to the Court of Justice for a preliminary ruling. For the reasons which follow, I am satisfied that a reference pursuant to Article 267 of the Treaty on the Functioning of the European Union ("***TFEU***") is unnecessary.

77. It is correct to say that the Court of Justice does not appear to have addressed, in explicit terms, the question of whether an employee, who has a contractual right to revert to a permanent post, is excluded from the definition of a "fixed-term worker". The Court of Justice has, however, considered the scenario where a fixed-term worker has become permanent. In Joined Cases C-302/11 to C-305/11, *Valenza*, the Court of Justice held that an employee, who has since become permanent, is entitled to rely on the principle of non-discrimination. On the facts, the applicants had complained that periods of their service as fixed-term workers were not taken into account in order to determine seniority and thus to determine their level of remuneration in their permanent posts.

78. (The Employer in the present case has sought to distinguish this judgment on the basis that it is concerned with the principle of non-discrimination, not the abuse of successive fixed-term contracts. This overlooks the fact that, as discussed at paragraphs 66 to 68 above, the same qualifying criteria applies to both sets of protections afforded under the Directive).

79. The Court of Justice has also held that a worker in a permanent post who merely *proposes* to move to a fixed-term post—but has not yet done so—does not come within the scope of the Fixed-Term Work Directive. Neither the Directive nor the Framework Agreement are applicable to a situation in which a public administration refuses to grant a leave of absence to a worker employed under a permanent contract on the ground that the purpose of that leave is to take up a fixed-term employment relationship. This is because the worker had not, *at the relevant time*, been providing remunerated services in the context of a fixed-term employment contract. (Case C-942/19, *Servicio Aragonés de Salud*).

80. The absence of case law on the specific issue which arises in these proceedings is, presumably, explicable by the fact that the definition of "employment contract" is a matter for domestic law. It is only where a Member State has purported to define the

scope too narrowly that a referable issue will arise as to whether the limits of the Member State's discretion have been exceeded. As explained at paragraphs 61 to 64 above, no such referable issue arises where the complaint is that the definition is too generous. An Article 267 reference is unnecessary in that the issue between the parties in this case falls to be resolved as a matter of domestic law.

DECISION OF THE HIGH COURT

81. The proper interpretation of the relevant provisions of the Protection of Employees (Fixed-Term Work) Act 2003 has been set out earlier (in particular, at paragraphs 42 to 50 above).

82. The Labour Court misconstrued the statutory definition of "fixed-term employee" by interpreting a "contract of employment" as being synonymous with an enduring employment relationship. The Labour Court mistakenly decided that, in order to qualify as a "fixed-term employee", a complainant's employment relationship must be coterminous with the expiry of a fixed-term or fixed-purpose contract of employment. The Labour Court mistakenly concluded that the fact that each of the successive contracts entered into between Mr. Power and the Health Service Executive from October 2014 onwards envisaged that he would revert to his role of chief financial officer was fatal to his claim for redress under the Protection of Employees (Fixed-Term Work) Act 2003.

83. The Labour Court erred in law in its analysis of the shifting contractual relationship between the Employer and Employee. The Labour Court appears to have thought—mistakenly—that the contract of employment remained unchanged throughout. The employment relationship between the parties is, instead, properly characterised as involving a consecutive series of contracts of employment. This was so even before Mr. Power was employed as interim group chief executive. For example, notwithstanding that Mr. Power had been employed by the Health Service Executive in various roles since as long ago as 1999, a further contract of employment had been entered into between the parties in January 2012 upon the Employee's promotion to the position of chief financial officer. The existence of this contract undermines the argument that there was only ever one contract of employment between the parties.

84. The terms and conditions upon which the Employee was employed from October 2014 onwards were very different. The capacity in which the Employee was employed, and the terms and conditions of his employment, undeniably changed upon his being appointed, on an interim basis, to the post of group chief executive. It is true that one of the terms of the changed terms and conditions expressly provided for the Employee *to revert* to his substantive, permanent position on the terms and conditions of employment applicable to that position. This does not alter the fact that, for the duration of his employment as interim group chief executive, the Employee was subject to a different set of terms and conditions under a distinct contract of employment. These included, most obviously, a higher rate of remuneration.

85. The Employee's employment during this period was pursuant to five successive contracts of employment as follows.

5 October 2014 to 31 March 2015
1 April 2015 to 31 December 2016
1 January 2017 to 31 December 2017
1 January 2018 to 30 December 2018
31 December 2018 to September 2019*
(*Date of appointment of new CEO)

86. In each instance, the end of the contract of employment concerned was determined by an objective condition, i.e. the arrival of a specified end date and/or the occurrence of a specific event, namely the appointment of a group chief executive on a permanent basis.

87. The position adopted by the Health Service Executive for the purpose of these proceedings is that there was only ever one ongoing contract of employment between the parties. This is incorrect as a matter of law for the reasons set out earlier. It is also inconsistent with the understanding of the Health Service Executive itself, as evinced in its contemporaneous correspondence. In particular, the letter of 14 November 2018 from

the National Director of Human Resources expressly refers to the termination of the fixed-term contract, and the termination of Mr. Power's employment under the terms of this contract. (The relevant extract from the letter has been set out at paragraph 31 above).

88. It is correct to say, as counsel for the Employer does, that the "label" used by the parties is not necessarily conclusive of the correct legal characterisation of an employment relationship. That is, ultimately, a matter for this court. It is, nevertheless, telling that the National Director of Human Resources understood there to be separate contracts of employment involved. It will be recalled that the letter of 14 November 2018 coincides with the time at which the Employee says a contract of indefinite duration is deemed to have arisen by operation of law. The aggregate duration of the fixed-term contracts of employment exceeded the four-year threshold at this time.

89. The decision of the Labour Court does not engage meaningfully with the question of the characterisation of the five contracts of employment entered into between the parties for the period October 2014 to September 2019. Instead, the decision under appeal places great emphasis on the definition of "permanent employee" under section 2 of the Protection of Employees (Fixed-Term Work) Act 2003. It is said that the contention that the Employee is a "fixed-term employee" is irreconcilable with his having accepted, for the purpose of the appeal to the Labour Court, that he had been employed as chief financial officer as "a permanent employee and consequently employed on a contract of employment of indefinite duration". It is further said that the Employee was employed in only one capacity at any one time, and that at no material time was his employment with the Employer at risk or under threat.

90. With respect, the reliance placed by the Labour Court upon the definition of "permanent employee" is entirely misplaced. The scope of the Protection of Employees (Fixed-Term

Work) Act 2003 is delimited by the definition of "fixed-term employee". The term "permanent employee" is defined exclusively by reference to the definition of "fixed-term employee". A "permanent employee" is defined negatively as an employee who is not a fixed-term employee. The term is defined for the purpose of identifying a comparator for the application of the principle of non-discrimination under sections 5 and 6 of the Act. The term "permanent employee" is thus a term of art, i.e. it bears a specific meaning for the purposes of the Act. This meaning is not the same as its everyday meaning. For example, the statutory definition includes employees in initial vocational training relationships or apprenticeship schemes. These are not categories of workers which would be described colloquially as being permanent employees.

91. The Labour Court approached the matter the wrong way round by seeking to circumscribe the definition of "fixed-term employee" by reference to the subsidiary term "permanent employee". The Labour Court appears to have started from the premise that because Mr. Power was in a permanent employment relationship with the Health Service Executive, he should be regarded as a "permanent employee", and, as such, could not be a "fixed-term employee". This reasoning is erroneous in that it not only ignores the primacy of the definition of "fixed-term employee", it also purports to apply a colloquial meaning to the term of art "permanent employee".

92. The correct approach is to apply the definition of "fixed-term employee" to the circumstances of the Employee's employment as interim group chief executive. For the reasons outlined earlier, the employment was as a "fixed-term employee".

SUMMARY OF CONCLUSIONS AND FORM OF ORDER

93. The proper interpretation of the relevant provisions of the Protection of Employees (Fixed-Term Work) Act 2003 has been set out earlier (in particular, at paragraphs 42 to 50 above).

94. The Labour Court erred in law in its interpretation of the definitions of "fixed-term employee" and "contract of employment". The Labour Court also erred in law in its analysis of the shifting contractual relationship between the Employer and Employee. (See paragraphs 82 to 92 above).

95. These errors resulted in the Labour Court dismissing the claim *in limine*, without engaging in a proper assessment of whether the continued use of fixed-term contracts was objectively justified.

96. Accordingly, I propose to make an order, pursuant to section 46 of the Workplace Relations Act 2015, setting aside the Labour Court's determination of 5 August 2020. Subject to hearing further from the parties, my provisional view is that a consequential order should be made remitting the matter to the Labour Court for reconsideration having regard to the findings in this judgment. This would allow the Labour Court to consider whether the use of successive fixed-term contracts may have been objectively justified.

97. As an aside, it should be noted that the Labour Court's characterisation of the threshold issue as one of *locus standi* is inaccurate. Whereas it is correct to say that only a complainant who can establish that they meet the definition of a "fixed-term employee" is entitled to relief under the Protection of Employees (Fixed-Term Work) Act 2003, this goes to the substantive merits of the claim and not to the procedural issue of standing. A complainant has the right to pursue the question of his or her employment status and the Labour Court has jurisdiction to rule on the matter. The fact that the complaint might ultimately be rejected on the merits does not mean that the complainant did not have

standing to bring the matter before the Labour Court. See, by analogy, *Health Service Executive v. Sallam* [2014] IEHC 298 (at paragraph 53).

98. Insofar as legal costs are concerned, Order 105 of the Rules of the Superior Courts (as substituted on 7 August 2020) provides that no costs shall be allowed in respect of an appeal under section 46 of the Workplace Relations Act 2015 unless the court shall by special order allow such costs. If either party wishes to agitate for a costs order in this case, then written legal submissions should be filed within fourteen days of today's date. The proceedings are to be listed for final orders on **2 July 2021** at 10.30 am.

99. Finally, it should be reiterated that the point of law which arises for determination on this appeal is a narrow one. The point is whether the Labour Court erred in law in dismissing the Employee's claim on the threshold issue. For the reasons outlined, I have concluded that the approach adopted by the Labour Court was erroneous. This judgment does not address the broader question of whether the use of successive fixed-term contracts might have been objectively justified in this case. This is something which the Labour Court will have to consider if and when the matter is remitted to it.

100. This judgment does not stand as authority for any wider proposition. It does not, for example, find that an existing employee who has been acting up in a more senior role for in excess of four years is *automatically* entitled to remain in that post. It is perfectly possible, within the confines of the Protection of Employees (Fixed-Term Work) Act 2003, for an employer, such as the Health Service Executive, to fill a vacant post on an interim basis pending the carrying out of a formal recruitment process. This judgment goes no further than holding that where a vacant post has been filled by an individual pursuant to successive fixed-term contracts with an aggregate duration of in excess of four years, an employer cannot avoid the Act merely by dint of the fact that that individual is an *existing employee* with a right to revert to their original post. Rather, once the four-

year threshold has expired, objective grounds of justification are required. The existence of a contractual right to revert to one's original post in an organisation, on the terms and conditions of employment applicable to that post, is no more than a *factor* to be considered in deciding whether the successive use of fixed-term contracts is objectively justified. It is not a bar to pursuing a complaint that there has been a breach of the Act, and having that claim adjudicated upon.

Appearances

Oisín Quinn, SC and Ray Ryan for the appellant/employee instructed by MacSweeney & Company
Marguerite Bolger, SC and Padraic Lyons for the respondent/employer instructed by Byrne Wallace LLP

Approved Gerrett Simms