



THE SUPREME COURT

Supreme Court Record No. 2021/94

High Court Record No. 2020/195 MCA

MacMenamin J.

Charleton J.

O'Malley J.

Woulfe J.

Hogan J.

**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

Respondent

-and-

HEALTH SERVICE EXECUTIVE

Appellant

JUDGMENT of Mr. Justice Woulfe delivered on the 31st day of March, 2022

Introduction

1. The legal backdrop to this appeal is that the Member States of the European Union demonstrated their desire in 1999 to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships. The Council of the European Union adopted Directive 1999/70/EC (“the Directive”) to put into effect the framework agreement on fixed-term contracts concluded on the 18th March, 1999, between the general cross-industry organisations representative of management and labour, as annexed thereto (“the Framework Agreement”).

2. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, the Member States agreed to introduce, in a manner which took 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.

3. The Directive was transposed into Irish law by the Protection of Employees (Fixed-Term Work) Act, 2003 (“the Act”). The provision of the Act which primarily governs the issues in these proceedings is s.9(2), which provides as follows:

“Subject to subsection (4), where after the passing of this Act a fixed-term employee is employed by his or her employer or associated employer on two or more continuous fixed-term contracts and the date of the first such contract is subsequent to the date on which this Act is passed, the aggregate duration of such contract shall not exceed four years.”

Section 9(3) deals with a purported contravention of subs. (1) and provides:

“Where any term of a fixed-term contract purports to contravene subsection (1)...that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration.”

The provisions of the Act will be considered in more detail below.

4. This appeal concerns a decision of the High Court in an appeal on a point of law against a determination of the Labour Court, pursuant to s.46 of the Workplace Relations Act 2015. Simons J. held that the Labour Court had erred in law in its interpretation of the definitions of “fixed-term employee” and “contract of employment”, and that the respondent was a fixed-term employee within the meaning of the Act, and he remitted the matter to the Labour Court for reconsideration.

5. This Court granted leave to the appellant to appeal by a determination dated the 24th September, 2021: see [2021] IESCDET 110.

Background

6. The factual background leading up to these proceedings is as follows. The respondent was employed by the appellant as a permanent pensionable employee since July, 1999. He was appointed as the Chief Financial Officer (“CFO”) of the Saolta University Healthcare Group (“Saolta”), a unit of the appellant, in January 2012. His written contract of employment included terms and conditions regarding his job title (with the main duties of his position set out in an attached job specification), remuneration, superannuation *etc.* Clause 25 provided that his terms and conditions “may be revised in accordance with agreements reached between the union representing your grade and the Health Service Executive”.

7. It is common case that the respondent, at the invitation of the appellant, took up the role of Interim Group Chief Executive Officer (“Interim CEO”) of Saolta on the 5th October, 2014. On the 20th November, 2014, the appellant wrote to the respondent confirming his appointment

on a temporary basis until the 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 Interim CEO ceased, he would revert to his “substantive terms and conditions as a permanent employee of the Health Service Executive”.

8. The deadline of the 31st March, 2015, passed without any express extension, and the respondent continued to perform his job as CEO. The respondent was then advised by letter dated the 7th May, 2015, that his appointment was extended until the 31st December, 2016. He was subsequently advised in December 2016 that his appointment as Interim CEO was being extended until the 31st December, 2017. On this occasion the respondent signed written terms and conditions of appointment for the renewal of the fixed-term contract. As regards tenure, clause 3 provided that the tenure of the appointment as Interim CEO was one year, but at the end of that period the Director General might extend this appointment for a further period. If not extended, the respondent would revert to his substantive permanent position on the terms and conditions of employment applicable to that position, or to an alternative permanent position at the same grade.

9. The respondent was advised again in late 2017 by the appellant that his appointment was extended to the end of 2018, and he again signed written terms and conditions similar to those applicable for 2017. In September, 2018 the post of Group CEO for a five-year term was advertised in a competition administered by the Public Appointments Service on behalf of the appellant. The respondent had acquired four years’ continuous service in his post as Interim CEO by on or about the 4th October, 2018.

10. The National Director of Human Resources of the appellant wrote to the respondent on the 14th November, 2018. The letter was notably headed up “Renewal of Fixed-Term Contract CEO Saolta University Health Care Group”, and the relevant part of the letter 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 Officer (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 aforementioned 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 employment 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.”

11. Similar language was used by another official of the appellant in an internal email dated the 11th December, 2018. In that email the HR Officer, National Acute Operations, referred to the contract for the Interim CEO post having been extended on a “fixed-term whole-time basis”, and also referred to how the “employment under the terms of the fixed-term contract” would terminate when the successful PAS appointee took up the CEO post.

12. The respondent wrote to the appellant by email dated the 14th January, 2019, and asserted an entitlement to a contract of indefinite duration in respect of the role of CEO. The appellant replied by letter dated the 21st January, 2019, and stated as follows:

“The Protection of Employees (Fixed-Term Work) Act, 2003 does not apply to you because you are not a fixed-term employee. You were informed in writing when you were appointed to the position of Chief Executive Officer, Saolta Hospital Group on a fixed-term basis, and upon subsequent renewals, that if your contract was not extended, you shall revert to your substantive permanent position on the terms and conditions of employment applicable to that position or to an alternative permanent position at the same grade.

As the position has been clear at all times, the question of attaining a “contract of indefinite duration” by operation of law does not arise.”

13. The respondent was an unsuccessful candidate in the recruitment competition for the CEO position, and he resumed his position as CFO in Saolta in September, 2019.

14. The respondent presented a complaint to the Workplace Relations Commission in February, 2019, seeking adjudication of his complaint that the appellant had contravened the Act by failing to offer him a contract of indefinite duration as CEO of Saolta, despite his having accrued the four years of continuous service required to become entitled to such a contract on or about the 4th October, 2018.

15. The matter ultimately came before the Labour Court, as an appeal of an adjudication officer’s decision that the respondent’s complaint could not succeed as he was not a fixed-term employee within the meaning of the Act. In its determination dated the 5th August, 2020, the Labour Court dealt with the question of the applicability of the Act as a threshold issue. The Labour Court concluded that the respondent did not have *locus standi* (standing) to pursue his

claim in circumstances where he is a permanent employee, employed on a contract of employment of indefinite duration by the appellant.

16. It became unnecessary, therefore, for the Labour Court to consider the respondent's claim any further. In particular, the Labour Court's determination did not address the question of whether there were objective grounds justifying the renewal of the fixed-term contract for an aggregate duration in excess of four years, pursuant to s.9(4) of the Act.

The High Court Proceedings

17. As stated earlier, the respondent appealed the decision of the Labour Court to the High Court on a point of law pursuant to s.46 of the Workplace Relations Act 2015, on the grounds that the Labour Court erred in law in concluding that he did not have *locus standi* to maintain a claim under the 2003 Act.

18. In his judgment, Simons J. considered the concept of a "fixed-term employee" which is defined under s.2 of the Act as meaning:

"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..."

19. The trial judge noted that the parties were in disagreement as to the meaning to be attributed to the phrase "the end of the contract of employment concerned". On the appellant's analysis, it was only when 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. This reflected the approach taken by the Labour Court, which 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”.

20. Simons J. stated that he could not agree with the foregoing analysis. When the definition under s.2 speaks of the end of “the contract of employment concerned”, he felt that 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.

21. The trial judge held that it was incorrect, therefore, to say that a “contract of employment”, as defined under s.2 of the Act, should be interpreted as meaning an enduring employment relationship. The two things were 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.

22. 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. 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 respondent’s promotion to the position of CFO. This was so notwithstanding there was already a longstanding employment relationship between the parties, with the respondent having been employed by the appellant in other roles since as long ago as 1999.

23. Simons J. felt that it was instructive to consider the attitude of the appellant at the time of renewal of the respondent's fixed-term contracts, and he looked at the letter dated the 14th November, 2018, as set out at para. 10 above. He held that it was evident from this letter that, at this point in time at least, the appellant understood the respondent to be employed under successive contracts of employment. The appellant also understood that these contracts of employment would terminate, and that the respondent's employment under the terms of these contracts of employment would terminate upon his reverting to his substantive permanent position. In his view the stance adopted by the appellant for the purposes of these proceedings was entirely different. It was now said by the appellant that there was only ever one ongoing contract of employment between the parties, and it seemed to him that no proper explanation had been provided for this *volte face*.

24. In the light of his interpretation of the relevant provisions of the Act, Simons J. held that the Labour Court had mistakenly concluded that the fact that each of the successive contracts entered into between the respondent and the appellant from October, 2014 onwards envisaged that he would revert to his role of CFO was fatal to his claim for redress under the Act. The Labour Court appeared to have thought – mistakenly – that the contract of employment remained unchanged throughout. The employment relationship between the parties was, instead, in the view of Simons J. to be properly characterised as involving a consecutive series of contracts of employment.

25. The trial judge held that the respondent's employment during the period from October, 2014 to September, 2019 was pursuant to five successive contracts of employment. 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 CEO on a permanent basis.

26. Simons J. felt that the decision of the Labour Court did not engage meaningfully with the question of the characterisation of the five contracts of employment entered into between the parties for the relevant period. Instead, the decision placed great emphasis on the definition of “permanent employee” under s.2 of the Act. It was said that the contention that the respondent is a “fixed-term employee” was irreconcilable with his having accepted, for the purpose of the appeal to the Labour Court, that he had been employed as CFO as “a permanent employee and consequently employed on a contract of employment of indefinite duration”.

27. The trial judge was of the view that the reliance placed by the Labour Court upon the definition of “permanent employee” was entirely misplaced. The scope of the Act was delimited by the definition of “fixed-term employee”. The term “permanent employee” was 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. That term was defined for the purpose of identifying a comparator for the application of the principle of non-discrimination under ss.5 and 6 of the Act. The term “permanent employee” was 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.

28. Simons J. held that the Labour Court had approached the matter the wrong way around by seeking to circumscribe the definition of “fixed-term employee” by reference to the subsidiary term “permanent employee”. The Labour Court appeared to have started from the premise that because the respondent was in a permanent employment relationship with the appellant, he should be regarded as a “permanent employee”, and, as such, could not be a “fixed-term employee”. This reasoning was erroneous in that it not only ignored the primacy

of the definition of “fixed-term employee”, it also purported to apply a colloquial meaning to the term of “permanent employee”.

29. The trial judge concluded that the correct approach was to apply the definition of “fixed-term employee” to the circumstances of the respondent’s employment as Interim CEO. For the reasons outlined earlier by him, the employment was as a “fixed-term employee”. Simons J. made an order setting aside the Labour Court’s determination and remitting the matter back to the Labour Court for reconsideration, having regard to the findings in his judgment, which would allow the Labour Court to consider whether the use of successive fixed-term contracts may have been objectively justified.

Submissions in this Appeal

Submissions of the Appellant

30. The appellant contends that the High Court erred in its analysis of the contractual relationship between the parties, and in concluding that the respondent had been employed pursuant to five separate contracts of employment in the period from October, 2014 to September, 2019. It is submitted that the Labour Court’s interpretation of the contractual relationship was preferable, in terms of their focus on the permanent employment relationship created and maintained by the contract of employment entered into by the parties prior to the respondent taking up an appointment on a fixed-term basis as Interim CEO, and under the terms of which contract he returned to the role of CFO in 2019.

31. The appellant refers to the principle of contractual interpretation whereby the objectively ascertained intention of the parties is paramount. Applying this approach, it is submitted that the correct interpretation of the agreement between the respondent and the appellant is not that he entered into five separate contracts of employment in the period from October, 2014 to September, 2019, but rather that those engagements (as Interim CEO)

constituted an agreed variation of the 2012 contract of employment, in circumstances where that permanent contract was never terminated and continued to subsist at all relevant times. It should be noted that this “variation” argument is a new argument on the part of the appellant in this Court, not having been advanced in the Court below or in the Labour Court.

32. The appellant cites various authorities on the distinction between variation of contractual agreement and termination by agreement. Based on those authorities it is submitted that this Court should first ask whether the objectively construed intention of the parties was to terminate the previously existing contract entirely, or to vary its terms. If it is apparent that the parties intended to vary, rather than terminate the agreement, then it is not necessary to consider the degree of significance of change involved. A significant alteration to a contract – even a major or sweeping change – will not result in the termination of that existing contract, if it is objectively ascertained that the parties did not intend to terminate in the circumstances. If, however, the intention of the parties to terminate (or not) is incapable of being ascertained, then the degree of change will be considered. In that case a fundamental change which goes to the root of the contract will lead to the inference that it has been terminated.

33. It is argued that the objectively construed intention of the parties in this case points decisively to the continuation of the respondent’s 2012 contract of employment throughout the period in which he served as Interim CEO of Saolta. Nowhere was it stated, or agreed, between the parties at any time between 2014 and 2019 that the respondent’s 2012 contract of employment had been terminated. It is submitted that the respondent’s performance of the CEO role derived not from a series of new contracts of employment in the period from 2014 to 2019, but rather from the variation of his extant 2012 contract of employment. This conclusion is stated to derive inexorably from the undisputed fact that the respondent continued, at all times, to enjoy permanent status, as acknowledged in the documents relating to his temporary appointment as Interim CEO.

34. As regards the trial judge’s approach to the term “permanent employee” in the Act, it is submitted that he was mistaken in treating the term as a term of art. By adopting an excessively narrow and technical approach to the interpretation of the Act, it is argued that the trial judge reached a conclusion which did not conform with the intention of the Oireachtas. There is no necessity for a technical definition of the term, because its meaning is readily apparent having regard to the overall scheme of the Act and the object sought to be achieved, i.e. that employees who do not already have a permanent position should be given an opportunity to obtain a permanent position.

Submissions of the Respondent

35. The respondent argues that the appellant and the Labour Court have approached the critical issue of statutory interpretation, namely the meaning of a fixed-term employee, the wrong way around. They have started by taking a colloquial meaning of a permanent employee (namely, from their perspective, a worker with a permanent “employment relationship” with an employer), and then jumping to the proposition that the respondent is a “permanent employee” and therefore cannot be a fixed-term employee. It is submitted that this argument is plainly wrong. The Act defines a “permanent employee” as an employee who is not a fixed-term employee. Accordingly, the correct approach is to first ask whether or not the respondent was, at the relevant time, a fixed-term employee.

36. The legal position is that an employee works pursuant to a contract of employment, and one of the most fundamental terms of every contract of employment is the basic job description applicable to the post. It is submitted that the respondent’s job at all relevant times was as the CEO of Saolta. In legal terms, during the period of his contract as CEO, the respondent was not entitled to present at work and perform the duties of some fundamentally different job, such as the duties of CFO, his previous position.

37. The respondent points out that the appellant now seeks to focus on a new argument, that the respondent's appointment as CEO was in truth no more than a "variation" to his previous contract as CFO. He argues that aside from the novelty of this argument (not having been advanced before), it is plainly wrong on many levels. It conflicts with the actual communications, letters and contracts issued to the respondent in respect of his role as CEO. None of these documents state that his appointment as CEO is as a variation to his contract as CFO. This new argument therefore does not reflect reality, nor does it reflect how the appellant had previously described the position. In addition, this argument conflicts with the terms of the respondent's contract for his position as CFO.

38. As regards the "variation" argument now advanced by the appellant, the respondent submits that this argument has not featured in the dispute to date, even though it now appears to be the appellant's primary argument, and it is argued that this variation argument cannot properly be said to be within the contours of this appeal.

39. The respondent refers to s.2 of the Act, where "contract of employment" is defined, and certain categories are excluded. The type of situation that arises in the respondent's case is not excluded. The term "fixed-term employee" is defined. Two exceptions are provided for, but an employee in the respondent's situation is not excluded. Section 17 of the Act is entitled "Exclusions and other Provisions". Three types of employees are excluded, but again an employee in the respondent's situation is not excluded.

40. The respondent submits that the natural and ordinary interpretation of the Act is consistent with the Directive. In this context, a national Court is under an obligation not to allow or permit the effectiveness and objectives of the Directive and the Framework Agreement to be undermined. The respondent refers to principles of EU law, whereby phrases in the Framework Agreement may not be defined in such a way as to undermine or jeopardise the attainment of the objectives of the Framework Agreement. It is submitted that a conclusion that

the respondent is not a fixed-term employee would wholly undermine and largely negate the Directive. As such, it is submitted that such conclusion would in fact be contrary to EU law.

Decision

41. This appeal centres on the High Court's interpretation and application of certain provisions of the Act, and in particular the interpretation and application of section 9. As set out above, s.9(3) provides that where any term of a fixed-term contract purports to contravene subs (2), that term shall have no effect and "the contract concerned" shall be deemed to be a contract of indefinite duration. Section 9(2), it may be recalled, provides in essence that where a fixed-term employee is employed by his employer on two or more continuous fixed-term contracts, the aggregate duration of such contracts shall not exceed four years, subject to subs. (4) regarding objective grounds justifying a renewal for a fixed-term.

42. The net question to be decided is whether the High Court was correct as to how these provisions apply to the respondent's employment with the appellant as of the 4th October, 2018, having taken up the role of Interim CEO on the 5th October, 2014, and having had that role extended for a period in excess of four years. Was the High Court correct that during this period, and at the end of this period, the respondent was a "fixed-term employee" who was employed by the appellant on two or more continuous fixed-term contracts? If he was, then the aggregate duration of such contracts did exceed four years, and the appellant would have to establish objective grounds justifying the renewal of such a contract beyond four years, or else the respondent would become entitled to a contract of indefinite duration pursuant to s.9(3) of the Act.

43. The net question then comes back to the definition of "fixed-term employee" in s.2 of the Act. Between the 5th October, 2014 and the 4th October, 2018, was the respondent "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. As set out above, Simons J. held that the respondent’s employment as Interim CEO during the relevant period was as a “fixed-term employee” pursuant to a consecutive series of fixed-term contracts. In each case the end of the contract concerned was determined by an objective condition, such as arriving at a specific end date or the occurrence of a specific event, namely the appointment of a Group CEO on a permanent basis.

45. I am satisfied that Simons J. was correct in his approach to the construction of the Act and in arriving at the conclusions which he reached, for the following reasons.

46. Firstly, the construction of the words “fixed-term employee” must take place in the context of the respondent’s claim that there has been a contravention of s.9(2) of the Act. As a consequence, the references to “the contract *concerned*” in s.9(3), and to “the end of the contract of employment *concerned*” in the definition of “fixed-term employee” in s.2, appear to me to be of significance. These references appear to me to be consistent with the view adopted by Simons J. that an individual may be employed by the same organisation in a series of different posts, pursuant to a consecutive series of contracts of employment.

47. In my opinion the reference to “the contract *concerned*” in s.9(3) of the Act relates to the contract operative at the relevant time, being the time that a series of two or more continuous fixed-term contracts has caused the aggregate duration of such contracts to exceed four years, *i.e.* the last fixed-term contract giving rise to that excessive aggregate duration.

48. In the present case it seems to me that the contractual documents suggest that the respondent was employed as Interim CEO during the relevant period pursuant to five successive contracts of employment. These contracts ran from the 5th October, 2014 to the 31st March, 2015; the 1st April, 2015 to the 31st December, 2016; the 1st January, 2017 to the 31st December, 2017; the 1st January, 2018 to the 30th December, 2018; and the 31st December,

2018 to September, 2019, the date of appointment of the new CEO. On this basis the respondent was on the face of it a fixed-term employee, as the end of each of the contracts of employment concerned was determined by an objective condition, such as arriving at a specific date or the occurrence of a specific event.

49. At para. 10 above, I refer to the letter dated the 14th November, 2018, written by the appellant's National Director of Human Resources to the respondent headed "Renewal of Fixed-Term Contract" etc. It does appear to me to be significant that this very senior official of the appellant viewed the contractual relationship between the parties as of that date in terms of renewal of a fixed-term contract, in line with the ordinary meaning set out above.

50. In the course of the appeal to this Court, however, the appellant introduced a somewhat new argument. This was to the effect that the respondent was never a "fixed-term employee", as the "contract of employment concerned" was, and remained at all times, his 2012 contract of employment as CFO as a permanent member of staff. This contract, it is argued, was merely varied by way of assigning him to other duties of CEO between 2014 and 2019, but it never came to an end by being determined by an objective condition. On the contrary, the reassignments to CEO duties always included a stipulation that at the end of same the respondent would revert to his substantive permanent position, which stipulation pointed to the continuing nature of his 2012 contract of employment, and not the ending of same.

51. While this new "variation" argument can be seen as a clever attempt to circumvent the 2003 Act, in my opinion it does not accord with the factual or legal reality of the situation which arose in the present case. The 2012 contract of employment was in respect of a particular role as CFO at a certain salary, while the temporary appointments were in respect of a different role as CEO at a higher salary. The appointments to this different role were not the same as merely reassigning a person holding a particular grade to new and separate duties appropriate to that grade, which reassignment might amount to a mere variation. Changing a person's actual

job is in a different sphere; as Kelly J. stated in *Rafferty v Bus Eireann* [1997] 2 IR 424 (at 442): “At common law an employee is not required to do a fundamentally different job from that contracted for.”

52. As regards the authorities on variation relied upon by the appellant, the case law suggests that the intention of the parties as to variation or termination of an existing agreement is to be objectively ascertained from all the relevant circumstances “where parties do not expressly agree the mechanism for a change in terms and conditions of employment”: per Slade J. in *Potter v. North Cumbria Acute Hospitals NHS Trust* [2009] IRLR 900 (at para. 72). In the present case, however, clause 25 of the respondent’s 2012 contract of employment provided that his terms and conditions “may be revised in accordance with agreements reached between the union representing your grade and the Health Service Executive”. There was no evidence in this case that the respondent’s terms and conditions were in fact revised in accordance with any such agreement.

53. As regards the stipulations that the respondent would revert to his substantive permanent position, or to an alternative permanent position at the same grade, if the temporary appointment was not extended, I agree with the respondent’s submission that this stipulation was a term of the successive fixed-term contracts, rather than an indication of the continuing nature of the 2012 contract. If the reversion had been triggered, it would have led to the revival of the 2012 contract or the commencement of a new contract on the same or similar but equivalent terms.

54. In the circumstances it seems to me that the 2012 contract of employment was either terminated, or at least suspended, when the respondent entered into a consecutive series of contracts of employment as Interim CEO between October, 2014 and December, 2018. He did so on each occasion as a fixed-term employee, as the end of each contract of employment concerned was determined by an objective condition.

55. The appellant also submitted that as the respondent remained a permanent employee at all times, he could not by definition also be a fixed-term employee at the same time. Firstly, I do not accept the factual basis underlying this submission. The respondent was not employed as Interim CEO as a permanent employee during the relevant period, although he had a right to revert to his permanent status if his temporary appointment as Interim CEO was not extended. Secondly, I agree with the finding of Simons J. that the Labour Court approached the matter the wrong way around by seeking to circumscribe the definition of “fixed-term employee” by reference to the subsidiary term “permanent employee”. Section 2 of the Act provides that “permanent employee” means an employee who is not a “fixed-term employee”. As the respondent was a fixed-term employee during the relevant period, he could not by definition have also been a permanent employee for the purposes of the Act.

56. I might just add the following comment. It seems to me that the correctness of the trial judge’s conclusions is reinforced by considering the overall effect of the appellant’s submissions. The effect would be to remove the application of the Act from one entire cohort of employees, i.e. employees who are already in a permanent employment relationship with their employer, but who agree to “act up” in a higher role on a temporary basis. The Framework Agreement, however, and the Irish legislation giving effect to same, contain no express exclusion of such employees, and it seems to me that very clear language providing for any such exclusion would have been necessary.

Conclusion

57. In conclusion, I am satisfied that the trial judge was correct in finding that the Labour Court had erred in law in its interpretation of the definition of “fixed-term employee”, and in making an order setting aside the Labour Court’s determination and remitting the matter back to the Labour Court for reconsideration, having regard to the findings in his judgment, which

would allow the Labour Court to consider whether the use of successive fixed-term contracts may have been objectively justified.

58. I would therefore dismiss the appeal.