

THE HIGH COURT

2010 133 MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 15(6) OF PROTECTION OF EMPLOYEES (FIXED TERM WORK) ACT 2003

BETWEEN

HEALTH SERVICE EXECUTIVE

DUBLIN NORTH EAST

V

ALI UMAR

APPELLANT

RESPONDENT

Judgment of Mr. Justice Hedigan delivered the 7th day of April 2011.

1. The appellant is the Health Service Executive, Dublin North East and has its place of business at Dr Steeven's Hospital, Dublin 8. The respondent was a consultant who resided at 2 the Walls, Drumgala Wood, County Cavan. The respondent is now deceased; his wife replaces him in this action as personal representative of his estate.

2. The appellant seeks to appeal on a point of law against the determination of the Labour Court of 20th April, 2010. The appellant seeks the following reliefs:-

- (i) An Order pursuant to the provisions of Order 84(c) of the Rules of the Superior Courts and pursuant to Section 15(6) of the Protection of Employees (Fixed -Term Work) Act 2003 ["the Act"] directing that the part of the aforesaid determination which held that the appellant breached Section 9 of the Act and that the respondent was thereby entitled to a contract of indefinite duration be set aside;
- (ii) An order for the costs of the Appeal; and
- (iii) Such further, or other, Order as to this Honourable Court shall seem fit.

The grounds upon which the appellant brings this appeal are as follows:

- (i) That the Labour Court erred in law in its interpretation and application of section 7 of the Act.
- (ii) That the Labour Court erred in law in its interpretation and application of section 9 of the Act and in particular sub-sections 2, 3 and 4 thereof.
- (iii) That the Labour Court erred in law in particular in its interpretation of the true meaning and effect of the words "treatment... appropriate and necessary for that purpose" as contained in section 7(1) of the Act.
- (iv) That the Labour Court erred in law in failing properly or at all to determine, as was required by the terms of section 7(1) of the Act, whether the treatment concerned was appropriate and necessary for the purpose involved, namely, the achievement of the legitimate objective.
- (v) That the Labour Court erred in law in finding that the appellant had failed to discharge the burden of showing that there were objective grounds for not granting the respondent a contract of indefinite duration.
- (vi) That the Labour Court erred in law in finding that the respondent became entitled to a contract from the date of his dismissal.
- (vii) That the Labour Court erred in law in directing that the respondent be reinstated on a contract of indefinite duration.

3. The nature of this type of appeal was considered in *Castleisland Cattle Breeding Society v. The Minister for Social and Family Affairs* [2004] 4 I.R. 150, where Geoghegan J. stated at 158:-

"Clearly, on the authorities the High Court or this Court on appeal is entitled to consider whether it was open to the appeals officers to come to the decision which she did arrive at and, if not, whether the evidence conclusively established that Mr. Walsh was an independent contractor. If so, the High Court or this Court on appeal can make a declaration to that effect. A statutory appeal on a question of law is not a judicial review and a question of law includes the question of whether the evidence supports only one conclusion."

The Supreme Court gave further consideration to the nature of such appeals in the case of *NUI Cork v. Aherne* [2005] IESC 40, McCracken J. stated:-

"The Respondent submits that the matters determined by the Labour Court were largely questions of fact and that the matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However this is not to say that the High Court or this Court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters

relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered or taken into account by it in determining the facts, is clearly a question of law and can be considered on appeal."

Thus in the present case this Court is entitled to examine the question of whether certain matters ought or ought not to have been considered by the Labour Court in determining the facts of this case. It is also of course able to determine whether there has been an error of law.

4. 1 The appointment of persons to certain positions, including that of a Hospital Consultant, is governed by the Local Authorities (Officers and Employees) Act 1926 as amended. This statute provides that the appellant cannot appoint a person to a permanent post to which the Act relates other than on the recommendation of what is now the Public Appointments Service. The respondent was continuously employed by the appellant as a consultant in emergency medicine on a series of fixed term contracts between 2nd August, 2004 and 6th April, 2009, when his employment terminated.

4.2 The respondent was initially employed at Cavan General Hospital following an approval given to the appellant to fill a post of Consultant in Emergency Medicine by Comhairle na hOspideal in March 2003. In September 2003, another medical practitioner was employed to fill the post on a temporary basis but resigned in June 2004. The respondent was then recruited on a temporary basis following a competition. A competition was held to fill the post on a permanent basis and a candidate was selected but not appointed. It was expected that the respondent's appointment would be of short duration pending the successful candidate taking up the appointment. However the successful candidate declined to accept the appointment. The post was again advertised in February 2005. The respondent applied for the post but was unsuccessful. In September 2006, the appellant received a recommendation from the Public Appointments Service for the appointment of a selected person to the post which the respondent then held. That person was appointed and took up the post on 1st May, 2007. The respondent was then informed by the appellant that his employment would be terminated on 30th June, 2007 at the expiry of his then current fixed term contract. The respondent took issue with that decision and instructed his solicitor in the matter. Correspondence ensued between the respondent's solicitors and the appellant. The respondent then applied for and obtained another appointment on a further fixed term contract at Letterkenny General Hospital. The respondent applied through an employment agency for this post. The appointment was to provide cover for another doctor who was temporarily absent due to holidays and parental leave.

4.3 In December 2007, the appellant received approval for two further A&E Consultant posts in Cavan General Hospital. It was decided that pending the filling of these posts on a permanent basis one of them would be filled temporarily. The respondent applied for one of these temporary vacancies, again through an employment agency and was successful. He was reassigned to Cavan General Hospital with effect from 2nd January, 2008. Whereas the prior contracts under which the respondent was engaged were fixed in terms of their duration, this latter contract was expressed to be fixed in terms of its purpose, i.e. until the post was filled by a permanent appointee. While the respondent took up this appointment in January 2008, he was not furnished with a written contract of employment until May 2008. By letter dated 23rd May, 2008, the General Manager of the HSE wrote to the respondent in the following terms:-

" I am pleased to formally convey an offer of a specified-purpose employment to you with the Health Service Executive, Dublin North East Area. The position on offer is that of Temporary Consultant in Emergency Medicine at Cavan & Monaghan Hospital Group. The commencement date is 2nd January 2008. This vacancy has arisen due to reorganisation of Emergency Medicine services in the North East region, and particularly in the Cavan Monaghan Hospital Group. The circumstances which will bring an end to your contract will be the filling of this vacancy in a permanent capacity. I have enclosed a specified purpose contract of employment. Please study these documents carefully, so as to ensure that you fully understand the basis upon which employment is being offered. You will be aware that permanent consultant posts are recruited through the Public Appointments Service. The permanent post is currently advertised and the closing date is 13th June, 2008. An application form and full details may be obtained at www.publicjobs.ie under the heading of Consultants posts."

The respondent applied for the permanent post but was unsuccessful. Two practitioners were selected for permanent appointment. The first was appointed on 5th January, 2009, and the second on 4th April, 2009. Following the latter appointment the respondents employment terminated.

5.1 The respondent successfully challenged the decision to terminate his employment in front of the Rights Commissioner. This decision was appealed to the Labour Court by the HSE. In his submissions to the Labour Court, the respondent pointed out that as of 1st August, 2008, he had completed four years of continuous fixed-term employment with the appellant. He contended that by operation of s.9 (3) of the Protection of Employees (Fixed-Term Work) Act 2003, his contract became one of indefinite duration. In its submissions to the Labour Court the appellant contended that there were objective grounds justifying the extension of the respondent's fixed-term employment.

5.2 The Labour Court observed that the purpose of the Act was to prevent abuse arising from the use of successive fixed-term contracts. The Labour Court cited the decision in *Adeneler v. Ellinikos Organismos Galaktos* [2006] IRLR 716, where the European Court of Justice considered the rationale for The Framework Agreement upon which the 2003 Act is based. It was held at paragraphs 61-62 that:-

"The Framework Agreement proceeds on the premise that employment contracts of indefinite duration are the general form of employment relationship, while recognising that fixed-term employment contracts are a feature of employment in certain sectors or in respect of certain occupations and activities.

Consequently, the benefit of stable employment is viewed as a major element in the protection of workers, whereas it is only in certain circumstances that fixed term employment contracts are liable to respond to the needs of both employers and workers."

The Labour Court further observed that the entitlement of fixed term workers to the type of stable employment envisaged by the Framework Agreement can be offset where there are objective grounds for continuing their employment for a fixed term. The test for employers to meet in showing objective grounds was set out in *Inoue v. MBK Designs* [2003] 14 ELR 98. The employer must show that the impugned measures:-

- (a) correspond to a real need on the part of the undertaking,
- (b) are appropriate with a view to achieving the objective pursued, and

(c) are necessary to that end.

The Labour Court noted that a plea of objective justification in reply to a claim under the Act is in the nature of a defence and it is for the employer to make out each element of that defence.

5.3 The Labour Court considered that section 8 of the Act was relevant in this case. Section 8 requires an employer to inform a fixed-term employee, whose contract is being renewed, of the objective grounds for such renewal and the reason why the employee is not being offered a contract of indefinite duration. The Labour Court cited its earlier decision in *Health Service Executive, North Eastern Area v. Khan* [2006] 17 ELR 313, where it considered the effect of s. 8

“...the purpose of s.8 is not just to ensure that a fixed-term contract employee is informed of the reason why his or her contract is being renewed. On a reading of the section as a whole it is clear that it is intended to ensure that the employer definitively commits itself, at the point at which the contract is being renewed, to the grounds upon which it will rely if subsequently pleading a defence under s. 9(4). Thus where an employer fails to provide a fixed-term employee with a statement in writing, in accordance with s.8(2), it is apt to infer, in accordance with s.8(4) of the Act, that the grounds subsequently relied upon were not the operative grounds for the impugned decision and it would be for the employer to prove the contrary.”

The Labour Court concluded that the appellant appeared not to have complied with s.8 in any meaningful sense. The respondents fixed term employment was renewed on 2nd January, 2008, and the statement in writing was not furnished until the 23rd May, 2008. Section 8 (1) requires that the statement must be issued as soon as practicable. The statement furnished did set out the basis upon which the contract would terminate, namely on the making of a permanent appointment however of significance was the absence of any detailed explanation as to why the complainant was being offered a fixed-term contract rather than one of indefinite duration.

5.4 The Labour Court determined that the appellant should at least have considered offering the respondent a contract of indefinite duration before renewing his fixed term- contract. There was no evidence tendered to the Labour Court to suggest that the appellant gave any consideration to appointing the respondent to the post in issue on a permanent basis as an alternative to filling the post by public competition. In these circumstances the Labour Court considered that it was reasonable to infer that the appellant proceeded on the basis of a policy of adherence to the provisions of the 1926 Act.

5.5 The Labour Court found that the proposition advanced by the appellant that it was seeking to obtain the best available candidate was potentially of wide import beyond the medical profession or indeed the health service. It could be said with equal cogency that, with respect to many posts in public service management and administration, it is of crucial importance that the best possible candidate be appointed. If it were to be accepted that this consideration in itself constituted an objective reason for derogating from s.9(1) or s.9(2) of the Act, the protection afforded by the Framework Agreement, and the Act, to fixed-term employees across a wide spectrum of the public service would be rendered nugatory.

5.6 The Labour Court determined that in relation to the test of objective justification it was necessary to consider if the test should be applied to the circumstances which pertained in January 2008 (when the final fixed-term contract was granted) or whether it should be considered in the wider context of the totality of the respondents employment with the appellant. The Court found that if the question in issue was to be determined solely by reference to the facts prevailing in January 2008, it would be relatively easy to dispose of the matter. The appellant had obtained approval to appoint two additional consultants at Cavan Hospital. It wished to fill those posts by open competition. That was undoubtedly a legitimate objective and corresponded to a real need of the appellant. Appointing the respondent to the post on a permanent basis would have defeated that objective. It was therefore appropriate not to appoint him to the post permanently.

The Labour Court went on to determine however that the case could not be considered in so narrow a context. At the material time the respondent had been employed by the appellant on successive fixed-term contracts since August 2004. By the normal application of s. 9(2) of the Act, his fixed-term contract could not have extended beyond 1st August, 2008, unless saved by s. 9(4). Consequently, the right for which the respondent contended was not derived from the circumstances of January, 2008, but from the totality of his employment with the appellant.

5.7 The next issue the Labour Court considered was whether the means chosen were appropriate. The application of this aspect of the test it held, requires considerations of proportionality. This required the appellant to put into the balance its needs and requirements with the needs and rights of the respondent. The appellant needed a suitable and qualified doctor to provide the services of a consultant in emergency medicine. The respondent was such a person. The appellant wished to open the post in the hope of obtaining the service of a more suitable person. This must be balanced against the respondent's right to stable employment and the fact that he had performed duties similar to those entailed by the post in issue without complaint by the appellant over a prolonged period. There was no evidence to suggest that the appellant gave any or any adequate consideration to the respondent's rights in deciding not to appoint him to the post permanently. Accordingly the Labour Court concluded that the appellants decision was disproportionate and, therefore, inappropriate.

5.8 The Labour Court considered that having found the failure to offer the respondent a contract of indefinite duration was inappropriate it was not strictly necessary to consider the final limb of the test. However, for the sake of completeness, the Labour Court set out its views on the matter. This limb of the test requires the appellant to show there were no alternative means available, having a less deleterious effect on the respondent, by which the object in view could be achieved. The Labour Court found that in any occupation or profession a person can be employed on the basis that they were the best available candidate. Over time other more suitable persons will inevitably become available. Short of proven incompetence that would not be a justifiable reason for the dismissal and replacement of an employee, nor would it be an acceptable reason for requiring an employee to re-apply for his or her position from time to time. The Labour Court determined that the respondent became entitled to a contract of indefinite duration by operation of law and that he held such a contract at the date of his dismissal.

5.9 The HSE seeks to appeal this determination in the within proceedings. It complains that the Labour Court was unduly influenced by its failure to comply with section 8. The appellant further complains that that the objective ground which it advanced should stand or fall independently of whether or not it considered granting the respondent a contract of indefinite duration. The appellant also complains that the Labour Court erred in law in not adjudicating upon the presence of objective grounds from the time the contract between the parties was entered into in January 2008. Finally it's argued that it was a mis-characterisation of the appellants process to describe it as a search for “a more suitable” appointee.

6. Appellants Submissions

6.1 The appellant submits that consultant doctors stand at the apex of the medical hierarchy and it is therefore of fundamental importance to the proper functioning of the health service that the best possible candidates are appointed to permanent consultant posts. The appellant further submits that an open, transparent, and robust selection process constitutes best practice in the selection of permanent consultants and that it is absolutely essential that it is in a position to employ temporary consultants pending the selection of the successful candidate for a permanent post.

6.2 The Protection of Employees (Fixed-Term Work) Act 2003, gives legal effect to Council Directive 1999/70/EC. The Directive requires Member States to take legal measures to prevent abuse of fixed term contracts. Such measures are provided for in Section 9 of the 2003 Act:-

"S. 9 (1) Subject to subsection 4, where on or after the passing of this Act a fixed-term employee completes or has completed his or her third year of continuous employment with his or her employer or associated employer, his or her fixed-term contract may be renewed by the employer on only one occasion and any such renewal shall be for a fixed term of no longer than one year.

S. 9 (2) Subject to subsection 4, after the passing of this Act a fixed-term employee who 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 contracts shall not exceed four years.

S. 9 (3) Where any term of a fixed-term contract purports to contravene subsection 1 or 2 that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration.

S. 9 (4) Subsections 1 to 3 shall not apply to the renewal of a contract of employment for a fixed term where there are objective grounds justifying such a renewal."

The concept of objective grounds was addressed in *Adeneler and Others v. Ellinkos Organismos Galaktos* (ELOG) case c-212/04 where the European Court of Justice (ECJ) held at paragraph 69:-

"... the concept of 'objective reasons', within the meaning of clause 5(1)(a) of the Framework Agreement, must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable in that particular context of justifying the use of successive fixed term contracts."

The objective grounds relied upon by the appellant in the present case are that selection of the best available candidate for a permanent consultant position constitutes a legitimate objective and employing the respondent on a further fixed term contract which extended his employment on fixed term contracts beyond four years was necessary in order to achieve the purpose of selecting the best available candidate.

6.3 The Labour Court determined that the reasons put forward by the appellant to justify the renewal of the fixed term employment of the respondent do not constitute objective grounds for the purposes of Section 9(4). The appellant submits that this is an error of law and that the Labour Court misapplied the provisions of section 9(4) of the Act. It is the appellant's case that consideration must be given to the fact that the respondent was not in the one post in the same hospital throughout his four years of service. His employment with Cavan General Hospital ceased at the end of June 2007 after a period short of three years. He then applied for and was successful in securing a temporary position for six months as Consultant in Emergency Medicine at Letterkenny General Hospital. The respondent applied via an external recruitment agency for the new position of temporary consultant for the specified purpose of providing cover pending the appointment of two permanent consultants in Cavan General Hospital and he commenced in January 2008. The specified purpose was made clear to the respondent from the outset of his employment.

6.4 In its determination the Labour Court reiterated what it said in *HSE v. Khan* [2006] 17 ELR 313, that in interpreting Section 9(4) of the 2003 Act the proposed derogation put forward by an employer must be construed and applied strictly against the person seeking to rely on the subsection. The Labour Court further stated:-

"Moreover, a purposive interpretation of section 9 indicates that a respondent must establish that the reason relied upon as constituting objective grounds was the operative reason for the failure to offer a contract of indefinite duration at the time the fixed-term contract was renewed."

The Labour Court was unduly influenced in the present case by the failure of the appellant to comply with Section 8. It is accepted that the statement in writing was not furnished until the 23rd May 2008. However, the appellant submits that the respondent knew the reasons why he was being employed on a specified purpose contract and why he was not being offered a contract of indefinite duration on the date the contract was entered into in January 2008.

6.5 The Labour Court found as it did in *HSE v Khan* [2006] 17 ELR 313 that the appellant should at least have considered offering the respondent a contract of indefinite duration before renewing his fixed term contract. It is submitted that this was a misapplication of s.9 (4) in that an objective ground should stand or fall independently of whether or not there was consideration given in January 2008 to granting the respondent a contract of indefinite duration. This constitutes an error of law. The Labour Court found that there was no evidence tendered to it to suggest that the appellant gave any consideration to offering the respondent a contract of indefinite duration in January 2008 and thus it found it reasonable to infer that the appellant proceeded on the basis of a policy of adherence to the Local Authorities (Officers Employees Act) 1926. It is clear from the case of *Adeneler and Others v. Ellinkos Organismos Galaktos* (ELOG) case c-212/04, that the framework agreement is to be interpreted as precluding the use of successive fixed term contracts where the justification advanced for their use is solely that it is provided for by a general provision of statute or secondary legislation of the Member State. The appellant however made it clear to the Labour Court that it did not seek to rely upon national legislative measures as a means of avoiding its obligations under the European Directive or the 2003 Act. It is submitted that the finding against the appellant on that issue was not a reasonable inference for the Labour Court to draw.

6.6 The Labour Court held at page 16 of its determination:-

"If the question in issue were to be determined solely by reference to the facts prevailing in January 2008 it would be relatively easy to dispose of the matter. The appellant had obtained approval to appoint two additional consultants at Cavan Hospital. It wished to fill those posts by open competition. That was undoubtedly a legitimate objective and

corresponded to a real need of the appellant. Appointing the respondent to the post on a permanent basis would have defeated that objective. It was therefore appropriate not to appoint him to the post permanently. Furthermore, the appellant wished to have the duties of the post undertaken while awaiting a permanent appointment and this made the conclusion of a fixed-term contract necessary."

The Labour Court erred in law in not adjudicating upon the presence of objective grounds from the time the contract between the parties was entered into in January 2008. It is submitted that the time upon which the objective grounds must be adjudicated is the time the parties enter into the contract.

6.7 The Labour Court however went on to state that the appellant wished to open the post in the hope of obtaining the service of a more suitable person. The Labour Court held that:-

"Further, it must have been appreciated that the opening up of the post to competition could, potentially at least, result in the complainant losing his employment."

It is submitted that this finding is inconsistent with the finding that the offer of a specific purpose contract corresponded with a real need and a legitimate objective on the part of the appellant. On the issue as to whether the means chosen were appropriate the Labour Court held that:-

"There is no evidence to suggest that the respondent gave any or any adequate consideration to the rights and interests of the complainant in deciding not to appoint him to the post permanently. Accordingly it must be concluded that its decision was disproportionate and, therefore inappropriate."

Finally the Labour Court found that in all the circumstances it was not satisfied that the failure of the appellant to appoint the respondent on an indefinite contract was "necessary so as to ensure a high standard of care to patients within its charge." It is submitted that the test applied here by the Labour Court is incorrect. The stated object of the appellant was to obtain the best available candidate to "ensure a high standard of care to all patients in its charge". The respondent had applied for the post and had been unsuccessful. It was a mischaracterisation of the appellants process to describe it as a search for "a more suitable" appointee. There were no other means open to the appellant to ensure that a consultant's services were available to it pending the completion of the competition for the permanent post other than the use of a fixed-term contract. It is submitted that this Court must substitute its correct view of an erroneous interpretation of the law by the Labour Court. This is a consequence of the statutory appeal as provided for in s.15 (6) of the Act.

7. Respondents Submissions

7.1 It is clear from case law that a party seeking to have a finding of the Labour Court set aside in an appeal such as this has a formidable burden to discharge. The principles which govern an appeal brought pursuant to section 15(6) of the Act were addressed in *Russell v. Mount Temple Comprehensive School* [2009] IEHC 533. Hanna J. in his judgment therein, referred to the decision in *Henry Denny and Sons (Ireland) Limited v. Minister for Social Welfare* [1998] I.R. 34, where Hamilton C. J. held at 37:-

"I believe it would be desirable to take this opportunity of expressing the view that courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

Having set out from the earlier case law, the principles to be followed, Hanna J. also noted at p.16 that the:-

"Labour Court,...[is] after all, a tribunal possessed of formidable experience and expertise [and] the courts have traditionally been slow to interfere with its findings."

7.2 The respondent submits that when the appellant obtained approval to appoint two additional consultants in January, 2008, it was incumbent on the appellant to balance its needs with those of the respondent. It is clear from the case of *Lommers v. Minister Van Landbouw, Natuurbeheer en Visserij* [2002] IRLR 430 that the means chosen by an employer to achieve their objective must be proportionate; this requires an employer to balance its needs with those of its employee. The appellant needed a suitable and qualified doctor to provide the services of a consultant in emergency medicine. The respondent was such a person. There is no evidence to suggest that the appellant gave any consideration to the respondent's rights in deciding not to appoint him to the post permanently. It is therefore submitted that that the appellants decision was disproportionate and inappropriate.

7.3 The objective ground advanced by the appellant for the renewal of the respondent's fixed-term contract was that it was seeking to obtain the best possible candidate to fill the permanent consultant post. In advancing this objective ground, the appellant submitted that it was not the provisions of the Local Government (Officers and Employees) Act 1926 as amended, upon which it was relying but rather the policy underlying that Act. The Act of 1926 provides that the appellant can only appoint to a permanent consultant position a person nominated by the Public Appointments Service. It was however held in *Ahmed v. HSE* [2006] 2 I.R. 106, that the provisions of the Act of 1926 do not relieve the HSE from its obligations under the Protection of Employees (Fixed-Term Work) Act 2003. It is submitted that in reality the appellant did consider itself bound by this provision and in relying on the policy underlying the Act of 1926, the appellant was seeking to circumvent the decision in *Ahmed*.

7.4 If this Court were to accept the objective ground relied on by the appellant, it is submitted that this would in effect exclude all hospital consultants employed in fixed-term contracts, and potentially many other classes of fixed-term employees, from the ambit of the Act. In Section 17 of the Act the Oireachtas expressly exempted from its provisions members of the defence forces, garda trainees and nurses in training. In *Ahmed v. HSE* [2006] 2 I.R. 106, Laffoy J noted at 125:-

"The Oireachtas did not exercise its discretion to exclude consultants employed by the defendant from the operation of the Act of 2003. That was permissible under the directive and was its prerogative."

It is submitted that if the Court was to accept the appellant's contention this would constitute an unwarranted trespass by the Courts on the exclusive law-making authority of the Oireachtas.

7.5 The appellant argues that the objective ground justifying the renewal of the respondent's fixed-term contract was that it is necessary for it to appoint the best available candidate to the permanent consultant position in order to ensure a high standard of patient care. It submitted that such an argument is misconceived. First, were obtaining the very best candidate for a particular job a justification in any context, it would permit the use of fixed term contracts across a vast range of the labour market. Employers could always maintain that there is at least one better candidate somewhere who it is hoped would apply for the permanent post. No evidence was adduced by the appellant to show that the respondent did not carry out his duties to a very high standard. On the contrary, it was accepted that the appellant had no issue during the entirety of the respondent's employment with regard to the standard of his work. It is therefore submitted that there was no necessity to seek out a "better" candidate than the respondent to ensure a high standard of patient care and therefore no objective justification for the renewal of the respondent's fixed-term contract.

7.6 In *Adeneler and Others v. Ellinkos Organismos Galaktos* (ELOG) case c-212/04, the European Court of Justice stated:-

"The concept of 'objective reasons', within the meaning of clause 5(1)(a) of the Framework Agreement, must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable in that particular context of justifying the use of successive fixed-term employment contracts."

It is submitted that the reason for the renewal of the respondents fixed-term contract had nothing to do with the precise and concrete circumstances characterising the activity of a hospital consultant but rather with the manner in which the appellant manages the appointment of permanent consultants in the health services. There are delays in the appointment of a successful candidate to permanent posts as frequently appointees postpone almost indefinitely and unilaterally the taking up of their appointments. The appellant could make the appointment of a consultant to a permanent position strictly conditional on the successful candidate taking up his position by a certain date. It has not done so, this has resulted in an abusive use of fixed-term contracts which sections 8 and 9 of the Act were intended to prevent. For all these reasons it is submitted that the appellants appeal should not be allowed to stand.

8 Decision of the Court

8.1 The purpose of Council Directive 1999/70/EC of 28 June 1999 is to prevent the abuse of fixed term contracts. The Directive recognises that there are good reasons for maintaining fixed term contracts in certain work areas. Paragraph 2 of the preamble states:-

"The parties to this agreement recognise that contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers. They also recognise that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers."

The role of consultants in the medical care services would by any measure be one of those work areas where fixed-term contracts are appropriate because while open competitions to fill permanent consultant posts are conducted, it will inevitably be necessary to have those posts filled on a temporary basis in order that adequate medical coverage is provided while the competition is held.

8.2 The Labour Court at page 16 of its decision sets out what I may call a provisional determination to the effect that in the circumstances that prevailed herein holding an open competition for the permanent post was a legitimate aim corresponding to a real need of the respondent. That objective they held would have been defeated by appointing the complainant to the permanent post. The use of a fixed-term contract to fill the post pending the open competition was necessary. Thus far the decision of the Labour Court was in accordance with law.

8.3 The Labour Court then however went on to broaden its approach. It noted, as it already had, that the complainant had been employed on successive contracts since August 2004. He had been on fixed term contracts all this time. The Labour Court considered, as it already had, that the objective of seeking the most suitable available person was a legitimate one. It further found in reliance on *Lommers v. Minister Van Landbouw, Natuurbeheer en Visserij* [2002] IRLR 430 that they should consider the proportionality of what was proposed. The Court considered that the HSE ought to have balanced its needs and requirements with those of the complainant. In describing the needs of the HSE the Labour Court considered it to be for a suitable and qualified doctor to provide a consultancy in emergency medicine. It is to be noted that this was not what the HSE considered to be their need. Their stated need was for the 'best available person'. This was a different need and involved a criterion of excellence. The need identified by the Labour Court involves a criterion of acceptability. Balancing this need, as they perceived it, against the complainant's right to stable employment it noted his ability to fill the post satisfactorily; opening the post to competition might have resulted in his losing his employment. The Labour Court observed there was no evidence the HSE had given any or any adequate consideration to the rights of the complainant in not appointing him to the permanent post. It concluded that the decision was disproportionate and therefore inappropriate.

8.4 Notwithstanding that it considered the above was dispositive of the case, the Labour Court went on to consider necessity. Were there alternative means of achieving the end the appellants sought? They noted the complainant was appointed to the fixed-term contract in Letterkenny and Cavan following competition. They considered this meant he was the best available candidate for a temporary post. It must however be noted that there is a significant difference between a competition for a temporary post and one for a permanent post. Those doctors seeking a permanent post would quite likely not apply for a temporary one. The Labour Court goes on to consider that over time more suitable persons will eventually emerge in respect of any person holding a post. They observe that short of proven incompetence that would not be a justifiable reason to require him to re-apply for his job from time to time. This however was not the situation in relation to the complainant. He was not in a permanent position. His three contracts had all been fixed term and fixed purpose ones. Moreover although they do not say so, as a proposition it comes close to suggesting that, save for proven incompetence, the HSE would have been obliged to accept the complainant as the best person available. This it must be noted changes the criterion further. From excellence it thereby is reduced to bare competence.

8.5 In coming to its decision, the Labour Court adopted a purposive approach to its interpretation of the statutory provision herein as it had done in *Health Service Executive, North Eastern Area v. Khan* [2006] 17 ELR 313 where it stated:-

"Moreover a purposive interpretation of section 9 indicates that a respondent must establish that the reason relied upon as constituting objective grounds was the operative reason for the failure to offer a contract of indefinite duration at the time the fixed-term contract was renewed."

They considered that because his right to employment was engaged, the principle in *Lommers* should be applied. A court may

interpret a statute purposively where a provision has two or more meanings and the literal approach does not resolve the confusion. When the purposive approach is invoked a court examines the general purpose of the statute. In ascertaining the statutory purpose the court may examine the long title to the Act, its subject matter, the Dáil debates and the pre-existing law it was designed to alter. In *Mulcahy v. Minister for the Marine*, (High Court, 4 November 1994) Keane J. held at 23:-

"...while the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole."

The Interpretation Act 2005 gives legislative force to the common law rules of interpretation which have been established over time. Section 5(1) of the Act states:-

"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) (a) that is obscure or ambiguous, or (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of an Act of the Oireachtas the provision shall be given a construction that reflects the plain intention of the Oireachtas where that intention can be ascertained from the Act as a whole."

8.6 Section 9 of the Protection of Employees (Fixed Term Work) 2003 which the Labour Court sought to purposively interpret states:-

"S. 9 (1) Subject to subsection 4, where on or after the passing of this Act a fixed-term employee completes or has completed his or her third year of continuous employment with his or her employer or associated employer, his or her fixed-term contract may be renewed by the employer on only one occasion and any such renewal shall be for a fixed term of no longer than one year.

S. 9 (2) Subject to subsection 4, after the passing of this Act a fixed-term employee who 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 contracts shall not exceed four years.

S. 9 (3) Where any term of a fixed-term contract purports to contravene subsection 1 or 2 that term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration.

S. 9 (4) Subsections 1 to 3 shall not apply to the renewal of a contract of employment for a fixed term where there are objective grounds justifying such a renewal."

It is clear that a court must be faced with some obscurity or ambiguity that requires resolution before it can give a purposive interpretation. If there is no such obscurity or ambiguity then it must apply the law as the Oireachtas provided. To do otherwise is to amend the statute by imposing something which is not there. It seems to me that there is no ambiguity or uncertainty identified by the Labour Court which might require it to purposively interpret the s.9. The legislative intent seems clear.

8.7 *Lommers v. Minister Van Landbouw, Natuurbeheer en Visserij* [2002] IRLR 430, upon which the respondent relies, deals with individual rights and states that when seeking to derogate therefrom, due regard must be had to proportionality which requires such derogation must be appropriate and necessary. This it seems to me is exactly what the 2003 Act seeks to do when it provides for an exception where there are objective grounds justifying a renewal of a fixed term contract. I can find no obscurity or ambiguity in this provision. It is not therefore in my view permissible to import into the statute something which is not there by way of applying a purposive interpretation. The requirement to consider the respondent for the permanent post without an open competition seems to do just that. The purposive interpretation made in *Khan* and applied here is in my view an impermissible attempt to amend the statute. In this regard it appears to me that the Labour Court fell into error when it found on the basis of this impermissible interpretation of the statutory provision that the late Dr Umar's contract had become, by operation of law, pursuant to s. 9 of the Protection of Employees (Fixed Term Work) Act 2003, a contract of indefinite duration. Its provisional determination was altered by reason of this error. This earlier determination was in fact correct. The respondent was not entitled to a contract of indefinite duration. There will therefore be an order setting aside the Labour Court's determination to the effect that the appellant breached s. 9 of the Protection of Employees (Fixed-Term Work) Act 2003 and that the respondent was entitled by reason thereof to a contract of indefinite duration.