

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: S/101486/08 Held at Aberdeen on 12, 13, and 14 May 2008

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Employment Judge: Mr I McFatridge  
 Members: Mr M Turner  
 Ms A Riddell

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Dr Andrew Ball  
 The Gables  
 Hatton of Fintray  
 Dyce  
 Aberdeen  
 AB21 OHY

**Claimant**  
Represented by:  
 Mr A White -  
 Barrister

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University of Aberdeen  
 University Office  
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 AB9 1FX

**Respondents**  
Represented by:  
 Mr Napier -  
 Advocate

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the tribunal was that the tribunal make a declaration in terms of Regulation 9(5) of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 that the term of the claimant's contract of employment entered into on 1 April 2005 which provided that the contract be for a fixed term running between 1 April 2005 and 31 May 2008 shall be of no effect by virtue of Regulation 8(2) and 8(3) of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

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**REASONS**

1. The claimant submitted a claim to the tribunal under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. The claimant stated that he had been employed on a succession of fixed term contracts and that the respondents had refused to acknowledge that he was a permanent employee by virtue of Regulation 8 of the said Regulations and had instead asserted that there were objective grounds as to why the contract remained fixed term. The claimant sought a declaration from the tribunal in terms of

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5 Regulation 9(5) declaring that the provision of his contract restricting the duration of the contract to a fixed term should be of no effect and that the employee should be a permanent employee. The respondents lodged a response in which they denied the claim. They stated that the offer of a fixed term contract to the claimant was justified on objective grounds and that accordingly the provisions of Regulation 8(2) did not apply. They also indicated that in their view the JNCHES Guidance which will be referred to below qualified as a collective agreement modifying the application of Regulation 8. It was their position that the offer of a fixed term contract to the claimant fell within the circumstances envisaged in the JNCHES Guidance on making fixed term contracts are appropriate.

15 2. The hearing took place over three days with evidence being heard on the first two days. Prior to the hearing the parties lodged an agreed statement of facts. In addition evidence was heard from the under-noted witnesses. Witness statements were supplied to the tribunal by the respective parties and proved helpful to the tribunal in allowing the case to be dealt with within the time allocated. The respondents' witnesses who were heard first were:-

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|----|---|---|
| 20 | 1. Professor Dominic Fraser<br>Houlihan | Professor of Zoology and Vice Principal of the respondents for Research and Commercialisation |
| 25 | 2. Professor Christopher Secombes       | Professor of Zoology and Head of the School of Biological Sciences at Aberdeen University     |
|    | 3. Caroline Inglis                      | Director of Human Resources of the University of Aberdeen                                     |

30 3. The claimant's witnesses were:-

- |    |                   |   |
|----|-------------------|---|
| 35 | 1. The Claimant   |   |
|    | 2. Malcolm Keight | Head of Higher Education for the University and College Union, the claimant's trade union |

40 4. A joint bundle of productions was lodged. On the basis of the evidence and the productions and the agreed statement of facts the tribunal found the essential facts set out in the following section to be agreed or established. For the purposes of clarity the terms of the agreed statement of facts are set out in paragraphs (1) to (7) hereof and this is followed by the tribunal's own findings following consideration of the witness statements and the evidence heard at the hearing.

45 "(1) The claimant has been employed as a Research Fellow in the Department of Zoology at the University of Aberdeen since 1<sup>st</sup> April 1999. His employment has been under three fixed-term contracts. His first was for the period 1<sup>st</sup> April 1999 to 31<sup>st</sup> March 2002. Under this contract he was employed as a Post-Doctoral Research Fellow in the Department of Molecular and Cell Biology on Research Grade  
50 1A, examining the function of the testosterone receptor. Between 1<sup>st</sup>

5 April 2002 and 31<sup>st</sup> March 2005 he held a fixed-term contract with the Department of Zoology and was engaged on research concerned with "Tick Salivary gland fatty acid binding proteins." The research was funded by a grant from the Biotechnology and Biological Sciences Research Council ("BBSRC"). This grant ("the first grant") had been obtained following an application made by Dr Alan Bowman, a member of the respondent's Department of Zoology. The letter which offered the claimant appointment stated that there was no guarantee of employment beyond 31<sup>st</sup> March 2005, and in the written Statement of Particulars of Employment it was stated that 10 the appointment was dependent on external funding from BBSRC and, if the funding ended prematurely, the appointment may be terminated under the notice clause. The contract, apart from referring to research duties, stated that subject to any special 15 conditions of the funding body he could be called upon to undertake limited teaching duties not exceeding an average of six hours a week including not more than two hours of systematic lectures.

20 (2) The first grant was completed after a six month extension to the duration of the grant had been sought and obtained.

25 (3) Another grant was applied for to the BBSRC some time before June 2005. This was for research on the topic "Tick salivary gland aquaporins: characterisation and importance". This grant was for an estimated end date of 31<sup>st</sup> May 2008. On this occasion the claimant was named as a co-applicant for the grant, Dr Bowman being identified as Principal Investigator. His research is concerned with the properties and functions of the tick salivary glands, and the research is funded by a grant from the Biotechnology and Biological Sciences Research Council ("BBSRC"). By letter dated 22<sup>nd</sup> 30 February 2005 the respondent offered the claimant a further fixed-term contract for the period 1<sup>st</sup> April 2005 to 31<sup>st</sup> May 2008. The claimant was offered and accepted appointment as a Research Fellow to work on the research supported by this second grant. He 35 was issued with a Statement of Particulars of Terms and Conditions of Employment which was in similar terms to that issued when he had been employed to work on the research supported by the first grant.

40 (4) The claimant presently undertakes ad hoc lecturing and small group teaching duties and has some supervisory contact with Ph.D. students, although he is not a registered supervisor.

45 (5) The claimant has sought a written statement from the University that he is employed as a permanent employee. The University has declined to give this confirmation, on the ground that there is objective justification for his continued employment on a fixed term contract.

5 (6) The University's practice in relation to the use of fixed-term contracts is based on a Policy which was approved by the University Court in December 2004. That Policy states, inter alia, that fixed-term contracts will only be used where there is an objective and justifiable reason for their use. The Policy contemplates that there will be occasions where the use of fixed-term contracts is justified, and gives as an example of where there could be necessary and objective reasons or circumstances for the use of fixed-term contracts where "there is no reasonably foreseeable prospect of short-term funding being renewed nor other external or internal funding being available or becoming available."

10 (7) In accordance with the above Policy, the claimant was advised by letter dated 25<sup>th</sup> July 2006 that his present employment was funded by grant from BBSRC and due to conclude on 31<sup>st</sup> May 2008. He was informed that at the date of writing the University had no guarantee of further funding beyond this date and, for that reason, he would continue to be employed on a fixed-term contract basis."

20 5. Advance and improve its research agenda. The ambition of the University is to be recognised as one of the top twenty research intensive universities based in the UK and within the top one hundred world wide. The ranking at the University has improved in recent times. Previously in terms of world wide ranking the University sat outside the top two hundred. The progress made has been tangible and significant. One aspect of this success has been the increase in income generated by the University's research grant and contract income. In the year to 31 July 2008 the University's research grant and contract income was expected to be around £50 million. The previous year it was £46.5 million and for the coming financial year it is projected as £54.2 million. The Vice-Principal is tasked with delivering a 10% increase year on year in this stream of income. With one or two blips this aim has been successfully achieved over the last number of years.

35 6. Generally speaking funding for research for the University comes from three sources. The first two sources are the teaching grants which come from Scottish Government and what is known as the main quality research grant which is also distributed by the Scottish Funding Council on behalf of the Scottish Government. The distribution of funds for this particular grant depends mainly on the research assessment exercise carried out in respect of each university and research institution in Scotland. Aberdeen University has an RAE at level five which is the highest bar one which is possible. A further RAE assessment is currently under way.

45 7. The third source is that of grant funding to support specialised research activities or projects. Grants can be applied for from a number of sources including research councils, charities or industry. Such funding has to be applied for and the level of grant funding which a particular school obtains is dependent upon its success rate in grant applications.

8. Although the grants are paid to the University the applications are made by individual academics or researchers within the University. Most of the funding bodies have a rule whereby applications can only be made by members of staff who are on a permanent open-ended contract.

9. The terms imposed by the BBSRC, the body which funded the research participated in by the claimant are fairly typical. These were lodged. They state at paragraph 3.10 (bundle page 79).

"Research assistants, technicians and other researchers who are employed on short-term projects on Research Council grants are not eligible to apply either in their own right or as co-applicants. Neither are researchers who are holders of fellowships that are not portable or awarded competitively and have been awarded funded and held at the awarding institution.

**Researcher Co-investigators** (formerly known as Recognised Researchers).

30.11 A post-doctoral research assistant who is not eligible to be either principal or co-applicant in their own right, but who has made a substantial, recognised contribution to the formulation and development of the project and who will be engaged in the ensuing research may, with the approval of the principal applicant, be named as the "Researcher Co-investigator" in the application. This title will be recorded and included in published information."

10. The effect of this is that essentially only those members of staff who have permanent open-ended contracts are able to apply for grants as principal investigator.

11. Typically a member of the University's full-time academic staff will have responsibility as principal investigator for a portfolio of grant and contract awards. Building up that portfolio is one of their primary responsibilities. One of the consequences of this is that the actual research work will be carried out primarily by someone other than the principal investigator. Typically such research will be undertaken by a contract researcher such as the claimant.

12. There is a specific skill to obtaining grant funding and members of the University's permanent staff who are in a position to regularly bid successfully for such funding can have the status of "star players". A successful record of applying for grant funding will usually improve the career progression and professional success of that individual. The grant giving bodies usually apply fairly strict criteria to the type of research which they will fund. Such research has to be timely and also should generate a tangible benefit for society. This can be economic benefit but other benefits can be taken into account. The aim of the grant giving body is to stimulate original research which will add to the body of scientific knowledge in a certain area. The grant giving body may also

be interested in providing certain types of high quality training and developmental opportunities for those researchers engaged on the grant work.

- 5 13. The grant application will normally state the number and seniority of researchers who will be required to carry out the proposed research and the estimated cost. In addition to salary costs the grant will be expected to cover travel costs and contributions to equipment costs and general overhead levels within the University. On occasions an individual researcher may be identified in the grant application and sometimes such an individual researcher may be a  
10 Research Co-investigator as defined above.
14. Generally speaking the grant giving body will expect the contract researcher working on the grant funded project to work solely on that project. This contrasts with the position of the principal investigator who will generally be  
15 expected to be running a portfolio of such grant aided projects.
15. The grant giving body will usually set out certain aims and objectives. These objectives will normally be expected to be met within the period of the grant. Many grants are cash limited grants. The grant the claimant latterly worked on  
20 was such a grant. This means that the rules regulating the grant prevent additional cash being made available in the event that objectives are not met. The only latitude allowed relates to a possible extension of the period of the grant. An extension will only be applied for if there is a real prospect of the objective of the grant being fulfilled and there is some unused cash remaining  
25 within the grant. The system of grant funding is designed to exclude the possibility of there being any excess unused cash remaining within the grant. Grants will therefore usually only be extended in limited and unforeseen circumstances such as a prolonged period of illness, the absence of a contract researcher on maternity leave, a requirement to replace a contract researcher  
30 who has resigned. In certain situations the University may provide bridging finance to enable a research project to continue beyond the time of the grant funding. Wherever this is done the primary reason relates to the research work and not a concern to continue the employment of the researcher.
- 35 16. Although each grant is to some extent a stand-alone research project it may happen that as a result of one research project another project suggests itself. The process of obtaining grant funding can take a period of six to nine months. As part of the review process referees' reports will be made available. Circumstances can arise where it appears highly likely that a grant for further  
40 related research will be available in due course and in those circumstances the University can provide bridging finance out of their own more generalised resources so as to continue the employment of the researcher over the period between grants.
- 45 17. The University of Aberdeen sees itself as operating in a world wide marketplace. They are in competition with other institutions to employ distinguished professors and senior lecturers who are successful in obtaining grants. The success of these individuals depends on their track record of success in research. The greater the tangible value that can be demonstrated

5 from previous grant funded activity the more persuasive the justification for greater funding. The greater the funding the greater the opportunities for those undertaking research work. The more successful in terms of its research the greater the number of students that will be attracted to the University. This in turn increases the teaching requirement creating opportunity for growth in the numbers of permanent academic staff. Such growth is of assistance to the University in recruiting and developing further distinguished academics who will be successful in obtaining grant funding.

10 18. In the past in general terms where a contract researcher is employed to carry out research work on a project which is funded by a fixed-term grant the University would employ such an individual on a fixed-term contract. Such individuals are members of the academic staff of the University and enjoy the same rights and protections under the University Ordinances as are enjoyed by  
15 a permanent member of staff. The difference however is that of security of employment. The University of Aberdeen has reached agreement with the University Trade Unions that in general terms there will be no compulsory redundancies of permanent academic staff. In recent years there have been no such redundancies. The University's policy on redundancy is contained in  
20 the Ordinance of the University which is a private Act of Parliament which was last reviewed in 1992. The procedure for carrying out redundancies is set out in Part 11 of this document (bundle J142-144). This provides an extremely unwieldy and difficult to manage redundancy scheme. It involves consideration of a list by members of the University Court. The University's HR Department  
25 consider the scheme to be impractical. Although the scheme applies to fixed-term employees as well as permanent employees in practice the University do not apply the scheme of the Ordinance where a fixed-term employee is being dismissed on the termination of his fixed-term contract. The University Unions have not in the past made any serious objection to this practice.

30 19. Steps are being taken to modernise and update the University's Ordinance. This procedure is to some extent outwith the control of the University and the University do not know when and if the process will be completed.

35 20. It is likely that if the University sought to make redundancies of permanent staff that this would be seen as a newsworthy event and create comment in the media. The University has experienced no such comment in the past when fixed-term employees have been dismissed on termination of their fixed-term contract.

40 21. The respondents are members of a collective organisation of employers the UCEA. This organisation carries out regular negotiations at national level with the nationally recognised trade unions involved in higher education. The claimant is a member of the UCU (formerly AUT) which is represented on this  
45 negotiating body. The national negotiating body is known as the Joint Negotiating Committee for Higher Education Staff (JNCHES). The deliberations of this body can result in guidance which is provided to higher education institutions such as the respondents. Such guidance is not binding on institutions such as the respondents but is stated to be a recommendation

only. It is up to each individual institution to decide whether or not to follow the recommendations contained in the guidance.

22. In June 2002 the JNCHEs issued guidance on fixed-term and casual employment. This document was lodged (J171-179). The preamble to the agreement states that a joint working group was set up following the Bett Report of June 1999. The preamble makes reference to the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations which were at that time due to come into force in October 2002. The Guidance is dated June 2002. The preamble states that the Regulations:

“Will require institutions to reduce significantly the current and future use of such contracts.”

It also states:

“the Bett Report recommended that institutions review carefully the reasons for such contracts in order to limit their use.”

It goes on to state that the purpose of the Guidance is:

- “to provide guidance in implementing the legislation by reducing the existing number of fixed-term and casual posts and limiting their use in the future.
- to encourage HE institutions to employ staff on indefinite contracts as the normal form of employment and to use fixed-term and casual contracts only where there are transparent, necessary and objective reasons for doing so.
- to identify and assist the development of good practice in the use and management of fixed-term and casual employment.”

23. With regard to contract research staff the Guidance states:

“Contract research staff are a distinct group of employees in HE with a high proportion employed on fixed-term contracts. It is recognised that this has occurred in the past because of the short-term funding of posts, however it is also recognised that the Fixed-Term Employees Regulations will require a major overhaul of the way they are employed in the future resulting in a significant transfer to and use of indefinite contracts. The ending of short-term funding will continue to raise the possibility of termination of these indefinite contracts.”

24. It then goes on to state in section 9:-

“It is essential that there are transparent, necessary and objective reasons for placing a post initially and subsequently on a fixed-term or



casual contract. The renewal or extension of the fixed-term would also have to be justified separately by objective reasons. The list below includes some examples. Institutions are recommended to identify in partnership with the locally recognised unions the circumstances in which they – in light of their own individual requirements – would use fixed-term and casual contracts.

Within the context set out above, examples of necessary and objective reasons or circumstances could include.....

(f) Where there is no reasonably foreseeable prospect of short-term funding being renewed nor other external or internal funding being available or becoming available. Where the short-term funding has already been renewed continuing use of the fixed-term contract would need to be justified by objective reasons.”

25. The respondents themselves developed a policy on the use of fixed-term contracts. This policy was originally approved on 14 December 2004 (lodged J125-127). The policy was updated on 26 June 2006 (lodged J129-J133).

26. The current policy (June 2006) states it has been developed to implement the requirements of current employment legislation relating to the equality of treatment of fixed-term employees. At section 3 this policy states:

“...it is therefore accepted that fixed-term contracts will in the future only be used where there is an objective and justifiable reason for their use and the 'standard' form of contract will be 'permanent' whenever possible....The University will publish and update at appropriate intervals, guidance on the use of fixed-term contracts.”

27. Despite the statement that it would publish and update guidance at appropriate intervals the respondents have not yet done so. The June 2006 policy document goes on to state:-

“It will not be possible to completely eliminate the use of fixed-term contracts, although their use will be kept to a minimum consistent with the policy.....

a. Objective reason for the use of Fixed-term Contracts.

There will be occasions when the continued use of fixed-term contracts is justified. Within this context examples of necessary and objective reasons or circumstances for the use of fixed-term contracts could include -.....

2. Where there is no reasonably foreseeable prospect of short-term funding being renewed nor other external or internal funding being available or becoming available.”

28. This part of the policy repeats the first sentence of the wording found under category f of paragraph 9 of the JNCHES Guidance. The second sentence of paragraph f is not repeated in the respondents' policy. The second sentence stated:-

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“Where the short-term funding has already been renewed, continuing use of the fixed-term contract would need to be justified by objective reasons.”

10 29. The claimant was latterly employed on a fixed-term contract in the College of Life Sciences and Medicine. This College is split into four schools. In the School of Biological Sciences where the claimant currently works there are 80 research staff. Five of these are permanent contracts the remainder are on fixed-term contracts. Within the School of Medical Science there are 74  
15 research staff, 5 are permanent, the remainder on fixed-term contracts. Within the School of Medicine there are 223 research staff of which 33 only are permanent. The School of Psychology has 18 research staff none of whom are on permanent contracts everyone being on a fixed-term contract. Generally speaking there are two categories of research staff who are on a permanent  
20 contract. One category is those whose funding is paid out of core funding that is funding which is not based on a time-limited research grant. Many of these individuals receive this type of post because they have received a grant from Wellcome Trust or Leverhulme Trust or another highly sought after grant giving body which has as a term of the grant that at the conclusion of the grant period  
25 the individual concerned will be offered a permanent contract with the grant receiving institution. Prior to accepting such a grant the respondents normally carry out a budgetary process so as to ensure that they will be able to afford to meet this term before the grant is accepted. Another category are those who are employed on rolling grants of five years duration from a government body.  
30 Within the School of Life Sciences and Medicine there is a Health Services Research Unit and a Health Service Economics Research Unit which are both funded by external funding from the Scottish Government. Such funding has been granted on the basis of five year terms for the last 25 years and the respondents made a decision that renewal of this 5 year funding was  
35 sufficiently likely that the staff who were employed on these projects be given permanent contracts.

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30. It is virtually unknown for anyone who is funded on the standard type of research grant for a fixed period to be employed other than on a fixed-term contract.

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31. Each of the schools within the College has a member of HR staff allocated to them. When a research grant is obtained and the contract researcher has been identified the principal investigator will liaise with the grant administration team within the school. The grant administration team perform an accountancy function. They will produce a document which contains the dates of employment of the new employee which will be coterminous with the dates of the grant funding. This form will then be passed to the HR administrator for that school who will prepare contract documentation. No assessment typically

takes place at that stage as to whether or not there is a reasonably foreseeable prospect of short-term funding being renewed nor other external nor internal funding being available or becoming available.

- 5 32. Where the research is funded by a grant which is short-term then there is no expectation that the HR administrator within the school looks beyond this for some other objective reason to put the employee on a fixed-term contract.
- 10 33. Since 2005 there has been an aim that the HR administrator for each school will at some stage go through the list of individuals employed on fixed-term contracts with the principal of the school and discuss with him on a regular basis whether any of the fixed-term employees on the list should have their contracts converted to permanent. There is no documentation in respect of this procedure. It is unclear whether or not such procedure was ever carried out for 15 the claimant, and if so when or what criteria were applied.
- 20 34. As mentioned above the respondents have been successful in growing the amount of research funding they receive on an annual basis over the last number of years. The aim is to increase such funding by around 10% per annum. From 2003/4 to the forecast figure for 2006/7 such income for the School of Life Sciences and Medicine has grown from approximately 3.2 million to 3.69 million.
- 25 35. Within the respondents' University approximately 8% of the employees performing research are on permanent contracts. 92% are on fixed-term contracts. Within the School of Biological Science 97.5% are on fixed-term contracts. The University employees 580 research staff on fixed-term contracts. Of those approximately 70 who are on fixed-term contracts have 30 been continuously employed by the University for six years or more. This means that they have been employed on at least one fixed-term contract succeeding another.
- 35 36. There is usually no prospect of a research grant being renewed as such. The grant giving bodies will expect a fresh grant application to be made and even where a fresh grant is given in a similar subject the grant will be given on the basis of building on the previously funded research and will have entirely new objectives albeit they may be linked.
- 40 37. There is an appreciation within the academic community that individuals carrying out research work can find themselves becoming more and more specialised. There are certain generic skills such as the correct use of equipment and a common means of analysing results supplied by the contract researcher, but the preparation and conduct of experiments will be unique to the research being carried out. There is a risk that the contract researcher 45 become a person who knows more and more about less and less. In order to be funded research work must be original, however there can be situations where a set of skills developed in relation to one project can be applied in the performance of a subsequent project.

38. When recruiting contract researchers the University will generally wish to obtain the best possible contract researcher for the job and can be recruiting on a world wide basis. That having been said, it is not particularly unusual for the University to find that the most suitable candidate is someone who is already working as a contract researcher within the University. The Universities have applied their minds to the adverse consequences for a contract researcher in career development terms if his specialist skill set becomes too narrow and therefore non-transferable. This problem has also been recognised at governmental level. The University of Aberdeen itself takes steps to deal with this by providing generic skills training to its community of contract researchers and PhD students. Skills training is also given in topics such as networking, presentation skills, leadership and team working.
39. The career development path for a contract researcher can be difficult. There are very few core funded posts. Most contract researchers who make the move to a permanent post do so by becoming academics and becoming more involved with teaching. Even so there are only around 6,000 appointments nationally to such full-time academic posts within each year. There are approximately 60,000 contract researchers working in the UK at any one time. There is therefore no standard career progression from contract researcher to academic.
40. The current processes surrounding funding for original research in Universities is highly competitive. The competitive nature of the process is seen as a good thing by the academic community in general since it is believed it promotes excellence.
41. There are approximately 140 research institutions within the UK who compete with each other to obtain funding from the various grant giving bodies. Of these the vast bulk have a policy whereby as a general rule employees who are employed to carry out the work of researcher on such short-term funded work are employed on fixed-term contracts. Four of these institutions operate different systems. Two of these Bristol, and UCL are within the top ten of research institutions within the UK. The Guidance on UCL contracts of employment was lodged (J189-199). Their policy with relation to fixed-term contracts is set out in paragraph 9. This states:-
- "Fixed-term contracts can be used either (i) to provide cover (e.g. sabbaticals, leave of absence, sickness absence, maternity leave and vacancies), or (ii) for short-term appointments which are project or task related (e.g. a two month appointment to complete a specific task such as clearing backlog).
- Fixed-term contracts should be for one-off non-recurring appointments for a period of less than nine months in duration. However fixed-term appointments covering staff who will be returning to their post may be for longer duration (e.g. maternity leave, sickness absence, sabbatical and unpaid leave) coinciding with the expected period of absence.

5 The majority of staff appointed on research grant and contract are likely to be appointed on a grant or series of grants and contracts lasting longer than nine months. Accordingly, these individuals will be appointed on "open ended contracts with grant/project end dates" (see section 10 below).

42. Paragraph 10 states:-

10 **"Open-ended contracts with grant/project end dates**

These contracts should be used for employees who are appointed with a known risk of redundancy. This is most commonly the case with staff employed on:

15 (i) research grants and contracts where either the project or funding has a finite duration; and

20 (ii) projects (e.g. project managers for systems implementations or capital projects, etc) where there is a finite task or funding.

25 Open-ended contracts will include a paragraph making reference to the possibility of redundancy in certain circumstances. As far as possible this statement will be generic in order to avoid the need to issue new or amended contracts of employment when employees change grants, or when projects are extended.

30 The generic wording used for appointments on research grants and contracts is *'your post is funded by research grant or contract, and in the event that this funding should cease your post will be at risk of redundancy. In the first instance the funding supporting your post is from [start-date] to [funding-end-date] and your head of department, or his/her nominee, will keep you informed of the funding situation.'*

35 43. A similar type of contract is also used at Bristol University. The effect of this type of contract is that where the grant funding comes to an end there is a redundancy process undergone. Normally there will only be a pool of one in the redundancy process but this may not always be the case. Consultation will be carried out prior to the funding end date to discuss whether the funding supporting the employment or the project itself is likely to cease and whether alternative employment is available.

45 44. In 1996 a number of stakeholders in the research process in the UK entered into a concordat on contract research staff career management. The parties to the concordat included representatives of the Universities and of the UK Research Councils. The concordat set standards for the career management and conditions of employment of researchers in higher education institutes. There was a recognition that since the 1996 concordat various developments

5 had taken place in this field and a working party was set up which carried out wide consultation and engagement with the research sector within the UK with a view to updating the concordat. As at the date of the tribunal the final text of the concordat (dated 1 March 2008) was available and this was lodged with the tribunal (J251-270). The final text of the 2008 concordat had not been signed as at the date of the hearing. It is accepted within the University sector that the concordat is in its final form and that signature is simply a final formality.

10 45. The 2008 concordat contains a statement of seven principles which the parties undertake to adopt. Each of these principles is set out with a number of explanatory paragraphs.

46. Principle 1 states:-

15 "Recognition of the importance of recruiting, selecting and retaining researchers with the highest potential to achieve excellence in research."

47. One of the explanatory paragraphs in relation to this principle states:-

20 "Research posts should only be advertised as a fixed-term post where there is a recorded and justifiable reason as laid down in the Fixed Term Employees Regulations (2002)."

25 48. Principle 2 states:-

30 "Researchers are recognised and valued by their employing organisation as an essential part of their organisation's human resources and a key component of their overall strategy to develop and deliver world class research."

49. Under this principle it states:-

35 "1. Employers are encouraged to value and afford equal treatment to all researchers, regardless of whether they are employed on a fixed term or similar contract. In particular, employers should ensure that the development of researchers is not undermined by instability of employment contracts. This approach should be embedded throughout all departmental structures and systems.

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45 2. Commitment by everyone involved to improving the stability of employment conditions for researchers and implementing and abiding by the principles and terms laid down in the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations (2002) and JNCHEs guidance on the use of fixed-term contracts will provide benefits for researchers, research managers, and their organisations.

.....

4. Organisational systems must be capable of supporting continuity of employment for researchers, such as funding between grants, other schemes for supporting time between grant funding, or systems for redeploying researchers within organisations where resources allow. Funders are expected to make it a priority to consider how their policies, guidance and funding can be enhanced to help employers to achieve this objective."

#### **The Claimant's Particular Circumstances**

50. The claimant obtained a BSc from the University of Sheffield in Micro Biology/Chemistry. Thereafter he studied at Brunel University where he obtained an MSc in Applied Immunology. He studied for his PHD at University College London. Whilst studying for his PHD he also worked in the Physiology Department of University College London as a Research Technician. He also had work experience working in several Virology Departments in London hospitals between 1986 and 1992. After being awarded his PHD he worked between July 1997 and March 1999 in the Chemistry Department of the University of Washington, USA.

51. Thereafter he returned to the UK and has been working at the respondents' University since April 1999. He has been continuously employed by the respondents since 1999 albeit on a succession of three fixed-term contracts. His current fixed-term contract is due to expire on 31 May 2008 and he has accepted a fourth fixed-term contract which will commence on 1 June 2008 and would terminate on 27 March 2010.

52. The claimant's first fixed-term contract was as a research fellow conducting post-doctoral research examining the function of the testosterone receptor in the respondents' School of Biology. This continued until 2002.

53. Some time before the spring of 2002 Dr Alan Bowman a senior lecturer with the respondents who is a specialist in the study of ticks identified research into tick salivary gland fatty acid binding proteins as suitable for a grant application. Dr Bowman completed a grant application and submitted this to the BBSRC. The application was successful. The grant was for a duration of 38 months and the estimated end date of the grant was given as 31 May 2005. The grant stipulated the personnel who were to work on the grant by description and level. The grant identified the need for a post-doctoral research assistant (Grade 1A, Spine Point 6). Dr Bowman had had no dealings with the claimant prior to this and the post-doctoral research fellow position was advertised in the usual way. The claimant applied for and was successful in obtaining this. His employment therefore did not end at the expiry of his initial fixed term contract but continued under the terms of a new fixed-term contract which was for a fixed period ending on 31 March 2005.

54. Although the grant was for a fixed period in this particular case the period of the grant was extended. The justification for this was that the grant objectives would not have been completed in the original duration of the grant but were

capable of completion within a further six month period. The permission of the BBSRC was sought and they granted permission to reallocate an element of the grant which had been provided for the provision of equipment as additional salary payments to the claimant. Dr Bowman was able to do this having found an alternative existing equipment resource which was suitable for the project. Thereby a saving was achieved on equipment and these funds were then used to meet the claimant's salary costs. The first grant was completed successfully.

55. Prior to the spring of 2005 when the first grant was heading towards conclusion Dr Bowman gave consideration to identifying a suitable subject for a new grant application. A new grant application was submitted prior to June 2005. The title of this grant was:

"Tick Salivary Gland Aquaporins: Characterisation and Importance".

56. Dr Bowman again made this application as principal investigator, however on this occasion there were two co-applicants for the grant, namely the claimant and another individual who was also based at the University of Aberdeen. As explained above the fact that the claimant was on a fixed-term contract meant that he was not eligible to make an application to BBSRC for grant funding in his own name but he could be mentioned as a co-applicant on the grant application made by Dr Bowman.

57. The claimant has been working on the research project in respect of this grant from 2005 to the present. During this period the claimant's position is that where he has identified any ideas for research projects he has first of all to take them up with Dr Bowman the principle investigator. It is only if Dr Bowman agrees that an application for grant would go forward and this would have to be made under Dr Bowman's name. The claimant has had certain ideas for research which he put to Dr Bowman. Dr Bowman considered that these ideas were not necessarily within the remit of the laboratory, therefore the claimant has not been able to progress them further.

58. As a member of the research staff of the University the claimant ostensibly enjoys the same rights and protections as a permanent member of staff, in practice however the respondents do not treat the fixed-term employees in the same way as the permanent employees. They are not treated with the same esteem. Research staff who are on fixed-term contracts are not seen as of comparable status or standing to those who are on permanent contracts.

59. The claimant is not able to make application for grant funding in his own name to many of the Research Councils. This has unfavourable consequences for his career progression. The claimant cannot be a principle investigator and this negatively affects his career progression. The claimant cannot build up or demonstrate a track record in making successful grant applications in his own name and this has a negative affect on his career progression. Every three years the claimant finds himself in the position where his continued employment is uncertain. From 6 to 12 months before his contract expires he



finds himself preoccupied with the possibility of unemployment which is unsettling to him and his family.

5 60. The claimant has not personally experienced difficulties in obtaining credit. He is aware that if he seeks credit from a financial institution and they check his employment status with his employers, they will be advised that he is on a fixed-term contract. He considers that it is possible that this would unfavourably affect his chances of obtaining the credit sought. In the past the claimant has refrained from relocating to a larger house because of financial  
10 insecurity. The claimant feels he is less credit-worthy than he would be had he a permanent contract.

15 61. The claimant always had the ambition to be a scientist. He has a range of skills which he considers to be transferable. He is computer literate, he has work experience as a research technician as well as his experience as an academic post-doctoral researcher. Despite his preference for a scientific career the claimant has considered leaving for some other career because of what he perceives as the negative consequences of being employed on a succession of fixed term contracts. He is aware of former colleagues who have already done  
20 so.

25 62. The term of the current grant which funds the claimant's research expires on 31 May and this grant is cash limited. Although the objectives of this second grant have not been met the only latitude allowed relates to a possible extension to the period of the grant. This would only be possible if, as was the case with the first grant, Dr Bowman was in a position to reallocate unused funds within the grant to paying the claimant's salary. It would also be necessary for Dr Bowman to show that if this were done the objectives of the grant could be met. No such application for extension has been made and the grant funding will  
30 end on 31 May.

35 63. That having been said, the claimant has applied for and been successful in obtaining a further fixed-term contract as a researcher with the respondents. This contract (which will be the fourth fixed-term contract under which the claimant has worked since 1999) is in the respondents' School of Medicine. The claimant is to be employed from 1 June as a research fellow on a project to investigate the development of a commercial peptide array for the detection of clinically important blood group antibodies. The advertisement for this post was lodged (J271). It states that an applicant must have a PHD in Biochemistry or  
40 related disciplines. It states that post-doctoral experience in protein/peptide chemistry and the development of immunoassays is essential. It states that experience in proteomics/microarrays would be an advantage. The post is funded from the Proof of Concept Programme managed by Scottish Enterprise and the funding is short term being available for two years.

45 64. On 7 July 2006 the claimant wrote a letter to the University under Regulation 9(1) of the Fixed Term Employees Regulations (J45) in this letter Dr Ball requested a written statement confirming that his contract was no longer fixed-term. Under Regulation 9(1) and (2) of the Regulations the claimant was

entitled to be provided within 21 days of this request with either a statement confirming that his contract was no longer fixed-term or a statement giving reasons why his contract remained fixed-term and a statement of the objective grounds for his engagement under a fixed-term contract. The respondents' reply which was lodged (J49) states:-

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"The University Policy on the Use of Fixed-Term contracts Section 4 states that there will be occasions where the continued use of fixed-term contracts is justified. Within this context examples of necessary and objective reasons or circumstances are required. One of these circumstances for the continued use of fixed term contracts is included in Section 4a(ii) which states that:

10

'Where there is no reasonably foreseeable prospect of short-term funding being renewed nor other external or internal funding being available or becoming available'.

15

We believe that the uncertainty of funds is an objective reason for the continued use of a fixed term contract.

Your current contract extension is funded from BBSRC and due to conclude on 31 May 2008. At this stage, we have no guarantee of further funding for your appointment beyond this date and therefore in accordance with the aforementioned paragraph in the University's policy you shall continue to be employed on a fixed-term contract basis."

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65. The claimant's solicitors sought further particulars from the respondents. The respondents' solicitors replied on 21 February 2007 (J51) stating as follows:-

"We agree however that the issue to be addressed is the precise and concrete circumstances characterising the work for which Dr Ball was engaged and whether those circumstances justified objectively and in the interest of both Dr Ball and the University the use of the fixed term contract.

30

We consider that the significant point is not that beyond a specified date funding for Dr Ball's post was uncertain but that at least for a fixed term funding was secure. It was those funds upon which Dr Ball's appointment was dependent. He might agree that it was in his interest that he was appointed even though the period for which funding was secure was not indefinite.

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In our view and that of our client those circumstances lend themselves naturally to an appropriate use of a contract, the term of which was fixed in line with the period of secure funding. The use of the fixed term contract aligns directly with the precise and concrete circumstances of the post in question and was not the product of an abstract general rule."

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**Matters arising from the Evidence**

5 66. The tribunal was happy that each of the witnesses both in their witness statements and in their oral testimony was giving truthful evidence as they saw it. Any variations were simply due to their different perceptions. None of the respondents' witnesses were in a position to state precisely what matters had been considered as relevant at the time the decision was made to offer the claimant a fixed-term contract in 2005. The tribunal proceeded upon the assumption that the general procedure set out in our findings in fact and which 10 was spoken to primarily by Ms Inglis, the respondents' Director of HR had been applied. The tribunal therefore found as a fact that the respondents had moved automatically from the fact of the funding for the claimant's research project being short term to offering the claimant a fixed-term contract.

15 **Issues**

67. Having heard the evidence and submissions the tribunal were satisfied that the issue for them to decide was whether the employment of Dr Ball under a fixed-term contract was justified on objective grounds when his third fixed-term 20 contract commenced on 1 April 2005.

**The Statutory Framework**

25 68. Both parties made extremely detailed and helpful submissions. Prior to the tribunal the claimant had lodged a skeleton argument, the terms of which were accepted by the respondents as being broadly correct subject to the various detailed points made by the respondents' agent in his written submission which will be referred to later in this judgment.

30 69. The Regulations which the claimant seeks to invoke implement into domestic UK law the Framework Agreement annexed to Council Directive 1999/70/EC. The Framework Agreement is an agreement between the social partners namely ETUC, UNICE and CEEP. Paragraph 2 of the preamble to the agreement states:-

35 "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 40 circumstances, to the needs of both employers and workers."

70. The general conditions set out at the beginning of the agreement include the following:-

45 ".....  
6. Whereas employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance;

7. Whereas the use of fixed-term employment contracts based on objective reasons is a way to prevent abuse;

.....  
12. Whereas the social partners are best placed to find solutions that correspond to the needs of both employers and workers and shall therefore be given a special role in the implementation and application of this agreement."

71. The agreement then goes on to list certain matters which have been agreed between the parties. Amongst the clauses which are relevant for our present purposes are:-

**"1. Purpose**

The purpose of this framework agreement is to:

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

**5. Measures to prevent abuse**

1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

- (a) objective reasons justifying the renewal of such contracts or relationships;
- (b) the maximum total duration of successive fixed-term employment contracts or relationships;
- (c) the number of renewals of such contracts or relationships.

2. Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships:

- (a) shall be regarded as 'successive'
- (b) shall be deemed to be contracts or relationships of indefinite duration."

72. The Directive 1999/70/EC puts into effect the Framework Agreement. The terms of the Directive are implemented in domestic law by the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Amongst the relevant provisions are:-

**"8. Successive fixed-term contracts**

(1) This regulation applies where –

- (a) an employee is employed under a contract purporting to be a fixed-term contract, and  
(b) the contract mentioned in sub-paragraph (a) has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the contract mentioned in sub-paragraph (a).

(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if –

- (a) the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and  
(b) the employment of the employee under a fixed-term contract was not justified on objective grounds –  
(i) where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;  
(ii) where that contract has not been renewed, at the time when it was entered into.

(3) The date referred to in paragraph (2) is whichever is the later of –  
(a) the date on which the contract mentioned in paragraph (1)(a) was entered into or last renewed, and  
(b) the date on which the employee acquired four years' continuous employment.”

73. Regulation 8(4) goes on to state that for the purposes of Regulation 8(3) any period of continuous employment falling before 10 July 2002 is disregarded.

74. Regulation 8(5) appears to be designed to give the social partners the special role envisaged in paragraph 12 of the General Considerations contained in the Framework Agreement. Regulation 8(5) states:-

“A collective agreement or a workforce agreement may modify the application of paragraphs (1) to (3) of this regulation in relation to any employee or specified description of employees, by substituting for the provisions of paragraph (2) or paragraph (3), or for the provisions of both of those paragraphs, one or more different provisions which, in order to prevent abuse arising from the use of successive fixed-term contracts, specify one or more of the following –

- (a) the maximum total period for which the employee or employees of that description may be continuously employed on a fixed-term contract or on successive fixed-term contracts;  
(b) the maximum number of successive fixed-term contracts and renewals of such contracts under which the employee or employees of that description may be employed; or

(c) objective grounds justifying the renewal of fixed-term contracts, or the engagement of the employee or employees of that description under successive fixed-term contracts,

5 and those provisions shall have effect in relation to that employee or an employee of that description as if they were contained in paragraphs (2) and (3). “

10 75. Regulation 9 of the Regulations provides that an employee who considers that by virtue of Regulation 8 he is a permanent employee may request a written statement from his employer which either confirms that he is no longer fixed-term or gives reasons why his contract remains fixed-term. Regulation 9 goes on to provide:-

15 “(2) If the reasons stated under paragraph (1)(b) include an assertion that there were objective grounds for the engagement of the employee under a fixed-term contract, or the renewal of such a contract, the statement shall include a statement of those grounds.

20 (3) A written statement under this regulation is admissible as evidence in any proceedings before a court, an employment tribunal and the Commissioners of the Inland Revenue.

25 (4) If it appears to the court or tribunal in any proceedings –  
(a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement, or  
(b) that the written statement is evasive or equivocal,

30 it may draw any inference which it considers it just and equitable to draw.”

76. Regulation 9(5) gives the tribunal jurisdiction to grant a declaration that an employee who has invoked the Regulation 9 procedure is a permanent employee. This is what the claimant has sought in the present case.

35 77. The parties were in agreement that the essential question was whether the employment of the claimant on a fixed-term contract was justified on objective grounds as at the date his present fixed-term contract was entered into on 1 April 2005. With regard to the issue of objective grounds the first issue for the tribunal was whether Regulation 8(5) had any relevance. It was suggested by  
40 the respondents that the JNCHES Agreement was a collective agreement which had modified the application of paragraphs 8(1) to 8(3) of the Regulations in relation to the claimant by substituting for the provisions of paragraph (2) or paragraph (3) one or more different provisions which specified one or more of the matters set out in Regulation 8(5)(a) to 8(5)(c). In particular  
45 they claimed that the JNCHES Agreement had set out different provisions which, in order to prevent abuse arising from the use of successive fixed-term contracts specified objective grounds justifying the renewal of fixed-term contracts, or the engagement of the employee or employees of that description under successive fixed-term contracts.

5 78. In particular the respondents' position was that the JNCHES Agreement specified such objective reasons in section 9. It was the respondents' position that section 9(f) was the appropriate section in relation to the claimant. This states:

10 "Where there is no reasonably foreseeable prospect of short-term funding being renewed nor other external or internal funding being available or becoming available. Where the short-term funding has already been renewed, continuing use of the fixed-term contract would need to be justified by objective reasons."

15 79. The respondents argued that instead of the tribunal having to consider whether the employment of the employee under a fixed-term contract was justified on objective grounds in general in terms of Regulation 8(2)(b) of the Regulations, the true question for the tribunal to ask itself was whether there was no reasonably foreseeable prospect of short-term funding being renewed nor other external funding being available or becoming available at the time the contract was renewed, or secondly whether this was a situation where the short-term funding had already been renewed in which case continuing use of the fixed-term contract would need to be justified by objective reasons.

25 80. The tribunal accepted the respondents' contention that the JNCHES Agreement was a collective agreement in terms of section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992. The tribunal however did not accept the respondents' contention that this was a collective agreement which fell within the terms of Regulation 8(5). The tribunal considered that essentially what Regulation 8(5) permitted was for a collective agreement to be entered into which modified the application of paragraphs 1 to 3 by either substituting for the provisions of paragraph 2 or paragraph 3 or for the provisions of both different provisions which specified objective grounds justifying the renewal of fixed-term contracts or the engagement of the employee or employees of that description under successive fixed-term contracts. In the view of the tribunal the first point was that there required to be an agreement between the parties to the collective agreement to modify the application of paragraphs 1 to 3.

40 81. The JNCHES document was lodged in its entirety. Nowhere in the agreement does it state that it was the intention of the parties to modify the application of Regulations 8(1) to 8(3). The tribunal were of the view that such an intention could not be implied into the agreement. There were in fact a number of parts of the agreement which indicate that this was not the intention of the parties as expressed in the agreement.

45 82. The first point is that it was accepted by both parties that the JNCHES guidance was not binding on the respondents or indeed any of the higher educational institutions. This is clear even from the title of the document which calls itself Guidance for Higher Education Institutions. This fact is mentioned again in the preamble which states that the guidance is recommended by

5 JNCHES. The preamble also refers to a partnership approach which states that it is recommended that HEIs identify measures to implement the required changes in partnership with the locally recognised unions. The paragraph which sets out the purpose of the agreement has already been quoted and refers to "guidance in implementing the legislation". It does not say "modifying the legislation".

10 83. The tribunal did not consider that Regulation 8(5) came into play so as to have the effect of modifying a statutory regulation by virtue of a document which was only guidance.

15 84. The tribunal considered this point particularly cogent given that in the particular circumstances of this case the respondent employer had not in fact transposed the whole of the relevant part of the JNCHES Guidance into their own policy. The second sentence of paragraph 9 section (f) has been omitted.

20 85. Given that the JNCHES Agreement is imply an agreement on guidance the respondents were quite entitled to do this. If the respondents' submissions were correct however sections 9(a) to 9(f) would, despite the fact that this is contained in non-binding guidance become legally binding on the respondents because the agreement has modified the terms of Regulation 8(1) to 8(3) which is legally binding. The tribunal felt this could not be correct.

25 86. Furthermore it is interesting to note that the respondents' reason for not adopting the second sentence of paragraph 9 condition (f) was that they considered it to be ambiguous. In their written submission the respondents provide two interpretations of this. The sentence refers to the renewal of short-term funding. The tribunal heard evidence that in fact short-term funding is never renewed. It can be extended in certain circumstances or other short-term funding can sometimes be obtained to fund research which is similar to or linked with, but not identical to, the original research. The tribunal would question whether they should readily assume that it was the intention of the parties to substitute an ambiguously phrased clause for the terms of a statutory instrument.

35 87. The second ground for the tribunal coming to the view that the JNCHES Guidance does not fall within the terms of Regulation 8(5) comes from the wording of paragraph 9 itself. This refers to the need to ensure that there are transparent, necessary and objective reasons for placing a post initially and subsequently on a fixed-term or casual contract. It states that the renewal or extension of the fixed-term would also have to be justified separately for objective reasons. It the goes on to say quite crucially that:

45 "The list below includes some examples. Institutions are recommended to identify in partnership with the locally recognised unions the circumstances in which they – in light of their own individual requirements – would use fixed-term and casual contracts."



88. There are two points from this. The first is that once again it is clear that there is no suggestion that the JNCHES Agreement is intended to modify Regulations 8(1) to 8(3) and that it specifically invites the Universities to identify situations with their locally recognised unions. The second point is that paragraph 9 is listing some examples. It is not immediately clear from the paragraph what these are examples of, however the next paragraph goes on to state that these are examples of necessary and objective reasons of circumstances [which] could include:

89. It appears clear to the tribunal that there is absolutely no intention here to state that these are examples which modify or replace the need for objective grounds in Regulation 8(2)(b). They are examples of circumstances which could amount to objective grounds in terms of Regulation 8(2)(b).

90. The tribunal's view therefore was that Regulation 8(2)(b) was unmodified by the JNCHES Agreement and that the tribunal required to consider whether the employment of the employee under a fixed-term contract was justified on objective grounds or not. Given that the 2002 Regulations implement in domestic law the terms of the 1999 Directive the view of the European Court on the issue of what constituted:

“Objective grounds”  
required to be considered by the tribunal.

91. The test of justification on objective grounds in Regulation 8(2)(b) of the Regulations is based on Clause 5(1)(a) of the Framework Agreement annexed to the Directive which refers to “objective reasons justifying the renewal of such contracts or relationships”. We were referred by both parties to two decisions of the ECJ. One of these specifically relates to the concept of “objective reasons” within the meaning of Clause 5(1)(a) of the Framework Agreement. We were referred to three paragraphs in this judgment:

[69] In those circumstances, 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.

[70] Those circumstances may result, in particular, from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State.

[74] More specifically, recourse to fixed-term employment contracts solely on the basis of a general provision of statute or secondary legislation, unlike to what the activity in question specifically comprises, does not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contracts actually responds to a genuine need, is

appropriate for achieving the objective pursued and is necessary for that purpose.”

5 92. We were also referred to the Advocate General’s judgment which, although not binding on the tribunal the respondents’ representative considered to be helpful and authoritative. The Advocate General’s judgment was quoted at length in the respondents’ written submissions, however the tribunal were specifically referred to paragraph 57 and the statement that:

10 “the objective reason for concluding the fixed-term employment contract lies in precisely those special features which are considered to be characteristic of employment in the sector, occupational area or activity concerned.”

15 93. The tribunal considered this to be in the context of the Advocate General’s judgment on the question that in the particular circumstances of the Greek case the fact that in that case the conclusion of a fixed-term employment relationship was prescribed by a National Law was not sufficient to amount to objective reasons. The tribunal took it that the Advocate General was referring to the  
20 need to ensure that objective reasons were linked to the specific employment sector. It could not be an objective reason if it was general and applied to all employment sectors by statute. The point is important because the respondents in their submissions sought to draw a distinction between the concept of objective grounds as set out in Regulation 8(2)(b) (which requires to be interpreted where possible as similar to the concept of objective reasons  
25 within the meaning of clause 5(1)(a) of the Framework Agreement on the one hand and the concept of “objective grounds” under Regulation 3(3)(b) of the Regulations (which requires to be interpreted as being similar to the concept of “objective grounds” under clause 4(1) of the Framework Agreement. The issue of the interpretation of the concept of objective grounds under clause  
30 4(1) of the Framework Agreement was considered in the case of *Del Cerro Alonso -v- Osakidetza-Servicio Vasco De Salud [2007] IRLR 911*. In that case the ECJ held at paragraph 58.

35 “On the contrary, that concept (objective grounds) requires the unequal treatment at issue to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that  
40 unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.”

45 94. It was the claimant’s position that the concept of objective grounds in Regulation 8(2)(b) should be interpreted in the same way as the concept of objective grounds in Regulation 3(3)(b). They argued that it was clear from the *Del Cerro* case that in fact the test reflected the familiar approach to the concept of objective justification in EC Discrimination Law. It was the claimant’s submission that existing authorities on objective justification in

relation to discrimination could provide further guidance to the tribunal. In this connection we were referred to the cases of *Mangold -v- Helm [2006] IRLR 143* which was a case on age discrimination and the case of *Allonby -v- Accrington and Rossendale College [2001] ICR 1189* which was stated to be a leading domestic authority on the correct approach to the concept of objective justification.

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95. The respondents' position was that there was a clear difference between the concept of objective grounds between Regulation 3 and Regulation 8 of the Regulations. Regulation 3 was concerned with prohibiting discrimination against fixed-term employees. In that situation it might well be correct, as in the *Del Cerro* case, to equate the concept of objective grounds to the concept of "objective justification" and the well-known body of authorities on the approach to the issue which should be taken in EU Discrimination Law.

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96. It was the respondents' position that there is a difference between the situation where what has to be objectively justified as less favourable treatment and the situation in the present case where what was an issue was no more than the risk of abuse. The respondents also pointed out that there is an acceptance within the terms of the Framework Agreement that fixed-term employment contracts are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers.

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97. The respondents indicated that what the tribunal should be looking at in particular was paragraph 69 and 70 of the judgment in *Adeneler*. The tribunal should be looking as to whether there were precise and concrete circumstances characterising a given activity which were capable in that particular context of justifying the use of successive fixed-term employment contracts. The tribunal should be considering whether these circumstances resulted from the specific nature of the tasks for the performance of which such contracts had been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social policy objective of a Member State.

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98. The claimant's position was that essentially the tribunal had to consider whether there was objective justification as defined in EU Anti-Discrimination Law. They based their support for this on paragraph 74 of the *Adeneler* judgment. It appeared to the tribunal that the import of paragraph 74 of the *Adeneler* judgment was that the ECJ considered that a general provision of statute or secondary legislation could not amount to an objective reason for recourse to fixed-term employment contracts and that the reason for this was that this did not permit objective and transparent criteria to be identified in order to verify whether the renewal of such contract actually responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. It therefore appeared clear to the tribunal that the ECJ were indicating that when a judicial body required to consider whether there were objective reasons justifying recourse to fixed-term employment contracts the tribunal required to consider whether it could identify objective and transparent criteria in order to verify whether the renewal of such contract actually responds

to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. The claimant pointed out that this particular phraseology was exactly the same phraseology as used in paragraph 58 of the judgment in *Del Cerro* which also referred to:

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“The existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.”

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99. The tribunal also accepted the claimant’s contention that essentially the concept of objective grounds in the *Del Cerro* judgment was the same as objective justification in the context of EU Anti-Discrimination law.

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100. The case of *Mangold -v- Helm* was instructive in that it related to the use of fixed-term contracts where the statute allowed the imposition of fixed-term contracts of employment on all workers above a certain age. The aim of this was said to be the pursuit of a legitimate social policy objective of the Member State, in this case Germany. The ECJ held:

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“In so far as such legislation took the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it had not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, was objectively necessary to the attainment of the objective of the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued.....”

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101. With regard to the wording of the appropriate test the tribunal agreed with the claimant that the approach adopted by Sedley J in the case of *Allonby -v- Accrington and Rossendale College [2001] ICR 1189* at para 29 was appropriate.

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“What was required was at the minimum a critical evaluation of whether the college’s reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.”

102. It is clear from that case and from the case of *Enderby -v- Frenchay Health Authority [1994] ICR 112* that there is a need for the tribunal to apply the principal of proportionality. It is necessary for the tribunal in this case to

consider the seriousness of the effects on the claimant of his employment being on a fixed-term contract as opposed to some other way of meeting the genuine and legitimate business needs of the respondents.

5 103. It was the claimant's position that if the tribunal were with him on the appropriate test then the claimant should succeed because the respondents had already conceded the point in paragraph 34 of their written submissions. In this they state:

10 "It cannot be shown that it is necessary to employ contract researchers on fixed-term contracts, though there are certainly good reasons for doing so."

15 104. Since the *Del Cerro* case refers to the employer having to show a genuine need and means which are appropriate and necessary to the achievement of that need, the tribunal consider there was some merit in this submission. Nevertheless the tribunal felt it appropriate to apply the test as set out in *Del Cerro* and *Allonby* to the facts of the present case.

20 105. Approaching the case on this basis the tribunal essentially required to decide whether Dr Ball's employment under the current fixed-term contract was justified on objective grounds at the time when he entered into this contract in 2005.

25 106. It is noted that the question for the tribunal was whether the objective grounds actually existed at the time or not. It was not relevant whether the respondents had assessed the matter at the time or not. It was clear from the evidence that no matter what the respondents' policy document said there had been absolutely no individual assessment by anyone within the respondents of whether there was a reasonably foreseeable prospect of short-term funding being renewed or other external or internal funding being available or becoming available. It is clear to the tribunal that there was an automatic progression from the funding for the research contract being short-term to the claimant being employed on a fixed-term contract.

35 107. Ms Inglis's evidence was that in terms of their policy the matter should have been considered at some point subsequent to the claimant's appointment in what was apparently a rather non-transparent process of the HR administrator for the College going through a list of names with the principal at some undocumented meeting. Even if such a meeting had taken place, and the tribunal had no direct evidence on this, it was clear that this had taken place after the claimant's appointment and therefore could not have informed the decision at the time of his employment as to whether he would be employed on a fixed-term contract or not.

45 108. We were invited by the claimant to apply the terms of Regulation 9(4)(b) in that it was the claimant's contention that the written statement which the respondents had submitted in response to the claimant's letter of 7 July 2006 was evasive or equivocal. Regulation 9(4) allows the tribunal to draw any inference which it considers just and equitable to draw in such a circumstance.

5 The tribunal considered that the University's letter was equivocal. The letter simply refers to the policy and does not say exactly how the policy applied to the claimant. That having been said the tribunal did not consider it appropriate or just and equitable to draw any inference one way or the other. Unlike other areas of employment law the test here is an objective factual test. It is not a question of whether the respondents reasonably believed there were objective reasons. The fact that the respondents do not seem to have addressed their minds to the issue is not relevant. The question is a factual one of whether or not objective grounds existed or not. If the objective grounds existed in fact then the claimant is not entitled to the declaration that he seeks. If such objective grounds did not exist then the claimant is entitled to his declaration.

109. The tribunal's approach was to consider whether there was a genuine business need to be addressed and what it was and whether the use of a fixed term contract amounted to means which were necessary and appropriate to meet that need.

110. The business need to be addressed by the respondents was that of coping with the fact that the research funding from grant giving institutions was short term. In order to consider whether the use of a fixed term contract was an appropriate and necessary means of meeting that aim we had to consider the disadvantages to the claimant of the means adopted and the advantages to the respondents.

111. With regard to the disadvantages to the claimant of a fixed-term contract, these have been set out in our findings in fact; but to summarise were:

1. Uncertainty of future employment.
2. Disadvantage in terms of career progression and professional development due to inability to submit grant applications under own name.
3. Potential difficulties in obtaining credit.

112. The tribunal considered they were real and genuine disadvantages to the claimant. The claimant has also spoken of a lack of parity in esteem with permanent colleagues. The tribunal did not consider this to be of the same gravity as the other matters.

113. The respondents identified a number of what could be described either as advantages to them in using a fixed-term contract, or alternatively disadvantages to them of using an indefinite contract which was stated in the JNCHES Guidance to be the normal form of employment. The first which they identified was the cost to the University of having to continue to employ contract researchers beyond the term for which they had fixed funding. The tribunal heard evidence to the effect that this would cost some £15 million per annum and would be completely unsustainable financially.

114. During the course of the hearing however it became clear from the evidence that in actual fact this was a red herring since in the real world there was simply

no possibility of this happening. The choice was essentially between employing contract researchers such as the claimant on a fixed-term contract or employing them on an indefinite contract but with the possibility of redundancy should the University be unable to find sufficient funding to continue their employment once the initial funding has run out. Whether this is done in exactly the same way at UCL and Bristol Universities was not for the tribunal to consider, however it was clear to the tribunal that in attempting to match up future labour needs with future revenue the University was really in no different a position from many other employers.

115. Many employers find themselves in a situation where they cannot guarantee their funding stream beyond one or two years. In actual fact the Universities in having guaranteed funding for a period as long as three years were in a position which might be envied by other employers. The tribunal found that essentially the disadvantage to the respondents were they to adopt a system of open-ended indefinite contracts was that they would require to abandon their hitherto policy of not ever having compulsory redundancies of staff employed on indefinite contracts. A number of strands to this argument were presented in evidence, largely by Ms Inglis of the respondents' HR Department.

116. The first was the bureaucratic difficulty of using the redundancy process for employees employed on short-term grants. These employees were currently employed on fixed-term contracts. Although the University's redundancy policy was the same for employees on indefinite contracts as for those on fixed-term contracts in actual practice the University did not apply its redundancy policy to fixed-term employees. In this, arguably discriminatory and illegal approach, they were not challenged by the unions who did not create a fuss or insist that the redundancy policy be followed. Ms Inglis spoke of a "gentleman's agreement" to this effect. She also spoke of the union "turning a blind eye" to this. The tribunal did not consider these justifications to have any merit. As justifications they were themselves intrinsically weak. Quite apart from that it was not open to the respondents to say that they were disadvantaged in pursuing a genuine business need. The fact that the respondents are at present able to get away with not applying their redundancy policy when they dismiss fixed-term employees was characterised by the claimant as being a breach of Regulation 3 of the Regulations in that it amounted to less favourable treatment of fixed-term employees.

117. In any event the tribunal were of the view that this particular strand of argument could not be supported. If the respondents were to adopt a policy of indefinite or open-ended contracts and did require to make employees whose research projects were funded on a short-term basis and whose funding ran out redundant on a regular basis then they would require to take steps to ensure that such redundancy dismissals were fair. This would not be a major source of disadvantage to them.

118. The respondents also indicated that in their view moving to such a policy would have an adverse impact on industrial relations. The claimant's agents indicated that in their view the tribunal required to evaluate this statement

critically. In their view all that would happen would be a minor change in the respective negotiating positions of parties at the time of termination. Essentially if indefinite contracts were used, the same employees would be facing termination for the same reasons as exist at present. In the view of the claimant's agents the trade union side would have slightly greater advantage in negotiations since the respondents would be under an obligation to show that a redundancy situation actually existed and that the selection of the particular employee was fair. The respondents could not argue that it was a particularly strong business need of theirs to be in a position to make employees redundant without having to justify whether or not a redundancy situation existed. In fact essentially the claimant characterised all of the respondents' objections as being that they wished to keep their current absolute freedom to dismiss employees at the end of a fixed-term contract without requiring to give reasons at all.

119. In the view of the claimant any critical evaluation of whether the University's reasons demonstrated a real need for the claimant to be employed on a fixed-term contract as at April 2005 would founder. Any consideration of the seriousness of the disparate impact of the decision to use a fixed-term contract rather than an indefinite contract on the claimant and the respondents would lead to the decision that the disadvantages to the claimant massively outweighed the advantages to the respondents in pursuing any legitimate business aim.

120. It was clear from the claimant's own employment history that he had transferable skills. In 2005 the situation was that anyone considering his employment would have been aware that there was at least a possibility of his research skills being in demand following the end of the period for which immediate funding was available. The University's plan at that time was that they were trying to grow research income from short-term funding at the rate of 10% per annum. The claimant's own history up to that point (when he had already been employed on successive fixed-term contracts for 6 years), would have suggested that he might be successful at the end of that period in finding work on some other project within the University. Of the University's research staff of around 580 some 70 currently find themselves in the situation where they have been employed for more than 6 years on a succession of fixed-term contracts. It appears to the tribunal to be really no good reasons on objective grounds for the use of a fixed-term contract in 2005. The respondents' legitimate business objectives could be met just as easily by the adoption of an indefinite contract for the claimant. For example the University could have adopted lesser steps such as importing a clause into his permanent contract similar to the clause identified as being used at UCL. This would really have made very little difference to the University other than meaning that they would have required to reconsider their policy of no compulsory redundancies for permanent employees. On the other hand the advantages to the claimant of such a course would have been major. He and his family would have enjoyed the security of an indefinite contract. He would have faced the prospect of redundancy but this is something many employees have to face. He would have the knowledge that his employment could only be terminated after a fair



process. The terms of the Framework Agreement specifically mention the advantages of indefinite employment contracts where they state at paragraph 6 of the General Considerations:

5                   “6. Whereas employment contracts of an indefinite duration are the  
general form of employment relationships and contribute to the  
quality of life of the workers concerned and improve performance;”

121. In addition the claimant would also enjoy a specific advantage which is  
10       particular to the research sector. He would be able under current rules of the  
research bodies, to submit research proposals under his own name.

122. Ms Inglis gave evidence to the tribunal to the effect that in the case of a major  
switch by Universities from fixed-term contracts to open-ended contracts on the  
15       UCL model, funding bodies such as the BBSSRC might well change their rules  
as to who could be principal investigator. The tribunal considered this evidence  
to be speculative. In particular there was no evidence presented to the tribunal  
that BBSSRC had sought to change the rules in respect of those Universities  
which had already adopted the UCL Bristol model. In addition it would appear  
20       that if they did this would not be in keeping with the Concordat recently  
entered into between such institutions and the higher education institutions.

123. There would also be an advantage to the University in that whilst it appeared  
in this case the University had not even tried to identify whether or not there  
25       was any reasonably foreseeable prospect of neither short-term funding being  
renewed nor other external or internal funding becoming available at the end of  
the contract; the fact was that this was the respondents' policy. The policy was  
described by Ms Inglis as involving the University in carrying out a “crystal ball  
exercise”. She said that it would be difficult to predict whether funding would  
30       be available for a further fixed-term grant. She said that the process became  
completely impossible when one might be required to look at the possibility of  
an employee being redeployed to a research contract in another department  
once the funding for his current project ran out. The tribunal tended to agree  
that this was bound to be a difficult process to go through at the outset of  
35       employment. The fact that the respondent University appeared to have chosen  
simply not to even try would tend to bear this out. The point is however that  
from the University's own figures in a significant number of cases contract  
researchers are finding that further funding becomes available or they can be  
redeployed so that their employment continues.

40       124. There appears to be an acceptance on the part of the JNCHES Guidance that  
there should not be an automatic correlation between short-term funding and  
fixed-term employment. This can be clearly seen from paragraph 5 where it  
notes that the Regulations will require in a major overhaul of the way they  
45       (contract research staff) are employed in the future resulting in a significant  
transfer to and use of indefinite contracts. It also appears to have been  
recognised by the University in their own policy document. The difficulty is that  
the University have realised that in practice their own policy document is  
impractical and have operated in practice a policy of there being an automatic

5 correlation between short-term funding and a fixed-term contract in cases of all employees including those in the situation of the claimant. There would therefore be some advantage to the respondents as well as to the claimant in moving to a more transparent and open form of assessment where they no longer have to have a policy which requires them to carry out an impossible task (which in practice they do not bother to try to even attempt) at the outset of a short-term funded research contract regarding the possibility of continued employment of the employee beyond the extent of the short-term funding.

10 125. The respondents spoke of the additional cost to the University of dealing with the continuing process of compulsory redundancies. In actual fact the reason the University is not incurring these costs at present is because of its failure to abide by the terms of its own policy at the outset of the employment of contract researchers and its failure to abide by its own redundancy policy at the end of  
15 those researchers' fixed-term contracts.

126. The respondents also spoke of particular difficulties in Aberdeen because of the Ordinance relating to redundancy. The tribunal did not consider this to be a good reason. The respondents are already taking steps to change this  
20 Ordinance. Generally the fact that an employer will have to change its rules to comply with a piece of employment legislation is not seen as a good objective reason for non-compliance.

127. For those reasons the tribunal considered that the employment of the  
25 claimant under a fixed-term contract for a period from 1 April 2005 to 31 May 2008 was not justified on objective grounds at the time when it was entered into. It was a matter of agreement between the parties that the claimant had been continuously employed under that contract taken with a previous fixed term contract for a period of 4 years or more and the claimant is therefore  
30 entitled to a declaration to that effect in terms of Regulation 9(5) of the Regulations.

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Employment Judge: *Jan M. Fudge*

45

Dated: *23 May 2008*

Entered in Register/Copied to Parties: *27 May 2008*