

INTRODUCTION TO FIXED-TERM CONTRACTS

Over the past number of years, there has been an increase in the number of fixed-term and specified purpose contracts of employment. These serve as a necessary tool for employers in ensuring fluctuations in business demand can be adequately met. Given the current economic climate, the use of fixed-term and specified purpose contracts of employment is on the increase. There have consequently been a huge number of legal developments in recent times in this area and in particular in relation to the interpretation of the legislation governing the use of fixed-term and specified purpose contracts.

The RDJ employment unit has therefore decided to dedicate this entire employment bulletin to the issue of fixed-term and specified purpose employees. We hope that this bulletin will serve as a helpful aide to employer when making decisions about the use of such contracts.

Background

The Protection of Employees (Fixed-Term Work) Act, 2003 (“the Act”) first came into effect on the 14th July 2003. The Act has two main objectives:-

- 1) To give effect to the principle of non-discrimination in relation to conditions of employment as between a fixed-term worker and a comparable permanent employee.
- 2) To prevent abuse by employers of the use of successive fixed-term contracts.

Although the phrase “fixed-term” is used throughout the bulletin, the Act applies also to staff employed on specified purpose contracts.

The basic principle of the legislation is that a fixed-term worker must be treated no less favourably than a comparable permanent employee. All conditions of employment are covered in this respect from pay

through to sick pay, overtime, holidays, redundancy schemes and termination of employment issues.

There are exceptions to the principle of no less favourable treatment as follows:

- Where there is objective justification, i.e. based on considerations other than the fixed-term status of the employee and the treatment afforded to that employee must be appropriate and necessary for the business purpose to be achieved.
- Fixed-term workers can be treated less favourably than comparable permanent employees in relation to pensions if they work less than 20% of the hours of a comparator.
- Fixed-term workers can be subject to a period of service qualification provided their comparable permanent employees are subject to the same qualification.
- Benefits which are capable of being pro-rated, such as pay, can of course be pro-rated in respect of fixed-term workers in relation to the hours worked by them.

Where the fixed-term employee commenced employment post the 14th July 2003, the aggregate duration of the fixed-term contract shall not exceed four years. In this regard, there is a positive obligation on employers under the legislation to issue a written statement to the employee each time the fixed-term contract is renewed, setting out the objective basis for issuing a further fixed-term contract and failing to offer the employee a contract of indefinite duration.

Practical tips for the use of fixed-term contracts

In light of the recent legal developments outlined throughout this bulletin, the following are some practical tips for employers when considering the use of fixed-term/specified purpose contracts of employment:

- Only use them where absolutely necessary – not as a probationary period.

- The contract must be in writing and must contain a clause excluding the provisions of the Unfair Dismissals legislation from the termination of the contract arising out of the expiration of the fixed-term/specified purpose.
- Consider very carefully whether the contract should be a fixed-term or a specified purpose contract.
- Ensure renewals are done on time and issue your written statement setting out the reasons for the renewal and the failure to offer a contract of indefinite duration.
- Do not let successive fixed-term contracts run beyond a four year limit unless there is objective justification for doing so.
- Keep in mind that costs/industrial relations harmony/legislative provisions are not considered objective justification under the Act.
- Consider whether or not a fixed-term/specified purpose worker is entitled to a redundancy payment on the termination of their contract, as outlined below.
- While you can include a notice provision providing for termination of the contract in advance of the expiration of the fixed-term/specified purpose, you must always bring such notice provision expressly to the attention of the employee and you must keep a record of so doing.

FIXED-TERM WORKERS AND TENURE

Caselaw has established that while it is not permissible to treat fixed-term workers less favourably than comparable permanent employees in relation to their terms and conditions of employment, fixed-term workers can be treated less favourably in respect of tenure. Civil Servants in many cases enjoy security of tenure, meaning that they cannot be removed from their posts except in limited circumstances. This in particular would apply to permanent teachers or a tenured Lecturer in Universities.

In the case of the *Minister for Finance –v- Una McArdle* (March 2007), a Laboratory Technician, who was employed by the State on four consecutive fixed-term (one year) contracts, argued that she was entitled to a contract of indefinite duration when the fifth one year contract was furnished to her. Whilst her entitlement to such a contract was accepted by her employer, the parties disputed the definition of

“a contract of indefinite duration”. In particular, Ms McArdle was seeking security of tenure.

The Rights Commissioner, who heard the claim in the first instance, determined that the terms of a contract of indefinite duration should be no less favourable than an established Civil Servant and therefore the Claimant should enjoy the same tenure as an established Civil Servant. The Labour Court adopted the findings of the Rights Commissioner but the State appealed the matter to the High Court.

Ms Justice Laffoy, who heard the High Court appeal, found that the Labour Court was correct in finding that pension and career break entitlements were conditions of employment to which the Fixed-Term Workers legislation applied, meaning that Ms McArdle should be treated no less favourably in respect of those terms and conditions of employment than a comparable permanent employee. However, Ms Justice Laffoy went on to find that the Labour Court was incorrect in considering the tenure issue in the context of Section 6 of the Protection of Employees (Fixed-term Work) Act, 2003. She found that tenure was not a condition of employment, but a duration issue and Ms McArdle’s only entitlement under Section 9 (3) of the 2003 Act was to a contract of indefinite duration.

This was confirmed in the more recent case of *NUI Galway –v- Dr Nicholas Morley* (March 2009). In that case, Dr Morley was employed on a series of five continuous fixed-term contracts, from the 6th November 2000 to the 31st January 2004. He was then dismissed by reason of redundancy when his final contract expired in 2004. He received a redundancy lump sum to which he was entitled under the Redundancy Payments legislation.

Following the termination of his employment, Dr Morley brought a number of claims before the Rights Commissioner pursuant to the 2003 Act. He claimed that he was treated less favourably than a comparable permanent employee in being made redundant, that he had been excluded from the Company’s pension scheme and that his dismissal was for the purpose of avoiding his fixed-term contract being deemed one of indefinite duration.

In relation to the issue of tenure, the Labour Court stated that it is now clear, following the decision in McArdle referred to above, that Section 6 of the Act does not preclude less favourable treatment of a fixed-term employee in relation to tenure of employment. The Labour Court noted that the gist

of what the Claimant was contending was a right to remain in his employment for as long as the requirement for the post exists. That is, in effect, a claim for the same tenure of employment as a comparable permanent employee. The Labour Court was satisfied that no such entitlement arose under the Act.

The Labour Court went on to note that Section 13 (1) (d) of the 2003 Act prohibits an employer from dismissing a fixed-term employee from his or her employment where the reason for doing so is wholly or partially for the purposes of avoiding his or her fixed-term contract becoming one of indefinite duration. The Labour Court noted that it would seem clear that the question posed by this provision is essentially one of fact. It is thus for the Claimant to establish evidence from which it could be inferred that the Respondent was motivated by an intention to prevent the Claimant from accruing an entitlement to a contract of indefinite duration when the decision not to renew his contract was taken. The Court noted in this case that no such evidence was adduced.

The Court was satisfied that the reason for NUIG's decision not to renew Dr Morley's fixed-term contract was that the post which he had occupied had been made permanent and he had been unsuccessful in his application for the post.

It should be noted by employers in the public sector that there was another very important issue discussed in the Morley case, which is not related to the tenure issue but nonetheless merits reference in this article due to its importance from an employment law perspective. The issue was that of the comparator chosen by Dr Morley under the 2003 Act. Dr Morley compared himself to a permanent lecturer and his employer aspired that Dr Morley was required to undertake teaching duties only where a permanent lecturer undertook additional duties being research and administrative duties. In deciding that Dr Morley was correct in comparing himself to a permanent lecturer, the Labour Court turned to a like decision., (*Matthews and Others –v- Kent and Medway Towns Fire Authority*, 2006), in which the UK Tribunal stated that;

“The fact that full-timers do some extra tasks would not prevent their work being the same or generally similar. In other words, particular weight should be given to the extent to which their work is in fact the same and to the

importance of that work to the enterprise as a whole”.

The Labour Court said that, in considering if like work exists, the concentration should be on the similarities between jobs. In the case of Dr Morley, he was paid exactly the same salary, and apart from pension entitlements, all other conditions of employment were the same as permanent lecturers. That, in the Courts' view, indicated an acceptance by NUIG that the posts were, in fact, of equal value.

FIXED-TERM WORKERS AND REDUNDANCY

Given the current economic climate and the increased redundancies affecting Irish businesses, it is worthwhile to examine the issues relating to fixed-term workers in a redundancy context.

Legal Principles

Where a redundancy situation arises, an employee over 16 years and with at least 104 weeks' continuous service is entitled to a redundancy payment. What many employers do not realise is that this principle applies equally to fixed-term workers. In that regard, Section 9(1)(b) of the Redundancy Payments Acts 1967 - 2003 states that where a fixed-term contract expires or where the specific purpose for which the contract was created ceases without the contract being renewed, a redundancy situation can arise (provided that the other requirements under the Redundancy Acts are met).

Therefore, if the employer does not intend to renew the fixed-term contract, the employer will need to consider whether the employee is entitled to a statutory redundancy payment. The employer will need to look at the specific circumstances to establish if any of the definitions of redundancy are satisfied. If they are, then the employee may be entitled to a redundancy payment. The definition of redundancy in the legislation is extremely broad. Any one of the following situations will give rise to a redundancy situation;

- (a) employer has ceased/intends to cease to carry on the business in which the employee is employed or in the place where the employee was employed.

- (b) requirement of that business for employees to carry out work of a particular kind in the place where he is employed has ceased/ diminished.
- (c) employer decides to carry on the business with fewer/no employees.
- (d) employee not sufficiently trained/qualified to carry out work in a different manner as decided by the employer.
- (e) work will be done by other employees who can also carry out other work for which the employee is not sufficiently trained/qualified.

Therefore, if the circumstances of the termination of the fixed-term/specific purpose fit into any of the above, the employee is entitled to at least a statutory redundancy payment, and possibly an enhanced redundancy package if one is available for permanent employees of the same employer, as outlined below.

No Less Favourable Treatment

Section 6 of the 2003 Act sets out the basic principle that a fixed-term worker cannot be treated less favourably than a comparable full time employee. This has a number of applications in a redundancy situation. Firstly, fixed-term employees should not be selected for redundancy purely because they are on fixed-term contracts, unless the employer has objective grounds for such selection, for example level of experience, qualifications or length of service. However, where fixed-term employees have been brought in specifically to complete particular tasks or to cover for a specifically busy period, it is likely that an employer could objectively justify selecting them for redundancy at the end of their contracts. Each case, of course, must be looked at on its own particular facts.

In the recent case of *St Catherine's College for Home Economics/Minister for Education and Science and Maloney/Moran (EAT Determination No. FTD0819, 10 December 2008)*, the Labour Court ruled that fixed-term employees had been treated less favourably, because they had not been paid the same ex gratia package that was available to permanent employees. In this regard, the Labour Court held that the term "remuneration" in the 2003 Act includes ex gratia termination payments, noting its own decision in the case of *Sunday World Newspapers v Kinsella and Bradley ([2006] 17 ELR 325.)*, Therefore it was not objectively justifiable for the employer to offer less favourable terms to fixed-

term employees as their permanent counterparts where both had the same continuous service.

Where length of service is the main criterion for redundancy selection, the same criteria should apply to fixed-term as to permanent employees, unless differences are objectively justified. It is immaterial if the effect of a 'last in, first out' policy is that more fixed-term than permanent employees are made redundant. Parity of treatment must be foremost in the mind of the employer

TERMINATING A FIXED-TERM CONTRACT – PITFALLS FOR THE UNWARY EMPLOYER

Employers commonly query their legal obligations when terminating a fixed-term contract in advance of the termination date or, alternatively, ask what must be done when the contract comes to its natural end.

As a starting point, it is helpful to note that in the case of *Prasad –v- Merlin Park Regional Hospital (2006)* the Labour Court have recognised that a fixed-term worker does not have an automatic entitlement to have a fixed-term contract renewed.

Once an employer is satisfied that the individual does not have entitlement to a contract of indefinite duration, the next step will be to consider the reason for terminating the contract.

- Has the fixed-term/ specified purpose come to a natural end?
- Is the reason for the non-renewal of the contract (or its premature termination) due to a lack of available work? If there is a redundancy situation and the fixed-term worker's position ceases to exist, they may have an entitlement to a redundancy payment.
- Has the individual been performing unsatisfactorily or are there disciplinary issues?

If an employer is terminating a fixed-term contract before the natural expiry of the fixed-term or in advance of the specified purpose being reached, then it is important to identify whether there is a notice clause in the contract. In addition, the Labour Court has previously held in the case of *Louise Doyle v National College of Ireland (2005)* that where a fixed-term contract provides for termination of the

contract other than by expiration of the fixed-term, the notice provision must be brought to the employee's attention prior to signing the contract. If no notice clause exists or it was not properly brought to the employee's attention, the fixed-term worker can sue in the civil courts for breach of contract to recover the remainder of the fixed-term.

While there is no statutory entitlement to be provided with a reason for dismissal, in practical terms an individual will expect to be given a reason as to why their contract has not been renewed. It is also important to note that a fixed-term employee has the same right as a permanent employee to be treated fairly in a dismissal and a fixed-term worker with twelve months' continuous service may take a case under the Unfair Dismissals Acts 1977-2007.

The Unfair Dismissals Acts do not apply where fixed-term contract naturally expires and is not renewed provided that the following conditions are met:

- (i) the fixed-term contract must be in writing and
- (ii) the contract must be signed by both parties and
- (iii) contains a specific clause stating that the Unfair Dismissals Acts shall not apply to a dismissal consisting only of the expiry of the fixed-term

However, an employer will be in difficulty where, in reality, the true reason for the termination is not the expiry of a fixed-term. The Employment Appeals Tribunal recently awarded €15,000 where an individual was dismissed upon expiry of his fixed-term contract without any reason. The employee had previously received a written warning and had appealed this to a Rights Commissioner. The Tribunal accepted the employee's argument that this was the true reason for his dismissal and also noted that the employer was recruiting new contract workers at that time.

It is also important to note that an employer is prohibited under section 13 of the Protection of Employees (Fixed-Term Work) Act 2003 Act from penalising a fixed-term worker where they have asserted their rights under that legislation. This will include dismissing an employee to avoid having to grant them a contract of indefinite duration or where the employee is selected for redundancy.

Employers must therefore carefully examine the reasons behind terminating or failing to renew a fixed-term contract to identify whether there is potential exposure. Fixed-term workers should be given adequate notice of termination and should be clearly informed of the reasons for termination, which should then be documented by the employer.

ISSUING AND RENEWING FIXED-TERM CONTRACT – TOP TIPS AND BEST PRACTICE

A fixed-term contract is a contract which either:

- 1) lasts for a specified period of time, i.e. a fixed-term; or
- 2) will end when a specified task has completed; or
- 3) will end when a specified event does or does not happen

Fixed-term contracts are governed by the Protection of Employees (Fixed-Term Work) Act 2003 (“2003 Act”). Section 6 of the 2003 Act prohibits less favourable treatment of a fixed-term worker to a comparable permanent employee in respect of conditions of employment unless the employer can objectively justify such less favourable treatment.

The main issue which causes difficulty for employers is the treatment of successive fixed-term contracts. This is addressed under Section 9 of the legislation. There are two different rules which apply to employees prior and post commencement of the legislation.

- Fixed-term workers who commenced employment prior to 14 July 2003, and who have completed the third year of continuous employment with their employer, the fixed-term contract can be renewed on only one further occasion and any such renewal must be for a maximum term of one year.
- Fixed-term workers who commenced employment after 14 July 2003, where the employee is employed by his or her employer on two or more continuous fixed-term contracts, and the date of the first contract is subsequent to 14 July 2003, the duration cannot exceed four years in total.

The legislation goes on to provide that these rules do not apply where there are objective grounds for

renewal. Objective justification can include temporarily replacing another member of staff who is on leave e.g. maternity or parental leave; or is seconded to another post; or where a post is dependent on funding.

This issue of funding was considering recently in the case of *Ann Buckley v NUI Maynooth (2009)*. The claimant was initially engaged on a fixed-term contract starting on 1 October 2003 for a three year research project. The employee entered into a new contract for two years from October 2006 when NUI received independent funding.

The employee would have been entitled to a contract of indefinite duration as of from October 2007 unless there were objective grounds for renewal. The Labour Court noted that the employee signed a form which specifically stated that the contract was conditional on funding, which was made available for a two year period only. These grounds were repeated in her new contract. The employee claimed that she did not understand what she was signing and was afraid that if she did not do so that the University would refuse to host her research project. Her claim was rejected by the Labour Court. The Court held that it was made very clear as to why a fixed-term contract was being issued, the Court further noted that the employee did not seek legal advice or consult her union for clarification of the terms. Thus the Court held that there was objective justification for renewal.

Practical Tips when issuing and renewing a Fixed-term Contract

- Fixed-term contracts are difficult to administer and need to be specifically drafted to ensure that they have the following:
- A notice clause where either party can terminate on notice. This notice clause should be brought to the specific attention of the employee before the signing of the contract.
- A term specifically stating that the provisions of the Unfair Dismissals Acts, 1977-2007 will not apply.
- An explanation as to why the post is for a fixed-term or specific purpose.
- All other provisions normally contained in a contract including a retirement age clause in the event that the employee somehow obtains a contract of indefinite duration.
- There is no limitation on the duration of a single fixed-term contract, therefore, in theory

one can have a fixed-term contract for a once off period of ten years.

- Prior to renewal always check whether an employee has obtained a right to a contract of indefinite duration.
- Remember that under section 8(2) an employer must provide the employee with the reasons why a contract of indefinite duration is not being provided and also with the objective reasons for renewal. This must be in writing and provided no later than the date of renewal. An employee can claim compensation for breach of this provision.
- Before renewing a fixed-term contract, the employer should meet with the employee to outline why a further fixed-term contract is being issued and that they will not become a permanent employee for the particular reasons that the contract needs to be for a fixed-term basis. Ask the employee if they wish to ask any questions or if they are unsure of anything.
- Keep a signed record of the meeting on file and follow up with a letter which clearly confirms the objective grounds for renewal and why the employer is not issuing a contract of indefinite duration.
- Repeat the objective reasons in the contract and ensure that the employee has returned a signed copy of the contract.

For further information, to receive a copy of our legal updates or to discuss any aspect of employment law please contact a member of our employment law team:

Fergus Long: +353 21 4802722 or fergus.long@rdj.ie

Padraic Brennan: +353 91 594 777 or padraic.brennan@rdj.ie

Jennifer Cashman: +353 21 4802708 or jennifer.cashman@rdj.ie

Deirdre Crowley: +353 21 2332847 or deirdre.crowley@rdj.ie

Alice Crowley: +353 21 4802716 or alice.crowley@rdj.ie

David McCarroll: +353 91 594 777 or david.mccarroll@rdj.ie

Log on to our website, www.rdj.ie, to see profiles of our Employment Law team and previous issues of the bulletin.