

SUMMARY

2011/46 Numerous fixed-term contracts: difference between ‘continuous’ and ‘successive’ employment (IR)

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The Court also addressed an issue which arose as to whether Ireland had complied with its obligations in implementing Clause 5 of the Framework Agreement annexed to Council Directive 1999/70/EC. The issue arose because the objective of Clause 5 is to combat the abuse of ‘successive’ fixed-term contracts, whereas the 2003 Act is directed at preventing the unlimited use of ‘continuous’ fixed-term contracts. </p>*

<p>The Labour Court determined that there was incompatibility between the Framework Agreement and the 2003 Act because although ‘all periods of employment which are continuous are necessarily successive, not all employment which is successive is necessarily continuous”. The Court concluded that while the former employee had become entitled to a permanent contract, there were objective grounds for not giving the contract.</p>

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The Labour Court determined that there was incompatibility between the Framework Agreement and the 2003 Act because although “all periods of employment which are continuous are necessarily successive, not all employment which is successive is necessarily continuous”. The Court concluded that while the former employee had become entitled to a permanent contract, there were objective grounds for not giving the contract.

Facts

Between September 2002 and October 2008, Beary was included on annual panels from which temporary clerical officer vacancies were filled. The temporary vacancies arose due to the absence of clerical officers primarily due to illness, maternity leave, term time leave or special projects. During the years Beary was employed on a series of 14 fixed-term contracts. The periods of employment ranged from 12 weeks to 26 weeks with breaks in employment ranging from none to 35 weeks.

Beary originally worked on a temporary placement with the Revenue Commissioners¹ from September 2002. This first contract was for a period of 18 months. Thereafter, he obtained 3 further fixed-term contracts up to February 2004, after which followed a break in employment of 35 weeks until he received a further fixed-term contract with effect from 26 October 2004. Thereafter, Beary’s employment history was outlined as follows:

| Commence-ment of Assignment | End of Assignment | Duration of Assignment | Purpose of Assignment | Break until next Assignment |
|-----------------------------|-------------------|------------------------|-----------------------|-----------------------------|
|-----------------------------|-------------------|------------------------|-----------------------|-----------------------------|

| | | | | |
|----------|----------|----------|---------|---------|
| 26/10/04 | 25/02/05 | 18 weeks | Project | 2 weeks |
|----------|----------|----------|---------|---------|

14/03/05 15/07/05 18 weeks Parental leave 4 weeks

15/08/05 16/12/05 18 weeks Parental leave 24 weeks

06/06/06 01/09/06 13 weeks Term Time 4 weeks

02/10/06 02/03/07 22 weeks Maternity Leave 1 week

12/03/07 01/06/07 12 weeks Maternity Leave No break

05/06/07 31/08/07 13 weeks Term time 7 weeks

22/10/07 18/04/08 26 weeks Maternity Leave 4 weeks

19/05/08 01/11/08 24 weeks Maternity Leave No further assignment

During each period of employment the Revenue Commissioners issued Beary with a fixed-term contract specifying either the purpose or duration of the assignment. At the end of each period, the Revenue Commissioners issued Beary with an end-of-employment tax certificate (P45), which allowed him to take up other employment elsewhere or to claim social welfare benefits.

When Beary was not offered a further contract in November 2008, he claimed, inter alia, that by reason of his employment history he became entitled to a contract of indefinite duration as per sections 9(1)² and 9(3)³ of the Protection of Employees (Fixed-Term Work) Act 2003 (the 2003 Act). Beary argued that he was in the 'continuous' employment of the Revenue Commissioners within the meaning of section 9(5), which provides that whether an employee has been continuously employed is determined by reference to the First Schedule of the Minimum Notice and Terms of Employments Acts 1973-2005. In essence, Beary argued that the breaks between the various assignments should be regarded as periods of lay-off⁴, and therefore did not affect Beary's continuity of employment.

The Revenue Commissioners argued that Beary's employment was not sufficiently continuous to entitle him to a contract of indefinite duration. They argued that Beary's employment was terminated following each period of employment. In relation to Beary's argument that such

breaks should be regarded as periods of lay-off, the Revenue Commissioners relied on section 11 of the Redundancy Payments Act 1967 which requires a reasonable or legitimate expectation that the employment will resume and further that the employee must be put on notice to that effect. They argued that they provided no expectation of work at the end of each assignment and issued Beary with a P45 which allowed him to take up work elsewhere if he so wished.

Judgment

The Labour Court heard the case on appeal from the Rights Commissioner⁵. The Court addressed, inter alia, the issues of the anomaly between European and Irish law in the referencing of ‘continuous’ and ‘successive’ contracts, legitimate expectation and objective grounds.

European and Irish law anomaly: “continuous” vs. “successive”

The first issue the Labour Court had to address was the fact that the objective of Clause 5 of the Framework Agreement annexed to the Directive was to combat the abuse of successive fixed term contracts, whilst section 9 of the 2003 Act was directed at preventing the unlimited use of continuous fixed-term contracts. The Court referred to the ECJ ruling in the case of *Adeneler v Ellinikos Organismos Galaktos*⁶ stating that a Member State cannot purport to implement the Directive by confining its application to successive contracts which are also continuous “since this would amount to an unwarranted limitation on the effectiveness on the rights enshrined in the Directive”. The Labour Court followed this, outlining that “Clause 5.2(a) of the Framework Agreement left it open to the Oireachtas (the Irish Parliament) to provide an outer temporal limit beyond which renewed contracts would not be regarded as successive. The legislator chose not to do so and it is not now open to the Court, by way of interpretation, to import such provision into the statute”.

The Labour Court noted that it was obliged to interpret and apply the relevant national law, as far as possible, in light of the wording and purpose of the Directive and Framework Agreement. This suggested that the Court should seek to interpret the expression “continuous” as coterminous with the expression “successive”. The Court further outlined that “it would seem that the concept of successive employment arises where a person is engaged to do the same job intermittently. Hence it could reasonably be said that where a person’s employment is terminated because there is no longer work available for him or her to do, and it is envisaged at the time of the termination that his or her service will be required again in the future, and they are in fact re-engaged, the employment could be regarded as continuous.”

The Labour Court accepted that the ECJ case of *Vassilakis – v – Kerkyras*⁷ was authority for the proposition that a Member State might provide in domestic law that contracts which are separated in time by three months or more are not to be regarded as successive for the purpose of implementing Clause 5. However, the Court outlined that the case was not an authority for the proposition that, in the absence of a national statutory provision to that effect, contracts which are separated by more than three months cannot be regarded as successive.

Legitimate expectation

In the period of the first panel, from June 2003 to June 2005, Beary worked for a total of 85 weeks out of 131 weeks. Beary was in employment at the time of the constitution of the next panel, from June 2005 to June 2006. In that period Beary worked 18 weeks out of a total of 52 weeks. Beary was not employed at the time of the constitution of the next panel. However, due to his position on the previous panel, Beary was entitled to be included on the panel from June 2006 to June 2007. In that panel, Beary worked for a total of 43 weeks. Beary's employment was renewed twice after this date: on 6 June 2006 and 2 October 2006. In the final panel from June 2007 to June 2008, Beary worked until 31 October 2008 and worked a total of 62 weeks during the 73 week period.

The Court found that by retaining Beary on the panel, the Revenue Commissioners held out the prospect of further employment and on each occasion, that prospect was in fact realised. The Court found that all of the breaks during the period of June 2003 to October 2008 should be regarded as periods of lay-off. Therefore Beary was continuously employed by the Revenue Commissioners for this period. As Beary entered into employment with the Revenue Commissioners prior to the passing of the 2003 Act, his claim was dealt with under section 9(1) of the Act. It was found that Beary completed his third year of continuous fixed-term employment on 31 August 2005 and that the renewal of Beary's contract for a further fixed-term on 2 October 2006, contravened section 9(1) of the Act. The contract therefore became one of indefinite duration by operation of section 9(3), unless it could be objectively justified under section 9(4) of the 2003 Act.

The Court also considered the type of contract that Beary would become entitled to if section 9(3) of the Act applied. Beary contended that he should be entitled to a contract of indefinite duration as a permanent full-time clerical officer on the same terms and conditions as apply to all other clerical officers. The Court noted that in the entire period from 2003 to 2008 Beary's total number of hours and weeks worked was essentially of a part-time nature. The Court referred to the Irish High Court decision of *Minister for Finance v McArdle*⁸ where it was held that where a fixed-term contract becomes one of indefinite duration, the resulting contract is

identical to the original fixed-term contract in all respects other than the circumstances in which the contract will come to an end. In light of this, the Court stated by operation of section 9(3) Beary would not be entitled to a full-time but to a part-time contract.

Objective grounds

The Court then considered the question of whether the renewal of Beary's contract could be justified on objective grounds. Section 7(1) of the 2003 Act requires that an objective justification must be "for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose". The Court referred to the decision of the ECJ in *Bilka-Kaufhaus GmbH v Weber Von Hartzg* and the three-tiered test. This requires firstly, that the measure meets a 'real need' of the employer; secondly, the measure must be 'appropriate' to meet the objective which it pursues and finally, the measure must be 'necessary' to achieve that objective.

The Court also referred again to *Adeneler v Ellinikos Organismos Galaktosio* where the ECJ stated that the objective grounds relied upon must relate to real and concrete circumstances concerning the work to which the contracts relate. In this regard, the Revenue Commissioners argued that Beary was employed to provide cover for temporary absences of permanent staff and that such cover was a legitimate aim and a proportionate response. However Beary argued that the Revenue Commissioners employed a large number of temporary staff and this showed a real and permanent need for staff to provide cover for temporary absences. The Court was satisfied that there were objective grounds which justified the Revenue Commissioners' failure to appoint Beary to a permanent full-time position.

Conclusion

The Labour Court concluded that Beary was continuously employed on successive fixed-term contracts during the period in question, notwithstanding the break in employment of 35 weeks. Therefore the contract he received in October 2006 could be deemed to be one of indefinite duration unless it was justified on "objective grounds". The Labour Court accepted that Beary was employed to provide cover for temporary absences of permanent staff which was a legitimate aim, and the use of fixed-term contracts was an appropriate and proportionate response to that need. Therefore, Beary's claim to a contract of indefinite duration failed.

Commentary

This case is an important one in Ireland regarding the Protection of Employees (Fixed-Term

Work) Act 2003. The Labour Court's determination clarifies the anomaly which has existed between Council Directive 1999/70/EC and Clause 5 of the annexed Framework Agreement, with that of the legislation transposing the Directive in Ireland. With the rights of fixed-term workers being examined with ever-increasing regularity before the Irish statutory bodies, this determination is a welcome one for providing a comprehensive and contemporaneous clarification for legal practitioners.

The combined duration of the 14 fixed-term contracts spanning over 6 years and the legitimate expectation of the former employee meant that he was entitled to a contract of indefinite duration. However, this was still outweighed by objective grounds. The outcome therefore illustrates that an employment practice widely conducted by public sector employers whose finances are under severe pressure, is still afforded some protection by the Courts. It would be very interesting to see if an employer in the private sector presenting the same set of circumstances as this case would be as successful in pleading objective grounds.

Comments from other jurisdictions

Czech Republic (Natasa Randlova): According to the Czech Labour Code an employment relationship between the same parties may be agreed for an indefinite period of time or for a fixed term. A fixed term may be agreed for a period not exceeding two years from the date of commencement of the employment. The same applies to each extension of the employment for a fixed term agreed within the mentioned period between the same parties. If there has been a period of at least six months (24 weeks) since termination of a previous employment, that previous employment (even if for a fixed term between the same parties) will not be taken into consideration. However, this limitation of two years does not apply in certain specific situations stipulated by law, one of them being the replacement of temporarily absent employees, for example, to enable them to take maternity leave, parental leave, or to hold a public office. In such cases, the fixed term may be agreed for the period of the temporary absence.

A proposed amendment to the Labour Code, due to become effective as of 1 January 2012, introduces a substantive amendment to the conditions for fixed term employment. There will be a maximum duration of fixed term employment of three years, with a maximum of two repetitions (a 'repetition' being considered to be any extension of the employment relationship). In practice, this amendment will mean that fixed term employment will be possible three times, for a total period of nine years, beginning with the start of the first employment for a fixed term (i.e. three years + 1st repetition for three years, followed by 2nd repetition for three years). However, the old exceptions to this rule (e.g. temporarily absent employees) will no longer be possible.

Under both the current and newly introduced law, if the conditions have not been fulfilled, and the employee notifies the employer prior to expiry of the agreed term in writing that he or she insists on further employment, the employment is deemed to have been concluded for a indefinite period of time. Both the employee and the employer may apply to the court within two months of the date the employment was due to expire for a determination as to whether the conditions stipulated for fixed term employment are met.

Footnotes

1 Department of the Irish Civil Service, responsible for tax collection.

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

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

4 A lay-off period is a concept from Irish redundancy law. It is a period during which 'an employee's employment ceases by reason of his employer being unable to provide the work for which the employee was employed to do and (a) it is reasonable in the circumstances for that employer to believe that the cessation of employment will not be permanent and (b) the employer gives notice to that effect to the employee prior to the cessation'.

5 In the originating hearing, the Rights Commissioner's decision was that Mr Beary was not entitled to a contract of indefinite duration on the basis that his continuity of service had been broken and the aggregate duration of his employment did not exceed 4 years as required under section 9(2) of the 2003 Act.

6 C-212/04

7 C-364/407

8 [2007] ELR 165

9 C-170/84

10 C-212/04

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