

SUMMARY

2011/26 Nine fixed-term contracts: no abuse (IR)

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Facts

Ciara Joyce was employed by Donegal County Council as an assistant archivist for two separate employment periods on a total of nine fixed-term contracts. The purpose of the first contract (19 July 2004 to 19 February 2005) was to provide maternity cover for a permanent archivist who was the sole staff member in the archive services at the time. This contract was

then extended by a further four months (19 February to 17 June 2005) to complete the project on which Ms Joyce was working. Then there was a break of approximately four months (17 June to 20 October 2005). After this break, Ms Joyce was re-employed on seven successive fixed-term contracts which lasted a total of 3 years.

The foregoing is summarised in the following table:

contract 1 (7 months)

contract 2 (4 months) Period A: 11 months break

contract 3 (> 4 months)

contract 4

contract 5

contract 6 Period B: 3 years

contract 7

contract 8

contract 9

In September 2008, an agreement between public sector unions and local authority employers was concluded, implementing cost-containment public spending measures. It was agreed that a 3% payroll cut was required. This framework agreement was communicated to all local authority managers in October 2008, along with the fact that payroll cuts included the non-renewal of fixed-term contracts of those who had not acquired entitlements to contracts of indefinite duration. On foot of this, Ms Joyce was advised in November 2008 that it was unlikely that her contract would extend beyond 31 March 2009. The position was subsequently made redundant on 31 March 2009 and Ms Joyce was paid her statutory redundancy entitlement.¹

Irish law on fixed-term employment is contained in the Protection of Employees (Fixed-Term Work) Act, 2003. This Act (the “2003 Act”) is the transposition into Irish law of Directive 1999/70 concerning the Framework Agreement on Fixed-Term Work. Under the 2003 Act, an employee obtains an entitlement to an indefinite or “permanent” contract where the aggregate

duration of “continuous” fixed-term contracts reaches four years, unless objective grounds justifying a renewal of a further fixed-term contract can be made.² Fixed-term contracts are not “continuous” if they are separated by a gap during which the employee is not employed by the employer, even if such a gap lasts no longer than one day. However, if the gap qualifies as a “lay-off” period, it is disregarded. A lay-off period is a period during which “an employee’s employment ceases by reason of his employer being unable to provide the work 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”³. In addition, in order to combat abuse of successive fixed-term contracts, where a non-extension is “wholly or partially connected with the purpose of the avoidance of a fixed-term contract being deemed to be a contract of indefinite duration”, a subsequent new fixed-term contract is deemed to create a “continuous” series of contracts⁴.

Ms Joyce, who was represented by her union, argued that, under the terms of the 2003 Act, she had established the right to a contract of indefinite duration based on the fact that she had 4| years of “continuous” service on nine consecutive contracts. There were three main points to this argument:

1. the gap of four months qualified as a lay-off period and should therefore be disregarded;
2. (in the alternative) the non-extension of Ms Joyce’s ninth contract was for the purpose of avoiding a permanent contract arising;
3. the County had failed to make objective grounds justifying the non-renewal of the ninth contract and its inability to offer permanent employment.

Re 1. The Minimum Notice and Terms of Employment Act 1973 states that continuation of an employee in employment shall not be broken by dismissal followed by “immediate” re-employment. Ms Joyce contended that, as the duration of the gap between her second and third contracts lasted no longer than about four months and qualified as a lay-off period, she had effectively been re-employed “immediately”. She outlined that she had had a well-founded and reasonable expectation that she would be given a contract of indefinite duration and claimed that she had been informed on several occasions that she would be further engaged in employment and had no reason to believe otherwise. Given these circumstances, a four month gap should be held as not frustrating continuous service and, therefore, 4| years’ continuous service should be applied, meaning that Ms Joyce became entitled to a permanent contract with effect from 19 July 2008.

In response, the County argued that Ms Joyce's second period of employment was not an extension of the first period. It was claimed it was a new series of contracts. The first period of employment was to provide maternity cover. The second period of cover was to complete an entirely new series of specific projects. Therefore, the break in service of approximately four months could not be construed as a "lay-off" period and continuity of service did not apply.

Re 2. Ms Joyce contended that the County had dismissed⁵ her with the sole purpose of avoiding the creation of a permanent contract. She based this contention on the argument that there had been sufficient funding in place for the retention of her position until the end of 2009.

The County denied that the non-renewal of Ms Joyce's contract was connected with the purpose of avoiding her fixed-term contract being deemed to be one of indefinite duration. The County outlined that in accordance with the provisions of the 2003 Act had Ms Joyce accrued an entitlement to a contract of indefinite duration, like many others in such a situation, she would have been retained on a permanent contract. However, owing to the constraints on its budgetary resources, its policy at the time was to terminate all other fixed-term contracts upon their expiry. So had Ms Joyce continued in employment after March 2009, she would more than likely have accrued an entitlement to a contract of indefinite duration by operation of law and such an entitlement would have arisen in October 2009. However this was not the case. Cost-cutting measures for payroll had been agreed between the employer and the unions. The County outlined that any of those fixed-term employees who had over four years' continuous service were given contracts of indefinite duration. They contended that Ms Joyce had not accrued the continuous service, was not covered by the 2003 Act and the County was, therefore, under no obligation to offer her a contract of indefinite duration.

Re 3. Ms Joyce's third argument was that the County had failed to comply with the written requirements of the 2003 Act whereby an employer must provide a written statement setting out the objective grounds justifying the renewal of a fixed-term contract and its inability to offer a contract of indefinite duration⁶.

In response to this argument, the County accepted that the last contract issued to Ms Joyce on 24 November 2008 did not specify the reason justifying the renewal for a further fixed-term contract and the reasons why she was not being issued with a contract of indefinite duration. However, the County outlined that Ms Joyce was fully aware of the circumstances when her contract was renewed on a fixed-term basis. The County contended that this breach constituted a mere administrative error on its part and was not done out of malice.

The matter was originally before the Rights Commissioner⁷. The Rights Commissioner ruled against Ms Joyce and the matter was appealed to the Labour Court.

Judgment

The Labour Court deemed that Ms Joyce may have had an expectation of continued employment due to the number of extensions in contract she had received in the past. However, she was given a clear warning on 24 November 2008 that her contract was unlikely to be renewed beyond 31 March 2009. The Court looked at the fact that the archives service was not part of the County's core work and said that an assistant archivist position was one that could be made redundant as the need for the job was not fixed and permanent. The Court also found it significant that the County had not replaced Ms Joyce's position in the archive service since Ms Joyce had been made redundant. The Court accepted that the termination of all fixed-term contracts was agreed as one of the cost-containment measures by both the County and the unions involved. As a result, the decision not to renew Ms Joyce's fixed-term contract after March 2009 was taken in a neutral, impersonal and policy-driven manner, and was not motivated by the individual circumstances but by the requirements placed on the County through the public spending measures, which were entirely motivated by the economic climate and financial constraints requiring significant cost-containment measures to be taken during 2008 and 2009. The Court ruled that the avoidance of a contract of indefinite duration was not a consideration in the County's decision to terminate her employment. The Court, therefore, found that Ms Joyce's claim of penalisation was not well-founded.

With regard to penalisation the Court referred to *Adeneler – v – Ellinikos Organismos Galaktos*⁸ which recognised that such abuse can arise from the continuous use of fixed-term employment contracts to meet the fixed and permanent needs of the employer. A clear objective of both the fixed-term framework agreement and 2003 Act is the prevention of such abuse. That objective could be effectively frustrated if an employer could dismiss a fixed-term employee with impunity before he or she could accrue a right to a contract of indefinite duration, so as to replace them with another fixed-term employee.

The Labour Court was of the view that there was every indication that Ms Joyce was fully aware that it was unlikely a further contract would be issued, as a clause added to her 24 November 2008 contract (the final one) mentioned the current economic climate and the financial constraints within Donegal County Council meant it was unlikely that the County would be in a position to offer a further contract extension beyond 31 March 2009. However, the Court deemed that the fact that the County had not provided particulars in writing of the objective grounds justifying the further renewal of her contract and its failure to offer a

contract of indefinite duration meant that it had effectively failed to give proper notice to Ms Joyce that she would not be offered a contract of indefinite duration. On this basis the Court awarded Ms Joyce € 5,000 in compensation for the breach of the 2003 Act⁹.

Commentary

There is a fine line between meeting the needs of the employer and ensuring that the rights of fixed-term employees are not abused. The contention of Ms Joyce and her union representative that the gap of service of nearly four months should be ignored was in some senses a fair contention to make but realistically a far-fetched one. However, this case shows that it is vital for an employer to have proof and cogent evidence that periods of fixed employment can be seen as distinct and separate. The outcome may have been different had the County not been in a position to prove this.

As outlined in the case report “National University of Maynooth – v – Dr Ann Buckley” (EELC 2011/8), funding has long been used, particularly by employers in the state sector, for objectively justifying the use of successive fixed-term contracts rather than converting fixed-term employees to permanent status. And, as illustrated by this Labour Court judgment, it is a fair and legitimate reason particularly in under-funded sectors.

The case also illustrates that the courts will view quite strictly and narrowly what constitutes notification to a fixed-term employee that their contract will not be renewed. Ms Joyce was fully aware that it was unlikely that she would have a further contract issued, given the additional clause issued in her contract. However, the Labour Court did not see this as complying with the 2003 Act. In addition, whilst the County claimed this was an administrative error, it was not deemed sufficient by the Labour Court, which saw fit to compensate Ms Joyce in the sum of | 5,000 in respect of non-pecuniary loss. Therefore, the judgment shows that failure to comply strictly with the 2003 Act because of an administrative error can be costly to the employer.

Comments from other jurisdictions

Germany (Paul Schreiner, Elisabeth Hßler): German law distinguishes between two types of fixed-term contracts: those where the limitation in time is justified by an objective reason and those not so justified. An objective ground can be found, inter alia, in project work or the substitution of an employee on parental leave. Fixed-term contracts concluded without such a reason are limited to a total of two years. During this two-year period a fixed-term contract can be extended three times (making a maximum total of four fixed-term contracts). Another condition for the validity of a fixed-term contract is that there must not have been an employment relationship between the parties before. In a recent decision the Federal Labour

Court held $\text{\textcircled{D}}$ in contrast to the vast majority of German legal literature $\text{\textcircled{D}}$ that this restriction did not apply to employment relationships that ended more than three years before the conclusion of the fixed-term contract. In the Irish situation reported above a German court would therefore have concluded that the employment relationship before the break precluded the employer from concluding a new fixed-term contract after the break.

In Germany the conclusion of consecutive fixed-term contracts for a duration exceeding two years can only be valid if an objective reason for the limitation is given. German law does not provide for an obligation by the employer to give a written statement explaining the objective reasons justifying the renewal of a fixed-term contract or the employer's inability to offer a permanent contract. However, German Federal Court case law holds that, in the case of consecutive fixed-term contracts, the objective reasons to justify their limitation in time must be more substantial as the length of the employment with the same employer increases. Thus, the number and duration of the limitations might indicate that "substitution of an employee" could not be used as an objective reason.

Pursuant to section 14 paragraph 4 TzBfG the limitation of an employment contract must be in written form. A violation of this requirement $\text{\textcircled{D}}$ even amounting to just one day being worked without a written employment contract $\text{\textcircled{D}}$ will lead to a permanent employment relationship.

United Kingdom (Gemma Chubb): The position described in Ireland is similar in the UK. Where employees have been continuously employed for four years or more on a series of successive fixed-term contracts, they will automatically be deemed to be permanent employees unless the use of a fixed-term contract can be objectively justified.

As in Ireland, for these provisions to apply the employee must be "continuously employed" and a break between contracts could potentially prevent the employee from acquiring permanent status. Continuity will be broken by a break of one clear week between two contracts, unless certain exceptions apply. One of these is where a break is due to a "temporary cessation of work". A recent Employment Appeal Tribunal case (*Hussain – v – Acorn Independent College Ltd* [2011] IRLR 463) considered the question of what constitutes a "temporary cessation" and held that the relevant issue was the reason for the termination of the first contract. Whether or not there was an expectation of further work at the cessation date is not relevant.

Footnotes

¹ In Ireland, employees, including fixed term employees, aged 16 and over with more than two years' service are entitled to a statutory payment of two weeks per year of service plus one 'bonus' week under the Redundancy Payments Acts, 1967 $\text{\textcircled{D}}$ 2007.

2 Section 9 of the Protection of Employees (Fixed Term Work) Act 2003.

3 Section 11 Redundancy Payments Act 1967.

4 Section 13(1)(d) of the 2003 Act as construed in *Clare County Council – v – Power* FTD, 0812/2008.

5 The definition of dismissal in the 2003 Act expressly includes the non-renewal of a fixed-term contract.

6 Section 8 (2): “Where an employer proposes to renew a fixed-term contract, the fixed-term employee shall be informed in writing by the employer of the objective grounds justifying the renewal of the fixed-term contract and the failure to offer a contract of indefinite duration, at the latest by the date of the renewal.”

7 Rights Commissioners are appointed by the Minister for Enterprise, Trade and Innovation. They operate as part of the Labour Relations Commission and are independent in their functions. Rights Commissioners investigate disputes, grievances and claims referred by individuals or small groups of workers under employment legislation.

8 Case C-212/04, [2006] ECR I-6057.

9 Section 8 of the 2003 Act.

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