EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2011/8:Cost is not a factor justifying different treatment of fixedterm employees with respect to redundancy package (IR)

<p>The Labour Court was initially required to determine whether an employee with a fixed-term contract should be deemed permanent. It was deemed that she was not entitled to a contract of indefinite duration. In a subsequent case, the Labour Court was required to consider, inter alia, whether this now former fixed-term employee was entitled to the same redundancy package offered to permanent staff of the employing University. The Court believed that the University was not objectively justified in its difference in treatment between the former employee and her comparators, and awarded her a redundancy payment comparable to permanent employees.</p>

Summary

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Facts

The matter between Dr Buckley and National University Maynooth ("NUIM") involved a series of cases before the Rights Commissioner, the Labour Court and the High Court concerning her employment with NUIM and her equal treatment as a fixed-term employee. We will focus on the two main cases, both of which originated before the Rights Commissioner[1] and were appealed to the Labour Court. Dr Buckley commenced employment with NUIM on 1 October 2003. She was engaged in a research project concerning medieval Irish music, wholly funded by a State-run body providing grants. She was provided with a fixed-term contract contingent on specific funding from the State body. The contract ran from 1 October 2003 to 30 September 2006 (a three-year term). Dr Buckley applied for and received another grant near the completion of her research. A further fixed-term contract was issued, which ran from 1 October 2006 to 30 September 2008 (a two-year term).

Facts

: Case 1

In Dr Buckley's first complaint to the Rights Commissioner, she claimed that the circumstances of the renewal of the first contract were in breach of s9 of the Protection of Employees (Fixed-Term Work) Act 2003[2]. She claimed that her employer had failed to notify her in writing and in time of the objective justification for renewing her contract for a fixed term rather than for an indefinite term. NUIM claimed that Dr Buckley had signed a contract agreeing to objective reasons for its renewal on a fixed-term basis. The Rights Commissioner found in Dr Buckley's favour in August 2008 and declared that she should have received a contract of indefinite duration. This meant that she should then have had a permanent contract beyond the expiry date of 30 September 2008. NUIM appealed this decision to the Labour Court on the basis that it had justifiable grounds not to give Dr Buckley a permanent contract and that she had signed up to and agreed to this when she signed the second contract. Whilst awaiting the Labour Court appeal hearing[3], NUIM served redundancy notice on Dr Buckley in August 2008, because of the pending expiration of the fixed-term contract in September 2008. NUIM claimed that it had no further work for her. Following representations by Dr Buckley's union representative, NUIM placed Dr Buckley on "administrative leave" and agreed to continue paying a salary to her until the outcome of the Labour Court hearing. NUIM claimed that this was done as a gesture of goodwill. In November 2008, with the appeal still pending, NUIM offered Dr Buckley a redundancy lump sum in an amount equivalent to four weeks' pay per year of service, plus her statutory entitlements. The offer was expressed as being made on a "without prejudice basis"[4], in return for a full waiver of outstanding and potential future claims against NUIM, including her claim that had been adjudicated upon by

the Rights Commissioner and was still under appeal. It was also proposed that the amount payable under this formula would be abated by the amount of salary that she had received (as a goodwill gesture) since 30 September 2008. Dr Buckley refused this offer and in December 2008, NUIM notified her and her union that it intended to discontinue paying her salary[5]. NUIM ceased paying her salary on 12 January 2009.

Judgment

: Case 1

On 24 February 2009, the Labour Court issued its determination in NUIM's appeal against the decision of the Rights Commissioner in Dr Buckley's complaint under the Protection of Employees (Fixed-Term Work) Act 2003. The Court held that Dr Buckley did not have an entitlement to a contract of indefinite duration, as she had signed a binding contract agreeing to its renewal on a fixed-term basis and could not subsequently alter this. The determination of the Labour Court was not appealed[6].

Facts

: Case 2

However, in April 2009, Dr Buckley presented a new complaint to the Rights Commissioner, alleging that she had been treated less favourably in terms of her conditions of employment comparable to that of a permanent employee. She claimed, inter alia, a redundancy lump sum equal to four weeks' pay per year of service, plus statutory redundancy terms comparable to permanent catering staff employed by NUIM who had recently been made redundant. Under the Redundancy Payments Acts 1967 to 2007, 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. Therefore, fixed-term employees with more than two years' service are legally entitled to the statutory payment. The weekly statutory rate is currently capped at € 600 per week. With statutory entitlements only, Dr Buckley would receive (5 x 2) + 1 = 11 weeks' pay. Under the redundancy package recently offered by NUIM to permanent catering staff, she would receive the 11 weeks' statutory pay, plus a further 20 weeks' pay with no cap on the weekly rate. The Rights Commissioner directed NUIM to pay Dr Buckley such a sum based on this formula. NUIM appealed the Rights Commissioner's award, denying that Dr Buckley was entitled to the redundancy lump sum claimed. Firstly, it submitted that she was not treated less favourably than her nominated comparator, given that she had been offered and had declined the same redundancy settlement as her comparator. NUIM further submitted that the catering assistants became redundant in circumstances in which their working premises

were destroyed in a fire. Therefore, the circumstances in which these employees became redundant were sudden and unexpected. In contrast, Dr Buckley was employed to undertake research that was to be externally funded. NUIM believed that she was well aware at all times that the funding would come to an end with the inevitable loss of her employment. In these circumstances, NUIM submitted that the difference in treatment between Dr Buckley and the comparators was objectively justified. It also submitted that if Dr Buckley was entitled to an ex-gratia lump sum claimed (which was denied), then it was entitled to set off the amount that she received by way of salary given to her between 30 September 2008 and 12 January 2009, when NUIM had continued to pay her as a goodwill gesture awaiting the appeal. These salary payments were not insignificant and amounted to over € 22,000. Dr Buckley reaffirmed that there were no objective grounds justifying the difference in treatment by her employer.

Judgment

: Case 2

In its determination the Labour Court focused on ss5, 6, and 7 of the Protection of Employees (Fixed-Term Work) Act 2003[7], outlining that the combined effect of the statutory provisions is that a fixed-term employee is entitled to be treated no less favourably in respect of his or her conditions of employment than a comparable permanent employee, unless the difference in treatment is justified on objective grounds. The Court outlined that the Act expressly provides that conditions of employment include conditions as to remuneration[8], with the Court affirming that it is well settled that a redundancy payment constitutes remuneration as per recent case law[9]. The Labour Court outlined that what the comparators had received on being made redundant was an unqualified payment and compensation for the loss of their employment. In comparison, Dr Buckley was now seeking a redundancy package corresponding to that paid to the comparators, in accordance with her statutory right under s6 of the Act to equal treatment with a comparable permanent employee. The Court outlined that this was qualitatively different to what she was offered in November 2008 and, consequently, could not accept that her refusal to accept the terms of that settlement offer now barred her from pursuing her claim. Accepting that the comparators were engaged in like work within the meaning of s5(2)(c) of the Act, the Labour Court determined that Dr Buckley was entitled to be treated similarly on being made redundant, unless the difference in treatment could be objectively justified. In its determination, the Labour Court referred to Bilka-Kaufhaus GmbH – v – Weber Von Hartz[10], which sets out a three-tier test by which a discriminatory action by an employer may be justified, namely: the "measure must firstly meet 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 Directive". The Labour court

outlined that the case law of the ECJ effectively equates reliance on objective justification of a discriminatory practice with a derogation from the obligation to apply the principle of equal treatment. The Labour Court also referred to the ECJ's judgment in Lommers[11], which states that "according to settled case law . . . due regard must be had to the principal of proportionality, which requires that derogation must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principal of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued". The Labour Court outlined that in order to make out the defence, NUIM needed to identify the legitimate aim upon which it relied and show the less favourable treatment as an appropriate means of achieving this aim. This then raised the question of proportionality and NUIM would have to prove that the less favourable treatment was necessary in order to achieve the legitimate aim. This meant that NUIM would have to establish that there were no alternative means with a less discriminatory effect, by which the aim could be achieved. The Labour Court determined that, in this case, NUIM sought to justify the less favourable treatment complained of by reference to the different circumstances in which Dr Buckley and the comparators came to be redundant. The Labour Court determined that while the circumstances giving rise to redundancy in both cases were undoubtedly different, NUIM had not identified how those differences could be legitimately justified. It deemed that withholding the redundancy payment from Dr Buckley was neither appropriate nor necessary. The Court also outlined that while it may be said that NUIM was entitled to look at minimising expenditure, recent case law[12] made it clear that the cost associated with applying the principal of equal treatment can never provide objective grounds for maintaining unequal treatment. The Labour Court outlined that the suggestion by NUIM that the unequal treatment complained of was justified by the fact that the comparators were permanent employees with expectations of continuing employment that came suddenly to an end, whereas Dr Buckley was a temporary employee and could not have had such an expectation, was based on her status as a fixed-term employee and, therefore, was expressly precluded by the 2003 Act[13]. On this basis the Labour Court was satisfied that NUIM had failed to make out a defence of objective justification for the impugned difference in treatment between Dr Buckley and her comparators. As a result, the Court upheld the Rights Commissioner's Decision and awarded her the redundancy package comparable to the permanent catering staff[14].

Commentary

The rights of fixed-term employees have been examined with increasing regularity before the Irish statutory employment bodies, such as the Rights Commissioner and Labour Court. Such claims have been particularly prevalent in public sector educational and health services

institutions. This case illustrates a number of points concerning treatment of fixed-term employees and the mechanics of the employment bodies. 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. This is a fair and legitimate reason, particularly in underfunded sectors. The Labour Court believed that Dr Buckley's claim that she should be considered a permanent employee was a very weak one. This was clear in its decision in the first case[15]. However, the use of successive fixed-term contracts has been abused in Ireland and there have been numerous cases in areas such as the public health sector, with the Labour Court awarding high levels of compensation to employees, such as consultant doctors[16]. It is important to note that a fixed-term employee may be entitled to a statutory redundancy payment at the end of his or her fixed-term contract, if he or she has at least two years' service. Therefore, if the employer does not intend to renew the contract and the employee is not entitled to a permanent position based on length of service, then the employer will need to consider whether the employee is entitled to a statutory redundancy payment, or indeed some form of ex gratia payment comparable to permanent staff. Although the judgment does not provide any new significant legal points, the case clearly highlights that costs will not be a factor when an employer is seeking to justify different treatment of fixed-term employees. At a time when public sector institutions' finances are being slashed and scrutinised, and there have been moratoriums on recruitment of permanent staff, fixed-term or temporary employees have been a "get out of jail free" card for resourcing gaps whilst not increasing permanent headcounts, or potentially paying fixed-term employees less than a permanent employee. This series of cases shows that whilst employers may be able to protect themselves against employees claiming indefinite contracts where objective grounds do exist, this will not preclude them from other rights and responsibilities to fixed-term employees in areas such as remuneration and redundancy payments.

Comments from other jurisdictions

Germany (Paul Schreiner): In Germany, the situation is a bit different from Ireland. Since the employer is not required to make redundancy payments, such a duty can only be established by an agreement between the employer and the works council or the trade union. The best example of such an agreement is a social plan in relation to a mass redundancy. The main parameter for the amount of redundancy payments to be made to the employees is the loss they suffer as a result of the termination of the employment. Therefore, it is necessary to compare the situation before and after termination. For fixedterm employees this usually results in them suffering only minor disadvantages, since their employment would have terminated at the end of the term of the agreement anyway. Therefore, where a social plan

exists, the amount paid to employees on fixed-term employment contracts is typically rather low. Usually, the period for negotiating and concluding a compromise of interests and a social plan, plus the respective notice period for indefinite-term employees are rather long. This leads to the vast majority of fixed-term employment contracts expiring before the actual close of business. As a result, the fixed-term employees are not actually entitled to redundancy payments. The decision in the first case is much more pertinent in relation to the law in Germany. In Germany, as in Ireland, it is possible to limit an employment agreement in respect of its terms, if it is funded by a State body. However, this is only possible if the tasks that need to be performed under the employment agreement are not permanent in nature. Therefore, in the situation at hand a plaintiff before a German court would need to argue that in reality he or she performs permanent duties, meaning that his or her employment needs to be considered as permanent. This is very often the case, since usually the employees of universities and other relevant bodies are asked not only to perform the services they were employed for, but also various other tasks. If the original task under the fixed-term employment agreement is not the main duty of the employee, there is no justification for a limitation in terms. In these circumstances, a German court would treat the employment as being of a permanent nature.

The Netherlands (Peter Vas Nunes): In The Netherlands, staff downsizing is routinely achieved in large part at the expense of fixed-term staff. In fact, an employer that applies for permits to dismiss permanent staff risks being denied those permits, if it has not decided to discontinue the contracts of its fixed-term employees in similar positions. Those fixed-term employees are then sent away empty-handed, getting no compensation from their employer at all, in stark contrast to their colleagues with permanent contracts, who are commonly offered severance compensation ranging between one and two months' salary per year of service. I find this grossly unfair and, more relevantly, it may not be compatible with clause 4 of the Framework Agreement on Fixed-Term Work (Directive 1999/70). United

Kingdom (Hannah Vertigen): In the UK, a blanket exclusion of fixed-term employees from enhanced redundancy pay would be extremely difficult to justify and it is likely that Dr Buckley's claim for less favourable treatment by virtue of her fixed-term status would have been decided in the same way. In Hart and others – v – Secretary of State for Education and Skills (case no 2304973/2004, unreported), an employment tribunal ruled that the exclusion from an enhanced redundancy scheme of educational advisers working on fixed-term contracts, whose work was broadly similar to that of a permanent adviser, was not justified. The employer in Hart used the same argument as NUIM in its attempt to justify the difference

in treatment, i.e. that the redundancy payments were to compensate employees for loss of their expected ongoing employment, which was not the case in respect of a fixed-term employee who had no such expectation. However, the tribunal similarly rejected this argument, concluding that the fixedterm employees were entitled to an equal redundancy benefit to the permanent adviser, if their contracts were not renewed on expiry. As in Ireland, an employer in the UK would also need to justify the continued use of a fixed-term contract beyond four years' continuous service. Renewal of a fixed-term contract may be justified where the employer can show it is a necessary and proportionate means of achieving a legitimate aim.

Footnotes

1. 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 that individuals or small groups of workers refer under Employment Legislation.

2. s9 of the 2003 Act pertains to successive fixed-term contracts. Where a fixed-term employee completes his or her third year of continuous employment with his or her employer, the fixed-term contract may be renewed by that employer on only one occasion for a fixed term of no longer than one year. The employee must be given a permanent contract. However, this is not a requirement where an employer can make "objective grounds" justifying a renewal of a contract on a fixed-term basis. And in theory, once there are justified grounds, any number of successive temporary contracts can be offered.

3. There can be a six- to 12-month waiting time for Labour Court hearings.

4. Definition: a reservation made on a statement or an offer that it is not an admission or cannot otherwise be used against the issuing party in future dealings or litigation with any determinative legal effect.

5. It should be noted, as an aside, that following the discontinuance of her salary, with the decision of the Labour Court appeal still pending, Dr Buckley took another set of legal proceedings against NUIM, this time to the High Court, seeking an interlocutory injunction restraining her dismissal and requiring, inter alia, NUIM to continue paying her salary. The High Court refused to grant the interlocutory injunction, stating that Dr Buckley failed to establish that she had a strong case that she was likely to succeed at a full trial of the action.

6. The decision of the Labour Court was not appealed either.

7. The 2003 Act is the transposition into Irish Law of Council Directive 1999/70 concerning the Framework Agreement on Fixed-Term Work.

8. s2(1).

9. St. Catherine's College for Home Economics – v – Maloney & Moran [2009] 20ELR143.

10. C-170/84 of the ECJ.

11. Lommers – v – Minister van Landbouw, Natuurbeheer en Visserij C-476/99.

12. Catholic University School – v – Dooley, unreported, High Court Dunne J. 20 July 2010.

13. Precluded specifically by s7(1): objective grounds for less favourable treatment.

14. Dr Buckley also received a compensatory award of € 2,500.

15. Evidence of Dr Buckley's weak claim was also demonstrated by the High Court refusing to grant her an injunction to stop NUIM paying her salary.

16. Oshodi – v – Health Service Executive, Labour Court FTD 0913/2009; Dr. Abdel-Haq – v – Health Service Executive South, Labour Court FTD 0919/2009

Subject: Breach of Protection of Employees (Fixed-Term Work) Act 2003

Parties: National University of Ireland Maynooth – v – Dr Ann Buckley

Court: The Labour Court

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