SUMMARY

2021/38 An employee can be both a permanent and a fixed-term employee with the same employer at the same time (IR)

The Irish High Court has determined that, pursuant to the definitions of 'employment contract' and 'fixed-term employee' in the Protection of Employees (Fixed-Term Work) Act 2003 (the '2003 Act'), a permanent employee temporarily upgrading to a more senior role on a fixed-term basis, was entitled to protection under the 2003 Act as a fixed-term employee despite the fact that he had the right to revert to his substantive terms and conditions as a permanent employee. The Court held that Council Directive 1999/70/EC on fixed-term work (the 'Directive') was not only concerned with an employee's entitlement to continued employment, but also the nature, quality and terms and conditions of that employment. While Member States have the discretion to provide more favourable treatment to a broader category of employees than the Directive required, they could not define terms left undefined in the Directive or framework agreement on fixed-term contracts so as to arbitrarily exclude certain categories of workers from protection as 'fixed-term workers'.

Legal background

The 2003 Act gives effect in Ireland to the Directive, which in turn gives effect to the framework agreement on fixed-term contracts. As set out in clause 2(1) of the framework

agreement, the agreement applies to "fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements or practice in each Member State". As the terms 'employment contract' and 'employment relationship' are not defined in the Directive or the framework agreement annexed to it, the category of employees who qualify for protection as 'fixed-term employees' under Member State legislation giving effect to the Directive is a matter for national law.

The framework agreement has two stated purposes:

to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination; and

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

Section 9 of the 2003 Act provides that, if a fixed-term employee is employed on two or more continuous fixed-term contracts, the total duration of which exceeds four years, that employee is entitled to a contract of indefinite duration, unless there are objective grounds justifying the fixed term.

Facts

The complainant was a permanent employee of the respondent in the position of chief financial officer. At the invitation of the respondent he took up the position of interim group chief executive on a temporary basis for a period of six months or until the role was filled on a permanent basis, whichever was earlier. The respondent informed the complainant by letter that when his temporary role ceased he would revert to his substantive terms and conditions as a permanent employee of the respondent. The complainant's temporary appointment as interim group chief executive was extended four times, and lasted for a total period in excess of four years, but when the role was advertised on a permanent basis he was unsuccessful in his application. The complainant resumed his position as chief financial officer.

The complainant made a claim to the Workplace Relations Commission, pursuant to the 2003 Act, that he was entitled to a contract of indefinite duration in the post of group chief executive as he had been employed in that post under five successive fixed-term contracts with an aggregate duration in excess of four years. That complaint was dismissed. The Labour Court dismissed the complainant's appeal on the basis that he lacked locus standi under the 2003 Act as he was a permanent employee and thus could not, at the same time, qualify as a fixed-term employee and avail of the protection of the Act. The complainant appealed to the

High Court, on a point of law, 'concerning the interpretation of the relevant provisions of the 2003 Act, and the correct characterisation of the employment relationship between the parties'.

High Court judgment

The judge noted that the dispute between the parties turned largely on determining what was meant by the concept of a 'fixed-term employee'. A fixed-term employee is defined in Section 2 of the 2003 Act as:

a person having a contract of employment entered into directly with an employer where the end of the contract of employment concerned is determined by an objective condition such as arriving at a specific date, completing a specific task or the occurrence of a specific event [...].

The respondent had argued successfully before the Labour Court that 'contract of employment' in this context was synonymous with an enduring employment relationship, and therefore a person could only be said to be a fixed-term employee when their employment relationship itself would be brought to an end, or put at risk, by the occurrence of the relevant objective condition. The judge disagreed with this analysis. He noted that 'contract of employment' was defined in Section 2 of the 2003 Act as a 'contract of service' which referred to the agreed terms and conditions governing the employment relationship at any particular time. He stated that it was inherent in the scheme of the legislation that a continuous employment relationship could be regulated by a series of consecutive contracts of service, and the fact that one such contract came to an end and another commenced did not necessarily end the employment relationship. The judge held that in order to qualify as a fixed-term employee a person was only required to have a contract of employment the end of which was determined by an objective condition, even if they continued to be employed thereafter either by transitioning to a further contract or reverting to an earlier one. The employment relationship between the complainant and respondent was "properly characterised as involving a consecutive series of contracts of employment".

When moving on to consider the 2003 Act in light of the Fixed-Term Work Directive, the judge noted that the Court's interpretive obligation was nuanced as the Directive allows Member States to define terms not defined in the framework agreement; however, those definitions must respect the effectiveness of the Directive and EU law principles. He referred to the fact that the Court of Justice had delivered a number of judgments finding that Member States had defined the terms 'employment contract' or 'employment relationship' too narrowly so as to exclude certain categories of workers arbitrarily from protection as 'fixed-term workers'. In this case the respondent employer was arguing that an interpretation contended

for by the complainant was too broad, as the Directive was to provide minimum protections to promote stability in employment simpliciter. The Court did not accept that the objectives of the Directive were that narrow and referred to Case C-251/11 (Martial Huet – v – Université de Bretagne occidentale) as support for the proposition that they "go beyond simply ensuring that an employee is entitled to be employed within an organisation irrespective of the role, but is also concerned with the nature and quality of that employment". Further, it is expressly stated in clause 8(1) of the framework agreement that Member States can maintain more favourable provisions for workers than set out in the agreement.

The High Court found that the Labour Court's interpretation of 'fixed-term employee' was inconsistent with both of the objectives of the framework agreement. Not only would excluding employees with a right to revert to a permanent position fail to prevent the abuse of fixed-term contracts by allowing them to be used to meet a permanent staffing need, it would also exclude those employees from the protection against discrimination required by the Directive. Such employees would have no right to be informed of vacancies within their employer, even if such a vacancy was in the very role they had been acting in on a temporary basis for a number of years. They could also be discriminated against in respect of terms and conditions such as pension entitlements, if they were calculated by reference to their permanent, and more junior, role. There was nothing in the Directive that required such a narrow interpretation of the definition of 'fixed-term employee'.

The judge held that the Labour Court had erred in law in its interpretation of 'fixed-term employee' and 'contract of employment' and had further erred in its categorisation of the threshold issue as one of locus standi. A complainant has the right to pursue the question of their employment status under the 2003 Act, and the existence of a right to revert to a previous position in the organisation is not determinative, but merely a factor to be considered in determining if the use of successive fixed-term contracts was objectively justified. He declined to make an Article 267 TFEU reference as the issue between the parties fell to be resolved purely by reference to domestic law. The employer sought leave to appeal to the Supreme Court on the basis that the High Court decision involved a matter of 'general public importance' and that there are 'exceptional circumstances' warranting an appeal. The Supreme Court granted leave to appeal, stating that the issues of statutory interpretation in the case were "of general public importance and are likely to impact on a broad range of persons employed in the State". The Supreme Court was of the view that it was in the public interest that it considers and clarifies the provisions of the 2003 Act at issue.

Commentary

The finding of the High Court in this case, if upheld by the Supreme Court, will have a serious impact on the recruitment and hiring practice of employers in Ireland. This is particularly so in the public sector where vacant positions are often temporarily filled by an employee 'upgrading' until a recruitment or promotion competition can be held. At least until the appeal is determined by the Supreme Court, and on an ongoing basis if the High Court judgment is upheld, employers will have to take care that any such temporary placements comply with the conditions of the 2003 Act.

Comments from other jurisdictions

Croatia (Dina Vlahov Buhin, Schoenherr): Under Croatian law, a fixed term employment contract may be exceptionally concluded for initiating an employment relationship, the end of which is determined by objective conditions, such as reaching a specific date, completing a specific task or the occurrence of a specific event. The total duration of all fixed-term employment contracts may not exceed three years (with specific exceptions in case it is necessary for the replacement of the absent employee or if it is allowed for other objective reasons prescribed by the law or collective agreement(s)). However, the requirement of existence of an objective condition and total duration of three year shall also not apply to a first fixed-term employment contract, which can be concluded for a period longer than three years (five, seven, ten years as so on). However, when the fixed term contract reaches its end (either the first and only fixed-term contract expires or three years of consecutive fixed-term employment contracts are reached) and the employee continues to work with the employer, the employment relationship will be deemed to be concluded for indefinite period.

In this specific case, the Croatian courts would likely reach the same conclusion as the Irish High Court and would therefore treat the employee as a fixed-term employee regardless of the fact that the respective employee's relationship with the same employer did not come to an end on the basis of the earlier contract concluded for indefinite period. This means that the employee's employment relationship established on the basis of fixed-term contracts would be deemed to be concluded for indefinite period while the earlier employment contract would be deemed to be terminated, i.e. replaced with the new contract. A different approach would likely be considered as discriminatory in comparison to other fixed-term employees who have no other (indefinite term) relationship with the same employer. Namely, the Croatian law expressly prescribes that the employer is obliged to inform the fixed-term employees on vacancies for which these employees could enter into an employment relationship for indefinite period and is obliged to ensure trainings and educations for them under the conditions comparable to those for employees employed for indefinite period. Moreover, different approach would also open a door for more abuses of fixed-term contracts in the

recruitment and hiring processes, as those would be used more often to fill out vacancies which would generally have to be filled by the employment contracts for indefinite period.

United Kingdom (Bethan Carney, Lewis Silkin LLP): This is a very interesting case because the implications are potentially so far-reaching. It is very common in the UK for permanent employees in the public sector to 'act up' by temporarily filling a more senior position whilst a recruitment exercise is ongoing to fill that position permanently. It is also common for permanent employees in all sorts of sectors to temporarily cover another employee's role, if that employee is on maternity or another type of family leave. A claim of this type has not been attempted in the UK and, as far as we are aware, there has not been any debate about the possibility. The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 define 'permanent employee' as an employee who is not employed under a fixed term contract. They do not define 'fixed term employee' as an employee not on a permanent contract but as an employee employed under a fixed term contract. Fixed term contract means a contract that will (in the normal course) terminate on the expiry of a specific term, on completion of a particular task or on the occurence or non-occurence of a specific event. There is no reason on the face of it then, why the UK regulations could not be construed in the same manner as by the High Court of Ireland.

Subject: Fixed-Term Work

Parties: Maurice Power – v – Health Service Executive

Court: High Court of Ireland

Date: 15 June 2021

Case number: [2021] IEHC 346

Internet publication: http://www.bailii.org/ie/cases/IEHC/2021/2021IEHC346.html

---

Creator: The High Court
Verdict at: 2021-06-15
Case number: [2021] IEHC 346