

EMPLOYMENT LAW TODAY

THE WHEEL

2FIXED TERM WORKERS

2.2The Right to Equality

Fixed term workers are strongly protected in law, primarily by the Protection of Employees (Fixed-Term Work) Act, 2003.

A fixed term worker is someone who has employment for a fixed period of time or for completion of a fixed task or the occurrence of a specific event and during that employment they are entitled to equality with their comparable permanent employees. On occasions the law has permitted a former fixed term worker to continue to claim that right to equality even though their fixed term contract has been replaced by permanent employment.

The right to equality is subject to the employer justifying inequality by “objective grounds” which must not be based on the fixed term nature of the employment.

The terms of the fixed term worker’s contract, taken as a whole, must be at least as favourable as the terms of their comparable employee. Therefore the comparison to be made seems to be a more general one than that previously applied under, for example, equality law. Under this legislation once an employer can show that the terms of the permanent employee, as compared to the fixed-term employee, are equal in an overall, global manner, they have complied with their obligations. This recognises the different needs that can arise, both of employer and employee, in a fixed-term work situation.

1.2 The Right to a Contract of Indefinite Duration

A fixed term worker may become entitled to a permanent contract (known as a “contract of indefinite duration”) if they are employed on at least 2 continuous fixed term contracts for a period exceeding four years, unless the employer has objective grounds justifying employment on a fixed term basis. A good example of where the Labour Court accepted that there was objective justification for not awarding a contract of indefinite duration rose where the claimant did not have a particular specialist qualification which the person appointed to the permanent post had to have in order to ensure that their employer did not lose certain training accreditation. In those circumstances the Court accepted that there were objective grounds justifying the failure to appoint the claimant to a contract of indefinite duration.

A lack of permanent funding could, depending on the circumstances, justify a contract being continued on a fixed term rather than an indefinite basis.

It is very important that a fixed term employee is advised in writing of the reason that their contract is being extended on a fixed term rather than a permanent basis. This reason should be included in the fixed term contract and should be signed by the employee, thereby acknowledging the existence of the objective justification and the employee’s acceptance of same.

1.3 Termination of a Fixed Term Contract: The Unfair Dismissals Acts

The Unfair Dismissals Acts permit an employer to enter into a fixed term contract and to terminate it without breaching the right of an employee not to be unfairly dismissed. However the contract must comply with certain requirements laid down in the legislation. As these requirements remove what would otherwise be the employer's liability for unfair dismissal, they must be construed strictly.

Where an employer is entering into a fixed term contract they must ensure the following:

3 That it is in writing.

4 That it is signed by or on behalf of the employer.

5 That it is signed by the employee.

6 That it expressly states the Unfair Dismissals Acts shall not apply to a dismissal consisting only of the expiry of the fixed term or the cessation of the specified purpose.

7 That the employee is not re-hired within three months of the expiration of the term on a second or subsequent fixed term contract in similar type employment. If this does happen and the contract is subsequently terminated *and* the Tribunal are of the view that it was done wholly or partly to avoid liability under the Act, the periods of the contracts will be added together with a view to establishing that the employee has the requisite period of qualifying service to bring proceedings under the Act.

Where an employee who enters into a single fixed term contract that strictly complies with the Unfair Dismissals Acts is dismissed by reason of the expiration of the term, they will have no recourse whatsoever to the legislation even where the fixed was for a considerably lengthy period, even where an employee may be given a hope that their contract would be renewed.

1.4 Termination of a Fixed Term Contract before the end of the term

1.4(i) Where the contract contains a Notice Clause

The inclusion of a notice period in a fixed-term contract which enabled either party to bring the contract to an end at an earlier date upon the giving of notice does not make the contract anything other than a fixed-term contract. If a fixed term contract contains a notice clause, then there is nothing to prevent the employer from invoking it to bring the contract worker's employment to an end before the contract was due to finish provided the other requirements of a fair dismissal are satisfied. Naturally the employee is perfectly entitled to challenge the dismissal in the usual way pursuant to the Unfair Dismissals legislation, although the any

remedy awarded by the tribunal may be influenced by the fixed term nature of the employment.

1.4(ii) Where the contract contains no notice clause

Where a fixed term contract does not contain a notice clause the law will not imply such a term into the contract. Thus, if the employer chooses to terminate the contract before it expires, they may be made liable for the payment of all salary due under the balance of the contract, subject to the employee being expected to mitigate their losses in the usual way.

1.5 Holiday entitlements for Fixed Term Workers

The Organisation of Working Time Act 1997 entitled fixed term workers to certain minimum breaks during their working day and week, limits the hours they can work in a week, regulates Sunday work and zero hour contract and regulates the provision of paid annual leave. Fixed contract workers will be entitled to paid holidays depending on the length of their contract.

An employee will be entitled to the greater of:

- (a) 4 working weeks per year of at least 1,365 hours worked;
- (b) 1/3 of a working week per each month where the employee has worked at least 117 hours in the month;
- (c) 8% of the hours worked in the year not exceeding four weeks.

Where an employee has worked at least 8 months in the year, they must get at least 2 weeks unbroken holidays. The timing of holidays is determined by the employer, having regard to the employee's family responsibilities, their opportunity for rest and recreation and upon consultation with the employee or their trade union. Holidays must be given within the leave year or up to 6 months later with the consent of the employee. It is the employer's responsibility to ensure that the employee takes their full statutory leave allocation within the appropriate period¹.

¹ Section 20.

Payment for holidays must be made in advance. At the end of employment, the employee must be paid for holidays due to them². An employer cannot pay wages in lieu of holidays unless the employment relationship has terminated. Therefore a fixed contract worker would be entitled to claim payment in lieu of holidays due to them upon the expiration of their contract.

Fixed contract workers may also be entitled to a public holiday, or a day off or a day's pay in lieu where they have worked at least 40 hours in the previous five weeks. If the fixed term contract comes to an end during the week ending on the day before a public holiday where the fixed term worker has worked for four weeks preceding that week, they are entitled to be paid for that public holiday³.

² Section 22.

³ Section 21.

8 REDUNDANCY

A redundancy is a fair dismissal unless the employee can show that it was a sham redundancy or that they were unfairly selected for redundancy or that the dismissal was found to be in breach of fair procedures. Issues of compliance also arise in relation to collective redundancies.

2.1 The Genuineness of the Redundancy

In considering whether or not a redundancy is genuine the key test is that that it is the job that should have become redundant and not the person.

The definition of redundancy is found in Section 7(2) of the Redundancy Payments Act 1967 as amended:

"[A]n employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to:

- (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed, or*
- (b) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish, or*
- (c) the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee has been employed (or had been doing before his dismissal) - to be done by other employees or otherwise, or*
- (d) the fact that his employer has decided that the work for which the employee has been employed (or had been doing before his dismissal) - should henceforward be*

done in a different manner for which the employee is not sufficiently qualified or trained, or

(e) the fact that his employer has decided that the work for which the employee has been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained."

The most obvious way of challenging a redundancy is to show that another person has been taken on to replace the supposedly redundant employee.

There is an onus on the employer to establish redeployment options for the person who is to be made redundant rests on the employer.

Even where there is evidence of a downturn that would suggest the existence of a genuine redundancy, evidence of difficulties can persuade the Tribunal to find that a person who is being made redundant has in fact been unfairly dismissed. This has become known as Cause and Effect type dismissals, i.e. was the dismissal caused by the redundancy or the difficulties in the employment relationship. Great care must be taken in making an employee redundant against a background of other difficulties.

2.2 Fair selection for Redundancy

Section 2(3) of the 1977 Act provides that a claimant who has been unfairly selected for redundancy has been unfairly dismissed. In order to prove an unfair selection it must be shown firstly that the circumstances constituting the redundancy applied equally to one or more employees in similar employment with the claimant who were not made redundant and secondly that the reason for the redundancy was for one of the prima facie unfair reasons outlined in Section 2(2) or was unjustifiably in contravention of an agreed procedure relating to redundancy.

As long as a redundancy is found to have been genuine, selecting on the basis of LIFO (last in first out) is unlikely to be criticised as unfair.

The Tribunal appear to take a wide approach to the concept of proper procedures for choosing candidates for redundancy. In a number of decisions in the recent past they appear to have imposed an obligation of fair procedures on how this selection is carried out, even there is no express reference to that requirement in the legislation.

2.3 Fair Procedures in Redundancy

As well as showing that there was a genuine redundancy and that the selection criteria were fair, the procedures applied in the dismissing an employee on grounds of redundancy must also be fair. The Tribunal can always take account of the reasonableness of the employer's conduct in relation to the dismissal. An employer must have and be seen to have regard to the employee's right to fair procedures, consultation and consideration of potential alternative positions.

2.4 Collective Redundancies

Very specific obligations are imposed on the employers where a collective redundancy takes place. The Protection of Employment Act 1977⁴ requires an employer to observe certain procedures in particular an obligation to engage in consultation, where a certain number of workers are dismissed within a certain period of time.

The employer must engage in consultation at the earliest opportunity and in any event at least thirty days before the first dismissal takes effect.

The Act repeatedly refers to consultation and does not mention negotiation. However very significantly, the European Court of Justice now seems to be of the view that an obligation to engage in consultation also obliges the employer to negotiate.

⁴ Necessitated by EU Council Directive 75/129 on Collective Redundancies, subsequently replaced by Council Directive 98/59/EC on Collective Redundancies.

The position is also significant in confirming that a contract of employment can only be terminated by reason of redundancy after the conclusion of the consultation/negotiation procedure. Any notice to which an individual employee is entitled can only begin to run after the thirty day consultation period pursuant to the 1977 Act has expired.

Thus it would appear that it is simply not open to an employer, at least in a collective redundancy situation, to inform its employees that they have been made redundant. The consultation requirement means that they must be advised that redundancies are contemplated, or something similar, and that consultation is now being entered into with a view to deciding what is to happen in relation to the employee's future employment.

In practice, this can mean confused employees complaining of a lack of clarity as to their employer's intentions. However in reality, this represents at least some attempts now being made by employers, particularly those embarking on collective redundancies, to be seen to engage in genuine negotiation and to have due regard to their employee's rights to fair procedures, before a final decision is made to terminate the employment by reason of redundancy.

2.5 Redundancy and Equality

A redundancy may also be challenged as a discriminatory dismissal under the Employment Equality Acts. Issues are increasingly emerging of a protected group such as non-national employees, or employees recently returned from maternity leave being unfairly selected for redundancy in a manner that could constitute unlawful discrimination. Awards of compensation in excess of actual loss of earnings can be made by the Tribunal to include compensation for the distress of having been dismissed in a discriminatory manner.

3. THE CONTRACT OF EMPLOYMENT

2.1 Essential terms which must be included in the contract.

(i) The Terms of Employment (Information) Act 1994

The Terms of Employment (Information) Act 1994 imposes an obligation on employers to furnish their employees with a written statement of certain terms and conditions of their employment.

The terms and conditions that must be provided are as follows:

- The full names of the employer and the employee.
- The address of the employer within the State.
- The place of work. If there is no permanent place of work, there should be a statement specifying that the employee is required or permitted to work at various places.
- The title or description of the job or the nature of the work for which the employee is employed.⁵
- The date of commencement of the contract.
- In relation to temporary, or fixed term or fixed purpose contracts, the expected duration and the expected date of termination of the contract.
- The rate of pay, the method of calculation and the frequency of payment⁶.
- The period of notice required from each party to terminate the contract.
- The terms and conditions applicable to sick pay and pension schemes, if any.
- The terms and conditions relating to paid leave, if any.
- Reference should be made to any collective agreement affecting the terms of the contract, whether or not the employer is a party to the agreement, including information about the institutions or organisations which drew up any Collective

⁵ Duties should always be described in an inclusive manner and include a general clause for example that the employee will, in addition, be expected to carry out any reasonable requests of the employer.

⁶ This clause should also include provisions on any permissible deductions in accordance with the Payment of Wages Act 1991.

Agreement which affects the terms of the contract to which the employer is not a party.

(ii) An Employee Working Abroad

An employee who is working abroad is also entitled to details of the following:

- The period of employment outside State.
- The currency in which they will be paid.
- Any other benefits in kind or cash that will be provided.
- The terms and conditions applicable on the employee's return home.

(iii) Changes in Employment

Section 5 of the Act requires an employer to furnish an employee with details of any changes in the terms or conditions of their employment as listed above. This is a useful provision as it ensures a certain level of communication between the employer and the employees in relation to changes that are taking place. Naturally a prudent employer would ensure to communicate such changes in any event, but the Act ensures that this will happen.

(iv) The Dismissals Procedures

Section 14(1) of the Unfair Dismissals Act of 1977 provided that an employer was obliged to furnish an employee with a notice in writing setting out the procedure that would be adopted prior to any dismissal of that employee. In practice the obligation was largely ignored. The Unfair Dismissals Amendment Act of 1993 strengthened the section considerably by providing that in an adjudication upon a claim for unfair dismissal, account shall be taken of the compliance, or non-compliance of the employer with that procedure. In practice the Employment Appeals Tribunal take a very serious view of the need for an employer to follow fair procedures prior to a dismissal.

The Code of Practice on Disciplinary Procedures⁷ provides a general framework for a disciplinary procedure, including dismissal, which lays particular emphasis on the need to comply with the principles of natural justice. The provisions of the Code may be introduced in evidence and may be taken into account in an adjudication upon a claim for unfair dismissal.

(v) The Organisation of Working Time Act 1997

The Organisation of Working Time Act 1997 regulates paid annual leave, breaks, Sunday work, maximum working week, overtime and double employment. For clarity these entitlements should be included in the contract of employment. It should also be expressly stated, where appropriate, that there is a prohibition on the employee working in another job

⁷ S.I. No. 17 of 1996.

where their cumulative hours would bring their weekly hours above the maximum permitted by the Act.

Workers are entitled to certain minimum breaks during their working day and week, limits the hours they can work in a week. They are entitled to a premium for working on a Sunday and must receive certain minimum payments for working a zero hours contract.

Holiday entitlements are set out in Section 19 which provides that an employee will be entitled to the greater of:

- (a) 4 working weeks per year of at least 1,365 hours worked;
 - (b) 1/3 of a working week per each month where the employee has worked at least 117 hours in the month;
 - (c) 8% of the hours worked in the year not exceeding four weeks;
- subject to a maximum annual period of four weeks.

Where an employee has worked at least 8 months in the year, they must get at least 2 weeks unbroken holidays. The timing of holidays is determined by the employer, having regard to the employee's family responsibilities, their opportunity for rest and recreation and upon consultation with the employee or their trade union. Holidays must be given within the leave year or up to 6 months later with the consent of the employee. It is the employer's responsibility to ensure that the employee takes their full statutory leave allocation within the appropriate period.

Payment for holidays must be made in advance. At the end of employment, the employee must be paid for holidays due to them. An employer cannot pay wages in lieu of holidays unless the employment relationship has terminated.

Workers may also be entitled to a public holiday, or a day off or a day's pay in lieu where they have worked at least 40 hours in the previous five weeks. For example if a fixed term contract comes to an end during the week ending on the day before a public holiday where the fixed term worker has worked for four weeks preceding that week, they are entitled to be paid for that public holiday.

(v) *The Pensions (Amendment) Act 2002*

Pursuant to the Pensions (Amendment) Act 2002, employers who do not provide an occupational pension scheme for their employees are obliged to provide access to at least one standard Personal Retirement Savings Account (PRSA) contract and to make deductions from the payroll at the employee's request in respect of the employee's contribution to the PRSA. The employer is not obliged to contribute to the PRSA. If an employer does not provide access to a pension scheme, then express provision should be made in the contract for providing the employees with access to a specific PRSA account.

(vii) *Other Legislative Provisions*

There are various provisions that should be included in an employment contract to ensure compliance with the many pieces of protective employment legislation. For example if there is no express term in the contract, for example providing for an equality clause in compliance with the equality legislation, such a term will be automatically implied into the contract. Employees must be paid a minimum level of pay pursuant to the Minimum Wage Act of 2000. The method of payment of wages is regulated by the Payment of Wages Act 1991 which entitles all employees to a pay slip and outlaws unauthorised deductions from wages.

2.2 Discretionary terms that should be included

There are certain terms that will not be implied into the contract and so, in order to ensure efficiency and flexibility, should be expressly included.

Some examples are:

- A Probationary period. This cannot exceed 12 months as at that stage the employee will enjoy the protection of the Unfair Dismissals legislation.
- Expenses.
- Lay-offs / Short-time. There is no automatically implied term in the contract entitling an employer to lay off employees during a slack period without paying the employees during that period⁸. In the absence of an express right on the part of the employer to put the employees on short-time or lay-off, an employee may be entitled to claim a contractual entitlement to be paid during the period they are not working or alternatively to leave their employment and claim that they were constructively dismissed.
- A right to reduce pay. Again this is unlikely to be implied in the absence of an express term even in unpredicted financial circumstances. A claim pursuant to the Payment of Wages Act 1991 could also be made where wages are reduced without express agreement.
- Health and Safety. It is advisable to furnish a copy of safety statement with the employment contract.
- Provisions relating to trade union membership, if any.
- The retirement age, including where the retirement age in a particular job is earlier than the State retirement age.
- A copy of the summary of the Pension scheme, where applicable.
- A Grievance procedure, ensuring due regard to the principles of natural justice.
- A Bullying and Harassment policy.
- A right to search.
- A mobility clause.
- A clause providing that an employee shall not abuse the employer's technology including e-mail and access to the internet or use it in an inappropriate manner. If an

⁸ Industrial Yarns Ltd v Greene [1984] ILRM 15.

employer wishes to have access to an employee's e-mails then express provision should be made for same in the contract.

- A confidentiality clause directing an employee not to disclose confidential information relating to their employer and directing them to deliver up all materials belonging to the employer including hard and soft copies of any information relating to the employer upon the termination of their employment.
- A Restraint of Trade clause. This is of vital importance where an employee is dealing with any sort of confidential information. It must be reasonable in terms of time, subject matter and space. These clauses can be very difficult to enforce in practice but by including them in the contract it gives the employer some opportunity to challenge a former employees activities which may result in an unfair advantage to the employer's competitors.

In the event that any of these clauses are omitted from a contract of employment, it may be very difficult to persuade a court that they should be implied therein. However where an employee has agreed to enter a contract on the basis of those express terms, they may find it difficult to avoid them.

4. POLICIES AND PROCEDURES

An employer should have policies on harassment, bullying, use of the employer's technology and disciplinary and grievance procedures. These policies and procedures, and any changes to them, should be clearly communicated to all employees who should be made aware of the consequences of failing to adhere to them. A common way of communicating policies and procedures is in an employee handbook and if this is used it must be clearly referred to in the contract of employment and the employee must be clearly advised that these policies form part of the contract. Any changes to the handbook must be communicated to the employee in writing.

Policies and procedures must be applied fairly.

4.1 Bullying and Harassment Policy

There is no specific legislative provision made for workplace bullying, unlike sexual harassment in the workplace, and there is no definition of bullying contained in any of the protective legislation. The most accepted definition and one which is included in the Health and Safety Authority Code of Practice is the following:

“Workplace bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could be reasonably be regarded as undermining the individual's right to dignity at work.

An isolated incident of the behaviour described in this definition may be an affront to dignity at work but as a once off incident is not considered to be bullying”.

The Health and Safety Authority Code of Practice recommends dealing with cases internally by way of an informal resolution if possible, and if not, by a formal complaints procedure. It

refers to getting outside support only if the internal processes fail, thereby suggesting that it might be appropriate to seek a third party investigation in the context of a formal investigation.

The Code confirms that a once off incident is not considered to be bullying. It also draws a distinction between bullying and harassment which it states is governed by equality legislation and predicated on the person being a member of one of the nine categories specified within that legislation. Significantly, the Code expressly states that bullying at work does not include reasonable and essential discipline arising from the good management of the performance of an employee at work and gives the example of an employee whose performance is continually signalled at a level below required targets who may feel threatened and insecure in their work but states that this in itself does not indicate bullying.

The Code emphasises the importance of having a Bullying Prevention Policy in place and providing appropriate training and development at all levels particularly for line manager roles. It also emphasises the importance of clarity of roles and job description and states that, as a matter of good practice, employers should define each employee's role and accountability as clearly as possible including a written description of main duties and responsibilities and a clear line of supervision. The policy should be jointly agreed where employee representation is in place and otherwise should be advised to all employees that it should be written in simple direct language that is reasonably likely to be understood. It should be effectively communicated and, where a staff handbook is in place, should be included therein. It should name a contact person who can listen and advise about complaints of bullying.

The Code makes it clear that a malicious complaint of bullying should be treated as a disciplinary issue within the disciplinary policy. At the same time, it confirms that a complaint made in good faith that is not upheld should not result in victimisation for the complainant.

The Code sets out what should be involved in the informal and formal procedures. It is clear that the preference is to resolve a matter informally but that it can only be done with the consent of the parties involved. The formal procedure must recognise the importance of complying of natural justice. Interestingly, whilst the Code emphasises the need for resolving

matters within a reasonable timescale, it seems to recognise the possibility of a timescale not being adhered to depending on the circumstances of the investigation. It also states that all parties should continue to work normally if possible during the formal investigation. It recognises the right to representation but seems to limit that to a work colleague or employee/trade union representative.

The Code also recognises that an appeals process for both parties should be in place.

The Code sets out a series of practical measures for any employer considering taking proactive steps to deal with the prevention of bullying in the workplace. Any employer who can show that he complied with the Code in advance of any complaint of bullying being made and complied with the Code in relation to the investigation, may well have a good defence to proceedings taken by the employee following on an investigation which finds against them. Ultimately that will depend on the quality of the investigations and procedures adopted in it.

Certainly, the starting point of a successful defence is for the employer to be able to demonstrate that they complied with the Code within the spirit of prevention of bullying being better than the cure of an award of damages and costs!