

# Practical implications of the moratorium on recruitment and promotion in the public service

Duncan Inverarity examines the legal issues arising from the moratorium

**The moratorium on recruitment and promotion in the public service (“the circular”) has now been communicated to all government departments and agencies. The contents of the circular are already well known and have been well publicised by the media.**

This circular has placed a moratorium on all “new” recruitment in the public service. It prohibits promotions until the end of 2010, it prohibits the payment of allowances for performance of duties at a higher grade and it emphasises that where vacancies arise, the relevant departments must reallocate or reorganise work or staff. It specifically states that it also applies to “temporary appointments on a fixed term basis and the renewal of such contracts”.

The circular currently exempts certain positions in the education and health sectors such as principal and vice/deputy principal in the education sector, and hospital consultants, speech and language therapists, occupational therapists and emergency medical technicians employed in the health sector. These exemptions are in place to reflect the flexibility required in these sectors.

## Legal background

Fixed term employees are afforded protection under the Protection of Employees (Fixed-Term Work) Act 2003 (“the 2003 Act”) which transposed the E.U. Council Directive 99/70/EC (“the Directive”) into Irish law. There are a number of employees who are excluded from the scope of the 2003 Act namely members of the Defence Forces, trainee Gardaí, nurses in training, employees in vocational training or apprentice schemes, and employees with a contract of employment that has been concluded within the framework of a specific public or public supported training, integration or vocational re-training programme.

The 2003 Act applies to all other employees and any provision in a contract purporting to exclude its application is void, by virtue of section 12 of the 2003 Act.

The Directive and the 2003 Act prevent the abuse of fixed-term employees by providing two specific protections:

(1) A fixed-term employee cannot be treated in a less favourable manner than a comparable permanent employee as regards his or her conditions of employment, unless the less



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favourable treatment can be justified on objective grounds. The mere non-renewal of a fixed term contract does not of itself amount to less favourable treatment, there must be another factor. A comparable employee is defined in the 2003 Act in extremely broad terms in order to afford the maximum possible protection to fixed term employees.

(2) An employee cannot be placed on fixed-term contracts for more than four years,

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*“If fixed term employees are selected for redundancy based only on their fixed term status, their selection for redundancy may be deemed unfair on the basis of the application of section 6(3) of the Unfair Dismissals Acts 1977 – 2007.”*

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unless the use of such a contract can be objectively justified. If an employee’s contract runs over the four year threshold, and there is no objective justification for this, the 2003 Act deems the employee to have what is termed “a contract of indefinite duration” and this arises by operation of the law. The term “contract of indefinite duration” is not defined in the Act but it has been judicially defined as meaning no more than a contract terminable upon the giving of reasonable notice (*Sheehy v Ryan* [2004]). A contract of indefinite duration is deemed to be “identical in its terms, including any express or implied terms as to training or qualifications, as the fixed-term contract from which it was derived” (*Health Service Executive v Khan* FTD 4/2006).

## Objective justification

In order to objectively justify less favourable treatment, an employer must show that the difference in treatment is attributable to a reason other than the fact that one employee is a fixed term employee and the other is a permanent employee. Further, the less favourable treatment should be for the purpose of achieving a legitimate objective on the part of the employer, and the treatment should be appropriate and necessary to achieve that aim.

In terms of the circular, the less favourable treatment of fixed term workers is simply that permanent workers are not subject to the same terms and conditions, i.e. the automatic non renewal of a contract. Arguably, this less favourable treatment of fixed term or temporary employees, which is in accordance with the requirements of the circular, will be for the purpose of “achieving a legitimate objective” as its intention is to curtail public expenditure. However this is rebuttable if sufficient evidence is produced to the contrary, i.e. if there are sufficient other methods for reducing public expenditure.

A 2002 Labour Court decision, (*NBK Designs Limited v Mary Inoue*), stated that in order for a measure to be objectively justifiable the measure needs to “correspond to a real need on the part of the employer, be appropriate with a view to achieving the objective pursued and be necessary to that end”. Again, compliance with the terms of the circular may meet these requirements, but the contrary position may be argued.

*“It is likely that the implementation of the moratorium in the circular may be challenged by some fixed term employees as a factor resulting in them being unfairly dismissed.”*



It is up to the employer to show that the measures were objectively justified. The European Court of Justice in the case of *Bilka Kaufhaus v Weber von Hartz* has stated that monetary considerations alone cannot justify less favourable treatment and evidence should be produced in order to justify the measure. Each case is decided on its own facts but there is some guidance from case-law in this area; compliance with public pay policies was found to be objective justification in a 2007 case. (28 Workers v Courts Service [2007]).

Even if one is to proceed on the premise that the circular will not fall foul of the legislation as constituting less favourable treatment (and one is not convinced this premise is correct), it does not necessarily mean that all fixed term or temporary employees will be legitimately dismissed as a result of compliance with the terms of the circular.

Some fixed term or temporary employees may be entitled to contracts of indefinite duration, or, in the event of the termination of their contracts, a redundancy payment.

### **Entitlement to a contract of indefinite duration**

Those employees with the requisite period of service, i.e. in excess of four years (as required under section 9 of the 2003 Act), will be entitled to a contract of indefinite duration. The terms of the circular therefore will not apply to them as they will be treated in the same manner as permanent employees. They will, by force of law, have a contract of indefinite duration (a permanent contract) in advance of the commencement of the circular.

### **Entitlement to redundancy**

Those employees who have less than the

requisite service required for a “contract of indefinite duration” under section 9 of the 2003 Act, but more than the 104 weeks continuous service required under the Redundancy Payments Acts 1967-2007, may be entitled to a statutory redundancy payment.

A recent decision of the Labour Court affirmed the fact that fixed term employees are entitled to redundancy payments pursuant to the Redundancy Payments Acts 1967-2007 on the same basis as other permanent employees, unless there is an objective ground justifying the difference in treatment.

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(*St. Catherines College for Home Economics v Helen Maloney/Margaret Moran* 2008). If severance packages are being offered as part of a redundancy process, the manner in which the package is computed should not discriminate against fixed term employees.

### **Unfair selection of fixed term employees for redundancy**

Further, if fixed term employees are selected for redundancy based only on their fixed term status, their selection for redundancy may be deemed unfair on the basis of the application of section 6(3) of the Unfair Dismissals Acts 1977 – 2007 (“the Unfair Dismissals Acts”) which provides that “where an employee was dismissed due to redundancy but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who has not been dismissed, and ... the selection of that employee for dismissal resulted wholly or mainly from ... (some) matter that would not be a ground justifying dismissal... then the dismissal shall be deemed ... to be an unfair dismissal”.

The general rule in redundancy situations is that fixed term employees cannot be selected ahead of permanent employees unless there is some objective justification for doing so. Arguably the terms of the circular may amount to objective justification but if sufficient evidence is produced to the contrary this claim may be defeated.

### **Unfair dismissal**

Section 2(2) of the Unfair Dismissals Acts provides that the Unfair Dismissals Acts do not apply in relation to a dismissal of a fixed-term employee where “the dismissal consisted only of the expiry of the term without its being renewed under the said contract” and:

- (a) the contract is in writing,
- (b) the contract was signed by or on behalf of the employer and by the employee, and
- (c) the contract provides that the Unfair Dismissals Acts shall not apply to a dismissal consisting only of the expiry of the fixed term.

Fixed term employees whose contracts are terminated due to the implementation of the terms of the circular may bring a claim for unfair dismissal under the Unfair Dismissals Acts if they have the requisite service of one year and if their contract is not in accordance with section 2(2) of the Unfair Dismissal Acts.

### **Contracts terminated on their expiry dates**

Fixed term employees do not have an automatic right of renewal of their contract on the expiry of their contracts and this has been confirmed by the Courts many times (*Health Service Executive v Prasad* 2006).. However if a fixed term employee can establish that the termination of their contract was due to some other factor, they may bring a claim for unfair dismissal. It is likely that the implementation of the moratorium in the circular may be challenged by some fixed term employees as a factor resulting in them being unfairly dismissed.

### **Contracts terminated prior to their expiry dates**

If the contracts are terminated prior to their expiry date, either with or without notice, the employees will have the right to bring a claim for unfair dismissal provided they have the requisite one year's service under the Unfair Dismissals Acts. Further, they may also be entitled to receive the remuneration under the contract up to the expiry date as referred to in their contract.

### **Penalisation of fixed term employees**

Under Section 9(2) of the 2003 Act, "an employee is penalised if he or she (a) is dismissed or suffers any unfavourable change in his or her conditions of employment or any unfair treatment (including selection for redundancy), or (b) is the subject of any other action prejudicial to his or her employment". Again, it is arguable that the dismissal of a fixed term employee as a result of compliance with the terms of the circular amounts to penalisation of the fixed term employees. However, fixed term employees should bear in mind that they may only claim relief under the Unfair Dismissals Acts or the 2003 Act as relief cannot be claimed under both Acts.

### **Equality issues**

The Labour Court recently commented that



the abolition of part time positions impacts disproportionately on women, and in particular, women who were lone parents. In that particular case a part time employee who was a lone female parent successfully argued that she had been discriminated against on gender, marital and family status grounds. By analogy, this reasoning could be applied to the abolition of fixed term posts which

may have a higher impact on females or females with children working in the public sector. Those fixed term employees could claim indirect discrimination on grounds of gender, marital status or family status under the Employment Equality Acts 1998-2004. Indirect discrimination can only be justified if it is based on objective factors unrelated to the discriminatory ground complained of and is appropriate and necessary to achieve a legitimate aim.

### **Conclusion**

The implementation of the terms of the circular will have far reaching ramifications for fixed term employees in the forthcoming months. The question of whether or not fixed term employees who find themselves being dismissed, made redundant or not having their contracts renewed, will have any success in challenging these decisions if they choose to litigate, is far from clear-cut. The likely success of such claims will largely depend on the particular facts and circumstances of each individual case.

It has to be admitted that Irish employers, and in particular the Government, now find themselves in one of the most challenging periods of the economic history of the State. The "serious deterioration in the revenues of the State" was referred to in the Recitals of the Financial Emergency Measures in the Public Interest Act 2009 as one of the reasons for action to be taken to curb expenditure in the public service. The well publicised and significant decline in public finances, supported by evidence, will be relied on by any government department in defence to any potential claim brought by a fixed term employee.

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