



SUBJECT:

1. Appeal against a Rights Commissioner's Decision r-057589-ft-07/JT

BACKGROUND:

2. The Employer appealed the Rights Commissioner's decision to the Labour Court on the 10th September, 2008, in accordance with Section 15(1) of the Protection of Employees (Fixed-Term Work) Act, 2003. The decision read as follows:

"Considering the lengthy submissions and arguments put forward including the case law which was cited by both parties I take the view that the Claimant was treated less favourably than her colleagues in the permanent staff on the following basis. 1) That the Claimant's Union in negotiations with the department were led to believe that there was a moral obligation dealing with the staff on a fixed term contracts. 2) Of the Claimants colleagues received fixed term contracts after the closure of the school. The Claimants Union submitted that the precedent in regard to staff in the Greendale Community School. Therefore, the Claimant was treated less fairly as per Section 6 of the Act. I have decided that the Claimant should be paid the terms either of the voluntary early retirement scheme or the voluntary redundancy scheme as paid to her colleagues in the permanent staff. I make no award under Section 14(2)(D) of the Act.

A Labour Court hearing took place on the 26th November, 2008. The following is the Court's Determination:

DETERMINATION :

This is an appeal by the Minister for Education and Science against the decision of a Rights Commissioner in a claim taken by Ms Margaret Moran and Ms Helen Moloney under the Protection of Employees (Fixed-Term Work) Act 2003 (the Act).

In this Determination Ms Moran and Ms Moloney are referred to as the Complainants and the Minister for Education and Science is referred to as the Respondent.

Factual Background

This dispute arose from the closure of St Catherine's College for Home Economics in August 2007. The Complainants were both employed as Lecturers in the College on fixed-term contracts. At the time of the closure Ms Moran had seven years' continuous service and Ms Moloney had six years' continuous service.

In or about September, 2003, the Respondent announced that the College would close. It was then decided that the closure would be phased over four years. The College closed on 31st August 2007 and the Complainants, in common with many of their permanent colleagues, ceased to be employed by the Respondent by reason of redundancy.

Arrangements were put in place to compensate staff who were made redundant. A package of measures was offered to permanent staff which, it appears from the evidence, were adapted from a voluntary severance agreement negotiated

for the Civil Service in or about 1988. This package comprised three options as follows:-

Option A: Permanent Employees with over 2 Years' Actual Service

Superannuation Benefits: Preserved Pension and Lump Sum based on actual service (Payable at Age 60)

Severance gratuity: 6 weeks' pay per year of service subject to the following conditions: -

- § The total gratuity cannot exceed 2 years' pay, and
- § Where service is greater than 17.5 years, the total severance gratuity cannot exceed 7 weeks' salary per year of potential service to age 65.

As an alternative to the above, an employee with a minimum of 5 years' service could opt instead for an immediate payment of pension and lump sum as at B and C below.

Option B Permanent Employees with over 5 Years Actual Service

Superannuation Benefits: immediate Pension and Lump Sum based on actual pensionable service (plus purchased notional service, if applicable) together with the award of added years at the rate of 35% of actual pensionable service. The grant of added years will also be subject to the following restrictions: -

- (a) added years will not in any case exceed
  - (i) 7 Years
  - (ii) Potential service to compulsory retirement age, which ever is the lesser
- (b) total service for pension and lump sum purposes will be limited to the standard maximum of 40 years.

Option C permanent employees with over 5 Years' Actual Service

Immediate pension and lump sum based on actual pensionable service and any purchased notional service, subject to the standard 40-year limit, with no added years awarded, but with a severance gratuity at the rate of 3 weeks' pay per year of potential service to age 65, subject to a ceiling of 27 weeks' pay.

The Complainants were offered a redundancy lump sum calculated by reference to their statutory entitlement of two weeks' pay per year of service.

Discussion and correspondence ensued between Officials of the Respondent and the Complainants' Trade Union (IFUT) in which the Union sought to obtain for them the same terms as were available to permanent staff. There was significant controversy concerning what was said at various meetings but it is clear that the Union at all times contended that the Complainants had an entitlement to be treated equally with their permanent colleagues pursuant to Section 6 of the Act. The Respondent at all times contended that the Complainants had no such entitlement although there was again controversy on the reasons advanced on behalf of the Respondent for that

contention.

However, by letter dated 25th July 2007, the Minister for Education and Science wrote to the General Secretary of IFUT setting forth her Department's position in the matter. The following passage appears in this letter: -

"The situation regarding your members on fixed-term contracts has already been confirmed by letter from External Staff Relations on 6th June 2007. Section 6 of the Protection of Employees (Fixed-Term Work) Act 2003 states that a fixed-term employee shall not be treated in a less favourable manner than a comparable permanent employee in respect of their conditions of employment, unless there are objective grounds for doing so. Ex-gratia payments such as enhanced severance are not a condition of employment, as such payments refer to the period post the expiry of the fixed-term contract"

The Court was told that this letter was drafted by Officials of the Respondent and was approved by the Senior Official who made the decision to offer different terms to the Complainants from those available to the permanent staff. This Official was present at the hearing and assisted the Court by answering questions in relation to his involvement in the process. The Court is satisfied on the evidence that the passage just quoted represented the view of that Official at the material time.

#### Position of the parties

The Respondent contends that the object or purpose of the redundancy scheme was to compensate staff for the loss of tenure in their employment. Counsel for the Respondent, Ms Guinness B.L., submitted that permanent staff had tenure or potential service up to age 65 whereas the Complainants had no tenure since their contracts had expired at the time the redundancies took effect. Counsel told the Court that the reason for paying a greater lump sum to the permanent staff than that paid to the Complainants was to reflect the difference in tenure and the need to compensate staff fairly for the loss of potential earnings arising therefrom.

The Union, on behalf of the Complainants, contends that the reason now advanced by the Respondent in justification of the impugned difference in treatment was not the reason relied upon at that material time and was first asserted at the hearing before the Rights Commissioner. It was the Union's submission that the Complainants were treated less favourably because the Respondent took the view that ex-gratia redundancy payments were not a condition of employment within the meaning of Section 6 of the Act and the failure to treat the Complainant equally was simply because of their status as fixed-term employees. This, it was submitted, could not amount to objective grounds justifying less favourable treatment within the meaning of S.7 of the Act.

#### The Law Applicable

The relevant statutory provision in this case are contained at Section 6 and Section 7 of the Act. Section 6 provides as follows: -

6.—(1) Subject to subsections (2) and (5), a fixed-term employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable permanent

employee.

Section 2(1) of the Act provides that the term "conditions of employment" includes remuneration and matters related thereto. The term remuneration is further amplified by this Section as meaning: -

"remuneration", in relation to an employee, means—

- (a) any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment, and
- (b) any amounts the employee will be entitled to receive on foot of any pension scheme or arrangement;

The question of whether ex-gratia redundancy pay constitutes remuneration for the purpose of S. 6 was considered by this Court in *Sunday World Newspapers v Kinsella and Bradley* [2006] 17 ELR 325. Here, in reliance on the decision of the ECJ in Case C 262/88 *Barber v Guardian Royal Exchange Assurance* [1990] ECR 1-1889, the Court held that it did. The correctness of that decision is not in issue in the instant case.

Section 6(2) provides that: -

- (2) If treating a fixed-term employee, in respect of a particular condition of employment, in a less favourable manner than a comparable permanent employee can be justified on objective grounds then that employee may, notwithstanding subsection (1), be so treated.

This subsection must be read with Section 7 which delimits its scope. Section 7(1) of the Act provides: -

- (1) A ground shall not be regarded as an objective ground for the purposes of any provision of this Part unless it is based on considerations other than the status of the employee concerned as a fixed-term employee and the less favourable treatment which it involves for that employee (which treatment may include the renewal of a fixed-term employee's contract for a further fixed term) is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose.

It is settled that a plea of objective justification in relation to what would otherwise be discriminatory treatment is a defence. Consequently it is for the party who seeks to rely on that defence to prove the various elements which it entails.

Issues for consideration

On the fact of this case three issues fall for consideration: -

1. Is the reason now advanced for the difference in severance terms between the fixed-term and permanent staff the real or operative consideration at the time different schemes were put in place?
2. If the answer to that question is in the negative, can the Respondent rely on the reason now advanced as constituting an objective ground justifying the difference in treatment?

3. Can the reason now advanced for the difference in treatment be regarded as constituting an objectively justified ground within the meaning of S.7 of the Act?

Reason for less favourable treatment.

The Complainants were paid two weeks' pay per year of service by way of a redundancy settlement. Their permanent colleagues who opted to accept a redundancy lump sum, and who like the Complainant had less than 17.5 years' service, received six weeks pay per year of service. It is thus clear beyond argument that the Complainants were treated less favourably than permanent staff whose circumstances were similar other than in respect of their fixed-term status. In these circumstances the issue for the Court concerns the operative reason for the decision to treat the Claimants differently and whether that reason can be relied upon as an objective ground justifying the impugned difference in treatment.

It appears to the Court that in considering how to deal with the situation arising from the closure of the College the responsible Officials of the Respondent decided to adopt a severance package which was first introduced in 1988 and was applicable to permanent staff only. No consideration was given to the need to ensure equality of treatment between permanent and fixed-term staff because the decision makers believed that ex-gratia payments are not pay and are outside the intendment of S. 6 of the Act. This was made perfectly clear by the Minister for Education and Science in her letter of 25th July 2007 to the General Secretary of IFUT, the relevant passage from which is recited earlier in this Determination. Counsel for the Respondent now rightly concedes that the stated position of the Minister is unsustainable in law. Thus the operative reason for the impugned difference in treatment was the Respondent's mistaken view of its legal obligations vis-à-vis the Complainants. This could not be relied upon as constituting an objective ground within the meaning of S. 7 of the Act.

Difference in Tenure and Objective Justification

The Court next turned to consider if the Respondent's stated desire to compensate staff for the unexpired portion of their tenure could be relied upon as objective grounds for the impugned difference in treatment. The test for deciding if a ground can be regarded as an objective ground is the same as that first formulated by the ECJ in *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607. In that case the Court set out a three-tiered test by which an indirectly discriminatory measure may be justified. It said that 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 objective. The various elements of the test were analysed in detail by this Court in *Inoue v NBK Designs Ltd* [2003] 14 ELR 98. While there are textual differences in the formulation of the test in s.7 of the Act and that in *Bilka -Kaufhaus*, the differences are not material. Consequently the jurisprudence of the ECJ in the application of the test is relevant in cases under the Act of 2003.

Section 6 of the Act provides for the application of the principle of equal treatment to fixed-term workers. The principle of equal treatment is a foundation rule of Community law. It was described by the ECJ in *Case C-381/99, Brunnhofer v Bank Der Osterreichischen Postsparkasses Ag* [2001] IRLR 571 at [28] as follows: -

“...the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified, forms part of the foundations of the Community”

In essence the case law of the ECJ equates reliance on objective justification of a discriminatory practice with a derogation from the obligation to apply the principle of equal treatment. As with all derogations it must be applied strictly and should only be accepted where the statutory and jurisprudential requirements for its application have plainly and unambiguously been made out.

In *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] IRLR 430, par 30, the ECJ pointed out that: -

“ According to settled case-law, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued (*Johnston*, paragraph 38; *Sirdar*, paragraph 26, and *Kreil*, paragraph 23).

It seems to the Court that the requirements of this test could only be met if at the time the decision to discriminate was taken the objective which it was intended to pursue was actually within the contemplation of the decision-maker. As already found by the Court, the desirability of compensating those being displaced by reference to their potential service or tenure was not a factor which influenced the decision to treat the Complainants differently from their permanent colleagues. Hence, the Court cannot see how it could now be relied upon as an objective ground justifying that decision.

While this may be sufficient to dispose of this aspect of the case, for the sake of completeness, the Court has considered the Respondent's submissions on this point on their merits. In advancing the argument that tenure can be a factor justifying different treatment as between permanent and fixed-term employees Counsel for the Respondent referred the Court to the decision of Smyth J. in *Sunday Newspapers Limited v Kinsella and Bradley* [2007] IEHC 324. This was an appeal on a point of law from this Court in a case under the Act of 2003 brought by two fixed-term employees.

The pertinent facts of the case were that a redundancy situation arose when the employer closed its printing works. A compensatory package was made available whereby permanent staff were to receive a minimum lump sum equal to one year's wages. However this provision was qualified by a stipulation that no individual could receive more than they could have potentially earned up to their normal retirement age. The Complainants had periods of less than one year to run of their fixed-term contracts. They were offered a severance lump sum in an amount equal to the pay which they would have received for the unexpired term of their contracts.

On this point the High Court accepted that the Complainants were treated equally, for the purposes of Section 6 of the Act, with a permanent employee whose contract was due to expire within 12 months of the redundancy. Smyth J held that the Complainants were treated differently

but in no less favourable a manner than a permanent employee with less than one year of potential service before retirement. The Judge thus found that this Court has erred in point of law in finding otherwise.

This Court is, of course, absolutely bound to follow and apply the principle of law enunciated in that case. That principle is that where an ex-gratia redundancy lump sum payable to a permanent employee is calculated by reference to their potential earnings up to normal retirement age, it is not contrary to Section 6 of the Act to calculate the redundancy lump sum payable to a comparable fixed-term employee by reference to the unexpired portion of his or her fixed-term contract. While Smyth J. did not say so expressly, it is implicit in his Judgment that since treatment of the type at issue in that case is outside the purview of Section 6(1) of the Act altogether it does not have to be justified on objective grounds in terms of S.6(2) of the Act. The position in the instant case is, however, materially different.

The severance terms provided by the Respondent contained a number of options. A permanent employee was free to choose whichever option best suited his or her circumstances. While most of the options were in some respect linked to potential service up to retirement the first part of Option A was linked solely to past service. This is the option contended for by the Complainants. Thus permanent employees with the same length of service as the Complainants (six and seven years respectively), who opted for this formula, would receive the equivalent of 36 and 42 weeks pay regardless of the outstanding tenure on their contract. By contrast, the formula applied to a fixed-term employee with the same service would produce the equivalent of 12 and 14 weeks' pay regardless of the outstanding tenure, if any, on their contract.

In the Sunday Newspapers case the employer applied the same formula to both fixed-term and permanent employees (the lump sum was limited by what they could potentially earn before the expiry of their then current contract either by effluxion of time or retirement). In the instant case different formulae were applied to permanent employees and fixed-term employees.

It is settled law that discrimination can arise by applying different rules to comparable situations or by applying the same rules to different situations ( see Case (C-279/93) Finanzamt Koein- Altstadt v Schumacker [1995] ECR I-225). Where, as in the present case, a redundancy lump sum is calculable by reference solely to past service the only material difference between individuals can be their length of service. Hence, for the purpose of calculating a redundancy lump sum, the Complainants were in a comparable situation to that of a permanent employee having the same continuous service. Yet, the Complainants were treated differently by the application of a different formula for calculating the lump sum payable to them than was used in calculating the lump sum payable to comparable permanent employees. That amounted to less favourable treatment contrary to S.6(1) of the Act.

#### Objective Grounds

The Respondent cannot avail of the defence available under Section 6(2) in respect of the particular formula for calculating the severance gratuity set out in the first part of Option A, in the offer made to permanent employees. The amount receivable by either fixed-term or permanent employees was in no sense whatsoever linked to or determinable by reference to tenure or potential service. Hence it could not be said that it was directed at compensating staff for their loss of tenure or potential



service, even if that was to be regarded as a legitimate aim and otherwise conforming to the statutory or jurisprudential test for objective justification.

In so far as the Complainants are contending for an entitlement to Option B - Voluntary early retirement - the situation is different. This option allows for added years up to a maximum of 7 years or potential service up to compulsory retirement age. On the dictum of Smyth J in *Sunday Newspapers v Kinsella and Bradley*, the Court must equate the impending expiry of the Complainants' fixed-term contracts with compulsory retirement in the case of a permanent employee. Hence, while the Complainants would be entitled to elect for this option they would not be entitled to an award of added years by reason of the proviso contained at paragraph (a) of Option B

In light of its finding the Court must consider if it is appropriate to make an award of compensation pursuant to S 14(1)(d) of the Act. The Court is satisfied that the Complainant suffered inconvenience and expense in pursuing this complaint and the value of the severance gratuity to which they are entitled has been eroded by the passage of time. Moreover, the Court is satisfied that it should make an award of monetary compensation to mark the fact that the Complainants have been denied their right to equal treatment. The Court measures the amount which is just and equitable in all the circumstances at €2,500 each.

#### Determination

The Court determines that the complaints herein are well-founded.

Pursuant to the powers conferred on it by Section 14 of the Act the Court directs that the Respondent offer the Complainant the option of a severance gratuity calculated on the basis of six weeks' pay per year of service, inclusive of their statutory entitlement or an immediate pension and lump sum based on actual pensionable service (plus purchased notional service if applicable) but without an entitlement to added years.

The Court further directs that the Respondent pay to the Complainants compensation in the amount of €2,500 each.

The Decision of the Rights Commissioner is varied in accordance with the terms of this Determination.

Signed on behalf of the Labour Court

Kevin Duffy

10th December, 2008  
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Chairman

#### NOTE

Enquiries concerning this Determination should be addressed to Ciaran O'Neill, Court Secretary.