

Contracts of indefinite duration



Madeleine Delaney, Beauchamps Solicitors, looks at the meaning of "associated employers" when NCHD is claiming an entitlement of indefinite duration

Generally, a fixed-term employment contract ends on an agreed date. However, under the Protection of Employees (Fixed-Term Work) Act 2003 ('the Act') where a fixed-term employee completes or has completed his third year of continuous employment with his employer, his fixed-term contract may be renewed on only one more occasion for a fixed term of no longer than one year.

If any term of a contract operates to contravene this provision, the contract will be deemed to be a contract of indefinite duration. Claimants asserting an entitlement to a contract of indefinite duration therefore must have four years' continuous employment with the same employer or what is termed an 'associated employer'.

Many non-consultant hospital doctors work under fixed-term contracts and move from



hospital to hospital either within a Health Service Executive (HSE) region or across HSE regions (previously Health Board areas).

The HSE, in defending claims of an entitlement to a contract of indefinite duration under the Act, has sought to rely on the fact that the doctor or employee in question has worked for hospitals in different Health Board or HSE areas and therefore does not have the requisite continuous employment.

In response, claimants have asserted that the Health Boards were 'associated employers' within the meaning of the Act. Therefore, all of the periods of service, regardless of which Health Board area it was in, could be counted for the purpose of continuous service.

Associated employers

Section 2(2) of the Act provides that employers are deemed to be associated if:

- One is a body corporate

of which the other (whether directly or indirectly) has control; or

- If both are bodies corporate of which a third person (whether directly or indirectly) has control.

Recent case

In the recent case of Ahmed Abdel-Haq v Health Service Executive South, the Labour Court has held that the former Health Boards are associated employers within the meaning of Section 2(2)(b) of the Act.

The court focused on the question of control which it considered to mean the power to direct or command an activity. The court examined the provisions of the Health Act 1970 ('the Health Act'), which prescribed the powers, duties and functions of the Health Boards to ascertain if there was sufficient control by the State over the Health Boards to satisfy the requirement of Section 2(2)(b) above.

The court found that while the Health Boards were functionally independent, that independence was circumscribed in a number of significant respects by the Health Act.

These were primarily the fact that funding was from the State and the Health Boards were accountable to the State for expenditure of funding in relation to staffing, the appointment of staff and their terms and conditions were to be in accordance with directions of the Minister for Health and Children; the provision and maintenance of hospital services, a core function of the Health Boards, was subject to the direction and/or consent of the Minister; and the Minister had the power to regulate the provision of services, even to the extent of directing any Health Board on what statutory service it was to provide and to whom.

The HSE sought to rely on the High Court decision in *Brides v Minister for Agriculture, Food and Forestry* where it was held that the Department of Agriculture and Teagasc were not associated employers ([1998] ELR 125).

In coming to this conclusion the court noted that the

Department could not tell Teagasc how to do its work, or even what work to do.

Teagasc's functions are provided for by statute, and under that statute it has all the powers necessary or expedient for the purposes of its functions, while it is subject to supervision by the Department, it does not have control over how Teagasc does its business.

The Labour Court in *Ahmed Abdel-Haq* was satisfied that it was clear from the Health Act that the Oireachtas had reserved to the State the power or authority to supervise and direct Health Boards in the exercise of their statutory remit.

The court further concluded that this power of direction existed to a sufficient degree so as to amount to control within the ordinary meaning of that word.

Accordingly, the former Health Boards were found to be 'associated employers' for the purpose of Section 2(2) of the Act.

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