



# Employment Law Update

June 2009

## Fixed term contracts in a downturn

In today's economic climate employers face many difficult challenges including reducing payroll costs through pay cuts, recruitment freezes and implementing redundancies. However, even in these difficult times some employers may need to hire new staff on a temporary basis based on new work. The use of fixed term contracts can provide flexibility to employers in managing resourcing needs by aligning requirements for staff with particular projects or for set periods of time. Therefore where payroll costs have to be aggressively managed, fixed term contracts can be an efficient way to manage the employment process.

However, the use of fixed term contracts comes with a health warning and it is essential that they are both drafted correctly and monitored throughout their term. For example, in a recent case a fixed term employee was awarded €15,000 in compensation under the Unfair Dismissals Acts 1977-2007 despite the fact that the company had lawfully excluded the Unfair Dismissals Acts on the termination of the contract on the expiry of the fixed term (*Nwosu v Banta Global Turnkey UD810/08*). This was because the Employment Appeals Tribunal held, on the facts of this case, that the reason for terminating the contract was not due to the expiry of the fixed term.

These are some points to note about fixed term contracts:

1. The Unfair Dismissals Acts allow for the exclusion of dismissals resulting from the termination of a fixed term contract at its expiry. In order for this exclusion to apply the following conditions must exist: (a) the contract must be in writing; (b) the contract must specifically exclude the legislation; and (c) the contract must be signed by both parties.
2. Under the Protection of Employees (Fixed-Term Work) Act 2003 (the Act) a fixed term employee cannot be treated in a less favourable manner in respect of his conditions of employment (remuneration and related matters) than a comparable permanent employee (except in certain circumstances). For example, fixed term employees can be treated less favourably where this can be justified on objective grounds, that is, where the treatment is based on considerations other than the status of the fixed term employee and this less favourable treatment is for the purpose of achieving a legitimate objective of the employer and such treatment is necessary for that purpose.
3. The Act provides that where, on or after the 14 July 2003, 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 employment contract will be deemed to be a contract of indefinite duration (a permanent contract). This applies unless the employer has objective grounds for renewing the contract again on a fixed term basis.
4. If an employee is dismissed, he may, under certain conditions, bring a claim for unfair dismissal against his employer if he has one year's service. When an employee is dismissed at the end of a fixed term contract the unfair dismissals legislation applies as normal unless the employer has availed of the provision to exclude the operation of the legislation.
5. The unfair dismissals legislation contains a provision aimed at ensuring that successive temporary contracts are not used in order to avoid that legislation. Where a fixed term or specified purpose contract expires and the individual is re-employed within three months, the individual is deemed to have continuous service.



## Right to legal representation at an internal disciplinary hearing

For some time now, the question of legal representation at internal disciplinary hearings has troubled employers and lawyers alike. In *Stoskus v Goode Concrete Limited*, the High Court noted that the Code of Practice for Grievance and Disciplinary Procedures does not specify that the right to be represented at an internal disciplinary hearing includes a right to be represented by a lawyer ([2007] IEHC 432). In this case the employee had signed a contract which stated "At all stages the employee will have the right to be accompanied during any disciplinary meetings by a fellow employee but not any other person or body unconnected with the company." In addition the company adhered to the Code of Practice. The High Court held that the employee was not entitled to legal representation at the disciplinary hearing and the application for an injunction was refused.

Another recent judgment has given some further clarity to this area. In *Alan Burns & John Hartigan v Governor of Castlerea Prison and the Minister of Justice, Equality & Law Reform* the Supreme Court held that the prison officers concerned were not entitled to legal representation as the issues involved in the disciplinary hearing were factual issues and could "easily be defended without a lawyer. The issues were factual issues connected with the day to day running of the prison. It is difficult to see why a lawyer would be required" ([2009] IESC 3). The court went on to hold that even if a code of practice excluded the right to legal representation that it may be required in the interests of a fair hearing and in accordance with the Constitution – these situations the court described as "exceptional cases". The court outlined a set of criteria to be used in order to decide whether legal representation may be permitted, as follows:

1. The seriousness of the charge and of the potential penalty.
2. Whether any points of law are likely to arise.
3. The capacity of a particular employee to present his own case.
4. Procedural difficulties.
5. The need for reasonable speed in making the adjudication.
6. The need for fairness between the parties.

All employers should have disciplinary procedures in place and even though the above cases have held that there is no automatic right to legal representation, employers would be wise to include the right to be represented in their disciplinary procedure by a colleague or a trade union representative only and not by any third party.

## Update on the Working Time Directive

Under the EC Working Time Directive (93/104/EC) as consolidated in Directive 2003/88/EC, (the Directive) workers in the EU are generally subject to a maximum working week of 48 hours. The main provisions of the Directive are to limit maximum hours of continuous working, daily working and weekly working, and establish minimum entitlements to rest periods and paid annual leave for most workers in the EU. The Organisation of Working Time Act 1997 implements this Directive in Ireland.

The Directive applies to most sectors with the exception of the activities of doctors in training and a small number of other categories of workers. Although a 48 hour average working week is due to be introduced from 1 August 2009 for doctors in training.

On 15 September 2008 the Council of the EU adopted a common position to amend the existing Directive. The proposal changes the provisions regarding the opt-out, 'on call time', the reference periods for calculating the maximum working week and the time limits for granting compensatory rest.

Negotiations between the European Parliament and the European Council of Ministers to revise the Directive failed in April 2009. This means that the current Directive, including the 'opt out' (which permits certain member states such as the UK to allow employees to agree with their employers that they will work longer than 48 hours per week) continue to remain in force. Several member states, including the UK, were determined to retain the opt out, whereas the European Parliament wanted to make the opt out 'exceptional and temporary'. The Directive therefore remains in force in its current form.



## Pensions Insolvency Payment Scheme

The Social Welfare and Pensions Act 2009 which came into force on 29 April 2009 establishes a new Pensions Insolvency Payment Scheme (PIPS) to help employees and former employees of companies where the employer becomes insolvent and the defined benefit pension fund is in deficit. Under PIPS, the scheme trustees can pay a sum to the Exchequer to recover the cost of paying the pensions of retired members instead of buying annuities. Savings will then be put towards the pensions of those yet to retire, thereby reducing, to some extent, pension shortfalls. PIPS is intended to be cost neutral.

The way that funds are disbursed if a defined benefit pension scheme is wound up with a deficit has also been changed. Pensioners will continue to get first priority for their pensions but any future pension increases will not be granted until workers who have also contributed to the scheme and have yet to retire receive their share of the benefits.

Previously only existing employees can make sacrifices to secure the future of their pension scheme. The Pension Act 1990 has now been amended so that they will not be the only group to suffer if the fund is being restructured. Current and former employees and pension increases can now be included in any restructuring. For those already in receipt of pensions, the existing level of pension will not be affected. This will share the burden amongst all members, and prevent the current workers being the only group to suffer difficult loss. The Act also makes it easier to prosecute employers who do not pass on the pension contributions made by employees to the pension scheme and any employer convicted of this offence will also face much harsher penalties.

## UK Corporate Manslaughter and Corporate Homicide Act 2007

The first prosecution under the UK Corporate Manslaughter and Corporate Homicide Act 2007 has been brought. Under the Act, an organisation (which includes most employers) is guilty of an offence if the way in which its activities are managed or organised (by its senior management) causes a person's death. The death must be the result of a gross breach of a relevant duty of care owed by the organisation to the deceased.

A UK firm has been charged with the criminal offence of corporate manslaughter, following the death of an employee on a building site. This new offence does not apply to individuals (including company directors and managers) however, in this case, the firm's director has also been charged with the common law offence of gross negligence manslaughter. If convicted, the firm faces an unlimited fine and the director could face life imprisonment. They could also both be prosecuted under UK health and safety legislation.

There is no equivalent legislation currently in Ireland but under the Safety, Health and Welfare at Work Act 2005 (2005 Act) all Irish employers have a number of duties to ensure the safety, health and welfare of its employees and can face stiff penalties and/or imprisonment for any breach. In addition, directors may be prosecuted under the 2005 Act for failing to manage safety and health in their undertaking. Section 80 of the 2005 Act provides that a director, manager or other similar officer of the undertaking may be found guilty of the same offence as the undertaking if the acts that constituted the offence have been authorised by, or caused by the neglect of that person. In such instances, for example, ignoring a safety and health issue could constitute neglect.

Section 80(2) also states that if a person is prosecuted under that section then it is presumed that the breach or neglect was authorised by them. It is for the director or manager to show that they did all that could be reasonably expected of them under the 2005 Act and that they were not negligent.

### Employment and Benefits

Dermot Casserly (Head of Employment and Benefits)  
Mark Heslin  
Dairine Walsh

[d.casserly@beauchamps.ie](mailto:d.casserly@beauchamps.ie)  
[m.heslin@beauchamps.ie](mailto:m.heslin@beauchamps.ie)  
[d.walsh@beauchamps.ie](mailto:d.walsh@beauchamps.ie)

Claire Callanan  
Madeleine Delaney

[c.callanan@beauchamps.ie](mailto:c.callanan@beauchamps.ie)  
[m.delaney@beauchamps.ie](mailto:m.delaney@beauchamps.ie)

If you do not wish to receive the Employment Law Update in the future, please email [employment@beauchamps.ie](mailto:employment@beauchamps.ie) to unsubscribe.

### Beauchamps Solicitors

Riverside Two, Sir John Rogerson's Quay, Dublin 2  
Tel +353 (1) 418 0600 Fax +353 (1) 418 0699  
email [info@beauchamps.ie](mailto:info@beauchamps.ie) web [www.beauchamps.ie](http://www.beauchamps.ie)

This ezine is for general information purposes only and does not comprise legal advice on any particular matter. You should not rely on any of the material in this ezine without seeking appropriate legal or other professional advice. While every care has been taken in preparation of this ezine, we are not liable for any inaccuracies, errors, omissions or misleading information contained in it.