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legal opinion

Ruling could revive use of fixed-term contracts

Although some pitfalls remain, fixed-term contracts could be back in favour

There was a time when fixed-term contracts were the answer to employers' prayers. However, their attractiveness waned after many employers and legal advisers took the view that the implementation of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 was their death-knell.

Fixed-term employees already had unfair dismissal rights and the right to redundancy payments. The 2002 regulations introduced the right for these employees to be treated no less favourably than their permanent colleagues, so it seemed that there would be no advantage for employers at all in using a fixed-term contractor.

Ongoing employment

Notably, many people were concerned that to allow a fixed-term contract to expire without offering ongoing employment would of itself constitute less favourable treatment. This is because one of the key elements, set out in regulation 3, is couched in identical terms to anti-discrimination legislation.

In particular, a fixed-term employee has the right not to be treated less favourably by their employer than a comparable permanent employee – in terms of their contract or by being subjected to any other detriment by any act, or deliberate failure to act, by the employer – simply because the person is a fixed-term employee.

However, the employer has a defence if it can show that the different treatment was objectively justified.

Despite the possibility of being able to justify their actions, employers felt they faced considerable risks of litigation when they used fixed-term contracts so began to cool off the whole idea.

But a recent case suggests that fixed-term contracts may come back into vogue for short-term placements.

The question of whether the expiration of a fixed-term contract was protected by the regulations came before the Court of Appeal in the recent case of *Department for Works and Pensions v Atasha Webley* [2004] EWCA CIV 1745.

In this case, the employee's



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contract terminated at the end of the fixed-term period before she had accrued 12 months' continuous service, in line with Department for Work and Pensions' (DWP) policy of keeping temporary employees for a maximum of 51 weeks. Webley argued that the termination and non-renewal of her contract was a detriment constituting less favourable treatment on the basis of her status as a fixed-term employee.

The tribunal threw out the claim at preliminary issue stage on the basis that the fixed term was the very thing which separated her from permanent employment and that its expiry could not give rise to a claim.

Perhaps not surprisingly, the Employment Appeal Tribunal (EAT) rejected this approach. However, the Court of Appeal reversed the EAT decision. The judge said the act of entering into a fixed-term contract was not, in itself, capable of amounting to less favourable treatment and nor, therefore, was the expiry of that fixed term.

Decision open to argument

Before employers get too excited, this decision does not pave the way for fixed-term contracts in any situation.

The Court of Appeal, by focusing on whether the expiry of the fixed term 'of itself' could amount to

less favourable treatment under regulation 3, did not appear to rule out the possibility that an underlying discriminatory motivation for terminating the contract, or not renewing it, would be capable of breaching the regulations. Importantly, the DWP was able to justify its policy of dismissing temporary employees who had accrued 51 weeks' continuous employment because the Civil Service Code required appointments of more than 12 months to be made on merit and on the basis of fair and open competition.

Long-term fixed contracts

Where employers decide that they will not renew fixed-term contracts to avoid employees accruing the four years' employment needed to qualify for permanent status, the termination is likely to constitute a breach of the regulations.

Fixed-term employees still have the right to claim unfair dismissal if they have been employed for a year or longer. Fixed-term contracts are often used to cover specific situations, such as maternity leave, where the cover can be needed for 12 months. As a result, in longer-term situations, there is still scope for litigation.

Although a dismissal on the basis of the termination of a fixed-term contract because it expires is potentially fair by virtue of being for 'some other substantial reason' (as envisaged by the Employment Rights Act), there is still an obligation on the employer to implement a fair dismissal procedure, which would include an obligation to look for alternative work.

employment law timetable 2005

1 October

Laws to comply with Equal Treatment Directive introduced

Their definition of sexual harassment incorporates both sexual harassment and sex-based harassment.

1 October

Employment Relations Act 2004

Provisions changing the requirements on unions to provide notices to employers in advance of industrial action ballots come into force.

5 December

Civil partnership laws come into force

Gay and lesbian couples who register their relationships will have similar rights to married couples.

Data is based on the latest information from official sources, but may be subject to change

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