

in brief



Nick Abbott
Partner
t: 0121 456 8266
e: nick.abbott@mills-reeve.com



Nicola Brown
Partner
t: 01223 222282
e: nicola.brown@mills-reeve.com



Charles Pigott
Professional Support Lawyer
t: 01223 222411
e: charles.pigott@mills-reeve.com

Higher education June 2008

Fixed-term contracts for researchers in Higher Education: Do they have a future?

A ticking time bomb

When the Fixed-term Employees Regulations came into force in October 2002 they laid down the principle of equality of treatment between fixed-term and permanent employees (subject to a justification defence) from day one. But they also established the principle that employees on successive fixed-term contracts would be able apply for permanent status after four years, a request an employer could only turn down if there were objective grounds for retaining them as fixed-term employees.

Because the Regulations state that continuous employment prior to 10 July 2002 is to be disregarded for these purposes, it was not until July 2006 that the latter provisions were fully engaged. And it was almost another two years before the first employment tribunal decision to grapple with these provisions emerged, in May 2008.

We will deal with this case, involving Dr Ball and the University of Aberdeen, in more detail a little later. As most readers of this note will know, the result did not go the University's way. But to understand the full implications of the decision, it is necessary to start with a little background information.

Background

Fixed-term contracts and unfair dismissal

The expiry of a fixed-term contract is treated as a dismissal for employment protection purposes, and hence employers have to justify failure to renew a fixed-term contract in much the same way as other kinds of dismissal in order to defend unfair dismissal proceedings. But until 2002 fixed-term contracts had one major advantage: if they were for a term of at least two years, it was possible to take advantage of a limited exemption from the unfair dismissal and statutory redundancy regime.

This exemption allowed the parties to a fixed-term employment contract of at least two years' duration to agree that the employee would have no claim for redundancy or unfair dismissal if the fixed-term contract was allowed to expire without being renewed. This exemption was repealed by the Fixed-term Employees Regulations, removing at one stroke the best reason for using fixed-term contracts from an employer's perspective.

JNCHES guidance on fixed-term contacts

In June 2002, in the wake of the publication of the Regulations, the Joint Negotiating Committee for Higher Education Staff (JNCHES) issued guidance on fixed-term and casual staff. It suggested that the Regulations would require institutions to "reduce significantly the current and future use of such contracts".

The guidance singled out the position of contract research staff, of which a high proportion were employed on fixed-term contracts, as requiring particular attention, stating that the Regulations would require "a major overhaul of the way they are employed in the future". It said there would need to be "transparent, necessary and objective" reasons for placing a post on a fixed-term basis and for renewing such contracts.

The guidance gives a number of examples of situations where the continued use of fixed-term contracts could still be justified, including "where there is no reasonably foreseeable prospect of short-term funding being renewed nor other external or internal funding being available or becoming available".

The guidance concludes with a paragraph addressing how to deal with the expiry of a fixed-term contract. It includes recommendations that alternative options should be explored in good time, and that where the reason for not renewing the contract is redundancy, consultation should take place with recognised unions.

The Aberdeen case

The facts

Dr Ball had been employed as a research fellow at the University of Aberdeen's Zoology department on a succession of fixed-term contracts since April 1999. The last contract in the series ran from 1 April 2005 to 31 May 2008.

In July 2006 Dr Ball invoked the Regulations and asked for confirmation in accordance with regulation 9 that his contract was no longer fixed-term. The University declined to give this confirmation, stating that it had no guarantee of further funding for his appointment beyond 31 May 2008.

Within the University 92% of research staff were on fixed-term contracts. Within the School of Biological Science, where Dr Ball has been employed, the proportion rose to 97.5%. In theory fixed-term employees were entitled to the benefit of the University's redundancy policy, but in practice the University did not apply it to fixed-term staff and the unions did not insist that it was followed.

The decision

In order to decide whether Dr Ball should be awarded a permanent contract the employment tribunal had to consider whether the decision to award Dr Ball's most recent fixed-term contract was justified on objective grounds at the date the date it was entered into, 1 April 2005.

The employment tribunal concluded that the University "had moved automatically" from the fact of the funding for Dr Ball's project being short term to offering him a fixed-term contract. In accordance with the University's policy on the use of fixed-term contracts, which broadly reflected the JNCHES Guidance, it should have considered whether there was any possibility of the funding being renewed, or alternative sources of funding becoming available, before granting him another fixed-term contract. There was no evidence that this had been done.

This was not necessarily fatal to the University's defence, because the test for justification in this context is an objective one. In other words the University's motives were not relevant; what mattered was how the advantages to the University of using a fixed-term contract weighed against the disadvantages to Dr Ball. However, the absence of any evidence that they had even attempted to follow the JNCHES guidance left it very little room for manoeuvre.

The employment tribunal ruled that it could attach little weight to what appeared to be the main advantage to the University of granting Dr Ball his latest fixed-term contract – avoiding the application of its cumbersome redundancy policy in the event that it was not renewed – because that of itself amounted to a breach of the Regulations. On the other hand there were clear disadvantages to Dr Ball. As well as the security associated with a permanent contract, his career progression would be enhanced if he were able to submit research proposals in his own name, which was not possible until he attained the status of a permanent employee.

The tribunal therefore granted Dr Ball's application, and made a declaration that the term in his current contract which stated it was for a fixed term should be disregarded, thus awarding him the status of a permanent employee.

Conclusions

Overview

It may be that Aberdeen University underestimated the difficulty of justifying the decision to grant fixed-term contracts to the vast majority of its researchers. It is fair to add that an appeal to the Employment Appeal Tribunal remains a possibility, and that, as a first instance decision it will not be binding on other tribunals.

However, this case may well mark a significant turning point in the sector for the reasons which are explored below.

Best practice

It emerged in the course of evidence that the "vast bulk" of research institutions in the UK as a general rule still appoint researchers doing short-term funded work on fixed-term contracts. However, four institutions, including Bristol and UCL adopt a different system. They use fixed-term contracts in more limited circumstances – for example for maternity cover or for one-off appointments of short-term duration of less than a year – and appoint the majority of their research staff on open-ended contracts with grant or project end dates. This serves to flag up the possibility of redundancy when the

grant comes to an end, and makes sure the institution's redundancy procedure is properly engaged before the grant or project end date.

The evidence of best practice elsewhere played a crucial part in undermining Aberdeen's justification defence. As we have seen, Aberdeen's fixed-term employees were not formally excluded from its redundancy scheme. If they had been excluded, it might have been possible to re-position its justification defence and focus the argument instead on objective justification for excluding fixed-term employees from the enhanced redundancy terms.

For many other institutions the fact that permanent staff have more favourable redundancy terms than fixed-term staff is a major barrier to implementing best practice. As we see below, it may be that such arrangements are themselves unlawful, but to the best of our knowledge the point has not yet been tested in the HE sector, and there may be a temptation to let sleeping dogs lie.

Other case law

One of the arguments deployed by Aberdeen's legal team was that the objective justification defence in the Fixed-term Employees Regulations was less stringent than in the main body of discrimination law. That argument failed to convince the tribunal, which applied the same stringent test – of weighing the advantages to the employer against the disadvantages to the employee – as has been recently applied in cases involving indirect sex or race discrimination. One of the reasons for Dr Ball's success was that he was able to persuade the tribunal that there were significant disadvantages to remaining a fixed-term employee, despite the fact that, on paper at least, he was at no more risk of being made redundant than if he had been given permanent status.

The line taken by the tribunal on the justification defence is not a one-off, but reflects recent case law on fixed-term employees, and decisions made under the closely related Part-time Workers Regulations.

The most notable example is the decision of the House of Lords in 2006 in the part-time fire-fighters case, which emphasised the stringency of the objective justification defence, and which has recently been applied by the employment tribunal to resolve this long-running litigation in the employees' favour. A similar line on justification was taken by another employment tribunal dealing with selection of part-time lecturers for redundancy by Manchester City Council.

There have also been two relatively recent decisions under the involving fixed-term employees which are relevant in this context:

- A 2005 decision of the London South employment tribunal which ruled that four civil servants working at the what was then the Department for Education and Skills on fixed-term contracts should not be denied access to the enhanced redundancy scheme available to permanent employees.
- A 2007 decision of the Northern Ireland industrial tribunal which ruled that Dr Biggart, a sociology lecturer at the University of Ulster, had been unfairly dismissed when he had not been considered for alternative employment when his fixed-term contract was allowed to expire without being renewed.

Finally, recent decisions of the European Court of Justice (involving references from Greece, Spain and Ireland) have established the wide scope of the Fixed-term Framework Directive (to which the Fixed-term Employees Regulations give effect) and served to emphasise that the position of fixed-term employees merit careful scrutiny.

Publicity

Although the Aberdeen case does not create new law, it has already attracted considerable publicity. This may increase the chances of the unions backing similar cases against other institutions.

Workforce agreements

For the sake of completeness, it is worth mentioning that it is possible to adjust the provisions of the regulation 8 (which provide for the conversion of a series of fixed-term contracts into a permanent contract after four years) by using a collective or workforce agreement. Under this route it is possible to modify the maximum length of service or number of fixed-term contracts which act as a trigger entitling the employee to apply for permanent status, and to adopt a tailor-made objective justification defence.

Aberdeen University was able to establish that the JNCHES Agreement was a collective agreement, but failed to convince the tribunal that it was intended to modify regulation 8, particularly as it was expressed to be non-binding guidance. However, the way remains open for institutions to reach agreement about exactly how these anti-avoidance measures are to operate. Since institutions are likely to come under increasing pressure to abandon the routine use of successive fixed-term contracts for researchers, this may be a route worth exploring.