

Group Briefing

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Labour Court re-affirms that different treatment does not necessarily mean less favourable treatment

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

The Labour Court, in *Kerry County Council v Cora Carrigg*, has overturned a WRC award made against Kerry County Council for an alleged breach of the Protection of Employees (Fixed-Term) Work Act, 2003 (the “2003 Act”), finding that the employee in question had not suffered any financial or other less favourable treatment as a result of his fixed-term employment.

BACKGROUND

Ms Carrigg was employed by Kerry County Council as a sports co-ordinator on a series of fixed-term contracts from 2006 to 2010. These contracts provided for annual increments “*subject to satisfactory attendance, conduct and performance*”. From 2010, Ms Carrigg was employed under a fixed purpose contract which provided that the role “*will continue indefinitely for as long as the funding partner exists and is supported and funded as appropriate.*” The 2010 contract did not provide for annual increments. Ms Carrigg, a fixed-term employee, claimed that she had been treated less favourably than a comparable permanent employee in respect to her conditions of employment. The WRC had awarded Ms Carrigg €48,153.86, in addition to placing her on the appropriate grade she would have been on if she had received annual incremental reviews of her salary since she commenced employment. Kerry

County Council appealed the decision to the Labour Court.

The 2003 Act provides that an employee who has been given two or more fixed-term contracts, where the aggregate duration of the contracts is greater than four years, is entitled to a contract of indefinite duration, unless there are objective grounds justifying the renewal. In the absence of objective grounds, the contract is deemed to be a contract of indefinite duration. Ms Carrigg’s contractual status was not disputed in this case as Kerry County Council accepted that she was entitled to a contract of indefinite duration. The Labour Court found that, by operation of law, Ms Carrigg’s contract transmuted to one of indefinite duration in September 2010. The Court then had to determine whether Ms Carrigg had experienced less favorable treatment in comparison to a comparable permanent employee of Kerry County Council.

IDENTIFICATION OF COMPARATORS

In identifying a comparable employee, the 2003 Act provides that:

- » the comparator must be employed by the same or associated employer, an employer deemed to be the same employer by reason of a collective agreement or, if none of those tests apply, work in the same industry or sector of employment; and
- » the comparator must do the same work, work of a similar nature or work equal in value to the claimant.

In a situation where no comparator exists, a claimant can maintain a claim based on a comparator outside the same employer. Ms Carrigg argued that a named sports partnership coordinator with another local authority was an appropriate permanent comparator and that the local authority was an ‘*associated employer*’ of Kerry County Council. She submitted that the failure of Kerry County Council to afford her annual increments constituted less favorable treatment when compared to her chosen comparator who did receive annual increments.

Kerry County Council instead submitted that an administrative officer at Grade VII of the salary scale was the appropriate permanent comparator for the purpose of the 2003 Act. The Council accepted that the comparator named by Ms Carrigg did perform the same work as her. However, it argued that there are 27 other sports partnership coordinators who do the same work and that any comparison would need to take into account the terms of the entire group, whose terms and conditions were not homogenous. Kerry County Council further submitted that another local authority could not be regarded as an ‘*associated employer*’ for the purpose of the 2003 Act as local authorities are autonomous, established by statute and controlled by their elected members.

It argued that it was only in a situation where no comparable employee existed, that a claimant could refer to a comparator outside his or her employer. The Labour Court was satisfied that Kerry County Council identified an internal comparator and, as such, did not find it necessary to consider the comparator put forward by Ms Carrigg.

THE DIFFERENCE BETWEEN ‘DIFFERENT’ AND ‘LESS FAVOURABLE’ TREATMENT

The comparable permanent employees were recruited by Kerry County Council at the first point of the Grade VII salary scale and progressed on the basis of annual increment in accordance with the relevant circulars. Ms Carrigg argued that the failure of Kerry County Council to afford her annual increments throughout her employment constituted less favourable treatment in contravention of the 2003 Act. Kerry County Council submitted that Ms Carrigg had originally progressed on the incremental scale at an accelerated rate shortly after her recruitment and received superior remuneration to any comparable permanent employee. The Labour Court accepted that Ms Carrigg was treated differently than a comparable permanent employee. However, the question for the Court was whether the different treatment resulted in less favourable treatment and, if so, whether it could be justified under the 2003 Act. In this regard, section 7(2) of the 2003 Act provides:

Where... a fixed-term employee is treated in a less favourable manner... than a comparable permanent employee, the treatment in question shall be regarded as justified on objective grounds, if the terms of the fixed-term employee’s contract of employment, taken as a whole are at least as favourable as the terms of the comparable permanent employee’s contract of employment. (emphasis added)

The Court was satisfied Ms Carrigg was not at any financial or other disadvantage and that the different treatment did not result in less favourable treatment “*when those terms and conditions are considered as a whole*”. Consequently, the Court made no award of compensation. The Court held that Ms Carrigg should be placed on the same incremental point of the Grade VII pay scale as she would have been had she been recruited as a permanent employee in 2006 and subsequently received the relevant increments.

ADVICE FOR EMPLOYERS

It is vital that employers have procedures in place in respect of the administration of fixed-term and specified purpose contracts in order to avoid the risk of litigation. As highlighted by this case, while the employer bears the burden of objectively justifying a difference in the treatment of fixed-term workers, differences in treatment can be justified.

When employing people under fixed-term contracts, employers should:

- » Ensure the contract clearly details the circumstances that will bring the contract to an end (i.e. the end of a specified term or the completion of a specific purpose). The contract should also expressly provide that the Unfair Dismissals Acts 1977 to 2015 will not apply to a dismissal consisting only of the expiry of the fixed-term or specified purpose. The contract must also be in writing and be signed by both parties.
- » Ensure that fixed-term workers are not treated less favourably than permanent comparators by reason of their fixed-term status.
- » Exercise caution when renewing a fixed-term contract and ensure that the objective grounds relied on are documented.

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