Academic Fraud, Bribery and Corruption: 
HE institutions under siege

Also in this issue

• The Criminal Justice (Corruption) Bill 2012
• Discrimination against Fixed-Term Workers: recent cases
• New Legislation: The Education and Training Boards Bill and the SOLAS Bill
Welcome

Welcome to our Autumn Issue of Education Law Update, a publication discussing legal issues relevant to further and higher education providers.

The decision in August by the UK Border Agency to revoke the right of London Metropolitan University to enrol foreign students, and also their more widespread revocation of recruiting rights last year has highlighted the threat of application fraud to the reputation of institutions. Last month, Harvard was hit with a widespread fraud on a take-home exam, and the issue was discussed in Dublin at a high profile conference. Our first article breaks down the different categories of academic fraud, bribery and corruption and proposes some solutions.

Our second article continues this issue’s theme with an in-depth review of the draft Scheme for the Criminal Justice (Corruption) Bill 2012, and explains the key new offences, and the actions HE institutions will need to take now to ensure they are protected.

Recent employment cases have questioned whether it will be enough to run successive yearly contracts for researchers with the caveat that the post is subject to the continuing availability of funds or economic constraints. The Courts have developed a narrow interpretation of ‘objective grounds’ for providing different terms and conditions to employees on fixed term contracts, when compared with their permanent comparators, under the Protection of Employees (Fixed-Term Work) Act. In our final article we have examined four cases from the last year.

With the Dáil back in session there are 31 new Bills expected to be published from now to the beginning of the next Session. They include the Education and Training Boards Bill and the Further Education and Training Authority (SOLAS) Bill.

I hope you enjoy this edition and look forward to talking to you soon.

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Academic fraud, bribery and Corruption: Part I: counting the cost

Few higher education institutions are accurately estimating the full impact that fraud has on them and are therefore failing to invest in and respond to protecting themselves against fraud.

There have been several high profile incidences of academic fraud in the press recently. During September, the Huffington Post reported that the Harvard College Administrative Board was investigating similarities in answers from more than 100 students on an open-book ‘take home final exam’. During the European Association for International Education Annual Conference held in Dublin this month the topic was discussed by a panel which included an expert who estimated fraud in HE being a US$1.5 billion a year business.

The social impact of academic fraud, bribery and corruption is more difficult to calculate. In this article we attempt to define the different types of fraud, discuss their impact and solutions to detect and prevent fraud.

Types of corruption and fraud

In the European Journal of Law and Economics, Richard E. Quandt (“Some Models of Academic Corruption”, D11–D23, 2012) classified corrupt acts in academia as those committed by students, professors and other staff members and even parents of students.

Student fraud

He said that corrupt acts by students encompassed predominately plagiarism and cheating on examinations.

One University’s own site includes the following examples of student fraud: “Claiming to have submitted work which you have not submitted, copying or stealing the work of another student, past or present, impersonation in exams or tests, securing advance unauthorized access to exam questions, submitting a small part of an essay and claiming that the college has lost the bulk of it, buying essays or copying them from the internet, and smuggling notes into the exam room all count as cheating”.

With the use of the internet and access to information we have seen student plagiarism become more prevalent in recent years.

Institutions are countering the problem by using computer programs which search millions of website pages and previous student papers and compare the assignment. A report is produced which identifies the percentage of the assignment which is plagiarised, producing a score, which if above an acceptable
threshold is examined in person to discover the reasons for the similarities. This process is essential as it can make allowances for quotes, use of generally accepted formulae and graphs, proper names and other permissible repetitions.

Faculty fraud

Quandt found that corruption by faculty primarily consisted of plagiarism and research fraud.

From a global viewpoint we would add the possibility of academics making multiple grant applications to secure more funding, institutions falsifying student returns to increase government grants to research subsidiaries or falsifying the accounts to hide misappropriations of assets.

Administrator fraud

Finally Quandt said faculty and/or administrators were capable of financial fraud and could get involved in cases of bribery, where an offer of cash was often made by the parent of a student or prospective student.

On a global scale, it is the instances of fraud by prospective students that we have seen increase. This would include bribery to pass English language tests, forged degrees and transcripts, false letters of reference, forged passports, and full-scale identity fraud.

Public policy concerns

At Government level, the quality of higher education is key concern at a time when other countries are developing and improving their higher education offerings.

They understand it is necessary to protect the reputation of the home country over the long term. One example of this was the decision in August by the UK Border Agency to revoke the right of London Metropolitan University to enrol foreign students, and also the more widespread revocation of recruiting rights in the UK last year.

Conversely, as higher education becomes more international and commercial, the opportunities for fraud against and within the institutions of the home country increase. This is because effective regulation and control of foreign activities is more difficult, particularly where institutions operate in jurisdictions which have less mature regulatory regimes. Secondly there is limited international co-operation between governments and quality assurance agencies to check for fraud.

The cost of fraud

The penalties for detected student academic fraud can include the imposition of a fail grade, the withholding of a degree, expulsion from a course or dismissal from the institution. When fraud or corruption relates to faculty members of administrators, dismissal without notice is usually the chosen route. However these remedies do not provide financial restitution to the plagiarised academic for breach of copyright, or to the institution for lost student enrolments caused by a reputational issue or indeed misappropriated assets.

Few Irish higher education institutions are accurately estimating the full impact that fraud has on them and are therefore failing to invest in and respond to protecting themselves against fraud. Institutions should include fraud risk on their risk registers and discuss fraud or the risks or fraud both at governing body and academic council level.

Summary

Staff should be trained to understand how to detect and prevent fraud. Most institutions do have policies and controls for dealing with plagiarism, cheating on examinations and good academic behaviour. However risk management policies and strategy are only part of the picture. Counter fraud work – fraud risk identification and mitigation – is essential.

Eversheds Education Group are used to working with a wide range of stakeholders in the higher education sector and are familiar with fraud risk assessments, risk management training and programme implementation designed to prevent fraud from taking place. Where the worst and unforeseen happens, the Group can respond very quickly to secure evidence, manage reputational risk and advise on remedial action at HR level where required, and advise in relation to insurance, reporting to the Gardai, QQAI and obtaining legal redress in the courts.
In advance of the implementation of the Criminal Justice (Corruption) Bill 2012, HE institutions should review the adequacy of their codes of governance to prevent bribery and corruption.

Over the summer, the Government published heads of a new Criminal Justice (Corruption) Bill for public consultation and comment. The draft Scheme for the Bill provides a consolidated corruption statute to replace and reform the existing law.

When passed, the new Act will repeal the seven Acts comprising the Prevention of Corruption Acts 1889 to 2010. From a practical point of view this is a major improvement as the new Act will consolidate merely 125 years of legislation which, in the case of three Acts predate the formation of the Irish State. This will significantly assist Irish HE institutions, Presidents, members of their Governing Authorities, College Secretaries and others who have had to grapple with the regime since 2004.

Who will the new Act apply to?

The new Act will apply to the same persons as are covered under the current legislation. In addition, as is explained below, there will be new anti-corruption provisions that will apply to all Irish persons (including entities) not just public ones.

A public body

For the purpose of the existing regime, the Ethics in Public Office Acts, 1995 and 2001 (Eipoa) define a “public body” as including a body established under an enactment which would include for example, the Institutes of Technology, and further “any other body, organisation or group financed wholly or partly out of moneys provided by the Oireachtas” which in the opinion of the Minister for Justice ought to be included in the public interest.

This Ministerial power was exercised in 2004 when the Ethics in Public Office (Prescribed Public Bodies, Designated Directorships of Public Bodies and Designated Positions in Public Bodies) Regulations 2004 were passed and prescribed the Irish universities, IOTs, Colleges of Education and other institutes as public bodies. An extracted list of prescribed bodies, based on the current 2011 Regulations, is set out at column 1 of the table at Fig 1.

Members, directors, employees and agents

Within those HE institutions, the key offence provisions in the existing Corruption Acts apply to any:-

- person who is a director meaning any person who is a member of the relevant public body or a member on any board or other body that controls manages or administers it
- person who is an employee of the institution
- person who is an agent for the institution (and this would include any person who is “employed by or acting for” the institution).

The new Act may tinker with the definitions of “public body”, and a “director”, “employee” and “agent” but basically you can expect the same group of HE institutions and staff members will fall under the new Act.

Designated directors and designated employees and their connected persons

The Eipoa requires certain designated directors (at column 2 in Fig 1) and designated employees (at column 3 in Fig 1) of the HE institutions to make:-

- declarations of interest of themselves, spouses/civil partners and children (and children of spouses/civil partners) which could materially influence (in the sense of conferring a substantial benefit) their function,
- declarations of material interest of themselves or a ‘connected person’ in the function of his or her office (or another office of the institution).

In that regard, a ‘connected person’ means:-

- A relative of the individual, being a cohabiting spouse or civil partner, brother, sister, parent, child or spouse/civil partner or child of the person, or of the spouse/civil partner
- A trustee of a trust in which the individual or any of the individuals children or bodies corporate controlled by the individual are a beneficiary
- A partner of the individual
- A company controlled by the individual (either solely or together with a connected person)
- A person acting together with the individual to exercise control over a company (and any person acting on the directions of any of them to exercise control of the company).

These provisions will not be affected by the new Act.

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1 Section 2(1) of the Ethics in Public Office Act 1995.
3 Section 18 of the Ethics in Public Office Act 1995.
4 Sections 17(1)(a) and 18(2)(a) of the Ethics in Public Office Act 1995.
5 Sections 17(1)(b) and 18(2)(b) of the Ethics in Public Office Act 1995.
### Fig 1: Ethics in Public Office (Prescribed Public Bodies, Designated Directorships of Public Bodies and Designated Positions in Public Bodies) (Amendment) Regulations 2011

<table>
<thead>
<tr>
<th>Public Body</th>
<th>Designated Directorships</th>
<th>Designated Positions of Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colleges of Education: Frobel College of Education; Coláiste Mhuire Marino; Mary Immaculate College; St. Patrick’s College; St. Angela’s College Sligo; The Church of Ireland College of Education</td>
<td>All Colleges of Education: Members of Board of Governors/ Governing Body</td>
<td>All Colleges of Education: College President/Principal Coláiste Mhuire Marino: Chief Financial Officer Mary Immaculate College: Vice-Presidents St. Patrick’s College: Registrar Secretary/Bursar; Principal Officer; Principal Lecturer; Head of Department; Assistant Principal St. Angela’s College Sligo: Bursar Human Resources Manager The Church of Ireland College of Education: Senior Lecturer in Irish; Bursar/Registrar; House Services Manager</td>
</tr>
<tr>
<td>Dublin City University</td>
<td>Members of Governing Authority; President</td>
<td>President; Vice Presidents; Deputy President &amp; Registrar; Secretary; Finance Secretary; Director of Estates Office; Procurement Officer; Director of Human Resources; Librarian; IT Manager</td>
</tr>
<tr>
<td>Dublin Institute for Advanced Studies</td>
<td>Members of Council; Members of the School Board</td>
<td>Registrar Finance Officer</td>
</tr>
<tr>
<td>Dublin Institute of Technology</td>
<td>Governing Body Members</td>
<td>President; Directors; Secretary/Financial Controller; Finance Officer; Registrar; Computer Services Manager; Estates Manager; Academic and Student Affairs Manager; Head of Human Resources; External Service Manager; Librarian</td>
</tr>
<tr>
<td>Grangegorman Development Agency</td>
<td>Chairperson; Board Members</td>
<td>Chief Executive Officer; Principal Officers; Corporate Affairs Manager; Director of Affairs Manager; Director of Architecture and Planning; Senior Architects</td>
</tr>
<tr>
<td>Institutes of Technology: Athlone; Blanchardstown; Carlow; Cork; Dun Laoghaire Institute of Art, Design &amp; Technology; Dundalk; Galway-Mayo; Letterkenny; Limerick; Sligo; Tallaght; Tralee; Waterford</td>
<td>All Institutes of Technology: Governing Body Members</td>
<td>All Institutes of Technology: President; Directors; Secretary/Financial Controller; Finance Officer; Registrar Assistant; Registrar; Head of Development; Head of Research; Heads of Centre/School; Computer Services Manager; Estates Manager; Academic and Student Affairs Manager; Head of Human Resources; External Service Manager; Librarian</td>
</tr>
<tr>
<td>Mater Dei Institute of Education</td>
<td>Members of Board of Governors</td>
<td>President; Director</td>
</tr>
<tr>
<td>National College of Art &amp; Design</td>
<td>Members of the Governing Body</td>
<td>Director; Register; Heads of Faculty; Head of Research and Postgraduate Studies; Procurement Officer; Human Resources Manager; Finance Officer; Head of Research; Head of IT</td>
</tr>
<tr>
<td>National College of Ireland</td>
<td>Members of the Board</td>
<td>President; Company Secretary; IT Manager; Director of Human Resources</td>
</tr>
<tr>
<td>National University of Ireland</td>
<td>Members of the Senate of the National University of Ireland</td>
<td>Registrar</td>
</tr>
<tr>
<td>National University of Ireland, Galway</td>
<td>Members of Governing Authority; President</td>
<td>President; Registrar and Deputy President; Bursar; Secretary (Rúnaí); Vice-Presidents; Director of Physical Resources; Librarian; Executive Director of Operations; Director of Human Resources and Organisational Development; Director of Information Solutions and Services; Procurement and Contracts Manager</td>
</tr>
<tr>
<td>National University of Ireland, Maynooth</td>
<td>Members of Governing Authority; President</td>
<td>President; Deputy President; Vice Presidents; Registrar; Secretary; Bursar; Procurement Officer; Campus Planning &amp; Development Officer; Campus Services Officer; Director of Human Resources; Librarian; Director of Computer Centre</td>
</tr>
<tr>
<td>The University of Dublin – Trinity College Dublin</td>
<td>Members of Governing Authority</td>
<td>Provost; Vice-Provost/Chief Academic Officer; Chief Operating Officer; Treasurer; Secretary; Director of Buildings; Procurement Officer; Dean of Research; Staff Secretary; Librarian; Director of IS; Associate Director of Research and Innovation; Director of Accommodation and Catering</td>
</tr>
<tr>
<td>University College, Cork</td>
<td>President; Members of Governing Authority</td>
<td>President; Vice Presidents; Registrar; Heads of College; Chief Finance Officer/Bursar; Corporate Secretary; Director of Buildings &amp; Estates; Procurement and Contracts Officer; Director of Human Resources; Librarian; IT Manager</td>
</tr>
<tr>
<td>University College, Dublin</td>
<td>President; Members of Governing Authority</td>
<td>President; Deputy President; Vice Presidents; Registrar; Corporate and Legal Affairs Secretary; Director of Capital Development; Director of Buildings &amp; Estates; Procurement and Contracts Officer; Director of Human Resources &amp; Organisational Development; Librarian; Head of Computer Centre</td>
</tr>
<tr>
<td>University of Limerick</td>
<td>President; Members of Governing Authority</td>
<td>President; Vice Presidents; Director of Finance; Secretary; Director; Buildings &amp; Estates; Procurement &amp; Supply Chain Manager; Director, Human Resources; Director, Library &amp; Information Services; Director, Information Technology Division</td>
</tr>
</tbody>
</table>
Main Offences

There are various new offences in the draft scheme, which will apply to any person not just a public body.

Head 2 contains offences of giving a bribe (active corruption) and accepting a bribe (passive corruption) which are a combination of the existing misdemeanours and offences in the 1889 and 1906 Acts, but like the 1906 Act will apply to any person, not just a person in a public body or role, who commits the offence in relation to “his or her office, employment, position or business”.

Active corruption is when:-
“a person…directly or indirectly …corruptly offers, gives or attempts to give any gift, consideration or advantage to a person as inducement to, or reward for, or otherwise on account of any person doing any act or making any omission in relation to his or her office, employment, position or business.”

Passive corruption is the corollary concept:- when a person corruptly accepts, obtains or attempts to accept or obtain the gift, consideration or advantage.

Head 4 of the Scheme contains an offence of corruption in office, which is a statutory restatement of the 2001 Act offence (which in turn codified the common law offence of misbehaviour in public office) and will apply when an Irish public official (which will include the HE institutions) does any act or makes any omission, including using confidential information to corruptly obtain a gift, consideration or advantage for himself or another person.

In terms of the new offences, Head 3 of the Scheme contains an offence of active and passive trading in influence involving an Irish public official (which will include directors, officers and employees of the HE institutions). The offence will occur when a person corruptly gives or accepts a gift or advantage as an inducement to exert an improper influence over the acts or omissions of an Irish or foreign public official. Other new offences include:

• Head 6, making reckless payments: giving a gift or advantage to another knowing, or reckless as to whether, that gift or advantage will be used to facilitate the commission of an offence of corruption

• Head 7, corruptly using a document to deceive: including a disk, tape, audio or video recording, or internet page, which the user knows or believes to contain a false or defective statement with the intention of inducing another to do or omit to do something relating to his office or employment; and

• Head 8, intimidation: corruptly threatening harm to a person with the intention to influence any person to do or omit to do something in relation to his office or employment.

“Corruptly”

The draft Scheme expands on the definition of “corruptly” in the 2010 Act, which and was limited to “acting with an improper purpose personally or by influencing another person”. The new broader definition includes acts or omissions which are in breach of duty (such as a duty of employment or of a director), without due impartiality or lawful authority, in breach of a relevant code of ethics or discipline, in pursuit of an undue benefit, in a deceitful dishonest or misleading manner or with an improper purpose.

Foreign Offences

The Prevention of Corruption (Amendment) Act 2010 gave fuller effect to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Act also broadened the legislation on corruption to that occurring outside the State. The draft Scheme proposes to extend jurisdiction to virtually all persons, including companies, having a connection with the State.

Ireland is now a party to a number of international agreements relating to corruption including the Council of Europe Criminal Law Convention on Corruption, and the UN Convention Against Corruption.

These commitments are reflected in the draft Scheme through offences such as bribery of a foreign public official (Head 5), corruption occurring outside the State (Head 9), and corruption occurring only partially within the State (Head 14).

Where other countries have also ratified these international agreements and Conventions, those provisions will be useful for Irish HE institutions to tackle issues of fraud in recruitment of foreign students to the Irish or foreign branch campus, such as forged or falsified references, grades and degrees, and English language tests.

For example, India has also ratified the UN Convention Against Corruption and is proposing new legislation on anti-bribery and corruption measures with whistleblower protection. And in 2011 China’s Government passed the Eighth Amendment to the Criminal Law of the People’s Republic of China which criminalises for the first time under Chinese law, the payments of bribes to foreign officials.

Presumption of Corruption

Heads 10-12 of the draft Scheme includes a number of presumptions, which are wider than the 1889-2010 Acts. These presumptions aid the prosecution of offences by placing the burden on the defendant to rebut the presumption.

Head 10 contains a presumption of corrupt gift, consideration or advantage. Corruption will be presumed to occur when a person with an interest
in the ‘functions’ discharged by an ‘Irish public official’ (which will include the existing categories of HE institutions) gives a gift, consideration or advantage to the official or a connected person. The “functions” can include the making of any decision or taking of any steps relating to a tender for goods or services, a contract, the appointment of a person to an office or position of employment, the acquisition, letting or sale of property, and the grant of a loan or a licence or an authorisation.

It is not necessary that it be proved that the Irish public official performed his or her function so as to give rise to an undue benefit or advantage to the donor of the gift etc. although a separate presumption can be raised if this is the case.

Corruption will also be presumed to occur when an Irish public official or connected person accepts a gift, consideration or advantage in breach of a code of ethics. Head 11 contains a presumption of corrupt donation. Donations will be presumed to be corrupt where the donor has an interest in the person doing any act or making any omission in relation to his or her office or employment, and this offence will extend beyond political donations offences already existing in other legislation such as the Electoral Acts 1992 to 2001.

Head 11 contains a presumption of corrupt enrichment. The presumption will arise when an Irish public official maintains a standard of living above, or is in control of property which is disproportionate to, his or her official emoluments and interests, to be as a result of corrupt enrichment.

Corporate Liability

The 2001 Act confirmed that Irish bodies corporate could be found guilty of an offence under the 1889-2010 Acts, and ascribed guilt to any director, manager, secretary or officer who consented to the company committing the offence or whose wilful neglect led to the offence. The 2010 Act extended liability to unincorporated bodies.

These provisions will be reflected in the draft Scheme, and in addition, the reverse is proposed. The draft Scheme proposes that bodies corporate and unincorporated bodies will be liable for corruption offences of their employees, agents, subsidiaries, officers, secretaries, managers and directors, where there is an intention by those persons to obtain or retain business for them. This is similar to Section 7 of the UK Bribery Act 2010. It will represent a significant change to Irish law as currently, in the absence of statutory liability, prosecution of ‘corporate’ corruption requires the acts of the individual to be identified as those of the body and for fault to be attributed to that body.

Defences

The draft Scheme proposes a defence for the body to prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence. At this stage the draft Scheme does not provide any guidance as to what will constitute ‘reasonable steps’ or appropriate ‘due diligence’.

This is very important for Irish HE institutions. Now, as a greater number of offences will apply to all Irish persons, there is risk that the HE institution or at least part of it could be considered a body corporate or unincorporated body, with clear statutory liability for these acts.

Whistleblower Protection

A key provision in the 2010 Act was the protection afforded to whistleblowers who made reports, in good faith, of offences under the 1889-2010 Acts. The 2010 Act provided that reports of suspected offences can be made on a confidential basis to “a confidential recipient”. In relation to suspected corruption offences abroad, the 2010 Act contained provisions enabling reports to be made to diplomatic or consular officers and foreign police forces.

The draft Scheme includes a head providing for whistleblower protection based on that previously provided in the 2010 Act.

Summary

In advance of the implementation of the Criminal Justice (Corruption) Bill 2012, HE institutions should review the adequacy of their codes of governance to prevent bribery and corruption and professional advice should also be sought to determine what policies and procedures may be appropriate, particularly in relation to the new offences which will apply to all parts of the institution. This action is essential to avoid liability for the actions of persons associated with a business should they be involved in any form of corruption or bribery.

In order to rely on the defence of having taken all reasonable steps and exercised all due diligence, we advise institutions to ensure that the revised policies and procedures are communicated to all employees, agents, subsidiaries, officers, secretaries, managers and directors, and to ensure, in particular, that persons operating in foreign jurisdictions, which may have less stringent anti-corruption laws, receive appropriate training on anti-corruption procedures.
Discrimination against contract researchers under the Fixed-Term Work Act: recent guidance on ‘objective grounds’

The recent cases show the difficulties in balancing the uncertainty of future funding for a contract post against the increasingly narrow interpretation given by the Courts to objective justification.

The Protection of Employees (Fixed-Term Work) Act, 2003 prohibits discrimination against employees on fixed-term contracts, vis-à-vis their permanent employee comparators unless there are ‘objective grounds’ for variations in pay and conditions.

This year has seen a number of cases where employers continue to have difficulties in objectively justifying less favourable conditions (including ex gratia redundancy payments and renewals for further fixed terms) under Section 7 of the 2003 Act.

The recent cases involved different aspects of the employer-employee relationship and they show the difficulties in balancing the uncertainty of future funding for a contract post against the increasingly narrow interpretation given by the Courts to “objective justification”.

Section 7(1) provides a three hurdle test and states that a ground shall not be regarded as an objective ground unless:

- it is based on considerations other than the status of the employee concerned as a fixed-term employee and the less favourable treatment which it involves for that employee (which treatment may include the renewal of a fixed-term employee’s contract for a further fixed term);
- it is for the purpose of achieving a legitimate objective of the employer; and
- such treatment is appropriate and necessary for that purpose.

Section 7(2) states that where, as regards any term of his or her contract, a fixed-term employee is treated by his or her employer in a less favourable manner than a comparable permanent employee, the treatment in question shall (for the purposes of section 6(2)) 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.

When are objective grounds needed?

Under the Act, objective grounds are needed for the purposes of Section 6(2) which is the general exception and Section 6(3) which provides that a period of service qualification shall be the same for a fixed-term employee as for a comparable permanent employee except where a different length of service qualification is justified on objective grounds. Likewise section 8(2) requires a fixed-term employee to be informed in writing by the employer of the objective grounds justifying the renewal of the fixed-term contract and the failure to offer a contract of indefinite duration. Section 9(4) will disapply a deemed contract of infinite duration on 4 years’ service (arising under section 9(3)) if objective grounds can be shown to justify a further renewal for a fixed term.

Recent cases

In Dublin Institute of Technology v Nealon (FTD126 17 February 2012) the claimant in appealing a Decision of a Rights Commissioner argued before the Labour Court that by September 2009 he has been employed...
on a succession of fixed term contracts, the aggregate
duration of which exceeded four years, and so the fourth
contract contravened section 9(2) of the Act unless it
was saved by section 9(4), and if not, it became a CID
under section 9(3).

In the final fixed term contract DIT stated that it was
not in a position to offer Mr. Nealon a permanent
position as it was “subject to State control as set out in the
Moratorium on Recruitment in the Public Service and the
Employment Control Framework for higher education sector
together with budgetary constraints within the institute.”
However, on appeal DIT contended that Mr. Nealon was
verbally informed by the Assistant Head of the School
of Construction of the factual position concerning the
decline in apprentice numbers and this was the reason
that the continuance of his employment was not viable.
Evidence was given on behalf of DIT in that regard, but he stated that these concerns
were not mentioned to Mr. Nealon before the final
contract was concluded, but rather it was nearer to the
end of the year that he spoke about the true extent of
the impending difficulties.

The Court cited Hanna J in Russell v. Mount Temple
Comprehensive School IEHC533 in stating that Section
9 (4) and by extension Section 9 (3) takes effect at
the commencement of the impugned contract and
concluded that the reasons relied on as constituting objective grounds for the purposes of the Act must
have been those operating in the mind of the relevant
decision maker at the time the impugned decision was
made. The Court said that this was also the effect of the
decision in St. Catherine’s College of Home Economics v.
Moran and Malone (FTD0819).

The Court also said that the decision of the European
Court of Justice in Lommers v. Minister van Landbouw,
Natuurbeheer en Visserij [2002] IRLR 430 was authority for
the proposition that a plea of subjective justification in
defence of a claim grounded on a social right equated
to reliance on a derogation from that right and like all
derogations it must be construed strictly against the
person invoking it.

The Court found that it was more probable that the
reasons for justifying the renewal of the fixed contract
were those stated on the face of the contract and not
those given verbally.

Similarly, in July of this year in Dupont v. St. Patrick’s
College Drumcondra (RP2159/2010, unreported 7
July 2012) the Employment Appeals Tribunal rejected
the non-existence of funding from the Department
of Education for a post as an objective justification for
not employing a claimant in a permanent capacity,
saying “it is well established that the legal entitlements
of a claimant are not subject to the dictates of a third
party i.e. economic reasons and lack of funding is not
an objective justification in accordance with the 2003
Act. If the legislature intended cost and/or funding
to be relevant consideration, same would have been
inserted into the Act of 2003”. The case concerned a
contract lecturer who was selected for redundancy and
claimed that she was entitled to a contract of infinite
duration and in being made redundant she was unfairly
dismissed.
Earlier the Labour Court had provided some guidance on when a University could justify unequal treatment in the context of making funded research posts available to successive cohorts of researchers or indeed specialist researchers. In *University College Cork v. Tomas O’Riordan* [2011] 22 ELR 187, the Court agreed with UCC that in order to meet its statutory obligations under Sections 12 and 13 of the Universities Act 1997 (which include the function of promoting and facilitating research) it was an entirely legitimate objective to use fixed term contracts to provide graduates access to research opportunities. However, the Court said they could not be deployed in “general sense” to justify the renewal of every fixed-term contract of employment and the facts of each individual case had to be considered.

The case concerned a privately funded post for the writing of school resources for a change in the history curriculum and the successive contracts had contained the statement that the appointment was “subject to the continuing availability of funds”. The Labour Court distinguished the post from the ordinary type of postgraduate research project which would be generated by the University itself by saying that the precise duration of this project was unclear from the start. The Labour Court said it would not be unreasonable to conclude that the work could have continued indefinitely and that funding could have been sourced from different sponsors or budgets over time to finance the project. Further, the Court was satisfied as a matter of fact that if the funding had continued the project would have continued until the funding ran out.

On the issue of whether the requirement to retain independent funding was a legitimate objective on the part of UCC, the Court said that while this was the case, the means implemented were not appropriate and necessary because instead UCC could have issued a contract for the term of the project, subject to funding, in which case if the project came to an end or the funding dried up, the contract could have been legitimately terminated.

The Court determined that Mr. O’Riordan became entitled to a CID.

A different aspect of the employer-employee relationship was tested in *University College Cork v. Naomi Bushin* (FTD1121, 20 July 2011) which was an appeal of a decision of a Rights Commissioner to the Labour Court. In that case the Labour Court considered whether an employer was justified in paying less favourable severance terms to a fixed-term employee than her permanent comparators.

UCC argued ex-gratia redundancy payments were not a condition of employment within the meaning of Section 6 of the Act and Dr Bushin’s contract had expired by effluxion of time. UCC also said there was a fundamental distinction between fixed and permanent employee due to the absence of any expectation of permanence on the part of the fixed-term employee.

In respect of the first argument the Labour Court found that ex-gratia redundancy pay did constitute remuneration citing the Labour Court in *Sunday World Newspapers v Kinsella and Bradley* [2006] 17ELR325 (relying on the European Court of Justice case of *Barber v. Guardian Royal Exchange Assurance* [1990] ECR1-1889). On the second argument the Labour Court found that the only grounds submitted by the respondent (that is an absence of expectation of permanence) for the difference of treatment related solely to the employment status as a fixed-term employee and as this directly contravened the Act, the Court found in favour of Dr. Bushin.

On appeal to the High Court ([2012] IEHC 76), Kearns P. upheld all findings by the Labour Court.

**Summary**

The recent cases demonstrate a need for employers to be mindful of the justifications enunciated for less favourable treatment of fixed-term employees.

The **Nealon Case** demonstrates that it is important that the correct justification for a fixed-term contract is given at least at the commencement of the fourth year contract.

The **Nealon and Dupont Cases** demonstrate that the Courts will not accept economic reasons such as a lack of funding or a moratorium on recruitment as objective grounds justifying a further renewal beyond the fourth year contract.

However the Courts have shown that they will accept the prospect of a decline in demand for a course (obiter, in **Nealon**) or a lack of research funding or the completion of a research project (**O’Riordan**) as satisfying the second hurdle of the test in section 7(1) (legitimate objective of the employer), however the use of successive fixed term contracts would not satisfy the third hurdle (appropriate and necessary for that purpose). In **O’Riordan** the Court suggested that the test would have been met if the research post was expressed to naturally expire on completion or discontinuation of the research project concerned or the unavailability of project funding, and that this would, in certain circumstances, allow for redundancies to occur in a legitimate way.
This is a neat theoretical solution, however legal advice would need to be taken to ensure that the contract is drafted correctly to ensure that a correct written statement is given for the purpose of section 8 (including that it is not evasive or equivocal), that the employee is regarded as a fixed-term employee under the Act and rights to claim unfair dismissal by the cessation of the specified purpose are properly excluded.

The Employment Control Framework supports the use of specified purpose contracts, and should allow them to be considered within the non-core post numbers (or indeed in the uncapped non-Exchequer /’other research and/or specialist project-based category). It states:-

“Appointments in these instances must be on the basis of fixed term or fixed purpose contracts, whose term shall not exceed the scheme/award duration. Such contracts must also include a specific clause providing for early termination before the specified expiry date of the contract in the event of the envisaged funding stream being terminated or reduced by the funding agency. A specific reference to such a clause must be included in the acknowledgement of the terms and conditions attaching to the offer of the post to be signed by the potential employee.”

Finally, the Bushin Case shows that the quantity of severance payments for fixed-term employees need to be carefully considered by reference to comparators with permanent status as the High Court was very clear in its support of the Labour Court decision. Legal advice might assist in considering whether there are other objective grounds that might be advanced to justify a lower severance payment.
The new Dáil Session: education legislation

With the Dáil back in session there are 31 new Bills expected to be published from now to the beginning of the next Session. They include the Education and Training Boards Bill which will provide for a revised configuration of the Vocational Education Committee system which will be reduced in number from 33 to 16. The recommendation in the McCarthy Report was to reduce the number of VECs to 22, however, this was revised by the former Minister for Education and the groupings have been made public. The Bill will repeal all existing VEC Acts, update functions and powers and modernise the regulatory framework for this sector.

Also the Further Education and Training Authority (SOLAS) Bill will be introduced to create a new further education and training authority called SOLAS which will have responsibility for integrating, developing and modernising the further education and training sector. This bill will also provide for the dissolution of FÁS.

We will be examining these Bills in detail when they are published.

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