

A considered approach Guidance on offering fixed term contracts



The recent decision by the High Court in the *Board of Management of Malahide Community School -v- Dawn Marie Conaty* highlights some key points for employers when offering fixed term contracts.

The exception for fixed term contracts under the Unfair Dismissals Acts 1977, as amended, (“the UDA”) was recently the subject of consideration by the High Court in the case of the *Board of Management of Malahide Community School -v- Dawn Marie Conaty*¹. The Board of Management of Malahide Community School (the “School”) appealed a Labour Court finding that Ms Conaty (the “Employee”) was unfairly dismissed when the School terminated the Employee’s employment on the purported end date of a contract issued to the Employee for the 2015/16 academic year. The Labour Court ordered the School to re-engage the Employee from the commencement of the 2018/19 school year.

The School’s appeal was primarily based on section 2(2)(b) which provides that the UDA shall not apply to dismissals where the employment was under a fixed term or specified purpose contract of employment and the dismissal consisted only of the expiry of the term or cessation of the purpose, provided the contract:

- i. is in writing;
- ii. was signed by or on behalf of the employer and employee; and
- iii. records the disapplication of the UDA to a dismissal consisting only of the expiry of the term or cessation of the purpose.

The High Court, in dismissing the School’s appeal, found that the provisions of the contract offered to the Employee in respect of the 2015/16 school year which purported to fix the term of the contract and thus deprive the Employee of rights she had already acquired under the UDA, were void, as they contravened section 13 of the UDA. Section 13 renders void any provision in an agreement which purports to exclude or limit the application of any provision of the UDA. Whilst the High Court acknowledged that section 2(2)(b) of the UDA carves out an exception to the general rights under the UDA, it held that the exception could not apply where the Employee was employed on a permanent basis prior to entering the fixed term contract, had already acquired rights under the UDA² and was not

informed that the 2015/16 contract involved a loss of these acquired rights. The Court also found that the 2015/16 contract offered to the Employee did not satisfy the requirements of section 2(2)(b) of the UDA.

The facts

The Employee commenced employment with the School in the school year 2013/2014 and was not provided with a written contract in respect of her employment in the academic years 2013/14 or 2014/15. In October 2015, the School required the Employee to sign a written contract for the balance of the academic year 2015/16. While the contract offered to the Employee purported to take the form of a fixed term contract, in that it expired after a period of approximately eleven months, it also contained a reference to the possibility of the contract being renewed in the event that “the allocated hours...continue to be available and the demand for these subjects continues”. The contract also sought to exclude the provisions of the UDA in accordance with section 2(2)(b), notwithstanding the fact that the Employee was legally considered a permanent employee having previously worked at the School for two years prior to the 2015/16 contract.

High Court decision

In the High Court’s decision to dismiss the School’s appeal, Mr Justice Simons held that the contract failed to satisfy the requirements of section 2(2)(b) for the following reasons:

Term of contract is not certain

The Court held that the requirement that the contract be for a “fixed term” had not been met. While the contract had a nominal termination date of 31 August 2016, this was contingent on future events, namely “in the event that the allocated hours as specified above continue to be available and the demand for these subjects continues.” As it was not known at the time the contract was entered into whether these contingencies would occur, the contract could not be regarded as being for a “fixed term”.

¹ [2019] IEHC 486

² As she had 1 year’s service.

Furthermore, as the Employee signed the contract after the nominated commencement date of 8 October 2015, the Court held that the requirements of section 2(2)(b)³ of the UDA had not been satisfied. The Court held that the timing of the signing the contract was important, as a procedure whereby an employee might be requested to waive their rights during the course of employment would be open to the risk of abuse.

“Employment” not under fixed term contract

Where there is a history of employment, regard must be had to the totality of the employment arrangements in order to determine whether the “employment” is pursuant to a fixed term contract. As the Employee’s initial employment had been based on a permanent contract, it could not be said that her “employment” was under a contract of employment for a fixed term. Furthermore, Mr Justice Simons confirmed that section 2(2)(b) of the UDA is only available in the case of a first time employment, or perhaps, employment pursuant to series of fixed term contracts.

No informed consent

The Court explained that the purpose of the procedural requirements set out in section 2(2)(b) are to ensure that the Employee: (i) is on notice that protections, which would otherwise arise under the UDA are being waived; and (ii) has confirmed his/her consent by his/her signature. As the formula of words contained in the contract failed to expressly acknowledge the effect that the Employee was relinquishing her acquired right to protection of the UDA, the Court held that the waiver was deficient and did not put the Employee on notice of the loss of her statutory rights. Furthermore, in circumstances where an employer requests the employee to agree to inferior terms and conditions which involve the loss of statutory rights, the employer is required to explain the precise legal effect of those changes to the employee. In any case, Mr Justice Simmons was of the view that it is not competent for an employee to waive their right of permanent employment by entering into a fixed term contract under section 2(2)(b).

Given the frequent use of fixed/specified purpose contracts within the education sphere, education bodies should carefully consider the following important points:

Takeaways

- i. Date of signature:** In order to avail of the exception under section 2(2)(b) of the UDA, the fixed term contract must be signed on/before the commencement.
- ii. Termination date ascertainable:** The termination date of the contract must be certain and ascertainable from the outset and not be contingent on future events.

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iii. History of employment: Where there is a history of employment, then regard will be had to same in order to determine whether the employment is in fact under a fixed term contract.

iv. Informed consent: An employer who is requesting an employee to agree to inferior terms and conditions, involving the loss of statutory rights, is required to explain the precise legal effect of those changes to the employee. In such circumstances, the employee should be advised in writing to seek independent legal advice.

v. General rule: Section 2(2)(b) is only available in the case of first time employment or, possibly, employment pursuant to a series of fixed term contracts.

Key contacts

Our specialist Education Team have extensive experience in advising and representing education bodies in the recruitment and selection of fixed term employees, including drafting fixed term and specified purpose contracts of employment, and in representing education bodies in unfair dismissal cases and cases involving fixed term employees.



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³ The contract must be signed on/before commencement of employment.