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COURT OF APPEAL – FIXED TERM CONTRACTS

Since the introduction of the Fixed Term Employee (Prevention of Less Favourable Treatment) Regulations 2002 (the "2002 Regulations") came into effect on 1 October 2002 there have been very few cases concerning Fixed Term Contracts. These Regulations made it unlawful to treat a fixed term employee less favourably than a comparable employee on a permanent contract. Most cases have involved claims of discrimination arising from the treatment of employees on fixed term contracts, eg *Whiffen v Milham Ford Girls' School*, where it was held that choosing teachers on fixed term contracts for redundancy before permanent teachers was indirect sex discrimination.

On 21 December 2004, the Court of Appeal handed down its decision in [The Department For Work and Pensions v. Webley](#)

The Facts

Mrs Webley was engaged on a fixed term contract, initially for a period of 3 months from 4 February 2002. This was ultimately extended to 17 January 2003, at which her contract was not renewed or extended. The employer continued to engage people on short fixed term contracts after Mrs Webley left. Mrs Webley claimed that as her contract was terminated before a period of 52 weeks had elapsed (known as the "51 week rule") she had been treated less favourably than a permanent employee whose contract would not have been terminated. Without 1 years service (or 51 weeks taking into account the statutory notice entitlement), the employee would have no protection following unfair dismissal. Further, she argued that as her employers had continued to engage people on fixed term contracts after her dismissal it was clear that there was a need for the work to be carried out.

The Issues

The issue for the Employment Tribunal was whether the non-renewal of a fixed term contract was of itself less favourable treatment. The potential consequence of this would be that fixed term contracts would be unlawful. The Employment Tribunal found for the employer which held that Parliament could not have intended that an employee could invoke the 2002 regulations where the **only** less favourable treatment is that they have a contract of a fixed duration whereas a permanent employee does not.

The Employment Appeal Tribunal

Mrs Webley appealed to the EAT who held in favour of her on the basis that the Employment Tribunal had asked the wrong questions. The EAT held that "the non-renewal of a fixed term contract is capable involving less favourable treatment depending on the facts and circumstances of the case". The EAT considered the "Whiffen" case which was decided prior to the 2002 Regulations and which was in fact a case of indirect sex discrimination.

The Court of Appeal's Decision

The Court of Appeal has restored the employment tribunal decision that where the only act of less favourable treatment is the failure or a refusal of an employer to extend or renew a fixed term contract, then termination of the contract at the end of that fixed term period cannot, of itself, be less favourable treatment in terms of the 2002 Regulations.

Implications for Employers

Since the introduction of the 2002 Regulations, the benefits of using fixed term contracts has become increasingly eroded. However, in some instances they are still an effective and appropriate way of employing staff. Particularly where there is only a short term need for work to be carried out or where there are funding issues. The Webley case had the potential of making fixed term contracts unlawful per se. Thankfully the Court of Appeal did not find this.

Employers however, should be careful when considering engaging employees on a fixed term contract. They should consider the reasons for engaging employees on such contracts rather than placing them on a permanent contract particularly as they now have to be engaged on terms and conditions of employment that are no less favourable than a permanent employee's terms and conditions. Further, the Webley case was only concerned with the situation where the only claim for less favourable treatment in terms of the 2002 Regulations was that their contract was not renewed or extended ie that the contract was subject to a limited duration. In many cases a claim under the 2002 Regulations will also involve arguments of less favourable terms and conditions of employment, treatment e.g. access to training or promotion, or discrimination.

Often, in the past, employers have preferred to use fixed term contracts as a matter of course. Employers should now be looking at their reasons for using fixed term contracts to see whether there are of any benefit to the employer in their particular circumstances.

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