FTC/10/42 DETERMINATION NO. FTD1121
(r-092479-ft-10/JOC)

SECTION 15(1), PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT, 2003

PARTIES :

UNIVERSITY COLLEGE CORK
(REPRESENTED BY ARTHUR COX SOLICITORS)

- AND -

DR. NAOMI BUSHIN
(REPRESENTED BY IRISH FEDERATION OF UNIVERSITY TEACHERS)

DIVISION :

Chairman : Ms Jenkinson
Employer Member : Ms Cryan
Worker Member : Mr Shanahan

SUBJECT:

1. Appeal of Rights Commissioner's Decision r-092479-ft-10/JOC.

BACKGROUND:

2. The Respondent appealed the Rights Commissioner's Decision to the Labour Court on the 20th December, 2010. A Labour Court hearing took place on the 11th May, 2011. The following is the Labour Court's Decision:-

DETERMINATION :

This is an appeal by University College Cork against the Decision of a Rights Commissioner in a claim by Dr. Naomi Bushin under the Protection of Employees (Fixed-Term Work) Act 2003 (the Act). At the Rights Commissioner hearing the Complainant argued that University

College Cork contravened Section 6 of the Act when she was treated less favourably than a comparable permanent employee.

The Rights Commissioner found in favour of Dr. Bushin and decided that she should be paid severance terms in the amount of six week's pay per year of service inclusive of the statutory redundancy entitlement. No award of compensation was made.

In this Determination the parties are referred to as they were at first instance. Hence University College Cork, which is the appellant, in this case, is referred to as "the Respondent". Dr. Naomi Bushin who is the respondent herein is referred to as "the Complainant".

Background

The Complainant was employed on a fixed term contract as a full-time Researcher on an EU-funded Marie Curie Excellence Grant Project in the Department of Geography from 1st April 2006 until 30th September 2009, when the contract came to an end and she was made redundant.

On 18th March 2010 the Complainant referred a claim under the Act to the Rights Commissioner, alleging that she was treated less favourably than a comparable permanent employee when she was paid statutory redundancy payments only instead of the more enhanced severance terms which applied to those persons chosen as her comparators, contrary to Section 6(1) of the Act.

The Complainant's case

Mr. Mike Jennings, IFUT on behalf of the Complainant submitted a complaint that she was entitled to the same ex-gratia redundancy payment as that paid to permanent employees within the higher educational sector who were made redundant, i.e. four week's pay per year of service plus the statutory redundancy payment.

In support of his contention Mr. Jennings cited the following persons employed on a permanent basis in third level institutions throughout the state and who had been made redundant, as valid comparators, within the meaning of Section 5 (1)(a) and (c) of the Act:

- **all staff of St. Catherine's College of Education for Home Economics,**
- **an employee of the Royal College of Surgeons,**
- **catering staff in the National University of Ireland, Maynooth**
- **an employee in Wexford VEC**

He stated that in each of these cases four week's pay per year of service plus the statutory redundancy payment was paid to permanent workers being made redundant.

Mr. Jennings submitted that the above employees could be cited by the Complainant as appropriate comparators. He submitted all of the entities by whom they were employed were bodies corporate over whom a single third entity namely the Department of Education and Skills (the Department) had control.

In support of this contention Mr. Jennings asserted that the Respondent is deemed to be

associated with National University of Ireland, Maynooth (NUIM), he relied upon the definition of "associated employer" contained in Section 2(2)(b) of the Act:

Section 2(2) Employers are deemed to be associated if:

(b) both are bodies corporate of which a third person (whether directly or indirectly) has control.

Mr. Jennings submitted that the Complainant's position was not analogous to that of the Complainant's in *Brides v Minister For Agriculture, Food and Forestry* [1998] 4 I.R. 250 (*Brides*) in which the issue arose as to whether The Department of Agriculture, Food & Forestry and Teagasc could be considered as "associated employers" – with the Minister allegedly having direct control over the affairs of Teagasc.

Mr Jennings submitted that, from the Union's own experience, the level of control exercised by the Department over the Respondent and the other third level institutions was far more direct, immediate and intrusive than that exercised by the Minister over Teagasc.

He held that the fact that an entity can be "a body corporate" while still being under such control proves that the control can be "indirect", for instance exercised through the medium of another agency or body, in this case the Higher Education Authority (HEA).

He said that it was important to note that the control exercised by the Department is at its most acute in the area covered by this dispute i.e. employment policy and redundancy issues. To substantiate this point he made reference to a number of incidents where the Department exercised its control over the Respondent, including a letter from the Respondent's HR Manager dated 30th September 2009 wherein the Manager confirmed that the ex-gratia redundancy "*would be subject to the sanction of the Department of Education and Science"*. At the time the Respondent was proposing to pay an ex-gratia redundancy payment to the Complainant. However, the Department instructed it not to pay anything over statutory.

Mr. Jennings referred to the Universities Act, 1997 to illustrate the amount of power which the Minister and his agents the HEA have over the day-to-day running of the Universities. He cited a number of sections from the Act, including the following:

Section 3 (1) defines the constituent Universities as UCC, UCD, NUIG and NUIM.

Section 21 empowers the Minister to suspend University Governing Bodies and terminate the membership of their members.

Section 25(1) empowers the Universities to appoint staff but subject to Government policy on public service pay and conditions.

Section 25(4) requires the Universities to have the approval of the Minister for all remuneration, fees, allowances, and expenses.

Section 25(5) says that any departures from 25(4) have to be agreed by the HEA and also any remuneration, fees, allowances or expenses paid to University employees by a corporation must also be agreed by the HEA.

Section 25(7) and the Fifth Schedule lays down that all matters to do with pensions and superannuation require the approval of the HEA and the consent of the Minister.

Mr. Jennings stated that the level of control exercised by the Minister under the Universities Act over the constituent Colleges was such that they were bodies corporate over which a third party exercised control within the meaning of section 2(2)(b) of the Act and accordingly were "associated employers" within the meaning of that Section.

Therefore, he submitted that the comparators chosen by him were appropriate and that the Complainant in being offered only statutory redundancy was being less fairly treated than the comparators in her terms and conditions of employment within the meaning of Section 6 of the Act.

Finally Mr. Jennings disputed the Respondent's contention that there were objective grounds justifying the difference in treatment.

The Respondent's Case

Mr. Séamus Given, Solicitor, on behalf of the Respondent denied that the Complainant was treated any less favourably than any permanent employee of the Respondent. Furthermore, he submitted that the educational institutions cited by the Union as comparators are not "associated employers" within the meaning of the Act. He raised a number of issues.

Mr. Given submitted that before the Court can consider whether employees in the higher education sector can be considered as valid comparators within the meaning of Section 5 (1)(c), it must first examine Section 5 (1)(a) to determine whether there are any valid comparators employed by *"the same employer or associated employers"*. Then the Court must examine Section 5 (1)(b) by reference to *"a collective agreement"* [not relevant in this case], before it is necessary or permissible for the Court to consider Section 5 (1)(c) "*employed in the same industry or sector of employment"*.

Mr. Given disputed the Union's appropriateness of citing the persons employed in the higher educational sector as valid comparators for the Complainant. He submitted that the Respondent cannot be deemed to be "associated" with the educational institutions cited as it is autonomous and makes its own decisions. In support of his contention, he cited *Brides.*

***Brides* arose from a claim by women employed as poultry officers by the Department of Agriculture, Food and Forestry for the same rate of pay as men employed as agriculture officers by Teagasc. The claim was made pursuant to the Anti-Discrimination (Pay) Act 1974. In order to sustain their claim it was necessary for the complainants to show that the Department, by which they were employed, and Teagasc, by which their comparators were employed, were associated employers for the purposes of the Act. The term was defined by the Act of 1974 in identical terms to that used in the Act of 2003. In advancing their claim the Complainants contended that the Department exercised a sufficient degree of control over Teagasc so as to bring both within the statutorily defined concept of associated employers.**

Budd J. took the view, as had this Court, that Teagasc was not controlled by the Minister for Agriculture. He stated:

"***In the view of the Court, the Department would certainly have an important supervisory function in relation to how Teagasc spends its money. But this supervision is to do with State management of public finances, and not with control over how a State body does its business. The Department cannot tell Teagasc how to do its work, or even what work to do. Teagasc's functions are provided for by statute, and it has 'all such powers as are necessary or expedient***

for the purposes of its functions' under Section 4(4) of the 1998 Act. There are certain functions which it cannot do unless authorised by the Minister, and it needs the consent of the Minister to provide any services outside of the State, but these controls are limited and to do with the extent of the remit which Teagasc has been given, and not with 'how' certain things are to be done. The conferring of any additional functions on Teagasc by the Minister must be by order, and such order must be laid before both Houses of the Oireachtas. The Minister provides funding to Teagasc by the making of advances to it, but he cannot tell it how he wants the money spent. Most importantly, the Minister could not unilaterally decide to close Teagasc down. If Teagasc were to be put out of existence, that decision would not be one for the Minister or the Department to take; it would be a matter for the government and the Oireachtas. The word 'control' is not defined in the Act, but its ordinary sense is to mean that there is a power of directing or to command an activity. The Court is satisfied that while the Minister has certain authority in relation to Teagasc, he does not have direct control of it, and such indirect control as he might have through his membership of the government and as a member of the Oireachtas is too far removed from real control to amount to control within the meaning of the section"

Mr. Given submitted that the situation in the instant case was in essence the same as that in the Teagasc case albeit that what was contended for in *Brides* was that the Department of Agriculture, Food and Forestry controlled Teagasc. In this case what was contended for was that UCC and NUIM Maynooth were both under the control of the Department to such an extent that they were "associated employers" under the Act. Mr. Given submitted that the Universities were in fact independent entities and there was insufficient control from the Department to allow them to be defined as "associated employers" as set out in Section 2(2)(b) of the Act

He stated that the Respondent is autonomous and makes its own decisions. Each of the characteristics of Teagasc identified by the High Court is present in the Respondent, it is a body established by Charter and now governed by Statute, it is directed and controlled by its Governing Body which is appointed under Statute. The Minister's functions are limited. The Minister has no power to direct or command the Respondent. The Minister or indeed the Department do not control the Respondent.

Mr. Given also relied on *McAllister v Board of Management, Guardian Angels National School (R-045526-FT-06)* where it was held that the school had not delegated or surrendered the functions of management and as such was not found to be "associated" with any other school. The Rights Commissioner in that case found "*that the Minister and/or Department does not control the two named schools and that the schools are not associated employers"*. Equally so the Respondent fully controls its own staff and researchers and has not delegated any of this function to any third party.

Mr. Given further submitted that in circumstances where neither the Respondent nor any associated employer has made any permanent employee redundant at the time the complaint was made then there can be no claim that the Complainant was treated less favourably than a comparable permanent employee.

In any event Mr. Given submitted that there is a fundamental distinction between a fixed-term worker whose contract expires by effluxion of time, for whom there can be no expectation of permanence and a permanent employee faced with redundancy and a loss of permanent employment. In these circumstances, the Respondent submitted that the difference in treatment between the Complainant and the comparators can be objectively justified.

Mr. Given further contended that entitlement to an enhanced ex-gratia severance payment is

not a term or condition of employment. He submitted that ex-gratia payments are a matter of negotiation between employer and employee, they are variable, carry no legal obligation, and reflect the economic circumstances at the time.

Conclusion of the Court

The Law

The principal statutory provisions applicable in this case are to be found at sections 2, 5, 6 and 7 of the Act.

Section 2 provides

Employers are deemed associated if-

a) one is a body corporate of which the other (whether directly or indirectly) has control, or
b) both are bodies corporate of which a third person (whether directly or indirectly) has control.

Section 5 provides: -

5.—(1) For the purposes of this Part, an employee is a comparable permanent employee in relation to a fixed-term employee if—

(a) the permanent employee and the relevant fixed-term employee are employed by the same employer or associated employers and one of the conditions referred to in subsection (2) is satisfied in respect of those employees,

(b) in case paragraph (a) does not apply (including a case where the relevant fixed-term employee is the sole employee of the employer), the permanent employee is specified in a collective agreement, being an agreement that for the time being has effect in relation to the relevant fixed-term employee, to be a type of employee who is to be regarded for the purposes of this Part as a comparable permanent employee in relation to the relevant fixed-term employee, or

(c) in case neither paragraph (a) nor (b) applies, the employee is employed in the same industry or sector of employment as the relevant fixed-term employee and one of the conditions referred to in subsection (2) is satisfied in respect of those employees, and references in this Part to a comparable permanent employee in relation to a fixed-term employee shall be read accordingly.

(2) The following are the conditions mentioned in subsection (1)
(a) both of the employees concerned perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work,

(b) the work performed by one of the employees concerned is of the same or a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed by each, either are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant, and

(c) the work performed by the relevant fixed-term employee is equal or greater in value to the

work performed by the other employee concerned, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions.

Section 6 provides: -

6.—(1) Subject to subsections (2) and (5), a fixed-term employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable permanent employee.

(2) If treating a fixed-term employee, in respect of a particular condition of employment, in a less favourable manner than a comparable permanent employee can be justified on objective grounds then that employee may, notwithstanding subsection (1), be so treated.

Section 7 of the Act provides: -

7.—(1) A ground shall not be regarded as an objective ground for the purposes of any provision of this Part 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) is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose.

(2) 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.

The combined effect of these statutory provisions is that a fixed-term employee is entitled to be treated no less favourably, in respect to his or her conditions of employment, than a comparable permanent employee, unless the difference in treatment is justified on objective grounds. Section 2(1) of the Act provides that the term "conditions of employment" includes remuneration and matters related thereto.

The term remuneration is defined by Section 2:

"remuneration", in relation to an employee, means—

(a) any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment, and

(b) any amounts the employee will be entitled to receive on foot of any pension scheme or arrangement;

Does an ex-gratia redundancy payment constitute "remuneration" for the purpose of Section 6.

The question of whether ex-gratia redundancy pay constitutes remuneration for the purpose of Section 6 was considered by this Court in *Sunday World Newspapers v Kinsella and Bradley* [2006] 17 ELR 325. There, in reliance on the decision of the ECJ in Case C 262/88 *Barber v Guardian Royal Exchange Assurance* [1990] ECR 1-1889, in which the ECJ held at paragraph 16 of it's judgment:

"a redundancy payment made by the employer, such as that which is at issue, cannot cease to constitute a form of pay on the sole ground that, rather than deriving from the contract of employment, it is a statutory or ex gratia payment"

The ECJ thereby found that an ex-gratia payment was remuneration within the meaning of the Act. In the instant case in making its determination this Court is constrained by the decision of the ECJ.

Appropriateness of the nominated comparators

Mr. Jennings submitted that *Brides* had no relevance as he held that that the appropriate comparator was not a permanent employee employed by the Department but a permanent employee of NUIM, and both the Respondent and NUIM are constituent colleges of the National University of Ireland. He held that the Minister through the aegis of HEA had such power over the day to day running of the both the Respondent and the NUIM that they can both be considered as *"bodies corporate of which a third person (whether directly or indirectly) has control"* within the meaning of Section 2(2)(b) of the Act.

Up until 1997 the Respondent was one of four constituent colleges of The National Universities of Ireland, along with University College Dublin, University College Galway and NUI Maynooth. The Act established the Respondent and the other three colleges as individual Universities in their own right.

The Respondent submitted therefore that its establishment as a University gives it the right to function independently, to accredit degree programmes and to confer degrees independently of any other body. It held that Section 14 of the Act entitles it to regulate its affairs in accordance with its independent ethos and traditions and by virtue of Section 15 of the Act the functions of the University are performed by a Governing Body. Those functions include the exercise of powers and the performance of its duties. The Respondent submitted that despite the fact that a significant proportion of the University's income is received from the Exchequer, it functions independently of the State and the Minister/HEA. Mr. Given stated that as a corporate body, established by Charter, it regulates its own affairs, its finances, its strategy and educational direction.

Conclusions of the Court on the appropriateness of the nominated comparators

Section 5 of the Act provides that in choosing a comparator the Complainant must under section 5(1)(a) first examine their own employer and any associated employer for a valid comparator. If unsuccessful then the Complainant must then proceed under Section 5(1)(b) to examine any employees employed under a collective agreement, which agreement which also affects them. If not successful under either of the above then under Section 5(1)(c) the Complainant may seek a comparator in the same industry or sector of employment with the proviso that the selected comparator must be engaged in the same or similar work or in work of equal or greater value.

There is no dispute between the parties as to the value of the work the comparators are engaged in and the only issue for the Court to decide is whether they fulfil the criteria set out in Section 5 (1).

Section 5(1)(a) of the Act provides that an employee is a comparable permanent employee if

the permanent employee and the relevant fixed-term employee are employed by the same employer or associated employers.

The Court notes that The Universities Act 1997 establishes the Respondent (and NUIM) as a University in its own right and provides for the governance of monies provided by HEA by the establishment of a Governing Body, which has powers to make certain provisions relating to staff, planning and financial matters. It provides that the functions of the University are to *"performed by or on the directions of its governing authority"*.

Section 14 of the 1997 Act entitles it *'to regulate its affairs in accordance with its independent ethos and traditions and the traditional principles of academic freedom'* subject to the University having regard *'to the effective and efficient use of resources'* and *'its obligations to public accountability'*.

With regard to staffing matters Section 25(1) of the 1997Act provides that the Respondent may appoint *'such and so many'* employees as it thinks appropriate, subject to qualifications similar to those outlined above and any HEA guidelines - which are not binding and do not impose restrictions on or limit the monies payable to the Respondent. While its powers to regulate its affairs are somewhat qualified the Court is of the view that the 1997Act affords significant control to the Respondent.

Section 25(3) and (4) of the 1997Act provide that staff remuneration, fees, allowances and expenses are determined by the Respondent and approved by the Minister with the consent of the Minister for Finance. Any departure from matters approved must be agreed between the Respondent and the HEA.

The Court is not satisfied that the level of control and power exercised by the Minister/HEA makes the Department a "third person" with control over the bodies corporate as per Section 2(2)(b) of the Act. Therefore, the Court does not find the Respondent and NUIM are "*associated employers*". The Court is of the view that this case is similar to *Brides* in that the Department has an important supervisory function in relation to how the Respondent (and NUIM) spends its money, however this supervision is to do with State management of public finances, and not with control over how the Respondent (or NUIM) does its business. Accordingly, the Court finds Section 5(1)(a) is not applicable in this case.

The Court is satisfied that Section 5(1)(b) is not applicable as there is no collective agreement in place. The Court will therefore proceed to consider the relevance of Section 5(1)(c). Section 5(1)(c) of the Act provides that an employee is a comparable permanent employee where the employee is employed in the same industry or sector of employment as the relevant fixed-term employee.

Mr. Jennings cited the following examples of comparable higher educational sector, ex-gratia redundancy settlements, where permanent employees received four week's pay per year of service plus the statutory redundancy entitlement:

- **permanent staff of St. Catherine's College of Education for Home Economics,**
- **a permanent employee of the Royal College of Surgeons,**
- **permanent catering staff in the National University of Ireland, Maynooth**
- **a permanent employee in Wexford VEC**

Mr. Given submitted that the educational institutions cited by the Union as comparators are not 'associated employers' within the meaning of the Act.

Section 5(1)(c) does not state that the comparators must be '*associated employers'*, it provides that in situations where the permanent employee is employed in the same industry or sector of employment as the relevant fixed-term employee, then it may be cited as relevant for comparison purposes. The Court is satisfied that the cited institutions and the Respondent are in the "higher educational sector" and accordingly the Court is satisfied that Section 5(1)(c) is applicable.

The Substantive Claim

The Court has found that the Complainant is entitled to ground her claim by reference to the nominated comparators in the higher education sector. The comparators were made redundant around the same time as the Complainant and were paid four week's pay per year of service plus statutory redundancy entitlements. Therefore, the Court must find that the Complainant was treated less favourably than her nominated comparators when she was made redundant.

Objective grounds justifying less favourable treatment

It is accepted that the comparators received a payment equal to four weeks pay per year of service plus their statutory entitlements on being made redundant. There is no dispute that the Complainant was engaged in work of equal to or greater value than the comparators within the meaning of Section 5(2)(c) of the Act. It follows that the Complainant is entitled to be treated similarly, on being made redundant, unless the difference in treatment can be objectively justified.

The test for determining if a ground relied upon is sufficient to justify treating a fixed-term employee differently than a comparable permanent employee is contained in Section 7 of the Act. The elements of this test are that factors relied upon as constituting an objectively justifiable ground must (a) be for the purpose of achieving a legitimate aim of the employer, (b) the unequal treatment must be an appropriate means of achieving the legitimate aim identified and (c) it must be necessary for its achievement.

The Respondent submitted that that the difference in treatment between the Complainant and the comparators was objectively justified. Mr. Given submitted that the Complainant was not paid an ex-gratia redundancy payment because it took the view that ex-gratia redundancy payments were not a condition of employment within the meaning of Section 6 of the Act; her contract had expired by effluxion of time and there was a fundamental distinction between a fixed-term worker and a permanent employee faced with a loss of permanent employment due to the absence of any expectation of permanence on the part of the fixed-term employee.

Section 7(i) of the Act precludes reliance on the status of the employee as a fixed-term worker as providing objective grounds for less favourable treatment. The Court is of the view that the only grounds submitted by the Respondent for the difference in treatment between permanent employees and the Complainant relate solely to her employment status as a fixed-term employee, hence the Court cannot accepts that it constitutes objective grounds justifying less favourable treatment within the meaning of Section 7 of the Act.

In light of it's finding the Court must consider if it is appropriate to make an award of compensation pursuant to Section 14(1)(d) of the Act. The Court is satisfied that there were

complexities in this case which needed to be addressed, as the situation was not clearly defined. Furthermore, the Court is satisfied that the Respondent did not set out to delay or be tardy with the process. In such circumstances the Court is not satisfied that *Von Colson & Kamann V Land Nordrhein - Westfalen [1984] ECR 1891* applies.

Determination

The Court determines that the complaint herein is well-founded.

The Court directs that the Respondent to pay the Complainant an ex-gratia redundancy payment calculated on the basis of four weeks' pay per year of service, plus statutory redundancy entitlement.

The Decision of the Rights Commissioner is varied in accordance with the terms of this Determination.

Signed on behalf of the Labour Court

Caroline Jenkinson
20th July, 2011 _____
JMcC Deputy Chairman

NOTE

Enquiries concerning this Determination should be in writing and addressed to Jonathan McCabe, Court Secretary.

Edit History:

	Rev.	Editor	Edit Date
4.		Jonathan McCabe/entemp	21/07/2011 08:07:20
3.		Jonathan McCabe/entemp	20/07/2011 15:29:26
2.		Jonathan McCabe/entemp	20/07/2011 15:20:01
1.		Jonathan McCabe/entemp	20/07/2011 11:21:51

** Only past five edits are shown*
