



**THE TRANSPOSITION INTO IRELAND AND NORTHERN IRELAND OF  
THE EUROPEAN DIRECTIVES ON FIXED TERM WORK AND  
WORKING TIME**

**Marguerite Bolger**

**and**

**Barry Fitzpatrick**

**For The Labour Relations Commission**

**and**

**The Labour Relations Agency**

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## **FOREWORD**

This report has been prepared by Marguerite Bolger and Barry Fitzpatrick for the Labour Relations Commission and the Labour Relations Agency. It contains an examination of the transposition in Ireland and Northern Ireland of the Fixed Term Work Directive and the Working Time Directive, together with analysis of relevant case law.

These are produced as separate reports on each Directive, considering first the transposition and relevant case law in Ireland, followed by Northern Ireland. The latter reports contain some comparative analysis of the position in the two jurisdictions.

Details of the relevant institutions and employment law systems in each jurisdiction are not set out by way of introduction. There are considerably more cases in the Irish jurisdiction and hence the Northern Irish cases are considered in more detail.

Marguerite Bolger

Barry Fitzpatrick

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# **THE PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT 2003**

## **THE PRESENT POSITION IN THE REPUBLIC OF IRELAND**

### **1. INTRODUCTION.**

- 1.1. The Protection of Employees (Fixed- Term Work) Act 2003 (hereinafter referred to as “the 2003 Act”) was implemented in Irish Law in order to transpose Council Directive No.1999/70/EC concerning the framework agreement on fixed-term work into Irish law. The Act came into effect on the 14<sup>th</sup> of July 2003 some considerable time after the Directive ought to have been implemented in Irish Law.
- 1.2. The Act has been the subject of a considerable amount of analysis before the Rights Commissioners, the Labour Court and the High Court. It has also been the subject of at least one reference to the European Court of Justice from the Irish Labour Court. After over five years of application and analysis, a number of principles have been clearly established and it is now possible to see emerging trends in the area.
- 1.3. In this paper I will address the scope of the legislation, the nature of the obligations it imposes on employers, the circumstances in which an employer can seek to avoid a contract of indefinite duration and the extent of the contract of an indefinite duration which an employee may claim. I will examine the clear principles which have now been developed since the Act was first implemented and highlight the issues in relation where there may still be some ambiguity.

## 2. WHAT IS FIXED TERM WORK

2.1. The scope of the Act is set out at Section 6 as the principle of non discrimination as between a fixed-term employee and a comparable fixed-term employee, this is defined at Section 2 (1) as meaning:

*“A person having a contract of employment entered into directly with an employer where the end of the contract of employment concerned is determined by an objective condition such as arriving at a specific date, completing a specific task or the occurrence of a specific event that does not include –*

- (a) Employees in initial vocational training relationships or apprenticeship scheme, or*
- (b) Employees with a contract of employment which has been concluded within the framework of a specific public or publicly-supported training, integration or vocational retraining programme”.*

2.2 The High Court has confirmed in the case of Doyle v National College of Ireland [2006] E.L.R. 267 that the inclusion of a notice period in a fixed-term contract which enabled either party to bring the contract to an end at an earlier date upon the giving of notice did not make the contract anything other than a fixed-term contract.

2.3 The definition of fixed-term contract employee expressly excludes an employee on an apprenticeship scheme. However it is clear from the decision of the Labour Court in ESB v Kingham [2006] E.L.R 181 that the Court will examine carefully what was being done by the employees in question in order to satisfy themselves on the fact that the contract was indeed an apprenticeship, i.e., the mere description of the contract as an apprenticeship will not suffice to remove it from the ambit of the Act.

2.4 It is clear from the decision of the Labour Court in Irish Prison Services v Donal Morris (Determination No. FTD073) that there must be a predetermined finish date or a specific task to be completed for a contract to come within the scope of the Act. The claimant was a priest who had been appointed as prison chaplain in September 1998. He had never been

appointed on the basis of continued fixed-term contract. He had received a written contract in 2002 in which his employment was described as temporary and which expressly provided for termination upon the revocation of his nomination by the Bishop. In August 2005 the Bishop did revoke his nomination as a result of which the prison service terminated his employment on notice. The Labour Court rejected the claimant's argument that the revocation of the Bishop's nomination could be taken "*as the occurrence of a specific event*" within the meaning of Section 2 of the Act. The Court pointed out that if that argument were to be accepted, any other reason such as redundancy which could be a normal occurrence within an employment relationship could also be taken as such a specific event. The Court found that the claimant was not a fixed-term employee within the meaning of the Act.

2.5 An interesting point arose quite recently before the Labour Court in the case of Dublin Port Company v McCraith and Kieran Determination No.FTD0810. The Court found that the claimants were entitled to the same rate of pay as was paid to their comparable prominent employees but only for the duration of the fixed-term contracts pursuant to which they were employed. The Court found that the claimants' protection under the Act came to an end when they applied for, were offered and accepted permanent positions. The Court pointed out that it was not a case of the original fixed-term contract being translated into one of indefinite duration but rather that "*a wholly new contract was concluded*". At that point the Court found the claimants had ceased to be fixed term workers and that the Act could not avail the claimants in "*seeking to address what they considered to be an unfair or anomalous rate of pay.*"

2.6 However that is not to say that a fixed term worker who becomes entitled to a contract of indefinite duration pursuant to the Act can no longer bring proceedings under the Act. In the case of Dublin Airport Authority v Keehan & Flannery FTD085, the Labour Court overturned a decision of the Rights Commissioner which had found that the extension of the claimant's contracts from month to month amounted to a single fixed term contract which was to expire on the implementation of restructuring proposals. The Court found that there was no express term in the contracts linking the duration of the contracts to

restructuring negotiations and rejected the proposition that such a term could be implied into the contract. They found that the claimants had been employed pursuant to a number of fixed term contracts which had become a contract of indefinite duration on a second renewal in June 2006. The Court also addressed the argument made by the company that, as the claimants had obtained a contract of indefinite duration by operation of law in June 2006 and as their complaints were not presented to the Rights Commissioner until May 2007, that they had no locus standi in making their complaints pursuant to the Act. The Labour Court rejected this argument and referred to certain obiter comments made by Laffoy J in McArdle where the court had addressed the employer's argument that the employee had no locus standi to rely either on the Directive or the Act after the point in time that she had ceased to be a fixed term worker. Laffoy J pointed out that whilst a concession was made by the employer that the employee was employed under a contract of indefinite duration some nine months before her complaint was lodged, she found that it was reasonable to infer that it was the complaints to the Rights Commissioner which had provoked that concession by the employer made some two days before the hearing before the Rights Commissioner commenced. Therefore the Court found the Rights Commissioner had jurisdiction to entertain the complaint. In considering those obiter comments in Keehan, the Labour Court found that the claimant's position was congruent with that of the defendant in the McArdle case. They went on to make what they said was "a more fundamental point" as follows:

*"If a fixed-term worker who obtains an entitlement to a contract of indefinite duration by operation of law ceases to have locus standi under the Act, a complaint alleging a contravention of either s 9 (1) or 9 (2) could never be maintained. Such a result could not have been intended".*

The distinction between McCraith and Keehan seems to be that in the former, the new contract was a permanent position offered to the employee and accepted by them. In the latter, the contract was one of indefinite duration which had evolved by operation of law. Therefore it would appear that a fixed term worker who becomes entitled to a contract of indefinite duration by operation of law may continue to have an entitlement to bring a

claim under the Act even after their contract has evolved into one of indefinite duration whereas the employee who moves from a fixed term contract to a new permanent contract offered to them by the employer and accepted by them, ceases to be entitled to bring proceedings under the Act after the statutory time limit of six months has passed from the date of the alleged contravention of the Act.

### **3. COMPARABLE PERMANENT EMPLOYEE**

3.1. Section 5 defines a comparable permanent employee in some detail and provides as follows;

*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.*

3.2 The approach to making a comparison is very similar to that under employment equality law. However the Act goes further than equality legalisation in allowing fixed-term workers to compare themselves to a permanent employee drawn from the same industry or sector of employment rather than being limited to a permanent employee in the employment where the fixed-term employee is employed.

3.3 A number of claims have been made by government employees on fixed term contracts seeking to compare themselves with established civil servants. The State has unsuccessfully sought to limit the comparable permanent employee to whom a fixed-term employee may compare themselves to an unestablished civil servant. In the case of IMPACT v Department of Agriculture & Others, the Rights Commissioner allowed some ninety one fixed-term employees to compare themselves to established civil servants in spite of the State's attempt to limit their comparators to unestablished civil servants who enjoyed less favourable terms and conditions than established civil servants as they entered the civil service through a different recruitment and examination process. The

point has been definitively established before the High Court in the case of Minister for Finance v McArdle [2007] E.L.R 165 where Laffoy J found that the plaintiff was entitled to compare herself to an established civil servant other than in relation to tenure.

#### **4. THE PRINCIPLE OF NON DISCRIMINATION BETWEEN A FIXED TERM EMPLOYEE AND THE COMPARABLE PERMANENT EMPLOYEE**

- 4.1. Section 6 sets down the general principle of non discrimination between a fixed term employee and a comparable permanent employee subject to any such less favourable treatment being justified on objective grounds. The principle is also subject, at Section 6(5) to it not applying to a fixed term employee whose normal hours of work constitute less than twenty per cent of the normal hours of work of a comparable permanent employee in relation to any pension scheme or arrangement.
- 4.2. Section 6(1) provides for a very broad concept of equality by stating that a fixed term employee shall not be treated less favourably than a comparable permanent employee “*in respect of his or her conditions of employment*”. However the Courts have found that some less favourable treatment of a fixed term employee does not come within this broad principle of non discrimination. The Labour Court has held in HSE v Prasad FTD 2/2006 that the non renewal of a fixed term contract does not constitute less favourable treatment. The High Court in McArdle confirmed that tenure does not form part of the conditions of employment to which the principle of equality in the Act applies. That approach of the High Court has been expressly followed by the Labour Court in the more recent decision of Khan v Our Lady’s Children’s Hospital Crumlin [2008] E.L.R 314 Determination No. FTC064 in which it was expressly held that the expression “*conditions of employment*” in Section 6(1) does not include the duration of the contract.
- 4.3. An example of where the Court found that a decision to pay a higher salary to the chosen comparable permanent employees was due to their permanent status and was therefore unlawful, can be seen in the case of Kenny v Cork County Council [2006] 17 E.L.R.

172. The Court found that once the claimants established that a higher salary was paid to the comparators for carrying out the same duties as carried out by the claimants, prima facia evidence of discrimination on grounds of their fixed-term status was established.

4.4 In Eircom v McDermott FTD 051 whilst the Labour Court found that the claimant had been treated in a different manner arising from the employer's failure to transfer her from a defined contribution pension scheme into a defined benefit scheme during a period of fixed term employment, they did not find that the difference was unfavourable as the level of both the employer and employee contributions under the defined contribution scheme was actually more beneficial and equal to the levels of contributions under the defined benefit scheme. However in the case of Irish Rail v Sted STD 052, the Labour Court found that the denial of an opportunity afforded to fixed-term workers to join the company's pension and GP medical scheme constituted less favourable treatment, where such an opportunity existed for comparable permanent employees.

## 5. THE ENTITLEMENT TO A CONTRACT OF INDEFINATE DURATION.

5.1 Section 9 of the Act sets out these circumstances in which successive fixed-term contracts become a contract of indefinite duration. Section 9 provides as follows:

Successive  
fixed-term  
contracts.

*9.— (1) Subject to subsection (4), where on or after the passing of this Act a fixed-term employee completes or has completed his or her third year of continuous employment with his or her employer or associated employer, his or her fixed-term contract may be renewed by that employer on only one occasion and any such renewal shall be for a fixed term of no longer than one year.*

*(2) Subject to subsection (4), where after the passing of this Act a fixed-term employee is employed by his or her employer or associated employer on two or more continuous fixed-term contracts and the date of the first such contract is subsequent to the date on which this Act is passed, the aggregate duration of such contracts shall not exceed 4 years.*

*(3) Where any term of a fixed-term contract purports to contravene subsection (1) or (2) that term shall have no effect and the contract concerned*

*shall be deemed to be a contract of indefinite duration.*

*(4) Subsections (1) to (3) shall not apply to the renewal of a contract of employment for a fixed term where there are objective grounds justifying such a renewal.*

*(5) The First Schedule to the Minimum Notice and Terms of Employment Acts 1973 to 2001 shall apply for the purpose of ascertaining the period of service of an employee and whether that service has been continuous.*

5.2 There has been a considerable amount of judicial analysis around the terms of a contract of indefinite duration. The Labour Court in the case of HSE v Khan [2006] E.L.R. 313, made it clear that the contract of indefinite duration should be identical in its terms, including any express or implied terms as to training and qualifications, as the fixed-term contract from which it was derived. The only term of the fixed-term contract rendered void is that relating to the expiry of the contract by the effluxion of time. The Court held as follows:

*“ Hence by operation of law, the offending term would be severed from the contract thus altering its character from one of definite duration, or fixed-term, to one of indefinite duration. However, the remaining terms and conditions of the contract would be unaffected including, as in the instant case, any express or implied terms relating to training or the attainment of qualifications”.*

5.3 An arguably different approach was taken by the High Court in the case of Ahmed v HSE [2008] E.L.R. 117. The plaintiff had been appointed as a locum consultant surgeon at Louth County Hospital in August 2000 and thereafter reappointed on successive fixed-term contracts. In September 2004 he sought a contract of indefinite duration pursuant to the Act. Whilst the defendant agreed to continue to employ the plaintiff, they refused to allow him to work at Louth County Hospital which resulted in the loss of his entitlement to engage in private practice as stipulated in the consultants’ common contract. When determining the terms of the contract of indefinite duration to which the Plaintiff was clearly entitled Laffoy J found that he was

*“subject to all of the terms of the consultants’ common contract, including Clause 8.1, which are consistent with a contract of indefinite duration. His workplace can be changed in accordance with the provisions of Clause 8.1.”.*

- 5.4 However she went on to reject the defendant’s argument that the contract of indefinite duration could not elevate the plaintiff into any status above the one he formerly enjoyed and that he was always a locum and was therefore still a locum pursuant to the contract of indefinite duration, albeit a permanent locum. Laffoy J agreed that when he was initially appointed to Louth County Hospital, he was undoubtedly a locum for one Ms. Mulcahy, but went on to find as follows:

*“However after Ms. Mulcahy returned, in my view, he was a temporary consultant surgeon on a period of fixed-term contracts on the terms of the consultants’ common contract insofar as they were consistent with the temporary fixed-term nature of his engagement, which, among other things, entitled him to engage in private practice. It is perhaps worth noting that the defendant had used the words “locum” and “temporary” interchangeably when describing the plaintiff’s status in the past. Since June 30, 2006, the plaintiff has been employed as a consultant surgeon on a contract of indefinite duration on the same terms as he had been previously employed, including his entitlement to engage in private practice.”.*

- 5.5 In a more recent decision of University College Hospital Galway v Awan [2008] E.L.R. 64, the Labour Court found that a purported attempt on the part of the HSE to renew the contract for a fixed-term after the fourth year of continuous fixed-term employment was in contravention of Section 9(1). The objective justification put forward was not accepted by the Court. The decision of the Rights Commissioner directing reinstatement on a contract of indefinite duration on the full terms of the common contract for consultants was affirmed. The decision was significant in that the Court clearly envisaged the terms of the contract of indefinite duration as being those of the

consultants' common contract even though the terms of the employee's fixed-term contract would not necessarily have equated to that contract.

## 6 OBJECTIVE JUSTIFICATION

6.1 Section 7 of the Act sets out what shall and shall not be regarded as objective justification. The concept applies both to defending what would otherwise be unequal treatment between a fixed-term employee and a comparable permanent employee pursuant to Section 6 and to refusing to grant a contract of indefinite duration pursuant to Section 9.

Section 7 provides as follows:

*Objective grounds  
for less  
favourable  
treatment.*

*(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.*

6.2 It is clear that the objective grounds relied on by an employer must be based on considerations other than the status of the employee as a fixed-term worker. It is also necessary that the less favourable treatment must be for the purpose of achieving a

legitimate objective of the employer and must be appropriate and necessary for that purpose which, as has been recognised by the Labour Court, is clearly a restatement of the three tier test for objective justification in indirect sex discrimination cases formulated by the European Court of Justice in Bilka Kaufhaus [1986] ECR 1607.

- 6.3 The section does not contain any defined circumstances that will or will not constitute objective justification in deciding on what or will not satisfy the requirements of the Act, which are left up to be decided on by the courts on a case by case basis.
- 6.4 It is clear from Section 7(2) that in deciding whether less favourable treatment can be justified, the terms of the fixed-term employees contract of employment are considered globally as the whole as compared to the terms of the comparable permanent employee's contract of employment. This approach is quite different to that of equality legislation where each individual element of a contract of employment can be compared vis a vis the claimant and the comparator.
- 6.5 It is also clear from the equality caselaw of the European Court of Justice that, for an employer to discharge the burden of proof in showing objective justification, generalisations and unsubstantiated claims will not suffice.
- 6.6 An examination of the caselaw illustrates matters which have not been permitted to justify either less favourable treatment or the refusal of a contract of indefinite duration. These include seasonal and fluctuating need (Department of Foreign Affairs v Group of Workers [2007] 18 E.L.R. 332); domestic legislation which may be in conflict with the Act (University College Galway v Awan), historical discrimination which is not relevant to the current time, industrial relations harmony (McGarr v Department of Finance E 2003/036) claims which are not backed by solid evidence (Case 171/88 Rinner Kuhn [1989] ECR. 2743) and different collective bargaining processes (Case C-127/92 Enderby v Frenchay Health Authority [1993] E.C.R. I-5535). Reasons which have been accepted to constitute objective justification include legitimate employment policy (Bilka Kaufhaus), labour market objectives, vocational training objectives, historical reasons

which are still operative, (Penneys v Mandate, [1997] E.L.R. 218, [1998] E.L.R. 94 [1999] E.L.R. 89) incentivising promotion, public pay policies, (28 workers v Court Services [2007] 18 E.L.R. 212) and payments due to a grading structure and requirement of flexibility of workers. Some of these reasons have been developed in equality cases but given that Section 7 is clearly to be decided by reference to the decision of the Court of Justice in the equality decision of Bilka Kaufhaus, it is to be assumed that the jurisprudence of objective justification within equality law is equally applicable to this Act.

6.7 A good example of where the Labour Court recently accepted that there was objective justification for not awarding a contract of indefinite duration can be seen in the case of HSE v Ghulam [2008] E.L.R 325 Determination No. FTD089. The claimant in that case did not have a particular specialist qualification which the person appointed to the permanent post had to have in order to ensure that the hospital did not lose its training accreditation. In those circumstances the Court accepted that there were objective grounds justifying the failure to appoint the claimant to a contract of indefinite duration.

6.8 An example of where the Labour Court accepted objective justification for what the claimant submitted was less favourable treatment of her as a fixed term worker as compared to a comparable permanent worker arose in the case of Marion College v Russell FTD082. The case concerned a teacher who argued she was being treated less favourably than comparable permanent employees in the allocation of certain subject hours. The school denied the allegations of discrimination. The Labour Court found that, in seeking to be relieved of the responsibility to teach her contracted subject, the claimant was seeking more favourable treatment than her permanent colleagues which the Court found was “*the antithesis of the Act*”. The Court overturned the Rights Commissioner’s finding that the claimant had been subjected to less favourable treatment and the requirement imposed by the Rights Commissioner that the employer confirm the content of the hours allocated to the claimant by agreement with her. However in the same case, the Court rejected the argument that the school was objectively justified in

declining to give a contract of indefinite duration due to the prospect of insufficient funding for the post in the future. The Court found that her contract was deemed by operation of law to be a contract of indefinite duration and that there was no need or necessity to issue a fixed term contract to her

*“especially in a situation where the Respondent was clearly in a position where, if the criteria necessary for her continuation in employment were not met, it could make her job redundant, in the same way as any employer in a similar situation. Consequently, the Court does not accept that there were objective grounds within the meaning of S 7 of the Act justifying the decision to renew the Complainant’s fixed term contract for another year”.*

## **7. OBLIGATIONS OWED TO FIXED TERM EMPLOYEES.**

- 7.1 Section 8 imposes an obligation on an employer to advise an employee employed on a fixed-term contract in writing as soon as practicable of the objective conditions determining the contract. Where an employer proposes to renew a fixed-term contract, the employee shall be informed in writing by the employer of the objective grounds justifying the renewal of the fixed-term contract and failure to offer a contract of indefinite duration.
- 7.2 An employer is also obliged pursuant to Section 10 to inform a fixed-term employee in relation to vacancies which become available to ensure that they should have the same opportunity to secure a permanent position as other employees.
- 7.3 In the case of Board of Management North Dublin Muslim National School v Colm Naughton Determination No. FT0811, the claimant argued that both Sections 8 and 10 had been breached by the employer. Whilst the Court rejected the claim under Section 8, it did set out what it considered to be the purpose of Section 8 as follows:

*“The nature of the obligation imposed by the section is to inform a fixed-term employee of the duration of his or her employment or, where this is indeterminable, of the circumstances in which it will expire. At least one purpose of the obligation is to ensure that the fixed-term employee knows the duration of the employment so as to be in a position to arrange his or her affairs accordingly. This suggests that the information should be given in close proximity to the commencement of the employment.”*

*The authorities also suggest that regard should also be had to any practical disabilities which might impede the respondent in providing the information. Since the existence of any such difficulties are necessarily within the particular knowledge of the respondent it is for it to explain any delay in providing the information”.*

- 7.4 In relation to the claim under Section 10, the Court found that posting a notice concerning vacancies for permanent posts in the school in July 2006 during the school holidays when the claimant was not at work could not have met the respondent’s obligations. However once the respondent instructed its solicitors to write to the claimant informing him of the vacancies and enclosing a copy of the advertisement placed in the public press, that constituted compliance with Section 10 even though the letter was not received by the claimant for reasons outside of the respondent’s control.
- 7.5 The Court found that the employer had contravened Section 8 (1) of the Act in failing to inform the claimant in writing as soon as practicable of the objective conditions determining his contract. Compensation of €2,000 was awarded.
- 7.6 More significant compensation of €25,000 was awarded in HSE v Ghulam [2008] E.L.R Determination No. FTD089. Whilst the Court accepted that the contravention of Section 8(2) was technical and due to inadvertence on the part of the respondent, it pointed out that the Section is a “*mandatory provision admitting of no exceptions*”. The Court determined that the appropriate redress was compensation in the amount of €25,000 with

no element of loss of earnings and in doing so, purported to apply the requirements of the European Court of Justice as set out in the case of Von Colson & Caman v Land Nordohein Westfalan [1984] ECR 1891 that in enforcing domestic legislation enacting the terms of a Directive, the remedy should be “*effective, proportionate and dissuasive*”.

- 7.7 It would appear that the level of compensation awarded in Naughton is far more consistent with the usual approach of the Labour Court to breaches of either Section 8 or Section 10. For example in the case of Henderson v Board of Management Scoil Iosagain Determination FTD055, compensation of €2,000 was awarded for a breach of Section 10. It would appear that the Court is attempting to draw a distinction between the severity of a Section 8 breach as versus a Section 10 breach. It seems that the Court views a breach of Section 8 as particularly serious and something to be deterred through the imposition of significant levels of compensation.

## **8. SUCCESSIVE FIXED –TERM CONTRACTS**

- 8.1 The meaning of successive continuous fixed-term contracts was considered by the Labour Court in the case of Department of Foreign Affairs v A Group of Workers [2007] 18 E.L.R. 332. The claimants had various periods of fixed-term employment with breaks between contracts. Some of the breaks were as long as twenty six weeks. The Act does not refer to successive contracts but rather refers in Section 9 to continuous contracts. However the Labour Court pointed out that Clause 5 of the Framework Agreement annexed to the Directive refers to successive contracts. In rejecting the respondent’s submission that the claimants were not covered by the Act, the Court pointed out:

*“If the Respondent’s submissions are correct, Section 9 of the Act only applies to continuous employment relationships and successive relationships, which are separated in time no matter how short, are excluded. If that is the correct statement of the law, in light of the decision in Adeneler v Ellinikus Organismos Galaktus, the conclusion is that the Framework Agreement has not been properly transposed in domestic law is inescapable. In that eventuality the court could not apply Section 9 of the Act in a way which would defeat the result envisaged by Clause 5 of the Framework Agreement”.*

8.2 Ultimately the Court upheld the decision of the Rights Commissioner that the periods between the claimants’ successive fixed-term contracts could properly be classified as periods of lay off and therefore the entirety of the periods covered by the contracts were periods of continuous employment for the purposes of Section 9 of the Act. The Court concluded that it was;

*“reinforced in its view that this is a correct application of the law to the facts of this case as it produces a result which is in harmony with the object pursued by Clause 5 of the Framework Agreement, as interpreted in Adeneler”*

## **9. PROCEDURAL ISSUES**

### **9(a) Applying the Direct Effects of the Directive.**

9.a.1 The Labour Court and to a lesser extent, the Rights Commissioner, regularly refer to the text of the Directive in determining the correct interpretation of the Act. For example in the case of Keehen the Court stated:

*“It is now trite law that an Act of the Oireachtas enacted to transpose a Directive must be interpreted and applied in the light of the wording and purpose of the Directive so as to achieve the objective pursued by the Directive”.*

9.a.2 A more significant issue arose in the case of IMPACT v Minister for Agriculture and Food & Others. This was a case taken on behalf of a number of unestablished fixed term civil servants who sought to compare themselves to established permanent civil servants. They argued that the claimants were entitled to rely on the direct effect of the Directive as against the State before the Rights Commissioner and the Labour Court during the period of time which a Directive had not been implemented in Irish Law when it should have been. The State contended that the claimants could only rely on the direct effects of the Directive before the High Court and not before the Rights Commissioner or the Labour Court. The matter was ultimately referred to the Court of Justice and in its decision of 15<sup>th</sup> of April 2008, the Court of Justice determined that the claimants could rely directly on the provisions of the Directive before the Rights Commissioner and the Labour Court and that Clause 4(1) of the Directive did enjoy direct effect.

9.a.3 Even before the Court of Justice delivered its judgment, the Labour Court clearly considered that it did have jurisdiction to apply direct effects as can be seen in its decision in Henderson v Scoil Iosagain Determination No. FTD055. Since the decision of the Court of Justice in the IMPACT case the point has now been definitively established that the Rights Commissioner and the Labour Court can apply the direct effects of any Directive including during a period of time that the Directive was not implemented in national legislation.

## **9 (b) Ouster of jurisdiction.**

9.b.1 In the case of Ahmed v HSE [2008] E.L.R 117 the defendants sought to object to the proceedings on the basis that the plaintiff had invoked the statutory claim for relief provided for in the Act and was therefore estopped from bringing the proceedings before

the High Court. Having reviewed the law, Laffoy J held that there was no statutory provision that ousted the common law jurisdiction of the High Court. She held that, unlike Section 15 of the Unfair Dismissals Acts 1977, there was nothing which put an employee to a selection at the initiation stage between pursuing a statutory redress available to him and his remedies at common law. She stated that;

*“given that the legislature has not taken away or limited the plaintiff’s right of access to the Court to enforce his common law rights, as it might have done, I cannot see how, by presenting his claim to the Rights Commissioner the plaintiff is estopped from pursuing his common law rights”.*

Laffoy J went on to say that, having regard to the *“unique complexities of terms of retainer of consultants by the defendant”* she was of the view that the common law remedies being sought by the plaintiff were more appropriate to a full hearing on the merits and the statutory remedies under the Act which *“would appear to comprehend much less complex contractual arrangements”*.

## **9 (c) Waivers of Rights under the Act.**

- 9.c.1 In the case of Sunday Newspapers Limited v Kinsellar & Another (unreported Judgment of the High Court 3<sup>rd</sup> October 2007) Smyth J overturned the determination of the Labour Court in relation to a severance agreement executed by the claimants which paid them less money than that paid to permanent workers upon the closure of a printing facility. The severance agreement had expressly stated that it was signed *“in full and final settlement of any and all outstanding entitlements, whether statutory or otherwise”*. The Union had argued that the agreement was invalid due to Section 12 of the Act, which provided that any provision in an agreement shall be void insofar as it purported to exclude or limit the application of or was inconsistent of any provision of the Act. The Labour Court permitted the claimants to consider the agreement as void in circumstances

where the court found their consent had not been an informed consent. However in the High Court, Smyth J stated:

*“If the claimants believe as determined by the Labour Court they could not credibly or at all sign “in full and final settlement”. If the claimants or either of them signed the Severance Agreement in the form in which they did with the intention of taking further action in the matter – they so deceived the company (Appellant Employer) that makes a sham and a mockery of seeking to conclusively resolve an employment dispute. In my judgment the Labour Court erred in law in allowing the claimants to consider as void the Severance Agreement because they mistakenly believed that they had been advised that s.12 of the 2003 Act meant that the Severance Agreement would not preclude them from bringing a claim pursuant to the 2003 Act. The section does not preclude settlement agreements or other compromises of claims or potential claims pursuant to employment legislation”.*

The Court also pointed to the fact that there had been

*“meaningful discussion and negotiation... and professional advice of an appropriate character before the agreement was signed”.*

## **9 (d) Compensation**

9.d.1 As can be seen from a number of the cases discussed above, varying levels of compensation have been awarded by the Rights Commissioners and the Labour Court where breaches of the Act have been found to have taken place. The Labour Court is clearly minded to ensure that a remedy awarded creates a deterrent effect in terms of the court’s obligations to follow the clear directions of the European Court of Justice in Von Colson (discussed above). This can be seen very clearly in the case of Ghulam (discussed above).

9.d.2 It is clear that the Court will award substantial compensation where it considers that there has been a blatant and unacceptable breach of the Act. However the Court has also made

it clear that it will take account of the reality of the situation. This can be seen in the decision of Clare County Council v Power FTD0812. The complainant had been employed by the respondent on a series of four fixed term contracts from March 2003 to March 2007. In October 2006 the claimant was advised that her employment would be terminated in March 2007 in circumstances where they were not in a position to consider her for a permanent role. A claim was brought before the Rights Commissioner who awarded compensation of €50,000 in respect of the contraventions of Sections 8 and 13 of the Act. On appeal before the Labour Court, the Court found that there was a breach of Section 8 which was more than just technical where the respondent could not make up their minds whether to employ the claimant on a full time basis or not and decided to have the best of both worlds by renewing her contract for another year. The Court stated that this was exactly the type of contract which the Act was enacted to prevent and in the view of the Court, represented more than a technical breach of Section 8. The Court went on to find that the termination of the claimant's employment constituted a breach of Section 13. However in considering the appropriate level of compensation, the Court referred to the fact that reinstatement was not an option as the main functions for which the claimant had been employed had disappeared. The Court stated as follows:

*“In deciding the amount of compensation payable, however, the Court has taken cognisance of the fact that when the complainant was originally employed it was for a specified purpose which all parties knew would come to an end. The Court proposes to vary the compensation and award the complainant €5,000 for the breach of Section 8 of the Act and €20,000 for the breach of Section 13 (1)(d). To this extent the appeal is upheld and the decision of the Rights Commissioner is varied.”*

- 9.d.3 The Court similarly varied the determination by the Rights Commissioner in relation to redress in the case of University College Hospital Galway v Awan FTD 072[2008] E.L.R 64. As the claimant had obtained employment on the same salary, the redress awarded by the Rights Commissioner of reinstatement with effect from the date on which the claimant became entitled to a contract of indefinite duration on the full terms and

conditions of the contract for consultants without loss of pay, was found to be inappropriate. The Court ordered that the claimant be re-engaged in the post which he held on the consultant's common contract but without loss of prior service. The Court in directing re-engagement declared that the claimant should receive compensation that was just and equitable having regard to the circumstances of the case including the loss he suffered from his diminished potential to earn private fee income. The Court invited the parties to negotiate on the matter and then declared that if agreement was not reached that they would make a further order fixing the quantum of compensation. The desire of the Court to place the claimant in the same position he would have been in had it not been for the discrimination but without enabling him to financially benefit from the situation can clearly be seen.

- 9.d.4 An interesting approach to the level of compensation to be awarded even where no financial loss has been suffered can be seen in the case of University of Limerick v Coveny O'Beirne Determination No. FTD075. The Labour Court found that the claimant had been denied access to the employer's pension scheme in contravention of her right to equal treatment as compared to a comparable permanent employee. The employer argued that as the loss had been retrospectively rectified, that where the claimant had suffered no loss of pension entitlements, no further remedy was appropriate. That argument was rejected and the employer was directed to pay compensation of €2,000 to reflect the infringement of her rights under the Act and the Directive. The case was appealed by the employer to the High Court but the appeal did not proceed.

# **FIXED-TERM EMPLOYEES (PREVENTION OF LESS FAVOURABLE TREATMENT) (NORTHERN IRELAND) 2002**

## **THE PRESENT POSITION IN NORTHERN IRELAND**

### **1. INTRODUCTION**

- 1.1 The Fixed-term Employees (Prevention of Less Favourable Treatment) (Northern Ireland) 2002 (hereinafter referred to as “the 2002 Regulations”) were enacted in Northern Irish Law in order to transpose Council Directive No.1999/70/EC concerning the framework agreement on fixed-term work. The Regulations came into effect on the 1st of October 2002.
- 1.2 As is typical with the transposition of European Community obligations, the Regulations were made under section 2(2) of the European Communities Act 1972. Hence, the approach of the legislator was to meet the minimum requirements of the Directives.
- 1.3 The 2002 Regulations have been subject to one minor amendment, in the The Fixed-Term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations (Northern Ireland) 2008, which largely remove agency workers from the scope of the Regulations.
- 1.4 There have been 10 cases in the Northern Irish Tribunals on the 2002 Regulations. This report broadly follows the format of the Irish Report.

### **2. WHAT IS FIXED TERM WORK**

- 2.1 Regulation 1(2), the interpretation provision in the 2002 Regulations defines ‘fixed-term contract’ and ‘fixed-term employee’ as follows:-  
““fixed-term contract” means a contract of employment that, under its provisions determining how it will terminate in the normal course, will terminate -

(a) on the expiry of a specific term,  
on the completion of a particular task, or  
(b) on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal bona fide retiring age in the establishment for an employee holding the position held by him,  
and any reference to "fixed-term" shall be construed accordingly;  
"fixed-term employee" means an employee who is employed under a fixed-term contract;"

2.2 The main issue before the Northern Irish Tribunals has been unsuccessful attempts by seconded employees to claim that their seconded and temporary promotion arrangements amount to fixed-term contracts.

2.3 In Gerard McCauley v Northern Ireland Housing Executive (Case Ref: 2480/06) (2007), the issue for the tribunal to decide was whether it had jurisdiction to consider the claim which was brought under the 2002 Regulations. Specifically the tribunal was asked to consider whether the claimant was employed on the series of fixed term contracts when appointed by his permanent employer to a number of year-long secondments within his employer's organisation or whether he was in fact employed on a full time permanent contract by his employer and therefore that his employment fell outwith the Regulations.

2.4 The Tribunal took into account the European Court of Justice (ECJ) judgment in Adeneler and Others -v- Ellinikos Organismos Galaktos (ECR) [2006] IRLR 716,<sup>1</sup> interpreting the Fixed-term Work Directive (Council Directive 99/70/EC). The case involved Greek legislation designed to protect the abuse of successive fixed term contracts. The Tribunal quoted paragraph 64 of the judgment as follows:-

"The concept of succession is one of the main legal concepts in the Framework Agreement. Of course the Framework Agreement and by extension, Directive 1999/70

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<sup>1</sup> Also referred to by Irish Labour Court (see §8.1).

are not intended primarily to obstruct the conclusion of individual fixed term employment relationships; on the contrary, they are focused above all on the possibility for pursuing abusive practices by concluding such contracts in succession (successive employment relationships) as well as on improving the quality of such fixed term employment relationships. In particular where a number of fixed term employment relationship have been concluded in succession, there is a danger that the employment relationship of indefinite duration, the employment relationship model defined by management and labour, will be circumvented thus giving rise to the problem of abuse. That is why clause 5 (1) of the Framework Agreement expressly requires that measures be introduced to prevent abuse arising from the use of successive fixed-term employment relationships."

2.5 At paragraph 20, the Tribunal stated:-

"The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 were introduced to prevent specific abuse of successive fixed term contracts which would prevent employees obtaining employment rights from which they would have benefited under a permanent contract of employment. Hence Regulation 8 requires an employee who has been employed for more than 4 years under a series of fixed term contracts and whose employment under a fixed term contract "was not justified on objective grounds" to be treated as a permanent employee. Going by the wording of Directive 1999/70/EC, and considering the judgment in Adeneler, the FTE Regulations were not intended to prevent the use of fixed term contracts where they were appropriate or to restrict flexibility in employment relationships between employer and employee where it was to be mutual benefit of both parties. They were however intended to prevent abuse of successive fixed term employment contracts or relationships. It is perhaps relevant to consider the use of the term "relationships" in this context. There is no suggestion in any of the documentation nor did the claimant argue that at the end of his secondment his employment relationship with NIHE would end: on the contrary, he was assured that he would be offered a post at his permanent grade of Level 6 when the secondment came to an end.

- 21: The use of secondment allows employers to offer employees opportunities to work in different areas, at different grades and to gain more experience and expertise. It would be quite inappropriate if the flexibility afforded by such opportunities to the benefit of both employer and employee, was constricted by legislation which was put in place to cure quite a different problem.”
- 2.6 The Tribunal therefore concluded:-  
“Having considered the submissions, I believe that the claimant is not employed on a fixed-term contract but is rather employed on a permanent contract which commenced in 1980 when he was first engaged by NIHE, continues today and will continue into the future after the end of his secondment.”
- 2.7 McCauley was followed in the later Tribunal decision in Brian Williams & Claire Foley v Department of Environment (Case Refs: 216/07 and 880/07) (2008). This case involved ‘long-term’ temporary promotions. The claimants wished to invoke Regulation 8 which would have required that these successive contracts should be treated as permanent.
- 2.8 Having referred to the McCauley Decision, the Tribunal stated, at paragraph 4.4:-  
“It is clear therefore that on each occasion that the letter was sent and the claimants were advised that the situation was temporary and that it would not extend indefinitely, although the tribunal can fully understand the claimants' frustration at being left in this unsatisfactory position for such a prolonged period of time. At the end of their temporary, although extended, promotion both claimants would revert to their original substantive grade. The claimants' representative argued that the Fixed-term Employee regulations did not preclude a permanent employee being a fixed-term employee: we do not agree. On reading the definitions in the Regulations, it is clear that "fixed-term employee" and "permanent employee" are defined in such a way that a permanent employee cannot be a fixed-term employee (see above, para.3.1). The claimants are permanent employees of the NICS and as such cannot benefit from the Fixed-term Employees Regulations.

Accordingly, they cannot rely on Regulation 8 of those Regulations to be treated as permanently graded at Curatorial Grade C.”

### **3. THE PRINCIPLE OF NON DISCRIMINATION BETWEEN A FIXED TERM EMPLOYEE AND THE COMPARABLE PERMANENT EMPLOYEE**

3.1 Regulation 3 provides for a ‘less favourable treatment’ claim:-

“(1) A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee -

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) Subject to paragraphs (3) and (4), the right conferred by paragraph (1) includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to -

(a) any period of service qualification relating to any particular condition of service,

(b) the opportunity to receive training, or

(c) the opportunity to secure permanent employment in the establishment.

(3) The right conferred by paragraph (1) applies only if -

(a) the treatment is on the ground that the employee is a fixed-term employee, and

(b) the treatment is not justified on objective grounds.”

3.2 Regulation 2 defines ‘comparable permanent employee as follows:-

“(1) For the purposes of these Regulations, an employee is a comparable permanent employee in relation to a fixed-term employee if, at the time when the treatment that is alleged to be less favourable to the fixed-term employee takes place -

(a) both employees are -

(i) employed by the same employer, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and  
(b) the comparable employee works or is based at the same establishment as the fixed-term employee or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.”

3.3 There have been three ‘less favourable treatment’ cases in the Northern Irish Tribunals. In Andrew Biggart v University of Ulster (Case Ref: 00778/05) (2006), the issues before the Tribunal were:-

“1. Was the Claimant unfairly dismissed from his employment with the Respondent by its failure to renew his fixed term contract or by reason of redundancy in February 2005?

2. Did the Claimant, who was a fixed-term contract employee, suffer less favourable treatment than a comparable permanent employee in being dismissed from his employment without the respondent considering redeployment and without affording him a right of appeal against his dismissal?”

3.4 The claimant, who had been a fixed-term employee since 1999, considered that he was being ‘sidelined’ during a School reorganization as permanent colleagues were being redeployed to other parts of the University but he was not. In particular, he was not allowed to be considered for redeployment to other posts as he was on a fixed-term contract. The University felt obliged to advertise these posts, in accordance with its Equal Opportunities Policy. The claimant applied for these posts but was not successful. Eventually, his fixed-term contract was allowed to expire.

3.5 On the issue of a ‘comparable permanent employee’, the University “argued that in order to show that the Claimant was treated less favourably than a permanent member of staff, he must compare himself with a permanent staff member who had been selected for redundancy and for whom the option of redeployment had been considered. This was

impossible, said the respondent, because no permanent member of staff had ever been in such a position and therefore there was no such actual comparator in existence.”

3.6 At paragraph 58, the Tribunal rejected this approach:-

“The Tribunal believes that the approach advocated by the respondent is too narrow. The 2002 Regulations simply require (see Regulation 2, set out above) that at the time when the alleged less favourable treatment occurs, the fixed-term employee and the permanent employee are employed by the same employer and engaged on the same or broadly similar work. It does not require the comparator to be in exactly the same situation in relation to his circumstances as the fixed term employee. If this were the case, it may well rob the legislation of its effectiveness. In the present case, Mr Magee told the Tribunal that to reduce staffing costs in the Faculty, a decision had been taken not to replace retirees, not to renew fixed-term contracts and to seek early retirements. Therefore Fixed-term employees as a group had been identified as a group vulnerable to dismissal and this in itself constituted less favourable treatment compared to permanent staff employed at the university in similar posts.”

3.7 This allowed the Tribunal to conclude, “The Tribunal finds that the Claimant has suffered less favourable treatment on grounds of his fixed-term status than a comparable permanent employee in being refused redeployment to suitable alternative employment when his fixed term contract ended.”

3.8 The Tribunal then briefly considered the issue of objective justification. In relation to ‘objective justification’, Regulation 4 provides:-

“(1) Where a fixed-term employee is treated by his employer less favourably than the employer treats a comparable permanent employee as regards any term of his contract, the treatment in question shall be regarded for the purposes of regulation 3(3)(b) 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.”

- 3.9 The Tribunal then concluded, “that this less favourable treatment means that the terms on which the Claimant was employed were not at least as favourable as the terms under which a permanent member of staff was employed and so cannot be objectively justified under Regulation 4 of the 2002 Regulations.”
- 3.10 A second case against the University of Ulster, McCartney v University of Ulster (Case Ref: 1782/04) (2006) concerned a range of claims sex discrimination and unfair dismissal but also less favourable treatment of a fixed-terms employee. Here there were not issues of redeployment. A permanent post became available in the field in which the claimant had held a series of fixed-term contracts for 7 years. However she was unsuccessful in her application and her contract subsequently expired.
- 3.11 Having found no evidence on direct sex discrimination, the Tribunal also considered that there was not evidence of less favourable treatment on account of the claimant’s fixed-term status. At paragraph 53, it reached the following conclusions:-  
“53: “The tribunal has been referred by the respondent's representative to the case of Department of Work and Pensions v Webley [2004] EWCA Civ 1745. In that case the Court of Appeal in England (examining the English equivalent of the 2002 Regulations), looked at the issue of whether, of itself, the termination or non-renewal of a fixed term contract was capable of constituting less favourable treatment under Regulation 3(1)(b) of the Regulations. The Court of Appeal held that since fixed-term contracts were not only lawful but recognised in certain circumstances as responding to the needs of both employers and employees, the termination of such a contract by the effluxion of time could not of itself constitute less favourable treatment by comparison with a permanent employee. Accordingly, the expiry of a fixed-term contract resulting in the dismissal of the fixed-term employee could not fall within regulation 3(1) of the 2002 Regulations and such a dismissal could not be a detriment for the purposes of regulation 3(1)(b). The Court determined that it could not be the case that there was an obligation to convert a fixed term contract into a permanent contract; fixed term contracts were not just lawful,

as was recognised in the 2002 Regulations, but it is of the essence of a fixed term contract that it does come to an end and the parties will be aware of that fact.”

3.12 The final ‘less favourable treatment’ case, Tony Meenan v Western Health & Social Care Trust (Case Ref: 1273/07) (2008) is the most substantial. The claimant was a manager working across three hospitals on a fixed-term contract. As a result of substantial reorganization across the public sector in Northern Ireland, known as the Review of Public Administration (RPA) a post was advertised but was only open to permanent staff. The RPA in paragraph 4.5 of a Background Paper, produced by the Department of Health Social Services and Public Safety stated:-

“The likely scale of change occurring from these proposed reconfigurations will require the HPSS to make every effort to retain and redeploy staff in order to ensure that valuable skills and experience are not lost to the service, and that any potential compulsory redundancies can be minimised.”

3.13 As in Biggart, there was discussion of the appropriate comparator. Once again, the Tribunal refused to adopt a narrow approach. At paragraph 20, it stated:-

“20. The different applicants for the post, from different disciplines, demonstrated the management ability required. It is in the view of the tribunal, too narrow a test to merely look at the comparison of what one manager was doing, in his or her current job and compare it with what another manager was doing. The true test is; did the applicants for the post perform management functions, of what ever type, for the respondent at a similar level? The job description did not specify the requirement of any particular skill, other than the ability to demonstrate leadership and collaborative working to achieve service improvements.

EC Fixed-term Work Directive (Council Directive 99/70/EC states that the comparator be “engaged in the same or similar work/occupation, due regard being given to qualification/skills.” The tribunal sees the word “occupation”, as confirmation of its view of the comparators in this case. They should be persons involved in management at the

appropriate level and they should not be subject to a narrow comparison of the actual tasks that each manager was doing on a day to day basis.”

- 3.14 On the issue of whether the respondent could provide ‘objective justification’ for the exclusion of fixed-term employees, the Tribunal relied on an English High Court judgment and an ECJ judgment on objective justification in sex discrimination law. At paragraph 28 of the Tribunal’s Decision, it quotes from the judgment in Hockenjos v Secretary of State for Social Security [2005] IRLR 471.

“The Secretary of State had failed to discharge the burden of justifying the discriminatory rule. Viewing the situation objectively, there was no evidence that the Secretary of State, or any one on his behalf, ever applied their mind to the question of whether there was a better or different way of achieving the policy aim that would avoid, or diminish the considerable discrimination. .... Where there may be alternatives that do not offend a fundamental principle of Community law but the Secretary of State has not explored them, he could not be held to have discharged the burden of establishing justification. It was not up to the [claimant] to show that there was an obviously better alternative.”

- 3.15 In Lommers v Minister Van Landbouw Natuurbeheer En Visserij [2002] IRLR 430, paragraph 39 of the judgment states “Nevertheless, according to settled case law, in determining the scope of any derogation from an individual right such as the equal treatment of men and women laid down by the Directive, due regard must be had to the principle of proportionality, which requires that derogation must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.”

- 3.16 The Tribunal had established that no guidance had been given on the position of fixed-term employees in relation to the RPA and that the respondent had not considered the

implication of the 2002 Regulations in setting out the recruitment criteria. The Tribunal therefore concluded:-

“The tribunal hold that a blanket ban on any application for a permanent post from a fixed-term employee was not proportionate to the problem being tackled by the respondent, especially when the respondent had clearly given no proper consideration to the tension between the rights given under the Regulations, the various lengths of service of the fixed-term employees and the legitimate aspiration of the respondent to avoid redundancies.”

#### **4. SUCCESSIVE FIXED –TERM CONTRACTS**

##### **4.1 Regulation 8 provides:-**

“(1) This regulation applies where -

(a) an employee is employed under a contract purporting to be a fixed-term contract; and  
(b) the contract mentioned in sub-paragraph (a) has previously been renewed, or the employee was employed by the same employer on a fixed-term contract, or on a series of successive fixed-term contracts, before the start of the contract mentioned in sub-paragraph (a).

(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if -

(a) the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and

(b) the employment of the employee under a fixed-term contract was not justified on objective grounds -

(i) where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;

(ii) where that contract has not been renewed, at the time when it was entered into.”

4.2 The two cases already considered on ‘fixed-term work’, McCauley and Williams and Foley, were ‘successive contracts’ cases. However, in both cases, the Tribunals concluded that the claimants were not engaged in fixed-term work and hence their claims on successive contracts failed.

## **5. PROCEDURAL MATTERS**

### **5.1 Whether the claimant was an ‘employee’**

5.1.1 The major case on procedural matters is Lorraine Elizabeth Fitzpatrick, Enid L J Ambrose & Karen Jane Hetherington v Department of the Environment (Case Refs 1103/06, 1106/06 & 1107/06) (2008). Here the issue was the familiar one of whether the claimants were ‘employees’. They were long-term agency workers, seeking the benefit of the successive contracts provisions. The case therefore has parallels with the Working Time case of Jason Matthew Andrew Vine v Hastings Hotels Group (Case Ref: 1497/07),<sup>2</sup> in which the issue was whether a casual worker was a ‘worker’, a wider concept than that of ‘employee’.

5.1.2 The Tribunal relied on the English Court of Appeal judgment, James v London Borough of Greenwich [2007] IRLR 168(EAT); [2008] IRLR 302 (EWCA) concerning the issue whether agency workers can become ‘employees’ within the meaning of the Regulations by implying this into the contract through ‘business necessity’.

5.1.3 Regulation 1(2) defines as follows:-

“‘employee’ means an individual who has entered into or works under or where the employment has ceased, worked under a contract of employment;”.

5.1.4 In paragraph 3.3 of the Decision, the Tribunal stated:-

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<sup>2</sup> See §7.3 of the Northern Ireland Working Time Report.

“The Court of Appeal made clear that Dacas v Brook Street Bureau UK Limited [2004] IRLR 358 is not authority for the proposition that the implication of a contract of service between the end-user and the worker in such a tripartite agency situation is inevitable in a long-term agency worker situation. It only pointed to it as a possibility, the outcome depending on the facts found by the Employment Tribunal in the particular case. ...It was necessary for the tribunal to consider, in these particular proceedings, whether the way in which the contract was performed was consistent with the agency arrangements and, if it was not, whether it was only consistent with an implied contract between worker and end-user.”

5.1.5 The Tribunal quoted from the EAT judgment in the James case, where at paragraph 53, the Tribunal stated:-

“The issue is then whether the way in which the contract is in fact performed is consistent with the agency arrangements or whether it is only consistent with an implied contract between the worker and the end-user and would be inconsistent with there being no such contract. Of course, if there is no contract then there will be no mutuality of obligation. But whereas in the casual worker cases the quest for mutual obligations determines whether or not there is a contract, in the agency cases the request for a contract determines whether there are mutual obligations. “

5.1.6 The Tribunal established that the claimants’ terms of employment had been revised in light of the Working Time Directive in terms of annual leave. In terms of supervision of annual leave, the Tribunal noted:-

“Again, there were differences in how the relevant paperwork was dealt with by the supervisory staff at the various properties in relation to such annual leave and who actually sent it on to the agency. However, for proper accounting purposes, as seen in relation to the monies due for hours worked, there again required to be the necessary authorisation before the relevant paperwork was sent to the agency to enable such paid leave to be given in accordance with the relevant Regulations. As with the paperwork for hours worked, the fact the paperwork was sent to the agency was consistent with the

terms of the contract of the claimants with the agency and the respondent's contract with the agency.”

5.1.7 The Tribunal took into account the degree of supervision and training which the claimants received but concluded that the claimants retained their ‘agency worker’ status throughout their working relationship with the respondents and therefore that they were not ‘employees’ within the meaning of the 2002 Regulations.

## **5.2 Compensation**

5.2.1 In two of the considered cases, Biggart and Meenan, compensation was considered. Regulation 7 (7) and (8) provide:-

“(7) Where an industrial tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable -

(a) making a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates;

(b) ordering the employer to pay compensation to the complainant;

(c) recommending that the employer take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

(8) Where a tribunal orders compensation under paragraph (7)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to -

(a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the infringement.

(9) The loss shall be taken to include -

- (a) any expenses reasonably incurred by the complainant in consequence of the infringement, and
- (b) loss of any benefit which he might reasonably be expected to have had but for the infringement.”

5.2.2 In Biggart, the Tribunal had already made a finding of unfair dismissal as a result of the non-renewal of the claimant’s contract. Therefore, paragraph 60 of the Decision, the Tribunal concluded:-

“The 2002 Regulations (Reg. 7(7), (8) and (10)) provide that where a tribunal finds a claim under the Regulations to be well founded, it may order compensation to be paid to the Claimant. The compensation shall be such as the tribunal considers just and equitable having regard to the infringement complained of and the loss attributable to the infringement, but shall not include an award for injury to feelings. As the Tribunal has already indicated its intention to award compensation to the Claimant to cover all the loss he suffered as a result of his dismissal, it would not be appropriate to make any further award of compensation in this case.”

5.2.3 This conclusion may be compared with the Irish Labour Court decision in University of Limerick v Coveny O’Beirne, in which the Court awarded €2,000 to reflect the infringement of the claimant’s rights under the Act and the Directive.

5.2.4 In Meenan, in which the Tribunal concluded that the claimant had been subject to ‘less favourable treatment’ in the blocking of his application for a permanent position, the Tribunal convened a ‘Remedies’ hearing to consider compensation. At paragraph 9 of the Decision, the Tribunal states:-

“9. The claimant gave evidence to show the extent of his loss as a result of his not being appointed to the post to which he aspired and which is the subject of this claim. This included future loss of wages and pension contributions which would have been made by the respondent. These losses were projected into the future and were based on the assumption that the claimant would have been successful in acquiring the post in

question. This however is, as the tribunal continues to remind itself, compensation for loss of a chance. In this connection the tribunal received guidance from Mr Justice Morrison in the case of Ministry of Defence v Cannock, [[1994] IRLR 509 (EAT)], in connection with the awarding of compensation for loss of a chance.”

5.2.5 At paragraph 10, the judgment in Cannock is quoted:-

“We suggest that tribunals do not simply make calculations under various different heads, and then add them up and award the total sum. A sense of due proportion involves looking at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed.”

5.2.6 The Tribunal concluded at paragraphs 13 and 14 as follows:-

“13. The tribunal hold that the claimant had a 50 % chance of being appointed to the post to which he aspired but for which he was wrongly not short listed. The compensation components will thus be discounted by this percentage as follows.

14. Loss of wages to 28 April 2008 (see para 36 main decision)	216.00
Future loss of wages	16600.00
Loss of Pension contributions	9500.00
	<hr/>
	£26,316.00

50% thereof is £13,158.00

The tribunal award compensation to the claimant of £13,158.00.”

## 6. CONCLUSION

It can be seen that there is a rich case law on the Fixed Term Work Directive in the Republic of Ireland compared to Northern Ireland. The Northern Irish cases have been limited to a narrow range of issues. Irish cases on fixed term work covered the issue of a fixed term contract being replaced with a permanent contract, as in McCraith and Keehan. The Northern Irish cases have concerned attempts to have temporary arrangements for permanent employees determined to be 'fixed term' contracts.

In both jurisdictions, a narrow approach towards comparators has been rejected and a rigorous approach taken to 'objective justification' of 'less favourable treatment', relying on ECJ case law in sex discrimination cases. However, in the Irish cases, a wider approach has been taken towards compensation, again invoking ECJ case law, particularly *von Colson* on effective remedies. Hence, in University of Limerick v Coveny O'Beirne, an award was made for 'infringement of right' but, in Biggart, in the Northern Irish tribunal, no award was made as the tribunal took the view that the claimant had already been compensated through unfair dismissal compensation.

**THE ORGANISATION OF WORKING TIME ACT 1997**  
**THE PRESENT POSITION IN THE REPUBLIC OF IRELAND**

**1. INTRODUCTION**

- 1.1. The Organisation of Working Time Act 1997 (hereinafter referred to as “the 1997 Act”) was implemented in Irish Law in order to transpose European Directive 93/104/EC concerning certain aspects of the organisation of working time into Irish Law. Since then a number of statutory instruments have extended the scope of the Act to effectively bring previously excluded employees within its protection.
- 1.1.1 Doctors in Training were brought within the scope of the Act by the European Communities (Organisation of Working Time) (Activities of Doctors in Training) Regulations 2004 (S.I. No 494 of 2004). Transport workers other than those performing mobile mode transport activities and mobile staff in civil aviation and offshore workers were brought within the scope of the Act by the Organisation of Working Time Inclusion of Transport Activities Regulations 2004 (S.I. No. 817 of 2004) and the Organisation of Working Time (Inclusion of Offshore Work) Regulations 2004 (S.I. No.819 of 2004). Employees within the mobile mode transport sector have their working time regulated by Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities and this Directive was transposed into Irish law by the European Communities (Organisation of Working Time of Persons performing mobile road transport activities) Regulations 2005 (S.I. No. 2 of 2005). A further Directive on the organisation of working time of mobile workers in civil aviation, Council Directive 2000/79/EC, was implemented by the European Communities (Organisation of Working Time) (Mobile Staff and Civil Aviation) Regulations 2006 ( S.I. No. 507 of 2006).

- 1.2. The Directive was introduced pursuant to Article 118A of the Treaty thereby allowing for qualified majority voting as the proposals concerned the health and safety of workers. That has had an impact on how the Act has been applied in Ireland. The Rights Commissioners and Labour Court have frequently emphasised the health and safety basis of the Act and, as a result, have tended to take a strict view of the legal obligations imposed on employers by the Act.
  
- 1.3. Whilst the claims brought under the Act have in general related to relatively small amounts of money, the Act does generate a considerable volume of claims and one of the most common reasons for workplace inspections. The legislation is regularly utilised by employees (and in particular by non national employees) to address oppressive working conditions such as excessive hours without any or any sufficient breaks, failures to pay holiday pay, Sunday premia etc. It is also quite common to see breaches of this legislation being used in other claims such as a claim pursuant to the Employment Equality Acts 1998-2004 to ground the factual basis for a claim of less favourable treatment on grounds of nationality and/or race. Therefore whilst claims under this Act can produce relatively modest awards of compensation, a finding in favour of a claimant can form the basis for other, and sometimes more lucrative, claims.
  
- 1.4. A number of issues have arisen in the case law which merit further consideration; what is meant by the concept of “working time”, how issues such as rest periods, Sunday work and weekly working hours have been approached, the importance of the provision of information by an employer, zero hour contracts, the right to paid holidays and the importance of keeping records. I will examine some important procedural points and the nature of the remedies awarded by the Rights Commissioner and the Labour Court on appeal.

## 2. WORKING TIME

2.1 Working time is defined at Section 2 (1) of the Act as any time that the employee is:

*“(a) at his or her place of work or at his or her employer’s disposal and*

*(b) carrying on or performing the activities or duties of his or her work.”*

2.2 The European Court of Justice have considered whether time on call comes within “working time” even where the individual is entitled to rest during a period of time that their services were not required. The Court has decided that a period of time on call, even where there are periods of inactivity during that time, still constitutes working time regardless of the intensity of work done during that time.

2.3 A further issue has arisen before the Irish Labour Court in relation to whether time spent in off the job training by statutory apprentices comes within the concept of working time. In the case of Fitzpatrick v Whelan DWT 36/2005 the Court held that time spent on off the job training was working time for the purposes of the Act given that such training is an integral part of the statutory apprenticeship and during the time on such training the apprentice was

*“at a place determined by the employer, carrying out the instructions of the employer and fulfilling the employer’s obligations under the rules of the scheme”.*

2.4 However the Labour Court has very clearly stated that travelling time is not working time. In the case of Breffni Carpentry Services Limited v Solodounikovs DWT 16/2008 the claimant had included the time he spent travelling from his home in Cavan to his workplace in Dublin in calculating the length of time he spent working without adequate work breaks. The claimant argued that because the company’s base was in Cavan,

whenever he had to travel from Cavan to a workplace in Dublin, he was entitled to include that travelling time in his calculation of his working time. The Court disagreed and found that only the hours which the complainant spent at the workplace and not time travelling there, could be regarded as working time. The Court found support for this proposition in the judgment in the Court of Justice in Sindicato de Medicos de Asistencia Publica v Conselleria de Senidae Y Sconsumo de La Generalidad Valencia [2000] ECR 1-7963 where the Court found that time spent by a doctor on call at a health centre was working time.

### **3 REST PERIODS**

- 3.1 Section 11 of the Act sets out an employee's entitlement to a daily rest period of not less than eleven consecutive hours in each period of twenty four hours. Section 12 sets out the right to breaks of at least fifteen minutes four hours and thirty minutes work and the right to a break of at least thirty minutes after six hours work. The latter may include the former.
- 3.2 The health and safety context of the Act, as a result of the Directive having been implemented via Article 118A, can be clearly seen in how the Labour Court have applied this section. In the case of The Tribune Printing and Publishing Company v Graphical Print & Media Union [2004] ELR 222 the Labour Court held that an employer was under a positive duty to ensure that employees received their rest breaks. The Court stated:

*“Merely stating that employees could take rest breaks if they wished and not putting in place proper procedures to ensure that the employee receives those breaks, thus protecting his health and safety, does not discharge that duty.”*

3.3 Certain employees are exempt from the entitlement to daily breaks pursuant to Section 12 depending on the nature of their work. However Section 6 of the Act requires an employer of such employees to make available equivalent compensatory rest. That can include compensation not necessarily of a monetary or material benefit but something which provides a benefit improving the physical conditions under which the employees work or the amenities and services available to them while at work.

3.4 An interesting application of the compensatory rest periods can be seen in the case of Goode Concrete Limited v Karpauskas DWT 0734. The employer argued that the claimant was a mobile worker and therefore exempt from the general requirements of the Act in relation to breaks. Whilst the Court accepted that argument, it also pointed out that the claimant came within the ambit of the Organisation of Working Time (Inclusion of Transport Activities) Regulations 2004, Article 7 of which provided as follows:

*“If a mobile worker is not entitled, by reason of an exemption under Regulation 6, to the rest period and break referred to in Sections 11, 12 and 13 of the Act, the employer shall ensure that such a mobile worker has available to himself or herself a rest period and break that, in all the circumstances, can reasonably be regarded as adequate rest”.*

The Court found that this imposed

*“a positive duty on an employer to whom the Regulations relate to so organise the work of workers covered by the Article that they have real opportunities to avail of adequate breaks during their working day.”.*

On the evidence the Court found that the claimant’s work was so organised as to leave him with little or no practical opportunity to take adequate breaks. The Court pointed out that the duty to provide breaks is

*“a health and safety imperative which has been characterised as a fundamental social right in European Law”.*

The Court found that the employed had failed in ensuring that there was sufficient time between deliveries so as to accommodate the claimant in taking breaks and in those circumstances found there had been a contravention of Section 12 of the Act. Compensation of €1,750 was awarded.

#### **4 SUNDAY WORK**

- 4.1 Section 14 of the Act entitles an employee who is required to work on a Sunday to be compensated by the payment of an additional allowance, an increase the rate of pay, paid time off or a combination of an allowance or increase in pay and paid time off. It does not automatically entitle the employee to any set rates such as double time or time and a half but simply an additional rate of pay. In the case of Jennifer Hamilton Weddings v Climo DWT0812, the Labour Court found that a rate of pay of €10 per hour for a Sunday where the claimant normally earned €8.50 per hour was a lawful premium for work performed on a Sunday and found in those circumstances there was no breach of Section 14 of the Act. That would appear to suggest that a fairly minimum increase in the basic rate will satisfy an employer's obligations pursuant to Section 14.

#### **5 WEEKLY WORKING HOURS**

- 5.1 Section 15 of the Act imposes a maximum working week of 48 hours worked out on an average basis calculated over various periods depending on the nature of the work. That period is two months for employees who are night workers, four months for most other employees, six months for certain activities such as agriculture and tourism and up to twelve months for employees covered by collective agreement approved by the Labour Court under Section 24.
- 5.2 The Section specifically refers to the employer's obligation not to "*permit an employee to work*" more than the average 48 hours. The use of the word "*permit*" was found by the Labour Court to be noteworthy in the case of IBM Ireland v Svoboda DWT 0818. In that

case, whilst the claimant's contract stipulated an average working week of thirty nine hours, she regularly worked in excess of forty eight hours and attended at her workplace outside her contracted hours and at weekends. The company argued that the claimant was a member of its professional staff and was afforded flexibility in determining her own working hours and that at no time was she instructed or requested to attend at work outside her core hours. The claimant argued that the company knew or ought to have known that she was working excessive hours and that these hours were necessitated by the workload assigned to her.

5.3 The Court pointed out that the obligation created by the Act is directed at

*“preventing an employee from working excessive hours and not merely at prohibiting an employer from instructing or requiring an employee to work more than the permitted hours. It further appears from the language of the Section that it imposes a form of strict liability (it does not provide that an employer may not – knowingly permit this construction of the Section as consistent with the object pursued by Directives 93/104 EC which the Act transposed into Irish Law. That objective, as stated in Article 1 of the Directive is to lay down minimum safety and health requirements for the protection of those at work.*

*Hence it would appear that it is no defence for the Respondent to say that it did not know that the Claimant was working excessive hours unless it had in place some system by which her hours of work could be monitored and appropriate corrective action taken if needed. In that regard the law has always recognised that a person can be fixed with imputed or constructed knowledge for the purpose of imposing liability for breach of statutory duty.*

*It is admitted that the Claimant worked excessive hours over a prolonged period. However there is no suggestion that the Respondent instructed or required her to do so. It is also clear from the evidence that the Respondent instructed the Claimant on more than one occasion during 2006 to confine herself to working her contractual hours. Yet the Claimant ignored these instructions and continued to attend at her place of work outside these hours.*

*On the evidence the Court accepts that the Respondent made a bona fide effort to bring about a state of affairs in which the Claimant would cease working in excessive of the permitted hours”.*

- 5.4 The Court went on to find that whilst a contravention of Section 15 (1) of the Act did occur in that the Claimant was permitted to work in excess of forty eight hours on occasions, the Court found that breach was technical and non-culpable in nature and that the Claimant was primarily responsible for what occurred. They made no further order and in particular made no order directing payment of any compensation.

## **6 ZERO HOURS WORKING PRACTICES**

- 6.1 Section 18 regulates what are known as zero hour contracts i.e. where an employee is asked to be available for work without a guarantee of work being provided to them. Section 18 entitles such an employee who is not given work of least 25% of the time the employer requires them to be available, to be entitled to payment for 25% of the contract hours or fifteen hours, whichever is less.

6.2 The scope of Section 18 was analysed by the Labour Court in Ocean Manpower Limited v Marine Port & General Workers Union [1998] ELR 299. The Court found that Section 18 did apply to the situation where an agreement required the employees to remain available for work during defined periods. Even though the Court accepted that the obligations might not be “*rigidly enforced*” by the company, it was clear that they remained part of the agreement and were therefore part of the employees contractual obligations. Therefore the Court found that Section 18 did apply. However they did not accept that the payment to which the employees were entitled should be calculated by reference to the number of hours over which they were required to make themselves available to the employer. The Court found that the payment should:

*“be calculated by reference to the number of hours which the employee may be required to work in a week and not to the number of hours over which they are required to be available to undertake that work”.*

## **7 HOLIDAYS**

7.1 Section 19 of the Act sets out the entitlement of every employee to paid annual leave and provides for three ways in which the amount of leave can be calculated depending on the working hours of the employee. Section 20 entitles the employer to determine the times at which annual leave shall be granted subject to the employer taking into account the need for the employee to reconcile work with any family responsibilities and/or opportunities for rest and recreation. There is also an obligation on the employer to consult with the employee or their trade union not later than one month before the day on which the annual leave is due to commence. The leave must be taken within the leave year to which it relates or within the six months thereafter, as long as the employee consents to the latter.

7.2 A similar strict approach to that adopted in relation to daily and weekly rest periods can be seen in the Labour Court's attitude to an employer's failure to provide paid annual leave i.e. that the obligation is imposed for health and safety reasons. In the case of Cementation Skanskav Carroll DWT 38/2003 the Labour Court described the obligation as having been imposed for health and safety reasons and acknowledged that the right to leave had been characterised "*as a fundamental social right in European Law*".

## **8 MAINTAINING RECORDS**

8.1 Section 25 requires an employer to keep records for at least three years to show compliance with the Act. The Labour Court has regularly highlighted the importance of maintaining records and has frequently criticised an employer for their failure to do so. In the case of IBM Ireland v Svoboda DWT 018, the company had not formally recorded the claimant's times of attendance and only had records available showing the times at which the claimant logged on and off her work telephone. In relation to the claimant's case that Section 25 had been breached, the Court pointed out that Section 25 is not a relevant provision within Section 27 of the Act which provides that a complaint that an employer contravened a "*relevant provision*" of the Act may be investigated. Therefore the Court found that it had no jurisdiction to investigate any alleged contravention of Section 25. However the Court will frequently use the absence of records and in effect a breach of Section 25, as evidence of an employer's failure to comply with other sections which are relevant sections within Section 27 i.e. use the absence of records to support the claimant's version of events over that of the employer.

## **9 BRINGING A CLAIM**

9.1 Section 27 entitles an employer or any trade union of which the employee is a member with the employee's consent, to present a complaint to a Rights Commissioner that the

employer has contravened a “*relevant provision*” in relation to the employee. The complaint must be presented within six months of the date of contravention to which the complaint relates, although that time can be extended to twelve months where the Rights Commissioner is satisfied that failure to present the complaint within six months was due to reasonable cause. In the case of Cennentation Skanska v Cara DWT 53/2003 the Court set out the scope of the reasonable cause test and stated as follows:

*“[I]n considering if reasonable cause exists, it is for the claimant to show that there are reasons which both explain the delay and afford an excuse for the delay. The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd. In the context in which the expression reasonable cause appears in statute, it suggests an objective standard, but it must be applied to the facts in circumstances known to the claimant at the material time. The claimant’s failure to present the claim within the six month time limit must have been due to the reasonable cause relied upon. Hence there must be a causal link between the circumstances cited and the delay and the claimant should satisfy the Court, as a matter of probability, that had those circumstances not been present he would have initiated the claim in time.”*

The Court also confirmed that the length of the delay should be taken in to account and that even where reasonable cause was shown, the Court should still consider if it was appropriate in the circumstances to exercise its discretion in failure of granting such an extension of time and in particular should consider whether the employer had suffered any prejudice by the delay.

- 9.2 The point at which time begins to run was determined by the High Court in the case of Royal Liver Assurance Limited v Mackey [2002] 4 I.R 427 where the High Court found that the Labour Court had erred in law in finding that the relevant date for the purpose of

the six months time limit was six months after the expiry of the leave year. The High Court found that unless the employer had actively sought the employee's consent to the extension of the leave year as required by Section 20(1)(c), the time had to run from the expiry of the leave year rather than six months thereafter. The decision of the High Court was considered by the Labour Court in the case of Singh & Singh Limited v Goutan DWT 44-2005 where the Court found that where the employer failed to provide an employee with the requisite amount of paid annual leave, the contravention of the Act occurs at the end of the leave year to which the leave relates. Where employment ceases during a leave year an employer is required to pay the employee compensation for any outstanding annual leave and failure to do so constituted a contravention of the Act which occurred on the day on which the employment terminated.

- 9.3 More recently in the case of Prestige Recycling Limited v Romanischeve TWT/086, the Labour Court, on an appeal by the claimant against the quantum of an award made by the Rights Commissioner arising from breaches of the Act relating to excessive hours, failure to pay annual leave and Sunday work premia, found that “*some of the contraventions relied upon occurred outside the limitation period prescribed by s.27(4) of the Act*”. The Court did not give any further details than to say that the contravention occurred “*more than six months before the presentation of the complaint*” and concluded that “*to that extent*” those contraventions could not be taken in to account in measuring the quantum of compensation which was fair and reasonable in the circumstances. The Court made an award of compensation which was expressly stated to be

*“in respect of the contraventions of the Act which occurred in the six months prior to the presentation of his complaints to the Rights Commissioner.”*

At least some of the contraventions on which the claimant was relying related to the failure to pay holiday pay. It would appear that this determination is authority for the proposition that the Labour Court has no jurisdiction to award compensation for any

contravention, including a failure to pay, which occurred outside of the six months before the complaint was presented.

9.4 Section 27(2) makes it clear that not only can the employee themselves make a complaint in relation to an alleged breach of the Act, but so too can a trade union of which the employee is a member. However the subsection makes it clear that the trade union must have the employee's consent to make such a complaint. In the case of Campbell Catering Limited v SIUTU DWT 35/2000 the subsection was found to permit a trade union to present more than one complaint on behalf of a number of employees affected by the subject matter of the complaint, with each one identical in form and content.

9.5 However it must be borne in mind that even though a trade union has a statutory right to bring a complaint on behalf of an employee, that does not mean that where evidence is required to be given (and it is difficult to think of circumstances in which it would not be necessary for an employee to confirm that they have suffered the breaches alleged), it must be given by the employee in question and cannot be given by a trade union on their behalf in the light of the clear comments of the Supreme Court in the case of Ryanair v The Labour Court [2007] ELR 67.

## **10 REMEDIES**

10.1 Section 27(3) sets out what a Rights Commissioner (and the Labour Court on appeal) may award in terms of a remedy including requiring the employer to comply with the relevant provision and payment of compensation that is "*just and equitable having regard to all of the circumstances*". The maximum compensation that can be awarded is two years remuneration. In practice, the Rights Commissioner and the Labour Court will frequently award compensation over and above the actual financial loss suffered by the

employee in relation to, for example, unpaid holiday pay. There is a clear awareness of the need to not just compensate actual financial loss but also to provide a deterrent, in accordance with the requirement of European Law as set out in the case of Von Colson & Camann v Lans Norgrhein, Westfalan [1984] ECR 1891.

10.2 In the case of Harbour House Limited v Jurksa DWT 0811, the Labour Court expressly referred to the decision of the Court of Justice in Von Colson and pointed out that the Court of Justice required judicial redress to provide not only for economic loss sustained but also to provide a real deterrent against future infractions. In that case the Court granted compensation of €3,000 for breaches of Section 11, 13 and 15 of the Act which was clearly in excess of any actual loss sustained by the employee. In the case of Solid Building Company Limited v Baranovs DWT 0821 the economic value of unpaid holiday pay came to €418 but the Court was:

*“satisfied that the respondent acted in flagrant disregard of its obligations in domestic and Community Law and in a manner which was oppressive and exploitive of the complainant. The Court was also satisfied that the claimant suffered significant inconvenience and expense in seeking to vindicate his rights. Accordingly, the quantum of compensation which could be regarded as appropriate must go considerably beyond the economic value of the loss sustained”.*

The Court measured the compensation at €3,000 which included €418 being the value of the holiday pay due and expressly awarded the remaining €2,582 in respect of the effect on the claimant of the transgression found to have occurred.

## **WORKING TIME REGULATIONS (NORTHERN IRELAND) 1998**

### **THE PRESENT POSITION IN NORTHERN IRELAND**

#### **1. INTRODUCTION**

- 1.1 The Working Time Regulations (Northern Ireland) 1998 (hereinafter referred to as “the 1998 Regulations”) was enacted in Northern Irish Law in order to transpose European Directive 93/104/EC concerning certain aspects of the organisation of working time and also provisions concerning working time in Council Directive 94/33/EC on the protection of young people at work. Since then a number of statutory instruments have extended the scope of the Regulations primarily to transpose Council Directive 2003/88/EC, which consolidates Directive 93/104/EC, as amended by Council Directive 2000/34/EC.
- 1.2 As with the Fixed Term Work Regulations, the Regulations were made under section 2(2) of the European Communities Act 1972. Hence, the approach of the legislator was to meet the minimum requirements of the Directives. In particular, regulation 5 provides for an agreement between an employer and an individual worker to exclude the maximum working week of 48 hours.
- 1.3 A small amendment was made in the Working Time (Amendment) Regulations (Northern Ireland) 1998. The amendment made to Regulation 4 made it clear that a worker's working time, including overtime, in any reference period which is applicable in his case, shall not exceed an average of 48 hours for each seven days.
- 1.4 The Working Time (Amendment) Regulations (Northern Ireland) 1999 provide for the Health and Safety Executive for Northern Ireland to assume the enforcement functions

previously exercised by the Department of Economic Development under the principal Regulations.

- 1.5 The Working Time (Amendment) Regulations (Northern Ireland) 2000 replace detailed requirements imposed on the employer of workers who have agreed to exclude the limit with a requirement and that the provisions relating to weekly working time and night work will only apply in relation to that part of the worker's work which is measured, predetermined or cannot be determined by the worker himself.
- 1.6 The Working Time (Amendment) Regulations (Northern Ireland) 2003 were enacted primarily in order to implement certain provisions of Council Directive 94/33/EC on the protection of young people at work.
- 1.7 The Working Time (Amendment) Regulations (Northern Ireland) 2006 impose limits on the maximum weekly working time of workers and on the length of night work.
- 1.8 The Working Time (Amendment) Regulations (Northern Ireland) 2007 increase the annual leave entitlement from 4 weeks to 5.6 weeks.
- 1.9 In this report the relevant aspects of the Regulations will be examined in relation to the relevant case law of the Industrial Tribunals to which complaints have been made. Most of these cases involve procedural matters and, as in the Republic of Ireland, many cases involve other complaints as well as complaints about breaches of the Regulations.

## 2. COURT PROCEEDINGS OVER THE LEGALITY AND TRANSPOSITION OF THE DIRECTIVE

2.1 A number of cases should be mentioned involving challenges to the legality and transposition of the Directive, First, in Case C-84/94, United Kingdom v Council,<sup>3</sup> the European Court of Justice (“ECJ”) rejected a extensive series of challenges by the United Kingdom to the effect that the Directive was not within the scope of Article 118a EC. The Court rejected all these challenges. The key elements of the Court’s judgment are as follows:-

“1. Article 118a, of the Treaty is the appropriate legal basis for the adoption by the Community of measures whose principal aim is the protection of the health and safety of workers, notwithstanding the ancillary effects which such measures may have on the establishment and functioning of the internal market. Since its aim is to ensure that protection, Article 118a constitutes a more specific rule than Articles 100 and 100a, the existence of which does not have the effect of restricting its scope, and must be widely interpreted as regards the scope it gives for Community legislative action regarding the health and safety of workers. Such action may comprise measures which are of general application, not merely measures specific to certain categories of workers, and which have to be in the nature of minimum requirements only in the sense that Member States remain at liberty to adopt more protective measures.

It is for that reason that, in terms of both its aim and its content, Directive 93/104 concerning certain aspects of the organization of working time could, save for the provisions in the second paragraph of Article 5 giving priority to Sunday as the weekly rest day which must therefore be annulled, be adopted on the basis of Article 118a.

4. The adoption by the Council of Directive 93/104 concerning certain aspects of the organization of working time did not constitute an infringement of the principle of proportionality.

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<sup>3</sup> See Fitzpatrick, 'Straining the Definition of Health and Safety?' (1997) 26 *Industrial Law Journal* 115-135.

The limited power of review which the Community judicature has over the Council's exercise of its wide discretion in the area of the protection of workers' health and safety, where social policy choices and complex assessments are involved, has not revealed either that the measures forming the subject-matter of the directive, save for that contained in the second paragraph of Article 5, were unsuited to achieving the aim pursued, namely workers' health and safety, or that those measures, which have a degree of flexibility, went beyond what was necessary to attain their objective.

5. An act of a Community institution is vitiated by a misuse of powers if it has been adopted with the exclusive or main purpose of achieving ends other than those stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.

That is not the case with Council Directive 93/104 concerning certain aspects of the organization of working time, since it has not been established that it was adopted with the exclusive or main purpose of achieving an end other than the protection of the health and safety of workers envisaged by Article 118a of the Treaty which constitutes its legal basis.”

- 2.2 Hence the Court accepted the ‘health and safety’ nature of the Directive and this has been reflected in some of the Northern Irish case law. The Court also rejected arguments that the Council had exceeded its powers in enacting the Directive.

- 2.3 Secondly, an application for judicial review was made in In The Matter Of An Application By Shirley Burns For Judicial Review, [1999] NIQB 5 (Kerr J.). Here the applicant sought a declaration that the United Kingdom of Great Britain and Northern

Ireland had failed to transpose the Directive in time. She also sought damages for losses which she claimed she suffered. The precise terms of her application were as follows:-

“(i) a declaration that the United Kingdom was in breach of its obligations under the European Directive on the Organisation of Working Time (Council Directive 93/104/EC) whereby each member state was required to adopt the laws, regulations and administrative procedures necessary to implement the Directive by 23 November 1996.

(ii) a declaration that the applicant be deemed a worker within the terms of the Directive notwithstanding the termination of her employment on 7 February 1997.

(iii) a declaration that the applicant be deemed a ‘night worker’ within the terms of the Directive.

(iv) a declaration that the United Kingdom's breach of European law in failing to transpose the Directive into domestic law is sufficiently serious to give rise to liability for any damage suffered by the applicant.

(v) a declaration that the applicant is entitled to exemplary damages.”

- 2.4 This was what has become known as a ‘State Liability’ case, in which damages can be claimed for losses suffered by a failure to transpose a Directive. The applicant had to establish that the failure to transpose the Directive was a ‘serious breach of Community law’. The Government sought to rely on a passage from the ECJ’s judgment in R v Secretary of State for Transport ex parte Factortame and others [1996] All ER (EC) 301, where at paragraph 57, the Court stated, ““On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case law of the court on the matter from which it is clear that the conduct in question constituted an infringement.”

- 2.5 The Court however relied on a passage from a later judgment, Dillenkofer & others v Germany [1996] All ER (EC) 917, in which the Court stated, at paragraph 29, “failure to take any measure to transpose a directive in order to achieve the result it prescribes within the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the state's obligation and the loss and damage suffered.”
- 2.6 The Court concluded that “If a member state does not transpose a directive within the proscribed period, it is in automatic and serious breach of Community law and, therefore, liable for an injury suffered by an individual who suffers loss and damage in consequence.” The judge concluded, “The applicant is entitled to the declarations sought in (i) to (iv) of the outline to the judicial review claim above. I am not satisfied, however, for the reasons earlier given, that she is entitled to damages for the loss of her employment. It appears to me, however, that, on production of the necessary evidence to establish that she would have been reassigned as a day worker had the Directive been in force in domestic law she may well be entitled to recover compensation for the loss of her employment.”
- 2.7 The applicant had withdrawn her application for an order of mandamus, requiring the Government to transpose the Directive on the basis that the Regulations were to be enacted.
- 2.8 Thirdly, in Case C-484/04 Commission v. United Kingdom, the ECJ held that the United Kingdom has breached Directive 93/104/EC - the Working Time Directive - by adopting guidelines which give the impression of curtailing rights conferred by the Directive itself. The Working Time Directive requires Member States to take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive

hours per 24-hour period and, per each seven-day period, to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest. To help people understand the Regulations, the Department of Trade and Industry (and the predecessor of the Department of Employment and Learning in Northern Ireland) published a set of guidelines that that 'employers must make sure that workers can take their rest, but are not required to make sure they do take their rest'.

2.9 The Court held that the guidelines let it be understood by all that while they cannot prevent the rest periods from being taken by workers, the employers are not obliged (according to the Guidelines) to ensure that the workers actually exercise such a right. As a result, the Court held that the guidelines effectively render the rights granted in the Directive meaningless.<sup>4</sup>

### **3. WORKING TIME**

3.1 Regulation 2(2) provides "'working time", in relation to a worker, means-

- (a) any period during which he is working, at his employer's disposal and carrying out his activity or duties,
- (b) any period during which he is receiving relevant training, and
- (c) any additional period which is to be treated as working time for the purpose of these Regulations under a relevant agreement;

and "work" shall be construed accordingly."

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<sup>4</sup> [http://eulaw.typepad.com/eulawblog/2006/09/united\\_kingdom\\_.html](http://eulaw.typepad.com/eulawblog/2006/09/united_kingdom_.html).

- 3.2 As stated in the Irish report (at §2.2), the ECJ has made a number of rulings on ‘on-call’ workers. This issue has arisen in the two extensive Tribunal decisions in Northern Ireland.
- 3.3 In Norman Ekin v United Hospitals Health & Social Services Trust (Case Ref: 3254/01) (2003), the issue before the tribunal was whether the applicant received appropriate compensatory rest in accordance with Regulations 10, 11, 21 and 24 of the Regulations. The applicant was an estates officer working at a hospital. He had ‘out of hours’, ‘on call’ responsibilities.
- 3.4 Before considering the compensatory rest issue, the Tribunal had to come to a conclusion as to how much of his ‘on call’ time was ‘working time’ for the purposes of the Regulations. It considered two ECJ judgments as follows:-
- “15. It is clear from the European Court of Justice decisions in Landeshauptstadt Kiel –v- Jaeger [2003 IRLR 804] and Simap –v- Conselleria de Sanidad y Consumo de la Generalidad Valenciana that periods of on-call when the employee is free to manage his/her time subject only to the constraint that he or she must be contactable at all times is not working time for the purposes of the legislation. In the Simap case it was held that only time linked to actual provision of primary care services by doctors must be regarded as working time. The situation is clearly different if the doctors are required to be physically present on the hospital premises during the on call period.”<sup>5</sup>
- 3.5 Applying this to the case before it, it concluded:-

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<sup>5</sup> The Simap case was also considered by the Irish Labour Court (see §2.4 of the Irish Report).

“16. Applying the reasoning in these cases, the tribunal is satisfied that only the time spent by the applicant in answering telephone calls from the hospitals and a reasonable period to get back to sleep (if the applicant was asleep when the telephone call was made) can constitute working time.”

3.6 Nonetheless, a Tribunal in the recent case of Samuel Blakley v South Eastern Health and Social Care Trust – Human Resources Directorate (Case Ref: 918/08 )(2009) reached a different conclusion on similar facts. The claimant was once again an estates officer attached to a hospital, claiming compensatory rest for periods of time during which he was ‘on call’. In Blakley, the crucial point upon the Tribunal concentrated was that the claimant worked from home when he was ‘on call’ and performed some of these duties from his home rather than returning to his place of work in order to perform them.

3.7 Two of the issues before the tribunal were “(a) Whether, given that the claimant was engaged in the work which needed continuity of service or production within the meaning of Regulation 21 of the Working Time Regulations (Northern Ireland) 1998 as amended (“the WTR”), the ad hoc arrangement for compensatory rest applied by the respondent provided him with adequate compensatory rest within the meaning of Regulation 24 of the WTR.

(b) Whether time spent “on call” by the claimant and his fellow estate officers constituted “working time” within the meaning of Regulation 2 of the WTR and therefore whether the claimant was entitled to be paid for all of his time on call.

He therefore agreed that when on call, he was not entitled to daily or weekly rest periods as set out in Regulations 10 and 11 of the WTR. He believed however that he should be entitled to a period of compensatory rest as set out in Regulation 24 of the WTR.”

3.8 As in Ekin, the Tribunal considered the ECJ judgments in Simap and Jaeger. The Tribunal quoted paragraph 65 of the Court's judgment, as follows:-

“It should be added that, as the Court has already held at paragraph 50 of the judgment in SIMAP, in contrast to a doctor on standby, where the doctor is required to be permanently accessible but not present in the health centre, a doctor who is required to keep himself available to his employer at a place determined by him for the whole duration of period of on-call duty is subject to appreciably greater constraints since he has to remain apart from his family and social environment and has less freedom to manage the time during which his professional services are not required. Under those conditions, an employee available at the place determined by the employer cannot be regarded as being at rest during the periods of his on-call duty when he is not actually carrying on any professional activity.”

3.9 However, unlike in Ekin, the Tribunal in Blakley considered authorities from the Employment Appeal Tribunal (EAT) in Great Britain and the English Court of Appeal, in order to distinguish the claimant's position from that of those who could be called into work, rather than those whose place of work was the home from which they were 'on call'. The first case was McCartney v Oversley House Management [2006] UKEAT IRLR 514. Here, the EAT noted that Mrs McCartney's home was a place of work for her; she was not merely liable to be called out by some independent service but was liable herself to take telephone calls from residents and deal with them.

3.10 Secondly, the Tribunal considered British Nursing Association v Inland Revenue [2002] IRLR480 (Court of Appeal), a case under the National Minimum Wage Regulations, but in which the issue of whether an 'on call worker' was 'working' during the performance of her 'on call' duties. Here again the distinction is made between being 'on call' to go into work and being 'on call' in the worker's home as a place of work. Hence the Court

of Appeal upheld the view that, although they could spend at least part of their time doing other activities such as reading or watching television, the employees operating the telephone booking service from home during night time hours were “working” throughout their shifts.

3.11 The Tribunal noted that Lord Justice Buxton, in the leading judgment in the Court of Appeal, reached his conclusion as a matter of the ordinary use of language and referred to Simap, which he distinguished on the basis that the doctors who were on call at home, did no work at home merely by being on call.

3.12 Finally, the Tribunal relied on a more recent judgment of the EAT, Hughes v Graham and Lynn Jones t/a Graylyns Residential Home [2008] UK EAT 0159 08 0310. This is another case under the National Minimum Wage legislation. They believed that the claimant was entitled to the benefit of the WTR which had been breached both in respect of the number of hours required to be worked including those on call and by the failure to provide rest periods and rest breaks. Given that Ms Hughes’ claim included a claim to be paid the minimum wage for all of the hours when she was on call, the EAT found that it followed that the minimum wage became payable for all of those hours save those under Regulation 16 (1A) of the Minimum Wage Regulations when the claimant was sleeping and so not entitled to be paid for those hours.

3.13 At paragraph 3.12 of its Decision, the Tribunal summarised the EAT judgment as follows:-

“They believed that the claimant was entitled to the benefit of the WTR which had been breached both in respect of the number of hours required to be worked including those on call and by the failure to provide rest periods and rest breaks.

Given that Ms Hughes' claim included a claim to be paid the minimum wage for all of the hours when she was on call, the EAT found that it followed that the minimum wage became payable for all of those hours save those under Regulation 16 (1A) of the Minimum Wage Regulations when the claimant was sleeping and so not entitled to be paid for those hours."

3.14 Having again considered the implications of the Simap and Jaeger decisions, the Tribunal concluded, at paragraph 4.8:-

"Our view is that the claimant's situation is more akin to that of the claimants in the McCartney and the British Nursing Association cases referred to above. The claimant is required by his employer to be available to do work out of hours and that contractual requirement is reflected by the Joint Agreement entered into by the respondent's predecessor with the Amicus Union in February 2003, but effective from 1 April 2002. That agreement we believe is a "relevant agreement" under the definition set out in Regulation 2 of the [Regulations], in that it is a workforce agreement which applies to him or a collective agreement which forms part of a contract between him and his employer."

3.15 Hence, without direct reference to the Ekin Decision, the Tribunal in Blakley took the opposite view and concluded that the time which a worker spent performing 'on call' duties from his home, was 'working time' within the meaning of the Regulations. Effectively, although the Labour Court in Breffni Carpentry Services Limited and the Tribunal in Ekin had relied on ECJ judgments in reach their conclusions, the Tribunal in Blakely relied on 'working time' judgments in the English courts and tribunals to reach the opposite conclusion to the Tribunal in Ekin on virtually identical facts.

#### 4. REST PERIODS

4.1 Regulation 10 entitles the applicant to a rest period of not less than eleven consecutive hours in each twenty-four hour period which he works for the respondent. Regulation 11 entitles the applicant to an uninterrupted rest period of not less than twenty-four hours in each seven day period during which he works for the respondent or to one uninterrupted rest period of not less than forty-eight hours in each fourteen day period.

4.2 Both Ekin and Blakley (discussed above) concerned claims for compensatory rest periods. This is because both claimants worked in the health sector. Regulation 21 (c) provides that, subject to Regulation 24, Regulations 10 (1) and 11 (1) and (2) do not apply in relation to a worker:-

“(c) where the worker’s activities involve the need for continuity of service or production, as may be the case in relation to -

(i) services relating to the reception, treatment or care provided by hospitals or similar establishments, residential institutions and prisons ...”

4.3 Regulation 24 therefore deals with compensatory rest:-

“Where the application of any provision of these Regulations is excluded by Regulations 21 or 22, or is modified or excluded by means of a collective agreement or workforce agreement under Regulation 23 (a), and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break –

(a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and

(b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety.”

4.4 In Ekin, having decided that only short periods of ‘on call’ time were ‘working time’, the Tribunal approached the ‘compensatory rest’ issue, at paragraphs 22 and 23 of its Decision:-

“22. In our view, since the health and safety of employees is of paramount consideration, a common sense approach must be adopted to individual circumstances. We agree that the starting point should be “a period of rest the same length as the period of rest, or part of the period of rest, that a worker has missed”. However, clearly that approach may not sufficiently protect the health and safety of workers in all cases. A worker whose sleep is disturbed by a series of short telephone calls and who is unable to return to sleep may require several hours compensatory rest in order to safeguard his health and safety. We consider that an employer should adopt a flexible approach to the issue.

23. However, we do not accept the applicant's submission that any disturbance of his eleven hours daily consecutive rest, no matter how short the disturbance or how much rest he had before the disturbance, means that he must be given a further eleven hours consecutive rest by way of compensation. We can find nothing in either the legislation or the authorities to suggest that the applicant's submission is correct.”

4.5 The Tribunal concluded that a ‘late start’ arrangement of the employer was an adequate form of compensatory rest and dismissed the application.

4.6 The Tribunal in Blakley also considered an ‘ad hoc’ arrangement whereby the claimant could ask for a late start or for time off if he had had a disturbed night's sleep while on-call. The Tribunal refused to accept this arrangement, at paragraph 4.3 of its Decision:-

“In the working culture which is prevalent today, it may be perceived as weakness or a lack of commitment if an employee asks for a period of compensatory rest. If there is a clear policy in place providing for compensatory rest to be made available in certain circumstances, and setting out how this compensatory rest is to be calculated and accessed, this gives clarity for both employer and employee. It allows an employee to avail of their entitlement to compensatory rest without feeling that they are asking for a “favour” rather than an entitlement. Given that the respondent was able to put in place a clear system of compensatory rest for the tradesmen working for the Trust, we really cannot see why a similar procedure was not put in place for estates officers. It would be simple and straightforward to do so and would be to the benefit of both staff and management.”

4.7 At paragraph 4.4, it reached its Decision on the ‘compensatory break’ claim as follows:-

“We therefore find that the respondent is currently in breach of its obligations under Article 24 of the Working Time Regulations (Northern Ireland) 1998 in failing to provide for the equivalent period of compensatory rest as required in order to safeguard the worker’s health and safety. No evidence was provided by the respondent to show that it was not possible to grant such a period of rest, and while the claimant did not produce any medical evidence that the on-call system was proving injurious to his health, we can entirely appreciate that if an estates officer is called out or telephoned though the night because of an emergency at his place of work, it is necessary for him to have an appropriate period of compensatory rest.”

4.8 In both these Decisions, the Tribunal made reference to ‘health and safety’ considerations. However, this is more likely to be due to the explicit reference to “the worker’s health and safety” in Regulation 24, rather than wider considerations of the

'health and safety' nature of the Directive, as confirmed by the ECJ in Case C-84/94, United Kingdom v Council.

## **5. SUNDAY WORK**

The Irish report refers to Section 14 of the Irish Working Time Act in relation to Sunday work. However, the only success on the part of the UK in its case against the Council was that "the second paragraph of Article 5 giving priority to Sunday as the weekly rest day which must therefore be annulled". Therefore regulation 12, on 'weekly rest period' makes no mention to 'Sunday work'.

## **6. WEEKLY WORKING HOURS**

6.1 Regulation 4 provides:-

"4. - (1) Subject to regulation 5, a worker's working time, including overtime, in any reference period which is applicable in his case, shall not exceed 48 hours for each seven days.

(2) An employer shall take all reasonable steps, in keeping with the need to protect the health and safety of workers, to ensure that the limit specified in paragraph (1) is complied with in the case of each worker employed by him in relation to whom it applies.

(3) Subject to paragraphs (4) and (5) and any agreement under regulation 23(b), the reference periods which apply in the case of a worker are-

(a) where a relevant agreement provides for the application of this regulation in relation to successive periods of 17 weeks, each such period, or

(b) in any other case, any period of 17 weeks in the course of his employment." However, as permitted by Article 22 of the Consolidated Directive 2003, regulation 5 allows for 'an agreement to exclude the maximum'. Regulation 5 provides:-

“5. - (1) The limit specified in regulation 4(1) shall not apply in relation to a worker who has agreed with his employer in writing that it should not apply in his case, provided that the employer complies with the requirements of paragraph (4).

(2) An agreement for the purposes of paragraph (1)-

(a) may either relate to a specified period or apply indefinitely; and

(b) subject to any provision in the agreement for a different period of notice, shall be terminable by the worker giving not less than seven days' notice to his employer in writing.

(3) Where an agreement for the purposes of paragraph (1) makes provision for the termination of the agreement after a period of notice, the notice period provided for shall not exceed three months.

(4) The requirements referred to in paragraph (1) are that the employer-

(a) maintains up-to-date records which-

(i) identify each of the workers whom he employs who has agreed that the limit specified in regulation 4(1) should not apply in his case;

(ii) set out any terms on which the worker agreed that the limit should not apply; and

(iii) specify the number of hours worked by him for the employer during each reference period since the agreement came into effect (excluding any period which ended more than two years before the most recent entry in the records);

(b) permits any inspector appointed by the Department of Economic Development or any other authority which is responsible under regulation 28 for the enforcement of these Regulations to inspect those records on request; and

(c) provides any such inspector with such information as he may request regarding any case in which a worker has agreed that the limit specified in regulation 4(1) should not apply in his case.”

6.2 Despite the controversy surrounding this ‘opt-out’ for individual workers, there is no case law in the Northern Irish tribunals on this issue.

## 7. HOLIDAYS

7.1 Regulation 13 provides:-

“(1) Subject to paragraphs (5) and (7), a worker is entitled in each leave year to a period of leave determined in accordance with paragraph (2).

(2) The period of leave to which a worker is entitled under paragraph (1) is-

(a) in any leave year beginning on or before 23rd November 1998, three weeks;

(b) in any leave year beginning after 23rd November 1998 but before 23rd November 1999, three weeks and a proportion of a fourth week equivalent to the proportion of the year beginning on 23rd November 1998 which has elapsed at the start of that leave year; and

(c) in any leave year beginning on or after 23rd November 1999, four weeks.”

7.2 The 2007 Amendment Regulations add a Regulation 13A which, in due course, will increase annual leave to 5.6 weeks.

7.3 There has been a number of cases on annual leave and holiday pay. The only substantial Decision is Jason Matthew Andrew Vine v Hastings Hotels Group (Case Ref: 1497/07) (2007), on whether the claimant was a worker within the meaning of Regulation 2(2) for the purposes of a claim under Regulations 13 and 14. The Irish Report has a section on ‘Zero Hours Working Practices’. There are no equivalent provisions in the Regulations

but this Decision does provide the opportunity to consider whether a ‘casual worker’ is a ‘worker’ within the meaning of the Regulations.

7.4 The interpretation provision, regulation 2(2), defines ‘worker’ as follows:-

"worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)-

(a) a contract of employment; or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;”

7.5 The claimant in Vine was a ‘casual worker’ in the hospitality sector who was claiming annual leave under the Regulations but also other employment rights which involved consideration of whether he was an ‘employee’. The definition of ‘worker’ in regulation 2(2), as in other legislation such as the National Minimum Wage legislation, creates a ‘hybrid’ category of those who are not employees but are still protected by the legislation, as being not ‘genuinely self-employed’.

7.6 The Tribunal in Vine made reference to the EAT judgment in James -v- Redcats (Brands) Limited [2007] IRLR 296 in which the EAT stated that “not all those who might properly be described as self-employed are engaged in a business undertaking. The requirement to distinguish between employees, workers and those engaged in a business undertaking of their own demands a more sophisticated analysis than in some of the earlier cases, which

loosely described all non-employees as being in business on their own account. What the courts must try to determine is whether the essence of the relationship is that of a worker or somebody who is employed in a business undertaking, albeit in a small way. Some assistance can be gleaned from cases which have analysed the definition of “employment” in the discrimination legislation and which have asked whether the dominant purpose of the contractual arrangement is the provision of personal services or whether that is an ancillary or incidental feature. The dominant purpose test is really an attempt to identify the essential nature of the contract. Is the obligation for personal service the dominant feature? Is the contract in essence to be located in the employment field or is it in essence a contract between two independent business undertakings? The test has the effect of excluding those found to be in business on their own account. The definition of “worker” in the National Minimum Wage Act and other recent statutes can be similarly analysed”.

7.7 At a later stage in the Decision, the Tribunal further referred to the EAT held in Cotswold Developments Construction Ltd –v- Williams [2006] IRLR 181. At paragraphs 49 and 50 of its judgment, the EAT stated:-

“We do, however, accept that when considering a statutory definition such as that of “worker”, what matters are the words of the statute. They focus not upon any obligation owed by the employer (save sufficient to ensure that there is a contract between the “employer” and the “worker”) but upon the nature of the obligation resting upon the worker”. ... “What is plain is that for an individual to be a “worker”, he must be (a) subject to a contract (b) whereby he undertakes to perform personally c) for someone who is not a client or customer of a profession or business of his.”

7.8 In consequence, the Tribunal, at paragraph 26, posed the following questions:-

“(a) Was there one contract between the claimant and the respondent or a succession of shorter and unconnected assignments?”

(b) If there was one contract, it is the natural inference from the facts that the claimant agreed to undertake some minimum, or at least some reasonable amount of work for the respondent in return for being given that work and pay?

(c) If the claimant had so agreed, was there a sufficient degree of control by the respondent to make it a contract of employment?

(d) If there wasn't sufficient control and therefore it wasn't a contract of employment was the claimant obliged to do some minimum (or reasonable) amount of work personally? I.e. was he a worker?”

7.9 The Tribunal then concluded that the claimant was not a ‘worker’ within the meaning of the Regulations. At paragraph 27, the Tribunal stated that “the claimant was not obliged to accept work offered to him by the respondent. There was therefore not one contract but a series of unconnected short contracts and the answer to the question at 26(a) above is such that I do not need to consider the questions at 26(b) to (d). There was no contract which could have given rise to any entitlement to holiday pay under the Working Time Regulations.”

7.10 Many of the remaining cases on holidays are holiday pay cases which are straightforward calculations of holiday pay.

## 8 BRINGING A CLAIM

8.1 A number of cases turned on procedural matters, mostly on whether the limitation period had expired. Regulation 30(2) provides:-

“An industrial tribunal shall not consider a complaint under this regulation unless it is presented-

(a) before the end of the period of three months (or, in a case to which regulation 37(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;  
or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.”

8.2 In John McAtee v Ministry of Defence (Case Ref 2745/02) (2007), protracted litigation ended with a finding that the claim was ‘out of time’. The case was complicated by the fact that the claimant had been a member of the armed forces. Regulation 37 provides:-

“(1) Regulation 36 [‘Crown employment’] applies-

(a) subject to paragraph (2), to service as a member of the armed forces, and

(b) to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996.

(2) No complaint concerning the service of any person as a member of the armed forces may be presented to an industrial tribunal under regulation 30 unless-

(a) that person has made a complaint in respect of the same matter to an officer under the service redress procedures, and

(b) that complaint has not been withdrawn.”

The claimant did follow the correct service redress procedures but failed to make his complaint to the Tribunal within 6 months of the relevant period. The tribunal noted that the Ministry, in its rejection of his application for redress of complaint, made clear that this did not affect his access to an industrial tribunal.

The ‘reasonable practicability’ test in Regulation 30(2) is more difficult to satisfy than the ‘just and equitable’ test found in discrimination statutes and the Tribunal refused to exercise its discretion to waive the limitation period.

8.3 A similar case is Liz Courtney as the Personal Representative of George Murdock (deceased) v Royal Irish Regiment Headquarters & Ministry of Defence (Case Ref 59/02)(2007). Once again a member of the armed forces followed the correct procedure in relation to the service redress procedures but failed to make a complaint to the tribunal service. In this case, there was some evidence that he was under the misapprehension that he could delay the tribunal complaint until the service redress procedures had been completed.

8.4 In the event, the Tribunal was satisfied that it was ‘reasonably practicable’ for him to have made his complaint within 6 months of his retirement and hence that his complaint was also ‘out of time’.

## 9. REMEDIES

9.1 Regulation 30 (3) - (5) set out the remedies available in the Industrial Tribunal, as follows:-

“(3) Where an industrial tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal-

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to-

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

(5) Where on a complaint under paragraph (1)(b) an industrial tribunal finds that an employer has failed to pay a worker in accordance with regulation 14(2) or 16(1), it shall order the employer to pay to the worker the amount which it finds to be due to him.”

9.2 In Sheila Ellen Matilda Phair v Roddy Baxter (Case Ref 1088/06)(2006), the Tribunal was considering the remedy in a holiday pay case, following a default judgment in light of the non-appearance of the respondent. It had been determined that the claimant was entitled to 10.8 days' holiday pay, following the termination of her employment. The Tribunal proceeded on the basis that this non-payment of wages constituted a deduction for the purposes of Article 45 of Employment Rights (Northern Ireland) Order 1996 and ordered that the 10.8 days' paid annual leave due under the Working Time Regulations be paid to the claimant.

9.3 In Deirdre Doherty v The Cocoon Group (Case Ref 8/06 & 135/06)(2007), the Tribunal took a different approach. It was considering a claim for unpaid holiday pay, following

dismissal. It relied on the English Court of Appeal judgment in Commissioners of Inland Revenue v Ainsworth and Others [2005] IRLR 465 (CA) to the effect that a claim to enforce an entitlement to holiday pay can only be taken under the Working Time Regulations and not as a claim for unauthorised deductions from wages under the Employment Rights (Northern Ireland) Order 1996. Therefore an order was made for £260.84 to be made to the claimant in respect of unpaid holiday entitlement.

9.4 However, in Blakley, discussed above in relation to ‘working time’ and ‘compensatory rest’, the Tribunal appeared to revert to the earlier approach in Phair, albeit in a case about payment for compensatory rest rather than holiday pay. Ainsworth however appeared to enunciate a wider principle, namely that claims under the Working Time Regulations precluded a claim under the deduction from wages legislation. Hence, the Tribunal considered the remedy in the context of unlawful deductions from wages contrary to Article 45 of the 1996 Order.

9.5 On this basis, the Tribunal considered, at paragraph 3.16 of the Decision, that:-

“In relation to unlawful deductions of wages for overtime, it was our view that as the claim in relation to this matter was for a series of alleged deductions of pay, if the claimant successfully established his entitlement to be paid for all his on-call hours, we could consider all deductions going back from the date of the claim which was lodged in time right back to the date of the claimant’s commencement of employment as an estates officer.”

9.6 It therefore adjourned the hearing for further submissions on the amount owed to the claimant.

9.7 This controversy has now been overtaken by the House of Lords decision in Her Majesty's Revenue and Customs v Stringer and others [2009] UKHL 31, which was an appeal from Commissioners of Inland Revenue v Ainsworth and Others, upon which the Tribunal in Doherty (above) relied.

9.8 The Stringer litigation, which included a reference to the ECJ, Cases C-350/06 and C-520-06, Schultz -Hoff v Deutsche Rentenversicherung Bund; Stringer v Her Majesty's Revenue and Customs, revolved around a range of issues unrelated to those before the Northern Irish tribunals. Nonetheless, the central issue concerned whether claims under 'deduction from wages' legislation could not be made where the Working Time Regulations applied.

9.9 Their Lordships concluded that a claim for holiday pay could be made under the deductions from wages legislation, even if the Working Time Regulations applied, hence reinforcing the approach taken by the Tribunals in Phair and Blakley. For example, Lord Rodger of Earlsferry, at paragraph 31, stated:-

"I accordingly conclude that a failure to pay a sum due under regulation 14 is the kind of impermissible deduction from wages that Parliament wanted to prevent by enacting section 13 of the 1996 Act [the equivalent of Article 45 of the 1996 Order]."

## **10 CONCLUSION**

10.1 As with the Fixed Term Work Reports, these Working Time Reports show a significantly wider range of issues before the Irish courts and tribunals than those in Northern Ireland. Despite the initial controversy surrounding the Burns judicial review on non-transposition of the Directive, case law in the Northern Irish tribunals has been largely concerned with straightforward holiday pay issues. In both jurisdictions, reliance was placed on ECJ case

law, although in Blakely, the tribunal made use of English decisions to reach a conclusion which was more expansive than that of an earlier tribunal on similar facts. This conclusion is now vindicated by the decision of the House of Lords in Stringer, which was itself based on an ECJ reference.

- 10.2 The overall conclusion is that Northern Irish tribunals could benefit from consideration of the case law of the Irish labour law system. In both situations, the relevant law has transposed EC Directives and, despite differences in the precise terms of the transposition, the broad scope of the respective legislation is necessarily very similar.
- 10.3 Of course, authorities from the courts and tribunals in Great Britain, up to the level of the Court of Appeal and Court of Session, only have persuasive force in the Northern Irish courts and tribunals. It is right and proper that the Northern Irish courts and tribunals should rely upon them. However, what appears to be a paradox, namely that the Irish courts and tribunals have considered matters not ventilated in Northern Ireland, is a source of opportunity in that important Irish decisions could have persuasive authority in areas of Northern Irish employment law which are based on the transposition of EU directives.