

Termination at the end of a fixed-term contract is not of itself discriminatory

This second article in a series of digests by **Thomas H. John**, pharmacist and barrister, of cases heard recently in the appeals courts of England and Wales is in two parts. This first part considers aspects of anti-discrimination law in relation to fixed-term employees. The second part will focus on similar issues as regards the rights and obligations of part-time workers

The question

Have the recent regulations relating to part-time workers — The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1651) and the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) — had the effect of enhancing the rights of these groups, in any way, as against their employers since they came into force on 1 July 2000 and 1 October 2002, respectively?

The law

The first article in this two-part series considers whether the termination of a fixed term contract of employment by simple efflux of time is of itself capable of constituting less favourable treatment of the employee in question, thereby amounting to unlawful discrimination by his or her employer. (The second article will consider whether the situation is any different for part-time workers and employees.)

From time to time, pharmacists with responsibility for the hiring and firing of staff and the settling of terms of engagement during periods of service may wish to engage workers on part-time or fixed-term bases. Perhaps you are a pharmacist who is already engaged on such a basis or is considering whether to take up an offer of employment on such terms.

Depending on the size of the pharmacy or department for which you are, or will be, working, you may find you have, or will have, colleagues who are doing comparable work but who are full-time or permanent members of staff. If your fixed-term contract is shortly to expire or you are being offered fewer hours per week as a worker who is already working on a part-time basis, can you argue that your employer's failure to maintain your



How to read this article

To obtain optimum benefit it is suggested that practitioners read the question or questions posed at the outset of the digest, then read the facts and the issues arising, then the decision of the court together with the reasoning behind the decision. The question, or series of questions, should then be reread and consideration given as to whether any lessons can be learnt in terms of practitioners' practices.

current weekly quota of hours is discriminatory when viewed against the terms enjoyed by your full-time colleagues?

Conversely, as an employer you may be wondering whether to reduce your current staffing levels or the number of hours you would wish to offer your part-timers. Might you possibly be laying yourself open to allegations of discrimination by doing so, thereby exposing you or your business to a claim for damages?

The case

Department of Work and Pensions v Webley. Court of Appeal (Civil Division) (Lord Justices Ward, Jacobs and Wall). Judgment given 21 December 2004.

This recent case before the Court of Appeal focused on whether the following set of circumstances discriminated against a fixed-term employee who was working under a series of short, fixed term contracts for a large government department.

Facts Ms Webley was employed by the Department of Work and Pensions (the DWP) under a series of short, fixed-term contracts. The DWP had a policy of limiting the duration of all such contracts to 51 weeks. Ms Webley worked alongside full-time colleagues doing comparable work and, in view of the nature of the DWP's workload, there would not only be a continuing need for that type of work to be carried out beyond the foreseeable future but there was also likely to be no diminution in the amount of work passing through. Effectively the circumstances outlined above meant that Ms Webley could not lawfully be made redundant. Any dismissal for redundancy would be potentially unfair thus leaving the DWP open to an unfair dismissal claim in an employment tribunal. Nevertheless the DWP failed to renew Ms Webley's contract at the end of the 51-week term. She therefore brought a claim before the employment tribunal, not for unfair dismissal on grounds of redundancy, but for unlawful discrimination.

In fact the tribunal found that the non-renewal of her contract was not capable of amounting to less favourable treatment of Ms Webley and therefore dismissed her claim.

She then appealed to the Employment Appeal Tribunal (EAT), the next tier within the court hierarchy. The EAT is chaired by a High Court judge who sits with two lay members and hears appeals from employment tribunals on points of law. The EAT reversed the employment tribunal's decision and so the DWP appealed to the Court of Appeal for a ruling clarifying the law and which would of course be binding on all lower courts and tribunals.

The decision and reasoning The Court of Appeal agreed with the original employment tribunal's findings. It reaffirmed that fixed-term contracts, far from being unlawful in themselves, respond in certain circumstances to the needs of both employers and employees and were in fact recognised as so doing by the EC in its directive (Council Directive 99/70), which gave rise in the first place to the enactment of the FTE Regulations by the UK government in 2002.

It followed, therefore, that the termination of such a contract by simple efflux of time could not on its own amount to less favourable treatment for a fixed-term em-

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ployee in comparison with a full-timer doing comparable work.

However — and this is where employers need to exercise care — there must also be an objectively justifiable reason behind the existence of, and the length of, the fixed term. In this particular case, the 51-week rule could be justified under a Civil Service Order in Council of 1995 and the Civil Service Commission's recruitment code.

Discussion

In the field of employment law there have over the past 10 to 15 years been a number of developments prompted by EC directives having the aim of protecting and enhancing workers' rights as against the obligations owed by employers. With the advent of the Disability Discrimination Act 1995 and now a third term for New Labour following the recent general election, it will be seen that there is an opportunity for the Government to cement certain rights now incorporated into UK law as a result of the regulations made under these directives.

Two such directives handed down during the last government led to the enactment of the FTE Regulations and the PTW Regulations. As secondary legislation, these have the force of law and apply to all contracts of employment coming into existence since the relevant commencement dates.

Both sets of regulations have as their aim the prevention of less favourable (in other words, potentially discriminatory) treatment of fixed-term and part-time workers when viewed against the treatment given to permanent or full-time employees who are doing comparable work. The original driving force behind both the EC directives and the UK Regulations was that evidence was brought to bear during the late 1980s and early 1990s that many employees, typically those not working full-time were being denied a number of contractual benefits commonly en-



joyed by full-timers, such as pension rights, holiday pay and sick pay entitlements.

Fixed-term employees as a group certainly have the right not to be treated less favourably than comparable permanent employees. That right is, of course, additional to the existing right not to be unfairly dismissed. However, as a result of the *Webley* case, it is now clearer that simple non-renewal of a fixed-term contract on expiry of its term does not of itself amount to less favourable treatment. The decision will maintain flexibility within the workforce at large and leave open the scope for negotiation between employer and employee over the period which it is proposed the employee will remain in employment.

Employers still need to be aware of and seek to avoid situations where reasons for terminating a contract are not objectively justifiable. There is the danger in many commonplace situations that dismissals at the end of a fixed contractual term would automatically be deemed unfair on other grounds even if the length in time of the contract were not discriminatory. These include, but are not limited to:

- Selection for redundancy
- Dismissals where the employee's absence from work is connected with pregnancy, childbirth, maternity, paternity or parental leave
- Discrimination on grounds such as trade union membership

Care must also be exercised where non-renewal of a fixed term contract in any of the following situations is proposed. These situations are those which may be viewed as potentially unfair by Employment Tribunals. Again, the list is not exhaustive, but simply reflects commonplace situations:

- Reasons of conduct on the employee's part
- Commercial or business reasons, including selection for redundancy (the last-in first-out rule is still a good rule of thumb for employers)
- The offer of a new contract to the employee but on less favourable terms than previous contract(s)

In any of the above circumstances employers and employees would be well advised to seek specialist legal advice before giving notice or dismissing a member of staff.

If the taking of early advice is not practicable for any reason employers should at the least seek to protect their position by, for instance, offering the fixed-term employee a longer period of notice than would be usual or sufficient opportunity to seek alternative employment either within the same firm or, if this is not possible, with a reasonable amount of paid time off to attend job interviews with other firms.

In summary the decision in *Webley* will undoubtedly serve to prevent claims for discrimination being brought simply because as fixed term worker's contract has time expired.

Society membership groups

The Royal Pharmaceutical Society has established special interest groups for community pharmacists, for veterinary pharmacists, for industrial, regulatory and technical pharmacists, for hospital pharmacists and for pharmacy academic staff. The groups hold meetings to consider topics of interest within their own fields of practice and they provide a source of advice to the Society's Council on specialist matters. Details of the groups can be obtained from the Society. Contact details are given below.

Community Pharmacists Group The Community Pharmacists Group, formed at the beginning of 1994, is open to all pharmacists engaged in the practice of community pharmacy. The group committee has the discretion to grant membership to pharmacists who are not engaged in community pharmacy practice but who have a direct involvement or demonstrable interest in that aspect of pharmacy. Contact: Angela Canning, practice division (tel 020 7572 2412; e-mail angela.canning@rpsgb.org).

Veterinary Pharmacists Group The Veterinary Pharmacists Group is open to all pharmacists who are engaged in, or actively considering engaging in, the preparation or supply of agricultural chemicals, veterinary medicines and allied products. Other pharmacists may be granted membership at the discretion of the group committee. Contact: Lorraine Fearon, practice division (tel 020 7572 2409; e-mail lorraine.fearon@rpsgb.org).

Industrial Pharmacists Group The Industrial Pharmacists Group is for pharmacists who are engaged in industrial practice, those who act as consultants to industry, those whose work is concerned substantially with questions of industrial pharmaceutical practice and those whose work concerns, or who have an interest in, industrial, regulatory or technical matters affecting pharmacy. Contact: Angela Canning, practice division (tel 020 7572 2412; e-mail angela.canning@rpsgb.org).

Hospital Pharmacists Group The Hospital Pharmacists Group is for pharmacists who work in NHS, private or armed forces hospitals and those employed by, or acting as consultants to, NHS health authorities, health boards and trusts. Also eligible are pharmacists working in the prison service, community pharmacists seconded to provide a service within a private hospital and other pharmacists whose work is significantly concerned with matters relating to the practice of hospital pharmacy. Contact: Lorraine Fearon, practice division (tel 020 7572 2409; e-mail lorraine.fearon@rpsgb.org).

Academic Pharmacy Group The Academic Pharmacy Group is open to pharmacists and other academic staff who make a significant contribution to pharmacy teaching and research in a UK school of pharmacy or a recognised pharmacy academic practice unit. Contact: Damian Day, education and registration directorate (tel 020 7572 2215; e-mail damian.day@rpsgb.org).