

***THE IMPACT OF THE FIXED TERM
DIRECTIVE ON SUPPORTING THE
CAREERS OF RESEARCH STAFF***

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INTRODUCTION AND OVERVIEW

- The Directive: What it is and what it does
- The Aberdeen Tribunal: Exploring objective justification of successive FTCs
- Key Policy Responses: Stability plus transition
- Case Study: Robert Gordon University, A bit about Bristol
- Over to you: Discussion

THE DIRECTIVE: What is it?

Council Directive 99/70/EC Concerning the Framework Agreement on Fixed-Term Work Concluded by ETUC, UNICE and CEEP

What is a Directive?

- Legislative tool used within the European Union to harmonise the laws within the Member States
- Binding as to the result to be achieved but leaves it to the Member State to decide the choice of form and methods
- Has to be transposed into national law

What is a Framework Directive?

- **Concluded by the EU level representatives of management and labour**
- **The substantive content is found in the framework agreement and the Directive gives it effect**
- **Drafting different to regular directives**

THE DIRECTIVE: What does it do?

Preamble: What Were the Social Partners Trying to Achieve?

- **Set out general principles and minimum requirements relating to fixed-term work across the EU**
- **Balance between flexibility in working time and security for workers**
- **Contracts of an indefinite duration are, and will continue to be, the general form of employment relationship**
- **Fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers**

Purpose: Clause 1

The purpose of this framework agreement is to:

- (a) improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;**
- (b) establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.**

THE REGULATIONS

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI 2002/2034

- Came into force on 1 October 2002
- Transpose Directive 99/70/EC into law in England, Wales and Scotland
- Introduces legally enforceable rights and remedies
- This is a very brief overview of some of the main features

Key Features

- Right not to be treated less favourably than comparable permanent employee
- Presumed permanence after successive fixed term contracts and four years of continuous service
- Subject to objective justification
- Right to take cases to employment tribunals

THE REGULATIONS: Rights and Remedies

Regulation 3: The Right Not to Be Treated Less Favourably

- A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee
 - The terms of the contract
 - Any other detriment by act or deliberate failure to act of the employer
- Only if the treatment is on the ground that the employee is a fixed-term employee
- Only if the treatment is not justified on objective grounds.

THE REGULATIONS: Rights and Remedies

Regulation 5: Right to a Written Statement

- **Right to request a written statement from the employer giving particulars of the reasons for the treatment**
- **This is admissible as evidence within a tribunal**

Regulation 7: Complaints to employment tribunals

- **Make a declaration as to the rights of employer/employee**
- **Order the employer to pay compensation**
- **Recommending that the employer take action**

THE REGULATIONS: Rights and Remedies

Regulation 8: Successive fixed-term contracts

- The provision of the contract that makes it fixed term shall be of no effect and the employee will be permanent
- Applies where employee employed on a fixed term contract and
 - That contract has previously been renewed
 - The employee has previously been employed on a fixed term contract before
- Only if the employee has been continuously employed for a period of four years or more
- Only if the use of a fixed-term contract was not justified on objective grounds
 - At the time it was last renewed
 - At the time it was entered into
- This takes effect from whichever is the later of
 - the date on which the contract was entered into or last renewed, and
 - the date on which the employee acquired four years' continuous employment

THE REGULATIONS: Rights Remedies

Regulation 9: Right to receive written statement of variation

- **Employee can request a written statement confirming that his contract is no longer fixed-term or that he is now a permanent employee**
- **Entitled to be provided with**
 - **A statement of permanency**
 - **Reasons why the employee is still fixed term with a statement of objective grounds**
- **Admissible as evidence in a tribunal**
- **Employee can make an application to a tribunal for a declaration that they are permanent**

Could grant funding be an objective justification? JNCHES

“where there is no reasonably foreseeable prospect of short-term funding being renewed nor other external or internal funding being available or becoming available” (JNCHES, 2002: 7)

ABERDEEN UNIVERSITY CASE

Background

- About an employee seeking a declaration that he was permanent
- 6 years of continuous employment
- 3 fixed term contracts
- Was there objective grounds for continuing to use fixed-term employment?

Tribunal's approach

“The Tribunal's approach was to consider whether there was a genuine business need to be addressed and what it was and whether the use of a fixed-term contract amounted to means which were necessary and appropriate to meet that need” (para 109)

The Business Need

“coping with the fact that the research funding from the grant giving institutions was short term” (para 110)

ABERDEEN UNIVERSITY CASE

Was a Fixed-term contract an appropriate and necessary means of meeting that aim?

Tribunal weighed disadvantages to the employee against advantages to the University

Real and Genuine Disadvantages to Dr Ball

- **Uncertainty of Future Employment**
- **Disadvantages in terms of career progression and professional development due to inability to submit grant applications under own name**
- **Potential difficulties in obtaining credit**

ABERDEEN UNIVERSITY CASE

Any Disadvantages to the University?

Cost of having to employ researchers beyond the term for which they had funding

“In actual fact this was a red herring since in the real world there was simply no possibility of this happening. The choice was essentially between employing contract researchers...on a fixed term contract or on employing them on an indefinite contract but with the possibility of redundancy should the university be unable to find sufficient funding to continue their employment once the initial funding has run out...In attempting to match up future labour needs with future revenue the University was really in no different position from many other employers”

ABERDEEN UNIVERSITY CASE

The bureaucratic difficulty of using redundancy for employees on short term grants

- **University redundancy policy (of no compulsory redundancy) was the same for permanent and fixed-term staff but the university was not applying it to staff on fixed-term contracts. This was described as an “arguably discriminatory and illegal approach” (para 116)**
- **If the university was to adopt a policy of indefinite employment and were required to make staff on grants redundant – they would be required to take steps to ensure that redundancy dismissal was fair “this would be no major source of disadvantage to them” (para 117)**

Moving to such a policy would have an adverse impact on industrial relations

“The respondents could not argue that it was a particularly strong business need of theirs to be in a position to make employees redundant without having to justify whether or not a redundancy situation existed” (para 118)

ABERDEEN UNIVERSITY CASE

The Tribunal discussed the following factors specific to the case

- The Transferable skills of Dr Ball
- At “least a possibility” that Dr Ball's research skills would be in demand by the university at the end of the funding period
- University's plan to increase funding from short term grants by 10% a year – Dr Ball's history would suggest that he might be successful in finding employment on another project i.e. six years on successive fixed-term contracts

“It appears to the tribunal to be really no good reasons on objective grounds for the use of a fixed-term contract from 2005” (para 120)

POLICY RESPONSES

Two Central Themes

- Promote more stability of employment
- Emphasise transition in Postdoctoral phase

Key Policy Tools

- **JNCHES Guidance (2002)**
- **The Roberts Review (2002)**
- **The European Charter and Code (2005)**
- **The Concordat (2008)**

POLICY RESPONSE: Promote Stability

Key Features

- **Greater use of indefinite contracts plus redundancy**
- **Hybrid funding models (grant plus core funding council funding)**
- **Having funding available to 'plug the gaps' in grant funding**
- **Better forward planning to match up labour needs and revenue**

POLICY RESPONSE: Promote Stability

JNCHES Guidance (2002)

- Suggests the legislation requires a significant reduction in the number of fixed-term contracts used by universities.
- Use of indefinite contracts promoted

“The ending of short-term funding will continue to raise the possibility of termination of these indefinite contracts. Where the research can be continued, all other appropriate sources of funding, both internal and external, need to be considered to replace the ending of the specific funding stream. Where this is not available, redeployment or other measures should be considered in order to render the redundancy procedures fair in accordance with the legislation.”
(JNCHES, 2002: 4).

POLICY RESPONSE: Promote Stability

Roberts Review (2002)

- **Proposed 5 year fellowships**
- **A 'hybrid' teaching and research post underpinned by a mixture of student-related funding council grant and external funding.**
- **The scheme known as the RCUK Academic Fellowship Scheme aims to develop an attractive and secure route into academic career structures for promising CRS through a five year fellowship with a guaranteed permanent post at the end**

POLICY RESPONSE: Promote Stability

The European Charter for Researchers (2005)

Stability and Permanence of Employment

- underlines employers obligations under Directive 1999/70 on Fixed Term work,
- “[e]mployers and/or funders should ensure that the performance of researchers is not undermined by instability of employment contracts”

POLICY RESPONSE: Promote Stability

The Concordat 2008

- **Research posts should only be advertised as a fixed-term post where there is a recorded and justifiable reason. (A. 3)**
- **Commitment by everyone involved to improving the stability of employment conditions for researchers and implementing and abiding by the Regulations (2002) and JNCHES guidance on the use of fixed-term contracts will provide benefits for researchers, research managers, and their organisations. (B. 2)**
- **Organisational systems must be capable of supporting continuity of employment for researchers, such as funding between grants, other schemes for supporting time between grant funding, or systems for redeploying researchers within organisations where resources allow. Funders are expected to make it a priority to consider how their policies, guidance and funding can be enhanced to help employers to achieve this objective. (B. 4)**

POLICY RESPONSE: Emphasise Transition

Key Features

- **Envisages at least one or two fixed-term contracts in postdoctoral career phase**
- **Employers should 'consciously' use fixed-term contracts**
- **Longer term career prospects are to be sought outside of HE sector**
- **Places responsibility on researcher to invest in employability**
- **Encourages employer to provide career and personal development training**

POLICY RESPONSE: Emphasise Transition

The Roberts Review (2002)

“anything which de-emphasises preparation for jobs outside academia would be a retrograde step” (Roberts, 2002: 151).

Once contract researchers have completed their first postdoctoral position:

- **Industrial trajectory,**

leading out of the higher education sector into the commercial sector;

- **Academic trajectory,**

leading into an ‘established style’ academic post combining teaching and research - the Review considered that these posts still be offered on a short term basis “to match the needs of research funders and encourage the mobility of potential academics” - the RCUK Academic Fellowship Scheme

- **Research Associate trajectory**

for researchers wishing to continue working on research projects and do not want to pursue an academic career (permanent, grant funded)

POLICY RESPONSE: Emphasise Transition

The European Code of Conduct for the Recruitment of Researchers

Postdoctoral Appointments

- Clear rules and explicit guidelines for the recruitment and appointment of postdoctoral researchers, including the maximum duration and the objectives of such appointments
- Should take into account time spent in prior postdoctoral appointments at other institutions
- Postdoctoral status should be transitional

POLICY RESPONSE: Emphasise Transition

The Concordat 2008

“The aim of this Concordat is to ensure maximum benefit to the researcher, their employing organisations and the research base during their period of employment as researchers in higher education and research institutions, recognising that this may be only part of a much longer career track”

It is recognised that positions of permanent employment are limited in the UK research and academic communities and that not all researchers will be able to obtain such a position. It is, therefore, imperative that researcher positions in the UK are attractive in themselves (and not, for example, solely as potential stepping stones to permanent academic positions). (C. 1)

Researchers should also be aware that the skills and achievements required to move on from a research position may not be the same as the skills and achievements which they displayed to reach that position. (D. 4)

CASE STUDY

Robert Gordon University

- **Contract research staff known as 'academic research staff'**
- **All academic research staff employed on indefinite contracts unless there is an objective reason – so the default is a permanent contract**
- **The end of short term funding triggers either redundancy or redeployment**
- **Objective reasons for using a fixed term contract are set out**
- **Clear advice that ending a fixed-term contract is a dismissal and may engage the university's redundancy policy**

KEY POINTS FOR DISCUSSION

- Responses to uncertainty in grant funding
 - Planning
 - Redundancy
 - Contingency funding
- Organisational Issues
 - Role of PI
 - Management of researchers – finance administrators or HR?
 - Breaking down the 'contractual divide' – changing management of permanent staff
- Promoting Employment Security
 - What will permanency mean?
 - Threat of redundancy = insecurity
 - Linking planning with communication
- Is there any role for fixed-term employment?
 - Are one or two FTCs appropriate?
 - How do institutions promote transition?