

Protection Of Employees (Fixed-Term Work) Act, 2003

Origin And Purpose Of The Act

The Protection of Employees (Fixed-Term Work) Act, 2003 came into effect on 14 July 2003. The purpose of the Act was to implement European Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term Work concluded by the European employers' organisations and the ETUC (European Trade Union Confederation).

The Act aims –

- i. To provide for the improvement of the quality of fixed-term work by ensuring the application of the principle of non-discrimination (i.e. fixed-term workers may not be treated less favourably than comparable permanent workers) and
- ii. To provide for the removal of discrimination against fixed-term workers where such exists and the establishment of a framework to prevent abuse from the use of successive fixed-term employment contracts.

Who Is Covered By The Act?

In general, the Act applies to any fixed-term employee –

- working under a contract of employment;
- holding office under, or in the service of, the State including members of the Garda Síochána, civil servants and employees of the Health Service Executive and any harbour authority or VEC.

The Act does not apply to agency workers placed by an employment agency into an employment; apprentices; a member of the Defence Forces; a trainee Garda or a nurse in training. However, the Act applies to agency workers employed directly by an employment agency.

Definition Of Terms Under The Act

The following definitions apply under the Act –

- *Conditions Of Employment* includes all terms and conditions of the employment contract whether statutory or otherwise including remuneration, pensions, VHI contributions, sick leave entitlements, etc;
- *Remuneration* in relation to an employee includes any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment and any amounts the employee is entitled to receive in respect of any pension scheme or arrangement;
- *Employer* means, in relation to the employee, the person with whom the employee has entered into or for whom the employee works under – or, where the employment has ceased, entered into or worked under – a contract of employment.

- *Fixed-Term employee* means, a person who has entered into a contract of employment with an employer where the end of the contract is determined by an objective condition such as the arriving at a specific date, completing a specific task or the occurrence of a specific event but does not include:

employees in initial vocational training relationships or apprenticeships or employees with a contract of employment concluded within the framework of a specific public or publicly supported training, integration or vocational retraining programme

- *Permanent Employee* means an employee who is not a fixed-term employee.

What Is A Comparable Permanent Employee?

An employee is a comparable permanent employee in relation to a fixed-term employee if –

- the permanent employee and the fixed-term employee are employed by the same or associated employer and one of the conditions referred to in (i) (ii) or (iii) below is met,
- where (a) above does not apply (including a case where the 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, or
- where neither (a) or (b) above apply, the employee is employed in the same industry or sector of employment as the fixed-term employee (and one of the conditions referred to in (i) (ii) or (iii) below in met)

The following are the conditions (i), (ii) and (iii) referred to above-

- both employees perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work,
- the work performed by one of the employees concerned is 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
- 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.

The Comparable permanent employee can be either of the opposite sex to the fixed-term employee concerned or of the same sex as him or her.

What Are The Benefits Of This Act For Fixed-Term Workers?

The Act provides that a fixed-term employee cannot be treated in a less favourable manner in respect of their conditions of employment than a permanent employee – unless there are objective grounds for doing so. The following examples demonstrate the point –

Overtime Payment - If a comparable permanent employee is paid overtime, then a fixed-term employee, who compares himself/herself with that comparable employee, is also entitled to overtime payment. A fixed term employee is entitled to the same rate of payment for overtime work as his/her comparable employee.

Holiday Entitlement - Holiday entitlement of a fixed terms employee is related to the holiday entitlement of a comparable permanent employee, subject to the minimum legal entitlements under the organisation of working time Act 1997.

Can A Fixed-Term Employee Claim Exactly The Same Conditions Of Employment As A Comparable Permanent Employee?

Yes – but if the condition of employment relates to an amount of benefit (in monetary terms) or to the scope of a benefit (in any other case) and is dependent on the amount of hours worked then it may be paid to a fixed-term employee on the principle of *pro rata tempis*. In other words, the condition of employment concerned, whether monetary or otherwise, shall be related to the proportion which the normal hours of that fixed-term employee bear to the normal hours of work of the comparable permanent employee. If a fixed-term employee works a quarter of normal weekly working hours of a comparable permanent employee, they would expect to receive a quarter of a normal week's wages.

The Act also provides that except where a different length of service qualification is justified on objective grounds such a qualification in relation to a particular condition of employment shall be the same for a fixed-term employee as for a comparable permanent employee.

Can A Fixed-Term Employee Be Treated Less Favourably Than A Comparable Permanent Employee?

Yes – if there are Objective Grounds for doing so and in relation to pensions –

- *Objective Grounds* – the Act provides that a fixed-term employee may be treated in a less favourable manner than a comparable permanent employee where such treatment can be justified on objective grounds. If the treatment of the fixed-term employee is based on the fixed-term status of the employee then it is not an objective ground for less favourable treatment;
- *Pensions* – the right not to be treated in a less favourable manner than a comparable permanent employee shall not apply to a pension scheme or arrangement for a fixed-term employee who works less than 20% of the normal hours of the comparable permanent employee. This does not, however, prevent an employer and fixed-term employee from entering into an agreement whereby that employee may receive the same pension benefits as a comparable permanent employee.

What Is An Objective Ground?

The Act outlines that the Objective Grounds for the purposes of justification of less favourable treatment than a comparable permanent employee, are that the less favourable treatment must be for the purpose of achieving a legitimate objective on the employee and such treatment is appropriate and necessary for that purpose.

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 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 less favourable as the terms of the comparable permanent employee's contract of employment.

Can the Employer avoid provisions under the Act?

No. A provision in any agreement or contract of employment is void insofar as it attempts to exclude or limit application of the Act or is inconsistent with the Act.

Nothing in the Act shall be construed as prohibiting the inclusion in any agreement or contract of employment a provision for more favourable treatment for fixed-term employees than that provided for in the Act. References to an agreement are to any agreement, whether a contract of employment or not, and made before, or after, the passing of the Act.

Does The Employer Have To Inform Me Of The Objective Condition Determining A Fixed-term Contract?

Yes - the Act provides that a fixed-term employee shall be informed in writing by his or her employer as soon as practicable of the objective condition determining the contract i.e. whether it is;

- a) arriving a specific date;
- b) completing a specific task, or
- c) the occurrence of a specific event

Does The Employer Have To Inform An Employee Of Objective Grounds Justifying Renewal Of A Fixed-Term Contract Or Failure To Offer A Contract Of Indefinite Duration?

The act provides that where an employer proposes to renew a fixed-term contract the employee shall be informed in writing, not later than the date of renewal, of the objective grounds justifying the renewal of the fixed term contract and the failure to offer a contract of indefinite duration. Such statements are admissible in evidence in any proceedings under the Act and an Adjudicator or the Labour Court may draw any inference he or she considers just and equitable if it appears to him or her that (a) an employer omitted to provide a written statement, or (b) a written statement is evasive or equivocal.

Can An Employer Employ An Employee On A Series Of Fixed-Term Contracts Indefinitely?

No. Where an employee is employed by his or her employer or associated employer on two or more continuous fixed-term contracts, the aggregate duration of those contracts may not exceed 4 years. Where any term of an employment contract purports to contravene this rule that term shall be void and of no effect and the contract concerned shall be deemed to be one of indefinite duration, that is to say a permanent contract.

However; the above-mentioned rules do not apply where there are objectives grounds justifying the renewal of a contract of employment for a fixed term only.

The First Schedule to the Minimum Notice and Terms of Employment Act 1973, applies for the purpose of determining whether the employment on a fixed-term contract is continuous or not.

Does The Employer Have To Inform A Fixed-Term Worker Of Permanent Vacancies and Training opportunities?

Yes - The Act provides that in order for a fixed-term employee to have the same opportunities as other employees to secure permanent positions, the employer shall inform him or her of vacancies which occur in the employment. This information may be provided by means of a general announcement at a suitable place within the employment. A fixed-term shall also “as far as practicable” be given access to appropriate training opportunities to enhance his or her skills, career development and occupational mobility.

Prohibition Of Penalisation Of An Employee By An Employer

The Act prohibits an employer from penalising a fixed-term employee on the grounds that:

- a) s/he has exercised or proposes to exercise his/her right not to be treated in a less favourable manner than a comparable permanent employee in relation to conditions of employment,
- b) s/he having acted in good faith opposed by lawful means an act which is unlawful under the act,
- c) s/he has given evidence in any proceedings under the Act or given notice of his or her intention to do so or to do any other thing referred to in (a) or (b) above,
- d) s/he has been dismissed from his/her employment and the dismissal is wholly or partly for or connected with the purpose of avoiding that a fixed term contract is deemed to be a contract of indefinite duration (i.e. Permanent) under provisions of the Act dealing with the abuse of successive fixed-term contracts.

What Constitutes Penalisation of an Employee?

The Act states that an employee is penalised if he or she:

- is dismissed;
- suffers any unfavourable change in the conditions of employment;
- suffers any unfair treatment, including selection for redundancy; or
- is subject to any other action which is prejudicial to their employment

Protection Against Penalisation Including Dismissal

Where an employee has less than one year's continuous service within the meaning of the Unfair Dismissals Acts, 1977-2015, s/he may refer a case to the Workplace Relations Commission alleging penalisation under the Protection of Employees (Fixed-Term Work) Act, 2003.

Where the employee has greater than one year's continuous service within the meaning of the Unfair Dismissals Acts, 1977-2015, s/he may refer a complaint to the Workplace Relations Commission alleging a breach of the Protection of Employees (Fixed-Term Work) Act, 2003 and/or alleging a breach of the Unfair Dismissals Acts, 1977-2015. Relief will, however, only be granted to an employee under one of these Acts.

How To Make A Complaint/Refer A Dispute?

A complaint in relation to contraventions of the Protection of Employees (Fixed-Term Work) Act 2003 may be made to the Workplace Relation Commission within six (6) months of the date of the contravention that gave rise to the complaint. The case will be heard by an Adjudication Officer in the first instance. The Adjudication Officer may extend the six (6) month time limit for making a complaint to twelve (12) months if there was reasonable cause for not submitting it within the six (6) months.

The Decision Of An Adjudication Officer

A decision of an Adjudication Officer shall do one or more of the following:

- declare that the complaint was or was not well-founded;
- require the employer to comply with the relevant provision;
- require the employer to reinstate or reengage the employee (including on a contract of indefinite duration)
- require the employer to pay the employee compensation not exceeding 2 years' remuneration.

Appeal To The Labour Court From A Decision Of An Adjudication Officer

An employer or employee may appeal an Adjudication Officer's decision in writing to the Labour Court within forty-two (42) days of the date the Adjudication Officer's decision. The Labour Court may extend the forty-two (42) day time limit for making an appeal if there were exceptional circumstances for not submitting it within the six (6) months

The Labour Court will notify the other party of the appeal and will arrange a hearing between the parties. A hearing before the Labour Court is in public unless an application is made for special circumstances and the labour Court so determine.

The Labour Court has the power to refer a point of law to the High Court for final determination.

Following the hearing the Labour Court will make a decision in writing affirming, varying or setting aside the decision of the Adjudication officer.

An employer or employee may appeal a Labour Court decision, within six (6) weeks of being served with the decision, to the High Court on a point of law only. A High Court decision arising out of such an appeal is final and conclusive.

What Happens If The Employer Fails To Implement A Labour Court Decision?

If an employer does not comply with a Labour Court decision within forty-two (42) days of receiving notice of the decision and the time for appealing the decision has passed, then the employee can seek to enforce the decision before the District Court.

If an employer appeals an Adjudicator's decision but abandons the appeal, then the employee must wait forty-two (42) days from the date of abandonment to apply to District Court for enforcement

The District Court may issue an Order, without hearing evidence, compelling the employer to comply with the terms of the decision.