SUBMISSION OF FREE LEGAL ADVICE CENTRES ON THE PROTECTION OF EMPLOYEES (FIXED –TERM WORK) BILL 2003

JUNE 2003

Introduction

Free Legal Advice Centres (FLAC) is an organisation with a strong track record in providing advice and information to members of the public on their entitlements under employment legislation. Our information line deals with up to a thousand queries a year in this area, with many referrals coming from state agencies including the Department of Enterprise, Trade and Employment. We also provide training and technical support to information providers such as Citizen's Information Centres (CICs) and occasional legal representation.

This submission focuses on specific aspects of the proposed legislation of particular concern rather than providing a general critique. They are taken in the order that they appear in the Bill.

Section 8 – Written statements from employer to employee

Subsection (1) of this section obliges an employer to inform an employee who is engaged in fixed term work in writing **'as soon as practicable'** of the objective condition for determining the contract. Surely it is the nature of fixed term/specified purpose contracts that they be put in writing **in advance** of the contract beginning and not be issued in a retrospective manner. Otherwise and this appears to be a possibility given the way this section is drafted, an employer could decide some time after the contract was under way what the objective condition for determining it may be.

It is suggested, therefore, that the words 'as soon as practicable' be replaced by 'in advance of the commencement date of the contract'

Subsection(2) of this section obliges an employer when renewing fixed term contracts to inform the employee in question of the objective grounds justifying the renewal of the fixed term contract rather than the offer of a contract of indefinite duration. However, this appears to be in the nature of an information provision only and there appears to be no corresponding right to for the employee to challenge this decision if they are unhappy with the explanation provided by the employer.

It is suggested, therefore, that the legislation should confer a specific right on the employee to bring a complaint to a Rights Commissioner if s/he is unhappy with the explanation offered as to renewal of fixed term contracts

Section 9 – Rights to permanent employment

This is a key section in this Bill in that it provides an opportunity to remedy the practice of repeated roll over fixed term contracts being offered by employers without permanency ever being compulsory. As presently worded, we feel that this section is ambiguous and may hinder rather than help employees engaged on fixed term/purpose contracts. To begin with, why must three years have elapsed before the employer is precluded from offering any more than one further fixed term contract? This means that an employee could have been engaged on a series of **6** six month contracts and then only be entitled to one more with no guarantee of permanency at its conclusion. A finite **number** as opposed to **duration** of contracts might improve the employee's position here.

This brings us on to what we believe to be the key weakness of this section, which is the absence of an obligation imposed on the employer issuing the final fixed term contract to then engage the employee under a contract of so called indefinite duration at its conclusion. We understand that a government amendment will limit the duration of the final fixed term contract to a maximum of one year. Nonetheless, we could conceivably have a situation under this legislation where an employee may have been engaged for four years under a series of fixed term contracts, only to be told by his/her employer that the law precludes the offering of a further fixed term contract, that there is no permanent position available and that there is, therefore, no more work for him/her.

Subsection (2) does nothing to remedy this situation. It only provides that an employer attempting to offer a further fixed term contract beyond the last one permitted by law will find themselves in a contract of indefinite duration. What employer would place themselves in this situation when under subsection(1), they will have no further obligation to the employee if they comply with the legislation.

The stated purpose of Clause 5 of the directive is to '*prevent abuse arising from the use of fixed-term employment contracts or relationships'*. Furthermore, Clause 5 allows Member States to '*determine under what conditions fixed-term employment contracts shall be deemed to be contracts of indefinite duration'*. Judging by the import of Section 9 of the Bill, the answer is never in the Irish case, unless an employer makes a mistake and offers one fixed term contract too many.

It is suggested, therefore that an employee become entitled under section 9 to a permanent post on the expiration of the final fixed term contract unless the employer in question can justify dismissal at that point

Section 9 and unfair dismissal claims

We also believe that this section may potentially form an uncomfortable relationship with the Unfair Dismissals (Amendment) Act 1993. This provides in this particular regard that

an employee engaged under a succession of two or more fixed term contracts (totalling over one year's service) containing unfair dismissals exclusion clauses may, nonetheless, ask the E.A.T to deem their service to be continuous under certain circumstances in order to process an unfair dismissal claim following the termination of their employment. If the Tribunal believe that the employer is using such contracts for the purpose of avoiding employment rights, they may allow the claim to proceed. The employer will then have to justify the dismissal in the normal manner.

It is conceivable that an employer may attempt to use Section 9 of the Bill to defend its position by arguing that it was precluded from offering a further fixed term contract and that a permanent position was not available for operational reasons such as funding or variations in demand and that, therefore, the dismissal is justified. This could lead to a dilution rather than a strengthening of the rights of employees engaged in fixed term work.

Section 14 – Methods of complaint under employment legislation

Anyone who has ever tried to explain the labyrinthine paths for processing complaints under employment legislation in Ireland will know how convoluted it can quickly become. There is simply no visible rationale in place. In this particular case like the part time work legislation, it is Rights Commissioner (R.C.) at first instance followed by an appeal to the Labour Court. Most employment legislation in the 1990's began with a referral to a R.C. followed by an appeal to the E.A.T. Then there is older employment legislation where the complaint is made directly to the E.A.T and even in the case of dismissal where an employee can choose R.C. or E.A.T. Throw in the employment equality legislation where you have the potential involvement of the Equality Tribunal and the Equality Authority, the Labour Court and the Circuit Court and one can see the potential confusion involved.

We believe that it is high time for a streamlined system of processing employment rights disputes and appeals to be put in place under a consolidated employment code that can be added to as directives come down the line.

Section 14 – Hearings in private

It is interesting to note that Rights Commissioners under this Bill and under the Protection of Employees (Part Time Work) Act 2001 sit in private. Furthermore, their decisions are not available at present. Only when an appeal is made to the Labour Court (there has only been one at the time of writing under the part time workers legislation) does this jurisprudence become available. We believe that this is an unacceptable situation especially as this legislation is implementing European directives. How are practitioners and trade unions to advise their clients/members of their rights if they are unaware of how legislation is developing and being interpreted?

It should be noted in passing that under this proposed legislation and under the part time workers legislation, there is not a single lawyer involved in the adjudication process unless the matter is ultimately referred into the civil courts. For many, this may be seen to be no bad thing. However, it can also be argued that the area of employment contracts is a specialised one and that specialised knowledge on the part of the decision maker is required. Without details of these decisions, it is difficult to judge.

We believe that it is perfectly compatible for these hearings to take place in private and yet for the decisions to be published, concealing the identity of the parties if so desired. Regulations to this effect, if necessary, should be put in place.

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