
**THE FIXED-TERM EMPLOYEES (PREVENTION OF LESS
FAVOURABLE TREATMENT) REGULATIONS 2003**

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**Subsidiary
2003/032**

Regulations made under s.86.

**THE FIXED-TERM EMPLOYEES (PREVENTION OF
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REGULATIONS 2003**

(LN. 2003/032)

1.4.2003

Implementing:
Directive 1999/70/EC

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ARRANGEMENT OF REGULATIONS.

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In exercise of his powers under section 86 of the Employment Act, and all other enabling powers, and in order to implement Council Directive 1999/70/EC concerning the framework agreement on fixed term work, the Minister has made the following regulations—

PART I GENERAL AND INTERPRETATION

Title, commencement and interpretation.

1.(1) These Regulations may be cited as the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2003 and come into operation on 1st April 2003.

(2) In these Regulations—

“collective agreement” means a collective agreement between an employer and a trade union representing the employees working for that employer;

“contract of employment” means a contract of service, whether express or implied, and (if it is express) whether oral or in writing;

“employer”, in relation to any employee, means the person by whom the employee is or (except where a provision of these Regulations otherwise requires) where the employment has ceased, was employed;

“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,
- (b) on the completion of a particular task, or
- (c) on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal and 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;

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“permanent employee” means an employee who is not employed under a fixed-term contract, and any reference to “permanent employment” shall be construed accordingly;

“pro-rata principle” means that where a comparable permanent employee receives or is entitled to pay or any other benefit, a fixed-term employee is to receive or be entitled to such proportion of that pay or other benefit as is reasonable in the circumstances having regard to the length of his contract of employment and to the terms on which the pay or other benefit is offered;

“renewal” includes extension and references to renewing a contract shall be construed accordingly;

“workforce agreement” means an agreement between an employer and his employees or their representatives in respect of which the conditions set out in Schedule 1 to these Regulations are satisfied.

Comparable employees.

2. For the purposes of these Regulations, an employee is a comparable 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.

PART II

RIGHTS AND REMEDIES

Less favourable treatment of fixed-term employees.

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3.(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 sub-regulation (3) and (4), the right conferred by sub-regulation (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) pay,
- (b) any period of service qualification relating to any particular condition of service,
- (c) the opportunity to receive training, or
- (d) the opportunity to secure any permanent position in the establishment.

(3) The right conferred by sub-regulation (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.

(4) Sub-regulation (3)(b) is subject to regulation 4.

(5) In determining whether a fixed-term employee has been treated less favourably than a comparable permanent employee, the pro-rata principle shall be applied unless it is inappropriate.

(6) In order to ensure that an employee is able to exercise the right conferred by sub-regulation (1) as described in sub-regulation (2)(d) the employee has the right to be informed by his employer of available vacancies in the establishment.

(7) For the purposes of sub-regulation (6) an employee is “informed by his employer” only if the vacancy is contained in an advertisement which

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the employee has a reasonable opportunity of reading in the course of his employment or the employee is given reasonable notification of the vacancy in some other way.

Objective justification.

4.(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.

(2) Sub-regulation (1) is without prejudice to the generality of regulation 3(3)(b).

Right to receive a written statement of reasons for less favourable treatment.

5.(1) If an employee who considers that his employer may have treated him in a manner which infringes a right conferred on him by regulation 3 requests in writing from his employer a written statement giving particulars of the reasons for the treatment, the employee is entitled to be provided with such a statement within twenty-one days of his request.

(2) A written statement under this regulation is admissible as evidence in any proceedings under these Regulations.

(3) If it appears to the industrial tribunal in any proceedings under these Regulations—

- (a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement, or
- (b) that the written statement is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that the employer has infringed the right in question.

(4) This regulation does not apply where the treatment in question consists of the dismissal of the employee, and the employee receives a written notice under regulation 13 of the Employment Regulations 1994.

Unfair dismissal and the right not to be subjected to detriment.

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6.(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part VI of the Principal Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in sub-regulation (3).

(2) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, of his employer done on a ground specified in sub-regulation (3).

(3) The reasons or, as the case may be, grounds are—

(a) that the employee—

- (i) brought proceedings against the employer under these Regulations;
- (ii) requested from his employer a written statement under regulation 5 or regulation 9;
- (iii) gave evidence or information in connection with such proceedings brought by any employee;
- (iv) otherwise did anything under these Regulations in relation to the employer or any other person;
- (v) alleged that the employer had infringed these Regulations;
- (vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations;
- (vii) declined to sign a workforce agreement for the purposes of these Regulations, or
- (viii) being—
 - (aa) a representative of members of the workforce for the purposes of Schedule 1, or
 - (bb) a candidate in an election in which any person elected will, on being elected, become such a representative,

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performed (or proposed to perform) any functions or activities as such a representative or candidate, or

- (b) that the employer believes or suspects that the employee has done or intends to do any of the things mentioned in subparagraph (a).

(4) Where the reason or principal reason for dismissal or, as the case may be, ground for subjection to any act or deliberate failure to act, is that mentioned in sub-regulation (3)(a)(v), or (b) so far as it relates thereto, neither sub-regulation (1) nor sub-regulation (2) applies if the allegation made by the employee is false and not made in good faith.

(5) Sub-regulation (2) does not apply where the detriment in question amounts to the dismissal of an employee within the meaning of Part VI of the Act.

Complaints to industrial tribunals etc.

7.(1) An employee may present a complaint to an industrial tribunal that his employer has infringed a right conferred on him by regulation 3, or (subject to regulation 6(5)), 6(2).

(2) Subject to sub-regulation (3), an industrial tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—

- (a) in the case of an alleged infringement of a right conferred by regulation 3(1) or 6(2), with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them;
- (b) in the case of an alleged infringement of the right conferred by regulation 3(6), with the date, or if more than one the last date, on which other individuals, whether or not employees of the employer, were informed of the vacancy.

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(4) For the purposes of calculating the date of the less favourable treatment or detriment under sub-regulation (2)(a)—

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- (a) where a term in a contract is less favourable, that treatment shall be treated, subject to paragraph (b), as taking place on each day of the period during which the term is less favourable;
 - (b) a deliberate failure to act contrary to regulation 3 or 6(2) shall be treated as done when it was decided on.
- (5) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of sub-regulation (4)(b) to decide not to act—
- (a) when he does an act inconsistent with doing the failed act; or
 - (b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to have done the failed act if it was to be done.
- (6) Where an employee presents a complaint under this regulation in relation to a right conferred on him by regulation 3 or 6(2) it is for the employer to identify the ground for the less favourable treatment or detriment.
- (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 sub-regulation (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.

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- (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.
- (10) Compensation in respect of treating an employee in a manner which infringes the right conferred on him by regulation 3 shall not include compensation for injury to feelings.
- (11) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law.
- (12) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.
- (13) If the employer fails, without reasonable justification, to comply with a recommendation made by an industrial tribunal under sub-regulation (7)(c) the tribunal may, if it thinks it just and equitable to do so—
- (a) increase the amount of compensation required to be paid to the complainant in respect of the complaint, where an order was made under sub-regulation (7)(b); or
 - (b) make an order under sub-regulation (7)(b).

Successive fixed-term contracts.

- 8.(1) This regulation applies where—
- (a) an employee is employed under a contract purporting to be a fixed-term contract,
 - (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), and

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- (c) the employee has been continuously employed under the contract referred to in sub-paragraph (a) and any preceding contract or series of contracts referred to in sub-paragraph (b) for a period of four years or more.

(2) Subject to sub-regulation (3), where this regulation applies, then as from whichever is the later of—

- (a) the date on which the contract mentioned in sub-regulation (1)(a) was entered into or last renewed, and
- (b) the date on which the employee acquired four years' continuous employment,

the provision of the contract mentioned in sub-regulation (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be regarded as being a permanent employee.

(3) Sub-regulation (2) does not apply if the employment of the employee under a fixed-term contract was justified on objective grounds—

- (a) where the contract mentioned in sub-regulation (1)(a) has been renewed, at the time when it was most recently renewed;
- (b) where that contract has not been renewed, at the time when it was entered into.

(4) A collective agreement or a workforce agreement may modify the application of sub-regulations (1) to (3) of this regulation in relation to any employee or specified description of employees, by substituting for either or both of the conditions set out in sub-regulation (2) one or more different conditions which, in order to prevent abuse arising from the use of successive fixed-term contracts, specify one or more of the following—

- (a) the maximum total period for which the employee or employees of that description may be continuously employed on a fixed-term contract or on a series of successive fixed-term contracts;
- (b) the maximum number of successive fixed-term contracts and renewals of such contracts under which the employee or employees of that description may be employed; or

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- (c) objective grounds justifying the renewal of fixed-term contracts, or the engagement of the employee or employees of that description under successive fixed-term contracts,

and those provisions shall have effect in relation to that employee or an employee of that description as if they were contained in sub-regulations (2) and (3).

Right to receive written statement of change.

9.(1) If an employee who considers that he is to be regarded, by virtue of regulation 8, as a permanent employee requests in writing from his employer a written statement confirming that the contract is to be so regarded, he is entitled to be provided with either—

- (a) such a statement under regulation 12 of the Employment Regulations 1994; or
- (b) within twenty one days of his request, a statement giving reasons why it is not to be so regarded.

(2) If the reasons stated under sub-regulation (1)(b) include an assertion that there were objective grounds for the engagement of the employee under a fixed-term contract, or the renewal of such a contract, the statement shall include a statement of those grounds.

(3) A written statement under this regulation is admissible as evidence in any proceedings before a court or industrial tribunal.

(4) If it appears to the court or tribunal in any proceedings—

- (a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement, or
- (b) that the written statement is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw.

(5) An employee who considers that his employment contract is to be regarded, by virtue of regulation 8, as a contract of indefinite duration may present an application to an industrial tribunal for a declaration to that effect.

(6) No application may be made under sub-regulation (5) unless—

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- (a) the employee in question has previously requested a statement under sub-regulation (1) and the employer has either failed to provide a statement or given a statement of reasons under sub-regulation (1)(b), and
- (b) the employee is at the time the application is made employed by the employer.

PART III MISCELLANEOUS

Liability of employers and principals.

10.(1) Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as also done by his employer, whether or not it was done with the employer's knowledge or approval.

(2) Anything done by a person as agent for the employer with the authority of the employer shall be treated for the purposes of these Regulations as also done by the employer.

(3) In proceedings under these Regulations against any person in respect of an act alleged to have been done by an employee of his, it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from—

- (a) doing that act, or
- (b) doing, in the course of his employment, acts of that description.

PART IV SPECIAL CLASSES OF PERSON

Crown employment.

11.(1) Subject to regulation 14, these Regulations have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees.

(2) For the purposes of subregulations (1) and (3) a person is to be regarded as being in "Crown employment" only if—

- (a) he is in employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision, and

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- (b) having regard to the terms and conditions under which he works, he would be an employee if he was not in Crown employment.

(3) For the purposes of the application of the provisions of these Regulations in relation to Crown employment and persons in Crown employment in accordance with subregulation (1)–

- (a) references to an employee shall be construed as references to a person in Crown employment;
- (b) references to a contract of employment shall be construed, in relation to a person in Crown employment, as references to the terms and conditions mentioned in subregulation (2)(b); and
- (c) references to dismissal shall be construed as references to the termination of Crown Employment.

Government training schemes etc.

12.(1) These Regulations shall not have effect in relation to a fixed-term employee who is employed on a scheme, designed to provide him with training or work experience for the purpose of assisting him to seek or obtain work, which is either–

- (a) provided to him under arrangements made by the Government, or
- (b) funded in whole or party by an Institution of the European Community.

(2) These Regulations shall not have effect in relation to a fixed-term employee whose employment consists in attending a period of work experience not exceeding one year that he is required to attend as part of a higher education course.

Agency workers.

13.(1) These Regulations shall not have effect in relation to employment under a fixed-term contract where the employee is an agency worker.

(2) In this regulation “agency worker” means any person who is supplied by an employment business to do work for another person under a

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contract or other arrangements made between the employment business and the other person.

(3) In this regulation “employment business” means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity.

Apprenticeship.

14. These regulations shall not have effect in relation to employment under a fixed-term contract where the contract is a contract of apprenticeship.

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SCHEDULE 1

Regulations 1 and 8

WORKFORCE AGREEMENTS

1. An Agreement is a workforce agreement for the purposes of these Regulations if the following conditions are satisfied—

- (a) the agreement is in writing;
- (b) it has effect for a specified period not exceeding five years;
- (c) it applies either—
 - (i) to all of the relevant members of the workforce, or
 - (ii) to all of the relevant members of the workforce who belong to a particular group;
- (d) the agreement is signed—
 - (i) in the case of an agreement of the kind referred to in sub-paragraph (c)(i), by the representatives of the workforce, and in the case of an agreement of the kind referred to in sub-paragraph (c)(ii) by the representatives of the group to which the agreement applies (excluding, in either case, any representative not a relevant member of the workforce on the date on which the agreement was first made available for signature), or
 - (ii) if the employer employed 20 or fewer employees on the date referred to in sub-paragraph (d)(i), either by the appropriate representatives in accordance with that sub-paragraph or by the majority of the employees employed by him;
- (e) before the agreement was made available for signature, the employer provided all the employees to whom it was intended to apply on the date on which it came into effect with copies of the text of the agreement and such guidance as those employees might reasonably require in order to understand it fully.

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2. For the purposes of this Schedule—

“a particular group” is a group of the relevant members of a workforce who undertake a particular function, work at a particular workplace or belong to a particular department or unit within their employer’s business;

“relevant members of the workforce” are all of the employees employed by a particular employer, excluding any employee whose terms and conditions of employment are provided for, wholly or in part, in a collective agreement;

“representatives of the workforce” are employees duly elected to represent the relevant members of the workforce, “representatives of the group” are employees duly elected to represent the members of a particular group, and representatives are “duly elected” if the election at which they were elected satisfied the requirements of paragraph 3 of this Schedule.

3. The requirements concerning elections referred to in paragraph 2 are that—

- (a) the number of representatives to be elected is determined by the employer;
- (b) the candidates for election as representatives of the workforce are relevant members of the workforce, and the candidates for election as representatives of a group are members of that group;
- (c) no employee who is eligible to be a candidate is unreasonably excluded from standing for election;
- (d) all the relevant members of the workforce are entitled to vote for representatives of the workforce, and all the members of a particular group are entitled to vote for representatives of the group;
- (e) the employees entitled to vote may vote for as many candidates as there are representatives to be elected;
- (f) the election is conducted so as to secure that—
 - (i) so far as is reasonably practicable, those voting do so in secret, and

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- (ii) the votes given at the election are fairly and accurately counted.