



**JILPT REPORT**

No. 9  
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# **Labor Policy on Fixed-term Employment Contracts**

– 2010 JILPT Comparative Labor Law Seminar –

**The Japan Institute for Labour Policy and Training**

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## Foreword

The Japan Institute for Labour Policy and Training (JILPT) held the Tenth Comparative Labor Law Seminar on March 8th and 9th, 2010 in Tokyo. This Comparative Labor Law Seminar has been held biannually for the purpose of providing researchers of this area the opportunity to discuss and learn across borders. In the seminar, we planned to have cross-national discussion and analysis on the theme of “Labor Policy on Fixed-term Employment Contracts.” We invited nine scholars from Australia, China, France, Germany, Korea, Sweden, Taiwan, the U.K and Japan to present their national papers on the theme.

The issue of fixed-term employment is an area of remarkable developments not only in Japan but in other countries as well, especially after the recent worldwide recession. Main focus of this seminar was on the regulation of fixed-term employment contracts, and any policy on it requires balance between social protection of workers and flexibility of the labor market.

We believe the seminar was a great success, because it enabled participants to learn more about the diverse regulatory approaches and provided an opportunity to explore normative direction for labor law and policy in the age of a diversified workforce. Through thought-provoking discussion, participants mentioned not only the legal framework but its relationship to the actual use of fixed-term employment in each country. This Report is a compilation of papers presented to the seminar. We very much hope that these reports will provide useful and up-to-date information and also benefit those who are interested in comparative study of the issue.

We would like to express our sincere gratitude to the guests who submitted excellent national papers and we are deeply grateful to Prof. Hiroya Nakakubo and Prof. Takashi Araki for their efforts to coordinate the seminar, and also to the Japanese researchers for their participation.

May 2010

Takeshi Inagami  
President

The Japan Institute for Labour Policy and Training



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# Introduction

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## Theme and Background

The 10th JILPT Comparative Labor Law Seminar (Tokyo Seminar) was held in Tokyo on March 8th and 9th, 2010, with the theme of “Labor Policy on Fixed-term Employment Contracts.” Reflecting its purpose of promoting the exchange of views among labor law scholars of Western and Asian countries, national reporters were invited from Australia, China, France, Germany, Japan, Korea, Sweden, Taiwan, and the U.K. As co-organizers involved in the planning of the seminar, we sent the following memo, which was attached to the letter of invitation, to the reporters to explain about the seminar’s theme and its background.

*The rise in non-standard or atypical workers, such as part-time, fixed-term, and temporary (dispatched) workers, has become a hot issue in labor law and labor market policy across the world. The focus of the 10th Tokyo Seminar is on the regulation of fixed-term employment contracts.*

*By definition, fixed-term employment contracts terminate automatically at the expiry of an agreed term. Such a termination falls out of the purview of dismissal regulation. For employers and the wider labor market, fixed-term contracts provide numerical flexibility. However, for workers, concerns arise over employment stability and working conditions (which tend to be inferior to those of standard workers).*

*In line with developments in case law, during the 1980s several European countries introduced rules regulating the abuse of fixed-term contracts as well as mandating non-discrimination between fixed-term and permanent workers. Under the 1999 Council Directive (1999/70/EC, fixed-term work), all EU member states have adopted national regulations curbing the use of successive fixed-term employment contracts and entrenching non-discrimination principles. However, regulation varies widely depending on the jurisdiction (see SEC(2006)1074).*

*In Asia, China and Korea have recently moved to regulate fixed-term contracts; Japan is yet to do so. Japanese law imposes a three-year maximum term for a fixed-term contract to ensure the employees are not committed to the one employer for an unduly long period. However, Japanese law does not require objective reasons for the employer to enter into or renew fixed-term contracts. Nor does the law set an upper limit on the cumulative duration of renewed fixed-term contracts or the maximum number of renewals. It is up to the employer and the worker to decide whether or not to renew the contract, although case law has established some protections for workers when the circumstances point to a legitimate*



*expectation of a contract renewal.*

*The rapid increase in fixed-term and other non-standard workers in Japan, however, has given rise to a number of employment issues, such as growing employment instability and widening inequality between standard and non-standard workers in terms of working conditions and social protection. Therefore, in January 2009, the Japanese government established a study group on fixed-term employment contracts to deliberate on the introduction of new regulations.*

*Any policy on fixed-term employment contracts requires a balance between the social protection of workers on the one hand and flexibility of the labor market on the other. Therefore, the purpose of this seminar is not only to enable participants to learn more about the diverse regulatory approaches to fixed-term contracts in jurisdictions across the world, but also to provide an opportunity to explore normative directions for labor law and policy in the age of a diversified workforce.*

## **Proposed Outlines**

Based on the foregoing concept, we laid out the following suggested outlines along which the reporters were to compose their national papers.

### **I. General overview of fixed-term employment in the labor market**

- Historic overview of non-standard (atypical, non-regular) employment and/or fixed-term contract workers in your country: ratio of non-standard workers and fixed-term contract workers in the labor force.
- Relationship between fixed-term contract employment and other non-standard employment, such as part-time and temporary (dispatched) workers.
- Characteristics and attributes of fixed-term contract workers.
- What is the most typical fixed-term employment? For what purposes and with whom (young, middle or aged; male or female) are fixed-term contracts concluded?
- Although fixed-term employment is usually characterized as employment with instability and lower working conditions, do you know of any different types of fixed-term workers?

### **II. Historic developments of fixed-term contract regulations**

- Brief history of fixed-term contract regulations and reasons for regulatory changes.
- Impact of the regulations on the labor market

### **III. Current regulations on fixed-term contracts**

- Please describe the current regulations on fixed-term contracts, including the legal consequences of their violation (criminal sanctions, damages, automatic conversion into an open-ended contract, etc.), any exceptions for certain groups of workers (e.g. older workers or those in newly founded companies), and the permissibility of derogation by collective agreements.
- If your country includes regulations on other material matters, please also include them in your paper.
- Does the law in your country require objective reasons for entering to or renewing fixed-term contracts? Are there any items that are broadly interpreted in order to provide labor market flexibility?
- Does the law set any upper limits on the maximum total duration of successive fixed-term contracts and /or the maximum number of contract renewals?

- Does the law require equal treatment between workers on fixed-term contracts and those on open-ended contracts?
- Does the law require employers to help fixed-term workers transition to open-ended (standard) employment, such as offering information on vacant permanent positions, training opportunities, etc?
- Do fixed-term workers face any problems in the social security system, such as limited eligibility for unemployed benefits?

#### **IV. Evaluation of current regulations on fixed-term contracts in labor policy and future prospects**

- How do scholars, policy-makers and stakeholders evaluate the current state of regulations on fixed-term contracts in your country? What are the merits and demerits of the current state of regulations?
- Have regulations curbed the exploitation of fixed-term contracts? Are there any side effects of limiting the maximum duration and/or the maximum renewal number of fixed-term contracts? Is there any evidence of liberal interpretation of formally strict rules to meet the needs of market flexibility?
- If the law entrenches principles of non-discrimination, are there any problems concerning the scope of equal treatment and conflicts in interests between fixed-term and permanent workers? How do labor unions representing permanent workers view the non-discrimination principle?
- Are there any proposals to reform current regulations? Are there any discussions to shift regulatory measures from substantive regulations by the state to procedural measures allowing agreement between the parties concerned?
- What is your overall view of regulations for fixed-term work in the context of labor law and policy in your country?

#### **National Papers**

The national papers submitted to the seminar are contained in the following pages. They describe and analyze the current conditions of fixed-term employment contracts, including various measures being taken regarding them. While readers will surely appreciate the comprehensive contents of these papers, let us offer a general overview of the legal regulations of each country by way of introduction.

First, as for the four European countries, the 1999 EU Directive mentioned above mandates them to ensure equality between permanent and fixed-term workers, and to prevent abuse arising from successive fixed-term contracts by taking one or more of the following measures: (a) objective reasons justifying the renewal of fixed term contracts, (b) the maximum total period for using successive fixed term employment contracts, (c) the number of renewals. It is interesting to note that there are substantial differences among the four countries concerning the latter aspect.

In the United Kingdom, there is no requirement for objective reasons for concluding or renewing fixed-term contracts, nor for the maximum number of renewal of such contracts. However, the total period of successive fixed-term contracts is limited to four years, beyond which the fixed term loses its effect and the contract is treated as one for an indefinite period. It also should be noted that termination on the expiry of a fixed-term contract is subject to the prohibition of unfair dismissal if the employee has been employed for a year or longer.

In Germany, the labor court established a rule that objective grounds are required for

concluding fixed-term contracts so as to prevent the evasion of dismissal protection. However, statutory exceptions have been developed since 1985. While the current law provides for objective grounds for fixed-term contracts, the parties are allowed to conclude a fixed-term contract without such grounds within the period of two years, and with renewal limited to three times. There is a more generous exception of up to four years for newly established enterprises.

In France, a strong policy against fixed-term contracts is embodied in the legal provisions specifying permissible reasons for fixed-term contracts, such as replacement and variations in the activity of the firm. The use of fixed-term contracts for such purposes is limited to the period of 18 weeks, and they are renewable only once. There is also strict regulation of successive fixed-term contracts. On the other hand, the list of permissible reasons includes those of welfare to expand employment opportunities for the elderly and the youth. In addition, a new scheme of project contract was adopted recently for engineers and managers.

In Sweden, permanent employment contracts were considered to be the rule, and the law specified, like France, objective reasons for concluding fixed-term contracts, such as seasonal work, temporary substitute, and probationary employment. However, as the list became longer and more complex, the system was streamlined in 2007 by introducing a new scheme of general fixed-term employment. The parties are free to conclude this type of fixed-term contract for any reason, provided that the total period of employment under the same employer may not exceed two years within five years.

Second, as for the Asian-Oceanic countries, while the issue of atypical employment is commonly recognized, their legal regulation of fixed-term contracts is more diverse.

In Japan, as mentioned in the memo to the national reporters, the parties are not required to have a good reason for concluding fixed term contracts. Also, no limit is set for the frequency of renewal of such contracts, nor for the total length of employment by such contracts (although each contract must be for a period of 3 years or less). There is no provision to prohibit discrimination against fixed-term workers. Only, when the parties have renewed such contracts repeatedly, the courts may invoke the law of dismissal by analogy and require the employer to have reasonable grounds for refusing to do so.

In Taiwan, conversely, the law provides for a stringent rule of non-fixed term employment, limiting the use of fixed-term contracts to temporary, short-term, seasonal, or specific work for not longer than one year. Moreover, when the total period of employment before and after the renewal of a fixed-term contract exceeds 90 days, it is converted to an open-ended contract unless there are 30 days or more between the two contracts. On the other hand, there is no provision for equal treatment. Also, there are efforts towards allowing the wider use of fixed-term contracts.

In Korea, a law was adopted in 2007 to protect irregular workers including fixed-term employees. The law prohibits discrimination against fixed-term employees in comparison with other employees engaged in the same or similar work. It does not regulate reasons for fixed-term contracts, but limits the total period of employment by such contracts to two years, beyond which the employee is considered to have an open-ended contract. Interestingly, after the law was adopted, 37% of fixed-term employees were converted into regular employees while almost the same number of such employees lost employment.

In China, where all workers used to enjoy permanent employment under the planned economy, fixed-term employment expanded explosively since the 1980s among private enterprises. To alleviate the situation, a comprehensive law on labor contract, which was

enacted in 2007, limited the period of consecutive fixed-term contracts to ten years and the frequency of their renewal to two. When either limit is exceeded, the employee is entitled to lifelong employment. In addition, the same severance pay as dismissal must be paid when the employer refuses to renew a fixed-term contract. There is no regulation of reasons for concluding fix-term contracts.

In Australia, the regulation of fixed-term contracts depends primarily on its awards system. Industry awards may limit the use of fixed-term employment to certain cases or to certain time periods. Collective agreements also may regulate the use of fixed-term contracts. The law of 2009 regarding unfair dismissal basically excludes fixed-term employees. However, when a series of consecutive fixed-term contracts have been concluded coupled with an expectation of further employment, the relationship may be regarded as continuous and warrant application of the law.

### **Analytical Viewpoints**

After presentations of the national papers, there was a general discussion among the participants. It touched on not only the legal framework but also its relationship to the actual use of fixed-term employment in each country, relying on relevant OECD statistics. Unfortunately we are unable to summarize the lively discussion in this paper, but we believe the following points were recognized as crucial in understanding and addressing the issue of fixed-term employment contracts.

First, there is a question of the fundamental value of fixed-term contracts. They are often regarded as “atypical” and “irregular,” or inferior, in comparison with traditional, open-ended employment contracts, justifying legal regulation to suppress their use. However, they may also work positively as a tool to increase flexibility and employment opportunity in society.

Second, the three-prong requirement of the EU Directive offers a good framework in regulating the use of fixed-term contracts. Yet, while some countries limit the grounds for concluding fixed-term contracts, others leave them unregulated and rather limit the maximum duration of employment and/or the maximum number of renewals.

Third, apart from such direct control of fixed-term contracts, the law on dismissal may be applied to the employer’s refusal to renew a fixed-term contract. The U.K. makes it clear in the statute, and Australia and Japan seem to have developed a similar case law when there have been repeated renewals in the past.

Fourth, the principle of equal treatment or prohibition of discrimination against fixed-term employees has been accepted rather commonly. This relates to a wider issue of equal treatment of part-time, dispatched, or other atypical employees as well. Still, it seems we are yet to know how this principle is applied in concrete cases.

Fifth, there is also a question as to who decides the regulation of fixed-term contracts. Naturally, it is the legislator that makes laws to deal with them. However, in some countries such legal provisions may be superseded by collective bargaining agreements. Also, in Australia industrial awards play a principal role.

Finally, although we could not invite a reporter from the U.S., it would be interesting to think about the legal situation there. According to the common law rule of employment at will, the employer is free to dismiss an employee any time for any reason under an indefinite contract. Thus, fixed-term contracts are more advantageous to employees because of their employment security during the term of employment. This reminds us of the fact the issue of fixed-term employment is inextricably connected to the law of dismissal.



# The Regulation of Fixed-term Work in Britain

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## Abstract

Fixed-term workers and more generally temporary workers have always formed a significant part of the total workforce in Britain. In contrast to legislation and practice in other Western European countries, the position of fixed-term workers was significantly neglected in law until recently. As a result of Council Directive 1999/70/EC (the Fixed-term Work Directive) that was adopted at European level, legislation in the form of the Fixed-term Employees Regulations has applied since October 2002. The impact of the Directive was considerable with respect to changes in domestic legislation but there is still limited evidence that qualitative and quantitative changes have been achieved in practice. While it may be still early for such change, it is not clear that the Regulations comply with the Directive in all respects.

## 1. General overview of fixed-term work in the British labour market

### *1.1 Historic overview of temporary work and fixed-term workers*

Until recently, there was no statutory definition of a fixed-term worker nor of a fixed-term contract. This contributed to a lack of precision of the same terms in practice as well. In the literature and statistical surveys, temporary work is defined to embrace a variety of forms and is the subject of a range of classifications. The multiplicity of terms used to describe the phenomenon and the way in which they overlap makes measurement of the size of the temporary labour force difficult.<sup>1</sup> Since there is no single, objective definition of ‘temporary’, attempts at measurement have had to rely upon subjective definitions provided by the workers or the employers.<sup>2</sup> The *Labour Force Survey* (LFS) is the main source of data on patterns of non standard or temporary work in Britain. The LFS defines temporary workers as including people on fixed-term contracts, agency temps, casual workers and seasonal workers. One question asks whether the job held is permanent and if not in which way it is not. In the latter case the questionnaire offers several options such as seasonal work, work done under contract for a fixed period or for a fixed task, agency temping, casual work or some other way in which the job was not permanent. But the survey results may give, in this respect, a

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<sup>1</sup> The definition of ‘fixed-term work’ in the present analysis follows that provided by McCann, where it is described as embracing ‘working relationships in which individuals are hired under contracts specified to subsist for a fixed period of time’, D. McCann, *Regulating Flexible Work* (Oxford: Oxford University Press, 2008) at 102.

<sup>2</sup> B. Casey, ‘The Extent and Nature of Temporary Employment in Britain’, (1988) 12 *Cambridge Journal of Economics*, 487 at 489.

potentially misleading picture of the interaction of the rules defining employment status with the practice of casual work as the data are based on self-reporting of employment status by individual respondents. A detailed study by Burchell et al. reported that LFS may not capture the extent of non-standard work due to the difficulties of the definition of the term and may lead to some under-counting of fixed-term contract employees, who regard their jobs as 'permanent' even though it takes the form of a fixed-term contract.<sup>3</sup> The implication is that when interpreting such data, it is important to bear in mind that the boundaries of non-standard work are vague and shifting, and that some forms of it may not be captured in labour force surveys.

Based on LFS data, temporary workers represent a relatively small percentage of the British workforce, their numbers having expanded during the 1990s but remained fairly stable since. In 1984, around 5 per cent of the labour force were in temporary jobs,<sup>4</sup> a figure that did not increase significantly until the early 1990s and peaked in 1997, when temporary workers accounted for about 8 per cent of the labour force.<sup>5</sup> The increase in temporary work was in fixed period contracts, which formed about half of all temporary employment, and in agency temping. The number of temporary workers has since 1997 fallen to around 6 per cent, where it has remained since 2003, indicating that temporary work is less prevalent.<sup>6</sup> But a significant reduction took place in the percentage of fixed-term employees, i.e. from 50.1 per cent of all temporary employees in 1997 to 44.1 per cent in the first quarter of 2007;<sup>7</sup> during the same period, agency temping increased from 13.5 per cent to 18.7 per cent of all temporary workers. During the period between 1997 and 2003, temporary working grew rapidly in Spain, Finland and France, but decline was reported in Denmark and Greece.<sup>8</sup> This discrepancy may suggest that it was national institutional arrangements (e.g. regulations that discriminate against non-permanent employees), rather than any possible global forces, that shaped employers' preferences for temporary rather than permanent employment. Other commentators point out that the fall in the use of temporary employment contracts followed improvements in the macro labour market which emerged after the major recession in 1991.<sup>9</sup> According to Green, a straightforward explanation for the declining proportions of temporary workers is that employers felt less need to use fixed-term contracts as their confidence in the economy was

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<sup>3</sup> Burchell, B., Deakin, S. and Honey S. *The Employment Status of Individuals in Non-standard Employment*. EMAR Research Series no. 6, (London: Department of Trade and Industry (DTI, now BIS), 1999).

<sup>4</sup> LFS figures cited in F. Sly and D. Stillwell, 'Temporary Workers in Great Britain', *Labour Market Trends* (September 1997) (London: ONS, 1997), 347 at 348, figure 1.

<sup>5</sup> Sly and Stillwell, n 4 above at 347.

<sup>6</sup> The latest *Workplace Employment Relations Survey* (WERS) (both employees and management are surveyed) reported that in 2004 92 per cent of employees stated that they had a permanent contract, while 5 per cent were employed on a temporary contract with no agreed end date, and 3 per cent had a fixed-term contract. Management respondents stated that 7 per cent of employees were on temporary or fixed-term contracts (B. Kersley, C. Alpin, J. Forth, A. Bryson, H. Bewley, G. Dix and S. Oxenbridge, *Inside the Workplace: First Findings from the 2004 Workplace Employment Relations Survey* (Oxford: Routledge, 2006).

<sup>7</sup> F. Green, 'Temporary Work and Insecurity in Britain: A Problem Solved?' (2008) 88 *Social Indicators Research*, 147 at 148.

<sup>8</sup> For a comparison of the development of temporary work within the EU-15, see K. Schömann, R. Rogowski and T. Kruppe, *Labour Market Efficiency in the European Union: Employment Protection and Fixed-term Contracts* (London: Routledge, 1998), at ch 4.

<sup>9</sup> P. Nolan and G. Slater, *The Labour Market: History, Structure and Prospects*, in P. Edwards (ed) *Industrial Relations: Theory and Practice*, 2<sup>nd</sup> ed. (Oxford: Blackwell, 2003) at 63.

high, and that thus employees were increasingly able to satisfy their evident preference for open-ended contracts.<sup>10</sup>

### **1.2 Relationship between fixed-term work and other non-standard forms of work**

According to Rogowski and Wilthagen, legal regulations of fixed-term contracts in developed labour law systems are shaped by their surrounding legal context and by national approaches to regulating employment protection rather than by economic trends or political fashions.<sup>11</sup> More precisely, the regulation of fixed-term contracts ‘reflects’ the level of regulation concerning dismissal.<sup>12</sup> In Britain, workers in jobs with open-ended contracts (permanent workers) have traditionally experienced low levels of formal employment protection. The flexibility of the British labour market relies primarily on the relatively weak protection of permanent workers.<sup>13</sup> In brief, two systems of legal regulation concerning dismissal are in place: the common law rules governing the termination of employment, and the statutory right to claim unfair dismissal, which was introduced in 1971. In common law, wrongful dismissal occurs where an employee has been dismissed without notice or an employee has not been given the right amount of notice, or the employment is terminated contrary to the contract.<sup>14</sup> Unfair dismissal<sup>15</sup> involves a two-stage test of fairness: at the first stage, the employer is required to show that the dismissal took place for reasons that were ‘potentially fair’, that is to say capable of providing a legitimate basis for the termination of employment. There are currently six, in their majority broadly defined, potentially fair reasons: misconduct, capability, redundancy, requirements of an enactment, retirement and ‘some other substantial reason’.<sup>16</sup> At the second stage, the tribunal assesses whether the employer ‘acted reasonably’ or ‘unreasonably’ in treating the reason relied upon as a sufficient reason, in the circumstances, for dismissing the employee.<sup>17</sup> In practice, very few workers have ‘no redundancy clauses’ in their contracts of employment, and the employer has thus the option of ending the employment relationship on financial grounds, with the only cost being that of a redundancy payment, if applicable.<sup>18</sup>

Concerning the extent and nature of other forms of temporary work, one of the most striking trends in the British labour market is the long-standing growth of part-time work. Part-time work, which constitutes an internal form of flexibility and is defined in LFS as work of less than 30 hours per week, grew steadily since the 1940s and then increased exponentially from the early 1970s, from 15 per cent of the workforce in 1971 to slightly

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<sup>10</sup> Green, n 7 above.

<sup>11</sup> R. Rogowski and T. Wilthagen, Introduction in R. Rogowski and T. Wilthagen (eds) *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulations* (Deventer: Kluwer, 1994).

<sup>12</sup> Schömann et al. n 8 above at 24.

<sup>13</sup> National Association of Citizens Advice Bureaux, *Flexibility Abused - A CAB Evidence Report on Employment Conditions in the Labour Market* (London: NACAB, 1997).

<sup>14</sup> See, for instance, *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 710 and *Shindler v Northern Raincoat Co Ltd* [1960] 1 WLR 1038.

<sup>15</sup> Section (s) 95 (1) of the Employment Rights Act (ERA) 1996.

<sup>16</sup> ERA 1996, s 98(3).

<sup>17</sup> S. Deakin and G. Morris, *Labour Law*, 5<sup>th</sup> ed. (Oxford: Hart Publishing, 2009) at 445.

<sup>18</sup> C. Barnard and S. Deakin, Chapter 7: United Kingdom, in B. Caruso and S. Sciarra (eds), *Flexibility and Security in Temporary Work: A Comparative and European Debate*, 2007, WP C.S.D.L.E. ‘Massimo D’Antona’ .INT – 56/2007 at 120. For an in-depth analysis, see S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005) at 127.



more than one quarter of all employees in 2006.<sup>19</sup> Overwhelmingly filled by women, these jobs in both the public and private sectors are much more likely to be poorly paid, low-skilled and unstable.<sup>20</sup> With effect from 6th February 1995, part-time employees have had the same rights as full-timers for purposes of the British employment protection legislation in that rules requiring employees to work more than a particular number of hours per week to qualify for employment law protection were then abolished.<sup>21</sup> But they did not give part-timers the right to the same rates of pay and conditions of employment as full timers, a right which was provided by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 as from 1st July 2000.<sup>22</sup> As from that date part time anyone who counts as a worker (not just an employee) has been entitled to all the same rights (pro rata) as full timers doing the same work.

Finally, agency work, an example of external form of flexibility, is a type of ‘atypical’ employment that owing to its substantial increase in the last years requires special attention in any analysis of non-standard employment in Britain.<sup>23</sup> Agency work is regulated and governed by the Employment Agencies Act 1973,<sup>24</sup> which was mainly designed to facilitate the establishment of agencies, and the Conduct of Employment Agencies and Employment Businesses Regulations 2003.<sup>25</sup> But this legislation does not specify what the status of agency workers should be for the purposes of employment legislation, leaving the matter to be decided under the common law tests of status.<sup>26</sup> While, as we shall see later, fixed-term workers tend to be employees with a contract of employment, agency workers and those on causal and intermittent work contracts, will in most instances not be employees.<sup>27</sup> Case law tended to assume a contract *sui generis* between the employment business and the worker.<sup>28</sup> Since then, the courts have accepted that there can be a contract of employment between the agency worker and the agency during the period in which the temporary workers worked for an end-user.<sup>29</sup> An increase in employment protection, mainly in terms of minimum wage and annual paid leave, has taken place in the recent years. However, there are no provisions for equal pay or treatment with comparable workers in the user firms, no legal restrictions over the permissible reasons for using agency workers or over the occupations/industries where they can be used, and no limits on the duration of their use – all of which statutory requirements can be found in various degrees in the pre-accession EU 15 Member States.<sup>30</sup> It

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<sup>19</sup> ONS, *Labour Market Trends* (December 2006) (London: ONS, 2006) at 405. For an analysis of the regulation of part-time work, see McCann, n 1 above at 55-100.

<sup>20</sup> M. Cully, S. Woodland, A. O’Reilly and G. Dix, *Britain at Work*, (London: Routledge, 1999).

<sup>21</sup> Employment Protection (Part-time Employees) Regulations 1995 (SI 1995/31) now effectively incorporated into the Employment Rights Act 1996 Part XIV, notably ERA 1996 s 210 and ERA 1996 s 212.

<sup>22</sup> SI 2000/1551, as amended. This legislation was the result of the implementation of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex: Framework agreement on part-time work, OJ L 14, 20.1.1998.

<sup>23</sup> Schömann et al. n 8 above at 3.

<sup>24</sup> As amended.

<sup>25</sup> SI 2003/3319, replacing SI 1976/715.

<sup>26</sup> Deakin and Morris, n 17 above at 153-157.

<sup>27</sup> An examination of the objective facts is necessary; see Deakin and Morris, n 17.

<sup>28</sup> *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All ER 220.

<sup>29</sup> *McMeechan v Secretary of State for Employment* [1997] IRLR 353 (CA).

<sup>30</sup> Green, n 7 above at 158. For the situation in other EU Member States, see J. Arrowsmith, *Temporary Agency Work in an Enlarged European Union*, (Luxembourg: Office for the Official Publications of the European Communities, 2006).

is expected that the transposition of Directive 2008/104/EC on temporary agency work<sup>31</sup> will change the regulatory landscape in Britain with respect to this type of atypical employment. In the main, after 12 weeks of employment agency workers will gain the right to the same pay, holiday and other basic working conditions as permanent staff. The rules may drive employers to reduce their reliance on agency workers, to recruit more employees directly or create an in-house bank of casual and fixed-term staff.

### ***1.3 Characteristics and attributes of fixed-term workers***

According to LFS data, the proportion of men working under a fixed period contract stood at 41.6 per cent of all temporary employees and that of women at 46.1 per cent in 2007. According to an earlier study,<sup>32</sup> men were more likely to work in craft jobs (1 in 5 men compared to with 1 in 20 women). In contrast, women were more likely to work in clerical/secretarial jobs (1 in 5 women compared with 1 in 20 men). There were also marked differences across industrial sectors. Just under half of the women respondents worked in public administration, education and health sector compared with just under a fifth of men. Men were much more likely than women to work in construction (1 in 5 men compared with 1 in a 100 women) and manufacturing sectors (1 in 5 men compared with 1 in 10 women). Temporary work has been also more common among young (25-49 years) and ethnic minority workers, mostly black, Indian and Bangladeshi.<sup>33</sup> LFS data suggests that in 2007 the highest proportion of all temporary employees was found in the professional occupations category (21 per cent). The majority of temporary employees under a fixed period contract was in the lower managerial and professional (25.1 per cent), the semi-routine occupations (20.8 per cent) and the intermediate occupations (18 per cent of all temporary workers). Rather surprisingly, the WERS 2004 reported that fixed-term contracts were more commonly used when an occupation formed the core group within a workplace. Kersley et al. noted that this finding demonstrates ‘the persistence of the use of fixed-term contracts to augment the core workforce, as observed by Cully et al., and is counter to the core-periphery model of labour market segmentation which suggests that fixed-term contracts are primarily used among the peripheral, rather than the core, workforce.’<sup>34</sup>

The rapid increase of temporary employment in the 1990s, as seen earlier, concealed radical shifts in particular sectors, as evident from the LFS data. Most striking was the expansion of short, fixed-term contracts in the public services, particularly in health and education, which began in the early 1980s and accounted for over two-fifths of all temporary work at the end of the 1990s. Budget uncertainties, as well as the need to provide cover for absent staff (e.g. on maternity leave), provided the main motives for this increase. In the private sector, temporary working increased in most sectors after the early 1980s,<sup>35</sup> although often from a low base, and for the first time took root in industries, such as banking and finance, previously associated with stable employment and ‘jobs for life’.<sup>36</sup> However, between 1997 and 2007, a decline in the proportion of temporary employees was evident in

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<sup>31</sup> OJ L 327, 5.12.2008.

<sup>32</sup> N. Tremlett and D. Collins, *Temporary Employment Survey* (London: Department for Education and Employment, 1999).

<sup>33</sup> Tremlett and Collins, n 32 above.

<sup>34</sup> Kersley et al. n 6 above at 81.

<sup>35</sup> B. Casey, H. Metcalf, and N. Millward, *Employers' Use of Flexible Labour*, (London: Policy Studies Institute, 1997).

<sup>36</sup> P. Nolan and G. Slater, *The Labour Market: History, Structure and Prospects*, in P. Edwards (ed), *Industrial Relations: Theory and Practice*, 2<sup>nd</sup> edition (Oxford: Oxford University Press, 2003).

the manufacturing sector, i.e. from 12.1 per cent in 1997 to 9.5 per cent of all persons in 2007, in construction, i.e. from 4.5 per cent in 1997 to 3.4 per cent in 2007, and in the banking, finance and insurance sector, i.e. from 14.7 per cent in 1997 to 13.3 per cent in 2007. In contrast, the percentage of temporary employees in the public administration, education and health sector still increased from 37 per cent in 1997 to 41.8 per cent in 2007. The proportion of temporary employees also rose in the distribution, hotels and restaurants sector, i.e. from 16.3 per cent in 1997 to 17.7 per cent in 2007.

Further, the 2004 WERS survey pointed to interesting findings concerning the types of workplaces where fixed-term contract are used. Larger workplaces were more likely to have some staff on fixed-term contracts than smaller workplaces, and workplaces which were part of a larger organisation were more likely to make use of fixed-term contracts than single independent workplaces (34 per cent compared to 21 per cent). Workplaces where at least one union was recognised were also more likely to make use of fixed-term contracts than workplaces where no unions were recognised, but this appeared to be due to the fact that, on average, workplaces where unions were recognised were larger than those without union recognition as this relationship disappeared when workplaces of a similar size were compared. In addition, union density was lower among temporary workers (29 per cent among those on fixed-term contracts and 17 per cent among those on temporary contracts) than among the standard workforce (35 per cent). The 1999 Temporary Employment Survey reported a correlation between the type of temporary work and the level of educational attainment. Those without qualifications were more likely to work in seasonal/casual jobs than those with qualification - just under half compared with just over a quarter of those with university or equivalent qualifications. Those with a university qualification were more likely to be employed on a fixed term contract (just under 60 per cent) than those with no qualifications (just under 40 per cent). Those working on a fixed term contract tended to be in the professional, managerial and associate and technical professions (just under 60 per cent). Those working as agency temps were found predominantly in clerical and secretarial occupations (just under 50 per cent).

Concerning the reasons for temporary working, the LFS reported an increase in the proportion of all employees working on a temporary basis because of not being able to find a permanent job, i.e. from 25.7 per cent in 2007 to 37.9 per cent in 2009, a figure close to that of 1992 (35.9 per cent). The proportion of employees not wanting a permanent job slightly decreased, i.e. from 28.6 per cent in 2007 to 25.4 per cent in 2009. The percentage of employees that had a contract with a period of training also decreased from 6.5 per cent in 2007 to 5.5 in 2009. Finally, the percentage of employees citing other reasons decreased slightly, i.e. from 38.3 per cent in 2007 to 34.9 per cent in 2009.<sup>37</sup> On the management side, the 2004 WERS found that the most common reason for using fixed-term contracts was to respond to a temporary increase in demand. More than one-third (36 per cent) of workplaces with some fixed-term employees made use of them for this reason. Almost one quarter (24 per cent) of workplaces used fixed-term contracts to cover for maternity leave or long-term absence. Fixed-term contracts were used to obtain specialist skills in 17 per cent of workplaces with such contracts, and 16 per cent of workplaces with some fixed-term employees used them to decide whether an employee should be taken on in a permanent job. Less than one in ten workplaces used fixed-term contracts to respond to a freeze on permanent

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<sup>37</sup> Further information on why workers undertake temporary work is provided by Tremlett and Collins, n 32 above.

staff numbers, in pursuit of enhanced performance, because of time-limited funding, or due to budget restrictions or financial constraints.<sup>38</sup>

Finally, available research on the terms and conditions of temporary workers in Britain reveals them to encounter a range of disadvantages.<sup>39</sup> Mainly, temporary working arrangements have been found to have higher proportions of workers on low pay than standard jobs, and also higher proportions who have no access to pensions and sick pay. McGovern et al. found in their 2004 study that 32 per cent of full-time temporary workers were low waged, compared to 21.4 per cent of full-time workers.<sup>40</sup> When asked if temporary work had any drawbacks, around 80 per cent of respondents in the 1999 Temporary Work Survey said that there were drawbacks to temporary work. Amongst those who said there were drawbacks, two fifths said that job insecurity was the main drawback. A further two fifths mentioned the lack of benefits, such as sick pay or uncertain wages, as the main drawback of temporary work. When asked if temporary work had any benefits, around 70 per cent of respondents said that there were benefits to temporary work. Amongst those who said there were benefits, two fifths said that flexibility was the main benefit. A further quarter mentioned the freedom to choose the type of work or better pay than permanent work as the main benefits.

Another significant issue has been that of job security. A 1998 LFS study found that those in temporary employment (including that of fixed-term work) were most likely to feel that their job was not secure, though more than half did not feel insecure. But temporary and fixed term contract workers reported higher levels of job satisfaction than those in permanent employment, perhaps because they felt they could change jobs more easily if they wished.<sup>41</sup> However, other research by Gallie *et al.* reports that temporary work is the single most significant predictor of job insecurity.<sup>42</sup> In terms of equality of treatment, the 1999 Temporary Employment Survey reported that of those who worked with permanent staff doing a similar job (around 50 per cent of all respondents), three quarters felt they were treated the same as their permanent counterparts. But restricted access to training has often been cited as one of the most clear-cut disadvantages encountered by temporary workers<sup>43</sup> and as McCann stresses ‘generates concerns about its repercussions across their working lives, in particular the risk that they will become trapped in low-skilled and low wage jobs.’<sup>44</sup>

Although temporary employment is usually characterised as employment with lower working conditions and instability, the extent of disadvantage has been suggested to vary in relation to the working pattern, length of tenure, and occupation.<sup>45</sup> For instance, casual workers and temporary workers in seasonal personal and protective work are in relatively

<sup>38</sup> For other accounts of employers’ reasons for using temporary labour, see P. Heather, J. Rick, J. Atkinson and S. Morris, ‘Employers’ Use of Temporary Workers’ *Labour Market Trends* (September 1996) 403 and Casey et al. n 35 above.

<sup>39</sup> McCann, n 1 above at 104-107. See also DTI, *Fixed Term Work Public Consultation* (URN 01/680) (London: DTI, 2001).

<sup>40</sup> P. McGovern, D. Smeaton, and S. Hill, ‘Bad Jobs in Britain: Nonstandard Employment and Job Quality’, (2004) 31 *Work and Occupations*, 225 at 236.

<sup>41</sup> ONS, ‘Employees’ Perceived Job Security: By Type of Employment’ (1998) *Social Trends* 32.

<sup>42</sup> D. Gallie, M. White, Y. Cheng, and M. Tomlinson, *Restructuring the Employment Relationship* (Oxford: Clarendon, 1998) at 144.

<sup>43</sup> Research by Arulampalan and Booth found that men were 16 per cent less likely to be trained when employed on temporary contracts and women nearly 12 per cent less likely (W. Arulampalan and A. J. Booth, ‘Training and Labour Market Flexibility: Is There a Trade-off?’ (1998) 36 *British Journal of Industrial Relations*, 521.

<sup>44</sup> McCann, n 1 above at 105.

<sup>45</sup> McCann, n 1 above 106-107.

low-paid and unstable jobs while professionals on fixed-term contracts in specialist fields were found to be well-remunerated.<sup>46</sup> But McCann refers to an analysis of the 1998 WERS findings by Hoque and Kirkpatrick that indicate that managers and professionals on non-standard contracts, and particularly women, are disadvantaged concerning training opportunities and workplace consultation.<sup>47</sup> Further, it has been reported that contract workers (those who work under contracts of one to three years) have similar skill levels to permanent employees, are in jobs of comparable levels of intrinsic interest and tend to see their jobs as allowing them access to a career ladder. On the other hand, short term workers (those on contracts of less than 12 months) have fewer opportunities to develop their skills, are engaged in work that involved comparatively few opportunities to take responsibility and are of fairly low levels of intrinsic interest, and view themselves as having little prospect of securing better work and their jobs as highly insecure.<sup>48</sup>

## 2. Historical development of fixed-term work regulation

### 2.1 History of fixed-term work regulation and its impact on the labour market

The phenomenon of ‘casual’ working relationships was common in many trades in the nineteenth and early twentieth centuries. Barnard and Deakin report that ‘references to debates about ‘decasualisation’ in particular sectors, such as the docks and low-paying “sweated trades”, go back to the late nineteenth century and many statutory reforms of the mid-twentieth century welfare state, such as those relating to social insurance legislation and the National Dock Labour Scheme, penalised casual work and attempted to regularise it’.<sup>49</sup> However, in contrast to the situation in most Western European countries<sup>50</sup> British labour law was traditionally characterised by a deliberate policy of abstentionism of the state, i.e. non-interference with statutory law in industrial relations, and a reliance on collective bargaining as the primary form of labour market regulation, i.e. collective *laissez-faire*.<sup>51</sup> Due to the reliance on abstentionism and collective *laissez-faire*, non-unionised workers and thus the vast majority of non-standard workers, as a regulatory model but also as a normative conception of labour law, were marginalised.<sup>52</sup>

In statutory terms, fixed-term work was subject to little regulation prior to the introduction of the Fixed-Term Employees Regulations (FTER). Common law placed no minimum or maximum limits on the duration of a fixed-term contract and allowed such a contract to be renewed any number of times without it being deemed to be permanent. The parties to a work relationship could agree for a contract to be discharged on completion of a particular task. Case law dealt with the definition of a fixed-term worker or contract: the

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<sup>46</sup> Sly and Stillwell, n 4 above at 351.

<sup>47</sup> McCann, n 1 above at 106; see also K. Hoque and I. Kirkpatrick, ‘Non-standard Employment in the Management and Professional Workforce: Training, Consultation and Gender Implications’, (2003) 17 *Work, Employment and Society* 667.

<sup>48</sup> Gallie et al., n 42 above.

<sup>49</sup> Barnard and Deakin, n 18 above at 18.

<sup>50</sup> See the analyses by Lokiec, Ronmar and Waas in this volume.

<sup>51</sup> For instance, in France, the use of fixed term employment contracts is covered by the detailed employment legislation set out in the *Code du Travail*. This specifies the situations in which employers may use fixed term contracts and places tight restrictions on their duration and renewal (see J. Pelissier and A. Supiot, *Droit du Travail*, 24<sup>th</sup> ed. (Paris: Dalloz, 2008)). However, Denmark and Ireland fell into the same category with Britain. For a more general discussion of continental European regimes, see Schömann et al., n 8 above.

<sup>52</sup> McCann, n 1 above at 9.

Court of Appeal in *BBC v Ioannou*,<sup>53</sup> indicated that a fixed-term contract is one that provides for a specified term of employment. But, it was also established that a contract which terminates on the completion of a defined task would not be considered as a 'fixed-term' contract if it did not contain a discernible end date.<sup>54</sup> Further, there was no express legal intention to combat abuse of successive contracts.

As Barnard and Deakin explain, the concept of fixed-term work only entered legal and policy discourse as a result of the introduction of unfair dismissal legislation in the 1970s.<sup>55</sup> This legislation made it necessary to define the non-renewal of a fixed-term contract as a 'dismissal', rather than simply the coming to the end of the contract 'by performance',<sup>56</sup> in order not to undermine the effectiveness of the legislation. The immediate consequence was that an employee working under such a contract could claim 'unfair dismissal' or a redundancy payment, if the contract was not renewed. However, it was still open to the employer to argue that the dismissal was fair, if, for example, objective economic reasons could be demonstrated for the employer's inability to offer permanent work (for example, loss of a research grant, in the case of a university, of loss of an external contract, in the case of a commercial business).<sup>57</sup> During the time when the legislation was considered, a debate took place about the necessity and desirability of fixed-term contracts.<sup>58</sup> In order to compensate for defining the non-renewal of a fixed-term contract as a 'dismissal', qualifying periods were attached to the unfair dismissal and redundancy payments rights. In 1971, a one year period applied which was reduced to six months in 1975, restored to one year in 1979 and increased to two years in 1985. As such, the universal legislated rights, which were introduced in the 1970s, operated to marginalise non-standard workers as the standard model was transplanted to the statutory arena.<sup>59</sup> In quantitative terms, 22 per cent of male and 29 per cent of female workers were excluded from the coverage of the legislation.<sup>60</sup> Further, by requiring that the employment 'be continuous', the application of the legislation proved problematic in the case of fixed-term workers who were engaged by the same employer across the qualifying period.<sup>61</sup>

A second significant aspect of the regulation of fixed-term work was that the employee could waive his or her right to claim unfair dismissal rights and the right to redundancy compensation, as long as the fixed-term was for a duration of at least two years.<sup>62</sup> The waiver had to be in writing and a number of procedural conditions were attached to it which gave rise to a complex case law.<sup>63</sup> Lorber observes that it is not entirely clear why the facility for such a

<sup>53</sup> [1975] ICR 267.

<sup>54</sup> *Wiltshire County Council v NATFNE* [1980] ICR 455, CA. See also P. Lorber, 'Regulating Fixed-term Work in the United Kingdom: A Positive Step Towards Workers' Protection?' (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations*, 121 at 128.

<sup>55</sup> Deakin and Barnard, n 18 above.

<sup>56</sup> ERA 1996 s.95 and ERA 1996 s.136.

<sup>57</sup> This is described in the first edition of Deakin and Morris, *Labour Law*, (Oxford: Hart Publishing, 1995) ch 5.

<sup>58</sup> Barnard and Deakin, n 18 above at 121.

<sup>59</sup> McCann, n 1 above at 9.

<sup>60</sup> S. Dex and A. McCulloch, *Flexible Employment in Britain: A Statistical Analysis* (Manchester: Equal Opportunities Commission, 1995), at 38.

<sup>61</sup> *Booth v United States of America* [1999] IRLR 16 Employment Appeal Tribunal (EAT). For an in-depth analysis, see McCann, n 1 above 109-110.

<sup>62</sup> Waivers were permitted by ERA, s 197. They were initially contained in the Redundancy Payments Act 1965 and extended by the Industrial Relations Act 1971 to unfair dismissal rights.

<sup>63</sup> Deakin and Morris, n 57 above at ch 5. An attempt to challenge the two-year qualifying period for entitlement to protection from unfair dismissal was unsuccessful given the lesser disparity between the numbers of men and

derogation from workers' protection was originally inserted into British law, other than to argue that, on the grounds of 'flexibility', it reduces the 'burden' on employers when terminating a fixed-term contract. On the workers' side, it could be that the attraction for an employee to agree to such a clause was the promise of a one or two year contract, which could be better than a contract for only a few months.<sup>64</sup> By declining to interpret the exception restrictively, the courts left the door open to even more 'abuse' by employers through routine use of such 'waivers' in contracts of employment.<sup>65</sup> The waiver rules were changed with effect from 1980 so that the employer was only required to offer a fixed-term contract of one year, rather than two, for the employee's opt-out from unfair dismissal to be valid. A two-year waiver was still required for redundancy compensation purposes. It was finally ERA 1999 that abolished the waiver for unfair dismissal claims but retained it for redundancy compensation.<sup>66</sup> Further, by making an appropriate amendment to ERA 1996 s.108 the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999<sup>67</sup> reduced the normal qualifying period from two years to one year. The rationale behind this compromise was that some control of the waiver option was desirable in order to counter the practices of 'unscrupulous employers' and in order to encourage employees to be 'less inhibited' about changing jobs, but that complete prohibition of waivers was undesirable since this would 'remove a useful flexibility for genuine employers'.<sup>68</sup>

When assessing the situation of temporary workers in Britain at the end of the 1970s, Hepple and Napier suggested that, considering the lack of regulations and the increase of atypical workers, there should have been a separate Act of Parliament dealing specifically with these categories of workers.<sup>69</sup> It is the case that while some of the protection afforded to employees depended on the length of service or seniority, this applied to all workers without distinction. However, in practice fixed-term workers were less likely to accumulate the necessary length of service to 'trigger' various statutory employment protection rights due to the nature of their contracts. In the same way, the content of those rights (such as protection against 'unfair dismissal' or the right to a redundancy payment), even if they were entitled to them, was likely to be affected depending upon the time which they spend with the employer. Further, fixed term workers were also routinely excluded from the same contractual terms as permanent employees by being excluded from employers' pension and sick pay schemes and contractual redundancy schemes, even though they had in many cases a long employment history with the same employer. In non-union companies, and in some organisations and industries they were paid at a lower rate – for example, the statutory minimum instead of a higher, collectively bargained rate – than were comparable permanent employees.<sup>70</sup> According to the evidence of Booth et al., temporary workers received approximately 16 per cent (males) or 13 per cent (females) lower wages than their counterparts with similar skills

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women in temporary contracts (*R v Secretary of State for Employment, ex parte Seymour-Smith* [1994] IRLR 448 (DC)). However, in *Whiffen v Milhna Ford Girl's School* [2001] IRLR 468 (CA), the Court of Appeal held that a redundancy policy that required the dismissal of staff on fixed-term contracts before embarking on a selection process was indirectly discriminatory.

<sup>64</sup> P. Lorber, 'Regulating Fixed-term Work in the United Kingdom: A Positive Step Towards Workers' Protection?' (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations*, 121 at 131.

<sup>65</sup> See, for instance, *Dixon v BBC* [1979] QB 546 (CA).

<sup>66</sup> See also *Montgomery v Johnson Underwood Ltd* [2001] IRLR 269 CA.

<sup>67</sup> SI 1999/1436.

<sup>68</sup> DTI, *Fairness at Work*, (Cm 3968) (London: HMSO, 1998) paras 3.9 and 3.13.

<sup>69</sup> B. Hepple and B. Napier, 'Temporary Workers and the Law' (1978) 7 *Industrial Law Journal*, 84 at 99.

<sup>70</sup> Casey, n 2 above at 504.

and other personal characteristics employed in permanent jobs.<sup>71</sup> The small increase in the number of employees in temporary jobs during this period, as seen earlier, was not associated with areas where employment levels were volatile, and was almost entirely due to people being in temporary jobs for longer. This increase contributed to an increasing perception of insecurity. Much of that rise in insecurity was a middle-class experience; it was thus not so much the traditional working class in manufacturing industries who suffered (they had already been decimated in the 1980s); rather the new insecurity fell disproportionately on newer industries, especially financial and business services, and in higher occupational groups, such as professionals.<sup>72</sup>

The anti-discrimination legislation introduced in the 1970s, i.e. the Sex Discrimination Act 1975 and Race Relations Act 1976, covered groups of workers marginalised under the employment protection regime.<sup>73</sup> In addition, the widening of the scope of labour law from the 'employee' concept to cover other 'workers' helped to ensure that some casual and intermittent work relationships came under the coverage of legislation such as, for example, the minimum wage payable since 1999 and working time.<sup>74</sup> As a result, the regulation of fixed-term work in Britain before the introduction of the FTER exhibited 'a dualist regulatory mode', in which the marginalisation of temporary workers under the employment protection legislation was accompanied by their integration into the anti-discrimination regimes, and also, to a certain degree, a recognition of the nature of these working relationships and the particular needs of temporary workers that differ from those of standard workers.<sup>75</sup>

### 3. Current regulation concerning fixed-term work

#### 3.1 General approach

The regulatory reforms, as introduced by FTER,<sup>76</sup> were designed to implement in Britain Council Directive 99/70 on Fixed-term Work. The latter, like Council Directive 98/23/EC (the Part-time Work Directive), gives effect to a Framework Agreement concluded by the European social partners.<sup>77</sup> The Agreement is premised on the view that 'contracts of an indefinite duration, are, and will continue to be, the general form of employment relationship between employers and workers'.<sup>78</sup> Its purpose is twofold: first, to improve the quality of fixed-term work by ensuring the principle of non-discrimination between fixed-term workers and comparable permanent workers and, secondly, to establish a framework to prevent abuse

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<sup>71</sup> A. Booth, L. Francesconi and J. Frank, 'Temporary Jobs: Stepping Stones or Dead Ends? (2002) 2 *Economic Journal*, 487.

<sup>72</sup> F. Green, B. Burchell and A. Felstead, Job Insecurity and the Difficulty of Regaining Employment: An Empirical Study of Unemployment Expectations, (2000) 62 *Oxford Bulletin of Economics and Statistics*, 855.

<sup>73</sup> Further anti-discrimination measures were later adopted: Disability Discrimination Act 1995; Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660); Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661); and Employment Equality (Age) Regulations 2006 (SI 2006/1031).

<sup>74</sup> Deakin and Morris, n 17 above at ss 3.18 – 3.38.

<sup>75</sup> McCann, n 1 above at 107.

<sup>76</sup> SI 2002/2034, as amended.

<sup>77</sup> The then British government was not ready to adopt any of the EU instruments that were proposed initially in 1989, maintaining the rhetoric that they would impede job creation and create burdens for business (Lorber, n 64 above at 122).

<sup>78</sup> Directive 99/70/EC, Annex (Framework Agreement on Fixed-Term Work concluded by the ETUC, UNICE and CEEP), recital 2.



arising from the use of successive fixed-term employment contracts or relationships.<sup>79</sup> There is recognition in the Directive that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers. However, by requiring the application of the principle of non-discrimination and the curtailment of what it regards as abuse of the fixed-term contract option the Directive reinforces the sense in which the indeterminate-duration contract of employment is to be regarded as the norm.

In implementing the provisions of the Directive, considerable flexibility was left to the Member States. At the time of the adoption of the Framework Agreement on Fixed-term Work, Britain was one of the countries with the lowest percentage of workers under fixed-term contracts: according to the Trade Union Congress (TUC), 850,000 workers were likely to be affected by the Framework Agreement.<sup>80</sup> The Directive clearly states that it applies to ‘fixed-term workers who have an employment contract or employment relationship as defined in law, collective agreements, or practice’.<sup>81</sup> By comparison, the Regulations controversially only apply to employees,<sup>82</sup> even though the term ‘worker’ is defined in British law for the purpose of other legislation;<sup>83</sup> thus individuals, whose working relationships operate in a semi-autonomous manner, and casual workers are excluded.<sup>84</sup> Also excluded, as a result of taking advantage of the leeway permitted by clause 2(2)(a) and (b) of the Agreement, are employees working under contracts of apprenticeship;<sup>85</sup> people employed within certain government and European Union supported training programmes;<sup>86</sup> people in work experience placements of one year or less as part of a higher education course;<sup>87</sup> members of the armed forces,<sup>88</sup> and agency workers<sup>89</sup> even though, as analysed in section one, the latter account for around 20 per cent of temporary workers. In a recent decision, the Court of Appeal held that FTER apply to all relevant contracts governed by English law, regardless of where they are performed.<sup>90</sup>

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<sup>79</sup> Directive, clause 1.

<sup>80</sup> TUC Press Release 17 March 1999 [www.tuc.org.uk](http://www.tuc.org.uk).

<sup>81</sup> Directive, clause 2. It is interesting to note here that in the negotiations that led to the signing of the agreement between the EU social partners, the term ‘employee’ was rejected (A. McColgan, ‘The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002: Fiddling While Rome Burns?’ (2003) 32 *Industrial Law Journal*, 194 at 196).

<sup>82</sup> FTER, regulation (reg) 1(2). ‘Employees’ are defined elsewhere as individuals who work under a contract of employment or a contract of apprenticeship (ERA 1996, s 230). The exclusion of workers is also in contrast to the wider definition of ‘worker’ adopted in the Part-time Workers Regulations. The Regulatory Impact Assessment, which accompanied the first consultation document produced by the government, indicated that it would be more costly to cover workers than employees (Department of Trade and Industry, *Fixed-Term Employees’ (Prevention of Less Favourable Treatment) Regulations 2002 – (Implementing the Framework Agreement on Fixed Term Work) Regulatory Impact Assessment* (London: DTI, 2001). In comparison with other countries, Britain is only joined by Ireland when limiting the application of the Directive to employees, see P. Lorber, *Achieving the Fixed-Term Work Directive’s Aims: United Kingdom Implementation and Comparative Perspectives*, in F. Pennings, Y. Konijn, and A. Veldman, (eds) *Social Responsibility in Labour Relations - European and Comparative Perspectives* (The Netherlands: Kluwer Law International, 2008) at 314.

<sup>83</sup> ERA 1996, s 230.

<sup>84</sup> M. Freedland, *The Contract of Employment* (Oxford: Clarendon House, 2003) at 346.

<sup>85</sup> FTER, reg 20.

<sup>86</sup> FTER, reg 18(1).

<sup>87</sup> FTER, reg 18(2).

<sup>88</sup> FTER, reg 14.

<sup>89</sup> FTER, reg 19.

<sup>90</sup> *Duncombe and others v Secretary of State for Children Schools and Families* ([2009] EWCA Civ 1355).

In contrast to the limited application of the legislation to ‘employees’ only, the relevant definition of ‘fixed-term contract’ is wider than that previously used in labour law. The new definition includes, as British unfair dismissal law previously did, contracts which are intended to terminate on the expiry of a fixed term (for the purpose of which, a contract which also contains a notice clause is not, for that reason, excluded from the scope of the Regulations),<sup>91</sup> but it also now covers task contracts and contracts which are intended to terminate ‘on the occurrence or non-occurrence of any other specific event’, except the attainment by the employee of normal retirement age. For example, this category would cover a contract that is expressed to expire when a sick employee returns from sickness absence, or a pregnant employee returns from maternity leave. This means that these employees will, subject to the qualifying periods, now have protection as follows: the right not to be unfairly dismissed; the right to a written statement of reasons for dismissal, and; the right to a statutory redundancy payment. In addition, the waiver option for redundancy compensation was abolished with effect from 1 October 2002 with the coming into force of FTER.<sup>92</sup> There are no provisions permitting the conclusion of a fixed-term contract in place of a permanent one in order to overcome particular types of labour market disadvantage. However, age discrimination legislation allows an open-ended justification defence and purports to allow employers to offer fixed-term employment, in place of permanent employment, on the grounds of age.<sup>93</sup>

### 3.2 The right to an indefinite contract

The Directive sets out three possible options for preventing abuses of successive fixed term contracts and requires one or more of them to be used: a) the number of renewals of a fixed term contract should be limited; b) the total duration of successive fixed term contracts should be limited and; c) fixed term contracts should only be renewed if there is an objective justification for doing so.<sup>94</sup> The Regulations combine two of the options given. Under reg 8, when an employee is ‘continuously employed’ under successive fixed-term contracts and has continuity of employment of four years or more from 10 July 2002, the term limiting the duration of the contract of employment is to be of no effect from the date on which the four years of continuous employment were acquired, or from the date on which the contract was most recently renewed, if later.<sup>95</sup> But the FTER requirements for employment to be ‘continuous’ in order for the measures against abuse to apply can hinder their effectiveness to a significant degree.<sup>96</sup> In *Adelener*,<sup>97</sup> the ECJ held that a national rule which provided that

<sup>91</sup> *Allen v National Australia Group Europe Ltd.* [2004] IRLR 847.

<sup>92</sup> FTER, reg 11.

<sup>93</sup> Barnard and Deakin, n 18 above at 130-131. The authors suggest that this may not be compatible with the European Court of Justice (ECJ) judgment in *Mangold* (Case C-144/04 *Mangold v Helm* [2006] IRLR 143) nor the Equal Treatment Framework Directive 2000/78 (OJ L 303, 2.12.2000).

<sup>94</sup> For a criticism on this approach, see M. Tiraboschi, ‘Glancing at the Past: An Agreement for the Markets of the XXIst Century’, (1999) 15 *International Journal of Comparative Labour Law and Industrial Relations*, 105 at 113.

<sup>95</sup> The Regulatory Impact Assessment (n 82 above) estimated at the time of the introduction of the legislation that only 5,000 – 13,000 would benefit from the ‘measures to prevent abuses’ of fixed-term contracts, i.e. the restrictions on renewals of such contracts.

<sup>96</sup> There is no continuity of employment if the work is simply a series of short self-contained engagements with gaps in between during which there is no ‘mutuality of obligation’ between the employer and the employee (*Carmichael and another v National Power plc* [1999] ICR 1226), see Deakin and Morris, n 17 above at 417.

<sup>97</sup> *Adelener Konstantinos and others v. Ellinikos Organismos Galaktos (ELOG)*, C-212/04 [2006] IRLR 716.

fixed-term contracts were not regarded as ‘successive’ if they were separated by more than 20 working days was precluded by the Directive. British courts can rely on this interpretation to develop a different construction of the continuity rules so as to prevent the circumvention of the Directive’s purpose.<sup>98</sup> However, an employee who is dismissed prior to acquiring permanent status never acquires a right to permanence and it is difficult, under these circumstances to identify any other right that has been infringed.<sup>99</sup>

Employers are not required to issue new contracts to fixed-term employees as their existing terms and conditions will continue to apply, save that the fixed term provisions of their contract will have no effect. If an employee who considers that, by virtue of regulation 8, he/she is a permanent employee requests in writing from his employer a written statement confirming that the contract is no longer fixed-term or that he/she is now a permanent employee, he/she is entitled to be provided, within twenty-one days of his request, with either (a) such a statement, or (b) a statement giving reasons why his contract remains fixed-term.<sup>100</sup> The employee who considers that he/she is permanent may present an application to the employment tribunal for a declaration to that effect.<sup>101</sup>

The Regulations do not specify the length of the first fixed-term contract; as such, a five-year contract, for instance, is not illegal. They neither require the presence of objective justification when a fixed term employment contract is concluded. Instead, the conversion of a fixed-term contract to a permanent one is subject to an ‘objective justification’ defence.<sup>102</sup> The notion of ‘objective grounds’ is not defined in the Regulations nor the Directive and it was unclear how the courts would evaluate employers’ decisions concerning working arrangements. This constituted one of the main issues in *Ball v University of Aberdeen*.<sup>103</sup> The tribunal relied on the interpretation of two ECJ decisions that dealt with different aspects of the use of fixed-term contracts in other jurisdictions, namely *Adeneler*<sup>104</sup> and *Del Cerro*.<sup>105</sup> Contrary to the respondents’ position that the interpretation under the ECJ decisions could only be valid in cases of less favourable treatment, the tribunal – relying on paragraph (para) 74 of the *Adeneler* decision – stated that it should consider ‘whether it could identify objective and transparent criteria in order to verify whether the renewal of such contracts actually responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose’.<sup>106</sup>

In line with this approach, the tribunal refined the following key principles in reaching its decision. One has to look at the specific circumstances of the individual employee, rather than assuming that a factor, such as external funding in this instance, automatically justifies fixed term employment. The employer must show a genuine need for the use of a fixed term contract. The adverse impact on the employee must also be considered. The tribunal stated that it also had to consider whether the employer could have managed the situation in any other way.<sup>107</sup> In a more recent decision, the Court of Appeal held that the Secretary of State

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<sup>98</sup> Deakin and Morris, n 17 above at 417.

<sup>99</sup> Deakin and Morris, n 17 above at 418.

<sup>100</sup> FTER, reg 9 (1).

<sup>101</sup> FTER, reg 9(5).

<sup>102</sup> FTER, reg 8(2)(b).

<sup>103</sup> 101486/08, 23 May 2008.

<sup>104</sup> N 97 above.

<sup>105</sup> *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* [2007] IRLR 911.

<sup>106</sup> N 103 above, para 98.

<sup>107</sup> For an analysis of the judgment, see A. Koukiadaki, Case Law Developments in the Area of Fixed-Term Work, (2009) 38 *Industrial Law Journal*, 89.

for Children Schools and Families who employs teachers only in the European Schools may not claim as objective justification for imposing a nine year fixed term rule on his employees, the existence of the rule in Staff Regulations adopted by the European Schools pursuant to a 1994 Statute.<sup>108</sup>

Further, the employer can vary the effect of reg 8 through a collective or workforce agreement.<sup>109</sup> The agreement may specify the maximum total period for which employees may be employed on fixed-term contracts before they are deemed to be permanent; the maximum number of renewals of fixed-term contracts which can be made; and more detailed objective grounds justifying fixed-term employment.<sup>110</sup> Parties can thus go below or above four years, or adopt a different system altogether by, for example, indicating that renewal of fixed-term contracts simply needs to be justified by objective reasons. Any of these agreements can take effect at one of several levels: enterprise or company level; part of the enterprise or company level; workplace level; or multi-employer level.<sup>111</sup> The possibility for ‘bargained adjustments’<sup>112</sup> was mainly inserted to accommodate a number of respondents representing specific sectors where fixed-term contracts are the norm such as sport or professions such as acting. While promoting autonomous negotiations that may be tailored to the specifics of a sector/occupation, this provision may have some negative implications. This is particularly the case in the workforce agreement option as such agreements are entered if collective agreements, negotiated by trade unions and employers, are not operational.<sup>113</sup>

The scope of reg 8 was considered in *Ball v University of Aberdeen*.<sup>114</sup> In this case, the tribunal was asked to consider whether the so-called Joint Negotiating Committee for Higher Education Staff (JNCHES) Agreement that was concluded between UCU and UCEA was a collective agreement within the confines of reg 8. While the tribunal found that the agreement was a collective agreement in terms of s 178 of the Trade Union and Labour Relations (Consolidation) Act 1992, it did not accept that it fell within the terms of reg 8(5). According to the tribunal, this was not explicitly or even implicitly the intention of the parties, as expressed in the agreement. Further, the JNCHES Agreement was recognised as an agreement on guidance and as such not binding on the respondents or any of the higher education institutions. Moreover, para 9 of the JNCHES Agreement specifically invited the universities to identify situations with their locally recognised unions where renewals of fixed term contracts could be justified objectively. While para 9 further listed some examples of circumstances which could amount to objective grounds in terms of reg 8(2)(b) the tribunal did not find any intention there to state that these were examples which modify or replace the need for objective grounds.

Preliminary evidence suggests that there is little take up of autonomous negotiations that lead to collective agreements.<sup>115</sup> In the university sector there appear to be only one agreement which formally varies the terms of Regulation 8. The agreement at Imperial

<sup>108</sup> N 90 above. Reference was made to the criteria for objective justification established by the ECJ in *Adelener* (n 97 above).

<sup>109</sup> FTER reg. 8. For the definition of collective and workforce agreements, see reg. 1(2) and Sch. 1.

<sup>110</sup> FTER, reg 8(5).

<sup>111</sup> Barnard and Deakin, above n 18 at 129.

<sup>112</sup> P. Davies and C. Kilpatrick, ‘UK Worker Representation After Single Channel’ (2004) 33 *Industrial Law Journal*, 121.

<sup>113</sup> See FTER, schedule (sch) 1 for conditions applicable to workforce agreements.

<sup>114</sup> N 103 above.

<sup>115</sup> S. Deakin and A. Koukiadaki (2009) *The Implementation of Social Policy Directives in the UK: Fixed-term Employment*, mimeo, Centre for Business Research, University of Cambridge.

College, London, extends the period of time prior to which ‘permanent’ status must be granted from four years (as stipulated by the Regulations) to six in the case of posts funded by external research projects. In return, the unions which negotiated the agreement, the Association of University Teachers (AUT, now University and College Union (UCU)), Amicus (now Unite) and Unison, obtained undertakings from the employer to minimise the use of fixed-term employment and to integrate fixed-term employees into the permanent workforce where possible. In other universities, the UCU and other campus-based unions have concluded agreement with university management on the stabilisation of fixed-term work and the incorporation of fixed-term workers into regular career structures, without concluding formal collective agreements that vary reg 8. Indeed, some of these agreements even specify that they are not to be construed as collective agreements within the meaning of FTER, in order to avoid the possibility that they will be viewed as derogating from the basic rights of employees which are set out in the Regulations. As such, the emphasis is on traditional forms of autonomous collective bargaining rather than on the adjustment of statutory norms via collective agreements.<sup>116</sup>

### 3.3 *The principle of equal treatment*

Reg 3 provides that a fixed-term employee has the right not to be treated by the employer less favourably than the employer treats a comparable permanent employee (a) as regards the terms of the contract; or (b) by being subjected to any other detriment by any act, or deliberate failure to act, of the employer.<sup>117</sup> The initial version of the draft regulations did not cover pay and pension benefits on the basis that framework agreements negotiated by the EU social partners could not legislate on these issues.<sup>118</sup> But, the final text of FTER includes pay and occupational pension benefits, but not payments made under state social security schemes, to the general equal treatment right.<sup>119</sup> In addition to the general equal treatment right, an explicit statement is made that this right extends to treatment in relation to period of service qualifications,<sup>120</sup> and to access to training.<sup>121</sup> In a recent decision, the failure of the employer to discuss and consult with the claimant over his options when his contract came to an end and to allow him a proper right of appeal against his dismissal constituted discrimination because of his fixed-term employee status.<sup>122</sup> It has to be noted here that the employer’s policy that contracts should be terminated after 51 weeks’ service, thereby preventing fixed-term employees from securing unfair dismissal rights, is not considered in breach of the equal treatment principle.<sup>123</sup>

The principle of *pro rata temporis*, which is defined to refer to a proportionate right to receive pay or benefits similar to those received by a comparable permanent employee, taking into account ‘the length of the [the applicant’s] contract of employment and to the terms on

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<sup>116</sup> Barnard and Deakin, n 18 above at 134.

<sup>117</sup> FTER, reg 3(1). The DTI Regulatory Impact Assessment (n 81 above) estimated that only 25,000 – 53,000 fixed-term employees (between 1 per cent and 3 per cent of the TUC’s estimated total fixed-term workers, or 2 per cent and 5 per cent of the DTI’s total) would benefit from the Regulations’ prohibitions on discrimination (see McColgan, n 81 above at 199).

<sup>118</sup> DTI, n 39 above at 9. See, however, the ECJ’s interpretation of the Directive in *Del Cerro* (n 105 above) where it was found that article (art) 137(5) as a derogation should be interpreted restrictively.

<sup>119</sup> *Del Cerro* (n 105 above); see also C-268/06, *Impact v Minister for Agriculture and Food* [2008] IRLR 552.

<sup>120</sup> FTER, reg 3(2).

<sup>121</sup> FTER, reg 3(2).

<sup>122</sup> *Biggart v University of Ulster*, 00778/05, 19 February 2007.

<sup>123</sup> *Department for Work and Pensions v Webley*, [2005] IRLR 288.

which the [relevant] pay or other benefit is calculated', applies.<sup>124</sup> But the Directive prohibits laws which count continuity of employment differently according to whether employment is fixed-term or permanent. British law on continuity of employment arguably complies with the Directive in this respect.<sup>125</sup> Case law illustrates that pay and pensions are issues where fixed term employees tend to be treated differently.<sup>126</sup> In *Coutts and Co Plc and Another v Cure and Fraser*,<sup>127</sup> where the question of identifying the grounds for less favourable treatment arose, the EAT found that fixed-term employees were able to use FTER to claim a bonus which their employer had decided should be paid only to 'permanent' staff. It was irrelevant that it had also excluded other non-permanent groups of workers. In *X and ors v Secretary of State for Education and Skills*,<sup>128</sup> the tribunal accepted that the four fixed-term employees who had been employed on a succession of fixed-term contracts were entitled to redundancy terms comparable to permanent employees.

The right not to be treated less favourably is subject to a number of significant limitations. As seen, FTER only apply to employees, thereby excluding casual and intermittent workers who do not have employee status; agency workers are also explicitly excluded.<sup>129</sup> Further, they apply only to treatment 'on the ground that the employee is a 'fixed-term employee'.<sup>130</sup> An employee is a 'comparable permanent employee' in relation to a fixed-term employee if both are employed by the same employer, engaged in the 'same or broadly similar work',<sup>131</sup> and work or are based at the same establishment. But in *Biggart v the University of Ulster*,<sup>132</sup> which concerned Dr Biggart's claim that his treatment by the university amounted to discrimination on the basis of his status as a fixed term worker, the employment tribunal followed the decision of the *House of Lords in Matthews and others v Kent and Medway Towns Fire Authority and others*,<sup>133</sup> which said that courts should focus on whether the work done by both groups was 'broadly similar'. On that basis, the tribunal said that the regulations did not require the comparator to be in exactly the same situation as the fixed term employee. Otherwise 'it may well rob the legislation of its effectiveness.'<sup>134</sup> The British legislator does not allow for comparisons to be made within the establishments of 'associated employers'. The use of hypothetical comparators is also prohibited, even though

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<sup>124</sup> FTER, reg 3(5).

<sup>125</sup> Deakin and Morris, n 17 above at 172; see also *Kingston upon Hull City Council v Mountain* [1999] ICR 715, 720, where it was found that in considering the amount of statutory redundancy pay which may be due on expiry of a fixed term contract a distinction must be drawn between the event triggering entitlement and the process of calculating that entitlement by reference to the length of continuous service.

<sup>126</sup> Lorber, n 82 above at 316-317.

<sup>127</sup> [2005] ICR 1098.

<sup>128</sup> Employment Tribunal case n. 2304973-7/04, reported in (2005) *IDS Brief* 792, November.

<sup>129</sup> FTER, reg 19.

<sup>130</sup> FTER, reg 1(3)(a).

<sup>131</sup> FTER, reg 2(1)(a).

<sup>132</sup> N 122 above.

<sup>133</sup> [2006] UKHL 8.

<sup>134</sup> N 122 above, para 58.

this is allowed in the anti-discrimination legislation.<sup>135</sup> Further, an employee is not a comparable permanent employee if the employment has ceased.<sup>136</sup>

The prohibition of less favourable treatment is not an absolute principle since the discrimination can be justified on objective grounds.<sup>137</sup> This notion is not defined in the Directive, but has been the subject of interpretation in recent ECJ decisions.<sup>138</sup> As already seen, the limited case law illustrates that British courts are ready to rely on the ECJ judgments in order to reject blanket exceptions to discrimination. A novel element of the justification defense, as articulated in FTER, is that less favourable treatment shall be regarded as objectively justified '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' (emphasis added).<sup>139</sup> The adoption of a 'package approach' is arguably incompatible with the approach taken to equal pay under EC law and the Equal Pay Act 1970.<sup>140</sup> Moreover, it is not altogether clear how this comparison of the overall value of the contractual terms is to be made, although the guidance suggests that the value of benefits should be assessed on the basis of their 'objective monetary worth rather than the value that the employer or employee perceives them to have'.<sup>141</sup> Another problematic issue concerns the relationship between reg 4 (permitting an overall comparison of contracts approach) and reg 3(3)(b) (the broad test of objective justification). It appears that the Regulations do not necessarily require the employer to provide compensatory benefits in situations where it is objectively justified in excluding the employee from the benefit in question. This is because the provisions of reg. 4 are expressed to be without prejudice to the test of objective justification in reg. 3(3)(b).

A fixed-term employee is entitled to be provided with written reasons for less favourable treatment if he or she considers that he or she may have been treated less favourably contrary to the Regulations.<sup>142</sup> The principal remedy for breach of the principle of equality is a complaint to an Employment Tribunal which may make a recommendation to the employer and award compensation to the employee.<sup>143</sup> The normal time limit for bringing a claim under FTER is three months from 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.<sup>144</sup> Dismissal is

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<sup>135</sup> Sex Discrimination Act 1975 and Race Relations Act 1976. This approach, in one view, insufficiently transposes the Directive, which allows that 'where there is no comparable permanent worker in the same establishment, the comparison shall be made ... in accordance with national law, collective agreements or practice' (McColgan, n 81 above at 196). More recently, the Equal Treatment Directive 2006/54/EC also permits the use of hypothetical comparators.

<sup>136</sup> This provision may be contrary to the ECJ decision in *Macarthy v Smith* [1980] ECR I-01275 where it was found that a woman could compare herself, for the purposes of an art 157 (principle of equal pay) claim, with her predecessor in employment (McColgan, n 81 above at 196).

<sup>137</sup> FTER, reg 3(3).

<sup>138</sup> *Del Cerro* (n 105 above). There, the notion was interpreted in a manner akin to the concept of objective justification in EC discrimination law, where the justification for discrimination must be objective and must show that a genuine need of the business is met and that the discriminatory means are both necessary and suitable to achieving this need (*C-170/84 Bilka-Kaufhaus v Weber Von Hartz*, [1986] ECR 1607).

<sup>139</sup> FTER, reg 4.

<sup>140</sup> See *Barber v Guardian Royal Exchange* (Case C-262/88 [1990] ECR I-1889) and *Hayward v Cammell Laird* ([1988] ICR 464 (HL)).

<sup>141</sup> DTI, *Fixed-term Work: A Guide to the Regulations*, (London: DTI, 2002).

<sup>142</sup> FTER, reg 5(1). Such a statement is admissible as evidence in any proceedings under FTER (reg 5(2)).

<sup>143</sup> FTER, reg 7.

<sup>144</sup> FTER, reg 7(2).

automatically unfair if it is for the reason that the employer has, in one or more of a number of ways, asserted his or her rights under the FTER.<sup>145</sup> In this case, a claim can be brought by an employee regardless of his or her length of service. However, there is no provision that makes automatically unfair the dismissal of an employee to prevent him or her acquiring permanent status; such a provision, was, according to the government, unnecessary as it is unlawful to dismiss a fixed-term employee for enforcing their rights. In respect of termination of employment, fixed-term employees are overall in a very similar legal position to permanent employees.<sup>146</sup> Provided that they have the necessary qualifying period of employment, a fixed-term employee has a potential claim for both unfair dismissal and redundancy compensation when the contract of employment is not renewed in the same terms as before.

### **3.4 Transition to open-ended employment**

Another right given under FTER to fixed term employees relates to information. Reg 3(6) stipulates that a fixed term employee has the right to be informed by his employer of available vacancies in the establishment. According to reg 3(7), ‘an employee is ‘informed by his employer’ only if the vacancy is contained in an advertisement which 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.

### **3.5 Social security system**

While the Fixed-term Work Directive relates to the employment conditions of fixed-term workers it recognises that matters relating to statutory social security are for decision by the Member States. In this respect the social partners noted the Employment Declaration of the Dublin European Council in 1996 which emphasised *inter alia*, the need to develop more employment-friendly social security systems by ‘developing social protection systems capable of adapting to new patterns of work and providing appropriate protection to those engaged in such work’. The parties to the Fixed-term Work Agreement reiterated the view expressed in the 1997 part-time agreement that Member States should give effect to this Declaration without delay.

FTER ensure that all fixed-term employees have the right to guarantee payments and payments on medical suspension after the same qualifying period as permanent employees.<sup>147</sup> They also provide for the Social Security Contributions and Benefits (SSCB) Act 1992 to be amended so that all fixed-term employees have a right to statutory sick pay after the same qualifying period as permanent employees.<sup>148</sup> However, there are certain implications in the area of pensions.<sup>149</sup> The Regulations require employers to offer access to occupational pension schemes to fixed-term employees on the same basis as permanent ones, but this is

<sup>145</sup> FTER, reg 6.

<sup>146</sup> Barnard and Deakin, n 17 above at 126-127.

<sup>147</sup> Part 1, 3(3). The qualifying period is one month’s continuous employment (ERA 1996 s.64(1)).

<sup>148</sup> Part 1, 1. Statutory sick pay is a state benefit and is quite separate from any sick pay entitlement an employee may have under his/her contract. The person in question must be an employed earner with normal weekly wages at or above the lower earnings level for national insurance contributions purposes. The Fixed-term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations 2008 (SI 2008/2776) amended reg 19 to ensure that agency workers are treated in the same way as all other employees with regard to entitlement to statutory sick pay, whether they are indirectly or directly employed and regardless of the length of their contract).

<sup>149</sup> See preamble to the Directive. The ECJ in *Impact* (n 119 above) found that clause 4 of the framework agreement on fixed-term work must be interpreted as meaning that employment conditions within the meaning of that clause encompass conditions relating to pay and to pensions which depend on the employment relationship, to the exclusion of conditions relating to pensions arising under a statutory social-security scheme.



subject to the objective justification defense. For example, where employees are on a fixed-term contracts that are shorter than the vesting period for a pension scheme, i.e. the qualifying period of work that must be met before an employee becomes a member of the pension scheme, the employer may be able to justify excluding them from that scheme if including them has a disproportionate cost and/or is of no benefit to them.<sup>150</sup> The employer will not have to provide alternative compensation. Further, where a fixed-term employee is not offered access to an occupational pension scheme and a permanent comparator is, the employer might give the fixed-term employee a salary increase equivalent to employer pension contributions paid in respect of the permanent employee. An employer may also be able to justify preventing someone on a very short fixed term contract from joining the pension scheme if he/she pays into a stakeholder or private pension scheme. However, there is no onus on the employer to ensure that the fixed term employees do not lose out if the stakeholder pension pays out a lower benefit than the company pension scheme.

#### **4. Evaluation of the current regulation on fixed-term contracts in labour policy and future prospects**

As examined above, recent changes to the British regulatory framework concerning fixed-term work involved changes in the provisions of the employment protection regime on both qualifying periods and waivers, and the introduction via FTER of limits to the renewal of fixed-term contracts and mandating a right to equal treatment. The latter was importantly the outcome of EC-level developments and not that of domestic consideration. The statutory framework introduced by FTER has been the subject of discussion and commentary concerning the level of clarity with respect to certain statutory requirements and the compatibility with the Directive's provisions. McColgan regarded FTER as representing Britain 'adopting its by now standard minimalist approach to transposition', in her view not only going no further than that required by the Directive, but arguably even failing adequately to transpose it.<sup>151</sup> In avoiding to commit to the notion that open-ended contracts should be the primary mode of establishing working relationships, the Regulations provide for the least strong of the Directive's available options for triggering conversion to an indefinite contract while there are no measures stipulated concerning the minimum duration or minimum period of notice of renewal of fixed-term contracts used prior to the four-year period. As such, the legislation relies on an assumption that fixed-term contracts are not in themselves problematic, only their use in the long term.<sup>152</sup>

Further, according to Davies and Freedland, a relatively tight constraint upon the transposition of the control of the abusive use of successive fixed-term contracts from the Directive was achieved by confining this conversion effect to employment of a minimum of four years' continuous duration.<sup>153</sup> This is in contrast to the equivalent regulatory measures

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<sup>150</sup> Reg 2(3) of the Local Government Pension Scheme (Benefit, Membership and Contributions) Regulations 2007 (SI 2007/1166), as amended, prevents an employee with a fixed-term contract of less than three months from joining the pension scheme.

<sup>151</sup> McColgan, n 81 at 195.

<sup>152</sup> Weiss has raised this point with regard to the Directive, see M. Weiss, 'The Framework Agreement on Fixed-term Work: A German Point of View, 15 (1999) *International Journal of Comparative Labour Law and Industrial Relations*, 97 at 103.

<sup>153</sup> P.L. Davies and M. Freedland, *Towards a Flexible Labour Market* (Oxford: Oxford University Press, 2007) at 88.

elsewhere in the European Union, which generally set limits of two or three years.<sup>154</sup> The procedural aspects of the protective regime for fixed-term employees, i.e. by requiring that the improvements in their terms and conditions be sought among a narrow range of comparators, may also undermine their potential to promote equal treatment.<sup>155</sup> Moreover, the one-year qualification period for unfair dismissal is still irrelevant to a significant number of employees who work on contracts of less than a year.

Although the regulations have definite limits (and employers have made maximum use of them), the recent jurisprudence both at European and national level, albeit still limited, illustrates that courts are prepared to scrutinise employers' practice concerning fixed-term contracts, at least as far as objective justification is concerned. In quantitative terms, Green examined, based on LFS data, the impact of FTER in the period between 2002-2004 and concluded that while the legislation was successful in improving conditions for fixed-term employees, the record for casual and seasonal employees was mixed. In comparison to the period 2000-2001, the mean pay of fixed-term contract workers rose faster than that of permanent workers, arguably as a result of the non-discriminatory requirements of the legislation.<sup>156</sup> There was no substantive change in the training levels of fixed-term/fixed-project workers or of permanent workers; fixed-term workers on average continued to receive relatively high levels of training. However, there was no evidence of improvement in weekly pay for seasonal and casual employees;<sup>157</sup> the only positive outcome for this group was a small rise in the rate of participation in training.

In the higher education sector, where the use of fixed-term contracts has been extensive, there is evidence from the Higher Education Statistics Agency (HESA) that indicates a decline in the use of fixed-term contracts since the legislation came into force. More particularly, the proportion of all academic staff employed on fixed-term contracts fell from 44.79 per cent in 2003/2004 to 35.2 per cent in 2008/2009.<sup>158</sup> According to UCU, fixed-term contracts are still routinely used for the majority of first appointments. Further, a number of institutions appear to continue to use fixed-term contracts for the majority of research staff and do little to find alternative employment at the end of the contracts. However, some institutions do appear to have moved some of the fixed-term staff onto open-ended contracts. This is done through the establishment of the so-called 'open ended' contracts with an 'at risk' date, where 'at risk' dates are usually the dates of which a particular funding stream is expected to end; such contracts can offer a level of certainty for employers and security for employees in certain institutions as long as are not being used to unfairly select individuals for redundancy.<sup>159</sup>

There has been no in-depth qualitative empirical research yet on the specific question of how far the implementation of FTER has led to an alignment of the conditions of fixed-term employees and comparable permanent workers, or of to what extent the limitations on the

<sup>154</sup> DTI, n 39 above, annex 2.

<sup>155</sup> McCann, n 1 above at 178-179.

<sup>156</sup> Green, n 7 above at 156-157. The author acknowledged though that further analysis would be required in order to assess whether the improvement could also reflect a change in the composition of fixed-term employment as the proportions in the labour force had fallen.

<sup>157</sup> While these workers would be not all of these would have been at workplaces where suitable comparable permanent employees would have allowed the principle of non-discrimination to take effect.

<sup>158</sup> HESA, Staff at Higher Education Institutions in the United Kingdom 2008/09, *Statistical First Release*, 143, available at <http://www.hesa.ac.uk/index.php/content/view/1590/161/>

<sup>159</sup> The Employment Tribunal in *Ball v University of Aberdeen* (n 104 above) made reference to this practice in its judgment.

equality principle might have restrained such an alignment.<sup>160</sup> The role of trade unions is significant here with respect to potential conflicts of interest between fixed-term and permanent employees. Historically, the general attitude of British trade unions towards temporary work was ‘hostile’, the exception being in those sectors such as retailing or holidays where temporary working was very traditional and largely accepted.<sup>161</sup> Segmented labour market theorists have long recognised this sort of phenomenon.<sup>162</sup> Partly as a result of declining union influence and partly of the recognition of the diversity in the workforce there has been in recent years a trend for trade unions to attempt to represent contingent workers, including workers on fixed-term contracts. In some cases, the representation of the fixed-term workers’ group is integrated with that of workers on open-ended contracts, through enterprise-specific or industry agreements.<sup>163</sup> The education unions, more particularly, have run campaigns on behalf of fixed-term workers.<sup>164</sup> Recent agreements between universities and trade unions that provide for a specific period of notice in the event of redundancy and for the cover of such instances by the statute/ordinance governing redundancy for academic staff have also included a reduction in redundancy notice for all new academic staff. While there is no substantial evidence concerning the misuse of the redundancy procedures for cases that do not flow from the cessation of external research funding, employees who have always been on permanent contracts may feel less secure than they used to.

There are no immediate plans to reform the regulation of fixed-term work or indeed any other aspect of atypical work, apart from agency work. A report by the House of Lords European Union Committee on the Green Paper concluded that British law is not in need of much change, as it has achieved the right balance on the issue of labour market flexibility by allowing employers and workers to retain a considerable degree of autonomy over the form of the employment contract.<sup>165</sup> This statement illustrates the continuing emphasis of the present government on the supply-side rationale for labour market flexibility, on the part of employers, and the perception that this flexibility could allow workers take control of their ‘portfolio’ careers in the fast-moving global economy, selling their high skills in a controlled sweep among high-quality jobs.<sup>166</sup>

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<sup>160</sup> Barnard and Deakin, n 18 above at 126.

<sup>161</sup> Casey, n 2 above at 504.

<sup>162</sup> See, for example, J. Rubery ‘Structured Labour Markets, Worker Organisation and Low Pay’, (1978) 2 *Cambridge Journal of Economics*, 17.

<sup>163</sup> In cases where fixed-term contract workers make up the majority of a workforce, however, this option is not available; for an analysis, see E. Heery, ‘Trade Unions and Contingent Labour: Scale and Method’, (2009) 2 *Cambridge Journal of Regions, Economy and Society*, 429.

<sup>164</sup> H. Conley, and P. Stewart, ‘Representing Fixed-term Workers: The anatomy of a Trade Union Campaign’ (2008) 30 *Employee Relations*, 515.

<sup>165</sup> House of Lords, European Union Committee, *Modernising European Union Labour Law: Has the UK Anything to Gain?* 22<sup>nd</sup> Report of Session 2006-2007 (HL Paper 120).

<sup>166</sup> J. Knell, *Most-wanted – the Quiet Birth of the Free Worker* (London: the Industrial Society, subsequently the Work Foundation, 2000).

# Labour Policy and Fixed-Term Employment Contracts in Germany

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## I. General overview of fixed term employment in the German labour market

A recent survey by an important German think-tank shed light upon the fact that at present only about 60 per cent of the workforce enjoy full-time employment on the basis of an indefinite term contract. The study was fittingly titled “Traditional Employment Relationships in Flux – Normal Employment Relationships in Retreat”.<sup>1</sup> The authors of the study state that there has been a considerable decline of indefinite term and full-time contracts in the German labour market for a couple of years. This is essentially due to the fact that part-time employment has become increasingly widespread. It is also due to ever-increasing fixed term employment however. According to the study 74.4 per cent of the working population worked full-time compared to 25.6 per cent that held part-time jobs in 2008. As regards fixed-term employment it was found by the authors of the study that 85.4 per cent of persons enjoyed an indefinite term contract while 14.6 per cent were in fixed-term employment in the same year. Compared to other European countries the number of fixed-term workers is still fairly modest. In Spain, Poland and Portugal persons having a fixed-term contract represent 29.4 per cent, 27.0 per cent and 23.3 per cent of the working population respectively. It is also slightly below the OECD-average which is at 15.4 per cent.<sup>2</sup> On the other hand fixed-term contracts are far more common in Germany than, for instance, in Great Britain (5.3 per cent) or the US (4.2 per cent). What is more, there seems to have been an accelerated growth of “atypical” employment over the last couple of years. According to the study the fraction of “traditional employment” was 60.1 per cent in 2008 as compared to 64.7 per cent in 2001. According to another recent study which was prepared by the Institute for Employment Research (*Institut für Arbeitsmarkt- und Berufsforschung*), the research institute of the Federal Employment Agency (*Bundesagentur für Arbeit*), the fraction of fixed-term workers increased from 4 per cent in 1996 to more than 6 per cent in 2006. While in 2001 only 32 per cent of new employment contracts represented fixed-term contracts, the according number jumped to 43

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<sup>1</sup> Eichhorst/Kuhn/Thode/Zenker for Bertelsmann Stiftung, Traditionelle Beschäftigungsverhältnisse im Wandel – Benchmarking Deutschland: Normalarbeitsverhältnis auf dem Rückzug, 2010.

<sup>2</sup> As regards the European Union about 12 per cent of workers work under fixed-term contracts; see *European Foundation for the Improvement of Living and Working Conditions*, Fourth European Working Conditions Survey, 2007, p. 8.

per cent in 2006.<sup>3</sup> According to the Federal Statistical Bureau almost 9 per cent of the workforce at present is employed under fixed-term contracts.<sup>4</sup>

Fixed-term employment is regarded as one form of “atypical employment”<sup>5</sup> in Germany.<sup>6</sup> The other forms are part-time employment and temporary agency work. In an individual case there may – and there will often – be a combination of these different forms. For instance, it is possible that an agency worker holds a fixed-term contract with the agency. It is equally possible that a fixed-term worker works part-time only. As a matter of fact, part-time work owed under a fixed-term contract seems to be almost the standard rule in practice. On the other hand, full time work regularly goes with open-ended contracts.<sup>7</sup>

## II. Historic development of the regulation of fixed-term contracts

Until the year 2000 the fixing of the term of an employment contract was ruled by section 620 of the Civil Code (*Bürgerliches Gesetzbuch*), according to which an employment contract ends when the period of time prescribed by the parties to the contract has come to its end. Though the wording of this provision suggests no restriction of the power of the parties to fix the term of the contract, the courts quickly started developing according limitations. In the year 1932, the Reich Labour Court (*Reichsarbeitsgericht*) had already ruled that a chaining of employment contracts was invalid if the employer, by choosing this particular contractual arrangement, tried to evade legal restrictions existing under dismissal law.<sup>8</sup> Accordingly, when the Act on Dismissal Protection was enacted in 1952, the legislator realised that the Act was not – or at least not directly – applicable on fixed-term contracts because such contracts reach their end automatically and as a consequence do not require the employer to give notice. At that time a deliberate decision was taken, however, by the legislator to leave the task of closing that possible loophole in the legal protection of workers to the courts.<sup>9</sup> This solution was found in the year 1960 with a ground-breaking ruling of the Great Senate of the Federal Labour Court (*Bundesarbeitsgericht*).<sup>10</sup> According to this judgment a fixed-term contract can only be legally valid if the fixing of the term does not amount to what is called in German legal methodology an “objective evasion” of the law (“*objektive Gesetzesumgehung*”). Under the doctrine of “objective evasion” a legal arrangement is ineffective if it confounds the purpose of a statutory provision and must be

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<sup>3</sup> *Institut für Arbeitsmarkt- und Berufsforschung*, *Spurwechsel – In neuen Erwerbsformen unterwegs durch die Arbeitswelt*, 2008.

<sup>4</sup> Statistisches Bundesamt 18.03.2010 ([www.destatis.de](http://www.destatis.de)). The rise of fixed-term contracts was immediately criticised by the head of the Federal Employment Agency on the ground that workers should be able “to plan their lives” and companies should “try to hold qualified workers”.

<sup>5</sup> As to “very atypical” employment (very short fixed-term contracts among them) see, most recently, *European Foundation for the Improvement of Living and Working Conditions*, *Flexible forms of work: ‘very atypical’ contractual arrangements*, Dublin, 2010.

<sup>6</sup> By the Federal Statistical Bureau in particular. This qualification is strongly opposed by temporary agencies however claiming that the relationship between agency and temp forms a “regular” employment relationship. As a matter of fact agency work in Germany is regularly performed under indefinite term contracts; see also *Wank* in: *Erfurter Kommentar zum Arbeitsrecht*, 10<sup>th</sup> ed. 2010, Introduction to AÜG no 6.

<sup>7</sup> *Eichhorst/Kuhn/Thode/Zenker for Bertelsmann Stiftung*, *Traditionelle Beschäftigungsverhältnisse im Wandel – Benchmarking Deutschland: Normalarbeitsverhältnis auf dem Rückzug*, 2010, p. 4.

<sup>8</sup> Reichsarbeitsgericht of 02.07.1932, ARS 16, 66.

<sup>9</sup> See Federal Parliament, Printing Matter 1951, p. 2090.

<sup>10</sup> Großer Senat of 12.10.1960 – Gr. Senat 1/59 (3 AZR 65/56), in: *Arbeitsrechtliche Praxis § 620 BGB Befristeter Arbeitsvertrag* no 16.

assessed as an abuse of rights. Because the legal evaluation is an “objective” one, the animus of the parties is of no importance whatsoever. From the perspective of the court the provisions which had to be guarded against possible evasion are the statutory provisions of dismissal law and, in particular, the provisions that are enshrined in the Act on Dismissal Protection (*Kündigungsschutzgesetz*). According to the Federal Labour Court the fixing of the term of an employment contract amounts to an “objective abuse” of the freedom of contract if no objective ground for this particular contractual arrangement existed. On the basis of what was regarded as an “intrinsic enhancement of law” (*gesetzesimmanente Rechtsfortbildung*) possible objective grounds were eventually carved out by the court. The consolidation of the according judgments and their underlying rationale later prompted the legislator to simply accept the according list by transposing it in the according statute.<sup>11</sup>

In the year 1985 the so-called Act on Advancing Employment (*Beschäftigungsförderungsgesetz*) came into force. Against the background of high unemployment the aim of this law was to induce employers to offer more employment opportunities.<sup>12</sup> Part of the legal package was a provision that intended to make the fixing of terms easier. At the time of passing law the Act was intended to expire after five years but instead was extended twice for five years each. With the second amendment of the Act – by the so-called Employment Law Act on Advancing Employment (*Arbeitsrechtliches Beschäftigungsförderungsgesetz*) of 1996 – admissibility of fixing the term of an employment contract without the need of an objective ground even became the basic rule. According to section 1(1) of that Act it was allowed to fix the term of a contract without objective grounds for a period of up to two years with at most three extensions possible within this period of time. The need to implement Council Directive 1999/70/EC of 28.06.1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP<sup>13</sup> led to legislation on fixed-term employment existing at that time being substituted by the Act which is in force at present, the so-called Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz*). This Act enshrines the principle that a fixing of terms requires an objective ground but fixes some exceptions that resemble the provisions formerly fixed in the Acts of 1985 and 1996.

Whether and to which extent the legislator reached the goal of creating more job opportunities by making it easier to conclude fixed-term contracts has become one of the most hotly-debated issues of employment policy in Germany. The according discussion seems to have grown almost into a religious war. Both parties claim that there is clear evidence. In fact there may be very little.<sup>14</sup>

### III. Present regulation of fixed-term contracts

#### 1. General Remarks

##### a) Legal Aim

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<sup>11</sup> See III. 3a aa) *infra*.

<sup>12</sup> Federal Parliament Second Chamber, Printing Matter 393/84, p. 15.

<sup>13</sup> Official Journal of the European Communities of 10.07.1999, L 175, p. 43. The Directive is based on the so-called social dialogue and puts into effect the framework agreement on fixed-term contracts concluded on 18.03.1999 between the general cross-industry organisations (ETUC, UNICE and CEEP).

<sup>14</sup> See *Jahn*, Zur ökonomischen Theorie des Kündigungsschutzes – Volatilität der Arbeitsnachfrage und duale Arbeitsmärkte, 2002.

Fixed-term employment at present is essentially regulated by the Part-Time and Fixed-Term Employment Act<sup>15</sup> which came into force on 01.01.2001.<sup>16</sup> As the title indicates, the Act is concerned with both part-time and fixed-term employment. According to section 1 the main purposes of the Act are, first, to encourage part-time employment (which is essentially done by establishing a claim of employees to reduce their working time),<sup>17</sup> second, to lay down the prerequisites of fixing the term of an employment contract (section 14) and, third, to foreclose discrimination of part-timers and persons working on the basis of a fixed-term contract (section 4(1) and (2) respectively). Regarding fixed-term employment it is noteworthy that the legislator adhered to the assessment that a fixed-term contract of employment should be an exception rather than the normal case.<sup>18</sup> This is in line with European law and the according appraisal by the partners to the framework agreement.<sup>19</sup>

### **b) Legal Definitions**

Section 3(1) contains a legal definition of fixed-term employment. According to section 3(1) sentence 1 a person works under a fixed-term contract if the duration of the contract is limited. According to section 3(1) sentence 2 the duration of the contract is limited if either the term is fixed according to the calendar (employment contract with a term fixed according to the calendar) or the duration is dependant on the nature, purpose or quality of the work to be provided (employment contract with a term limited by purpose).<sup>20</sup> In addition to that, section 21 states that an employment contract can be concluded under a condition subsequent (if the contract is dependant on an *uncertain* event)<sup>21</sup> in which case the restrictions on fixed-term employment essentially have to be applied however.<sup>22</sup>

### **c) “Undocking” of the Fixing of Terms from Dismissal Protection**

As has been explained earlier the original rationale of restricting the use of fixed-term contracts was to ensure that dismissal protection could not be evaded by simply fixing the term of a contract. This implied that the restrictive rules on fixed-term contracts were applicable if but only if the concerned worker enjoyed dismissal protection. The Act on Dismissal Protection (*Kündigungsschutzgesetz*), however, is applicable only to workers who have been employed for at least half a year (section 1(1) sentence 1) in establishments with a regular workforce of more than 10 persons (section 23(1) sentences 2–5).<sup>23</sup> As a consequence,

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<sup>15</sup> The most recent review of court rulings with regard to the Act is provided by *Kossens*, Aktuelle Rechtsprechung zum Befristungsrecht nach dem TzBfG, in: Neue Zeitschrift für Arbeitsrecht – Rechtsprechungs-Report Arbeitsrecht (NZA-RR) 2009, p. 233.

<sup>16</sup> For some areas specific rules exist, however, which according to section 23 remain unaffected by the Part-Time and Fixed-Term Employment Act. The most important, next to section 21 of the Federal Act on Family Allowances and Parental Leave (*Bundeseltern- und Elternzeitgesetz*), might be the ones contained in the Act on Fixed-Term Contracts in Higher Education and Research (*Wissenschaftszeitvertragsgesetz*).

<sup>17</sup> Section 8 of the Act.

<sup>18</sup> German Parliament, Printing Matter 14/4374, p. 1 and p. 12; see also Federal Labour Court of 08.08.2007 – 7 AZR 855/06, in: Arbeitsrechtliche Praxis § 14 TzBfG no 41.

<sup>19</sup> In the Preamble to the agreement the social partners recognise that contracts of an indefinite duration “are and will continue to be, the general form of employment relationship between employers and workers”. They also recognise, however, “that fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers”.

<sup>20</sup> Seasonal workers fall into this category; see Federal Labour Court of 20.10.1967 – 3 AZR 467/66, in: Arbeitsrechtliche Praxis § 620 BGB Befristeter Arbeitsvertrag no 30.

<sup>21</sup> See see *Müller-Glöge* in: Erfurter Kommentar zum Arbeitsrecht, 10<sup>th</sup> ed. 2010, § 3 TzBfG no 12.

<sup>22</sup> According to section 21 of the Act the provisions of sections 4(2), 5, 14(1) and (4), 15(2), (3) and (5) as well as sections 16 – 20 are applicable.

<sup>23</sup> If the employment relationship started after 31.12.2003.

the parties to an employment contract were free to fix the term of the contract if one of these conditions was not met. In such case there was *a priori* no danger of evading dismissal protection. This legal situation changed when Council Directive 1999/70/EC of 28.06.1999 came into force and eventually had to be transposed into German law. This Directive, which covers all workers independent of their length of service and whose application is equally independent of the size of the establishment or company employing them, does not contain any rules on the single fixing of the term of a contract; the only concern of the Directive in this regard is so-called “chain employment” (by succeeding fixed term contracts).<sup>24</sup> When enacting the Part-Time and Fixed-Term Employment Act, the German legislator used the opportunity, however, to make judicial control of fixed-term contracts independent of the requirements of dismissal protection. Since then the restrictions on the fixing of terms apply irrespective of whether or not a worker falls within the area of application of the Act on Dismissal Protection. The according “undocking” of the regulation on fixing of terms from dismissal protection was not less than a “paradigm shift”.<sup>25</sup>

## 2. Prohibition of Discrimination

In transposing Clause 5 of the framework agreement a fixed-term worker may according to section 4(2) sentence 1 not be treated worse than a respective person working under an unlimited term contract, provided that no sound reason exists to do so.<sup>26</sup> In particular, according to section 4(2) sentence 2 a fixed-term worker has a claim to pay (and other claims of cash value that are divisible)<sup>27</sup> for a given assessment period in accordance to the fraction of work provided by him during that period (so-called *pro-rata-principle*). Fixed-term workers may, however, be not able to claim a certain allowance if the duration of their contract is very short and a partial grant would result in an entitlement to a minor amount of money which must be regarded as being out of proportion when held against the purpose of the allowance.<sup>28</sup> Finally, if certain employment conditions are dependant on the existence of an employment relationship no different periods can be applied to fixed-term and full-time workers without good reasons (section 4(2) sentence 3).

The prohibition of discrimination is particularly relevant in the area of yearly allowances. Specific problems arise in this regard if such allowance serves the double purpose of not only being part of remuneration but also aiming at rewarding loyalty. As a rule of thumb it can be said that, if the second element features strongly, a differentiation between fixed-term and unlimited term workers is likely to be lawful.<sup>29</sup>

## 3. Lawful Fixing of Terms

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<sup>24</sup> Clause 5 of the framework agreement states that in order “to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States ... shall, where there are no equivalent legal measures to prevent abuse, introduce ... , one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships”.

<sup>25</sup> Federal Labour Court of 06.11.2003 – 2 AZR 21/03, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 9.

<sup>26</sup> This provision aims equally at employers and partners to collective agreements; see most recently Federal Labour Court of 27. 11. 2008 – 6 AZR 632/08, in: *Neue Zeitschrift für Arbeitsrecht – Rechtsprechungs-Report Arbeitsrecht (NZA-RR)* 2009, p. 490.

<sup>27</sup> Allowances or holidays, for instance.

<sup>28</sup> See Federal Parliament, Printing Matter 14/4374, p. 16.

<sup>29</sup> With regard to the issue of discrimination see also Federal Labour Court of 15.09.2009 – 3 AZR 37/08 (not yet published): Partners to collective agreements must not discriminate fixed-term workers because they are bound to the principle of non-discrimination as laid down in Article 3(1) of the German Constitution.



## a) Section 14(1): Requirement of Objective Grounds

### aa) Statutory Examples

Under Germany law the term of a contract of employment in principle can be fixed only if such fixing is justified on objective grounds. This is laid down in section 14(1) sentence 1 of the Part-Time and Fixed-Term Employment Act.<sup>30</sup> According to section 14(1) sentence 2 an objective ground exists “in particular” if

- the need for certain manpower is only temporary (no 1),
- the term is fixed in order to make it easier for an apprentice or post-graduate to get subsequent employment (no 2),
- a worker is employed in order to substitute for another worker (no 3),
- the nature of work justifies the fixing of the term (no 4),
- the fixing of the term serves the purpose of testing the worker (no 5),
- grounds which are related to the person of the worker justify the fixing of the term (no 6),
- the worker is remunerated from budget funds, these funds are earmarked for fixed-term employment only under the according budget rules and the worker is employed accordingly (no 7),
- the fixing of the term is based on an amicable settlement before a court (no 8).

Section 14(1) sentence 2 is meant to give examples. It is not an exhaustive list of possible objective grounds. However, it is difficult to figure out additional grounds which could also justify the fixing of a term of an employment contract. In any event, such grounds would have to carry the same weight as the grounds expressly mentioned in the Act.<sup>31</sup>

### bb) General Rules

The requirement of an objective ground applies to employment contracts fixed according to the calendar as well as to employment contracts with a term limited by purpose. As to the former the duration of the contract does not play any role. Even if a contract of employment is concluded for a single day only, an objective ground must exist.<sup>32</sup> Apart from that it should be noted that the requirement of an objective ground applies to every type of employment contract. In particular, the fixing of the term in a contract concluded between an employer and an executive employee (*leitender Angestellter*)<sup>33</sup> requires an objective ground too.

The requirement of an objective ground applies to the fixing of the term “as such” whereas it does not apply to the intended duration of the contract. It is necessary that the

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<sup>30</sup> Though the wording of section 14(1) may suggest otherwise the provision applies not only to the situation where a contract is fixed from the start but also to the situation where the term of a contract which was originally intended to be of unlimited duration is fixed later on; see *Müller-Glöge* in: *Erfurter Kommentar zum Arbeitsrecht*, 10<sup>th</sup> ed. 2010, § 14 TzBfG no 13. Section 14 is applicable to the fixing of the term of the contract; it does not apply to the fixing of terms of single elements of the contract; see most recently Federal Labour Court of 02.09.2009 – 7 AZR 233/08, in *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 1318 (with regard to the non-applicability of section 14(4) of the Act).

<sup>31</sup> See most recently State Labour Court Hannover of 21.09.2009 – 9 Sa 1920/08 (not yet published).

<sup>32</sup> Federal Labour Court of 16.04.2003 – 7 AZR 187/02, in: *Arbeitsrechtliche Praxis* § 4 BeschFG 1996 no 1 (regarding contracts concluded for a single day each under a “framework agreement” between the parties).

<sup>33</sup> See section 14(2) of the Act on Dismissal a Protection. In contrast to “normal” staff the legal protection of employees belonging to this category is restricted in the sense that unlawfulness of dismissal in principle leads to it being ineffective whereas in case of an unlawful dismissal of an executive employee only compensation can be claimed (see section 14(2) sentence 2, 9(1) sentence 2 of the Act on Dismissal Protection). Because of the “undocking” of the fixing of terms from dismissal protection this peculiarity, however, is of no relevance any more when it comes to fixed-term contracts.

fixing can be justified by the existence of an objective ground while it is not necessary to examine whether an objective ground, if existing, demands the contract to be of a specific duration.<sup>34</sup> Objective ground and duration of the contract in other words have not to be congruent in the sense that the moment when the contract ends must be identical with the point of time when the objective grounds will presumably cease to exist.<sup>35</sup>

An objective ground within the meaning of the law has to exist at the time of fixing the term. In case that such ground exists at that time it doesn't matter if it ceases to exist thereafter. If, for instance, a worker is hired on the basis of a fixed term contract in order to replace another worker who is on leave (section 14(1) no 1) the fixing is – and remains to be – lawful, if the replaced worker returns sooner than was (and could reasonably be) expected.<sup>36</sup>

In case of succeeding fixed-term contracts it is in principle the last contract only which forms the subject of the examination by the court as to whether an objective grounds exists or not. This is due to the fact that in concluding a new fixed-term contract without any (tacit or explicit) reservations the parties to the contract make it regularly clear that only the “last contract” should be of relevance henceforth.<sup>37</sup>

Section 14(1) requires the existence of an objective ground according to the underlying facts. Neither does it require the objective ground forming an explicit part of the contract nor does it require the objective ground having been part of the deliberations of the parties leading to the conclusion of the contract nor does it require the objective ground being (expressly) communicated to the worker by the employer.<sup>38</sup> With regard to employment contracts with a term limited by purpose, on the other hand, it is necessary to notify the objective ground to the employee because otherwise the content of the agreement on the fixing of the term would not be certain.<sup>39</sup>

### cc) The Objective Grounds in More Detail

One of the most important possible objective grounds is the need for certain manpower being only temporary (no 1). In this case the existence of the objective ground is dependant on a prognosis decision to be taken by the employer according to which it is sufficiently likely that an existing need for certain manpower will cease to exist in the future.<sup>40</sup> The employer must be able to show that his prognosis decision is based on facts.<sup>41</sup> It is not sufficient if an employer is uncertain about what future business developments will look like.<sup>42</sup> In particular,

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<sup>34</sup> A specific duration may indicate however that an objective ground for fixing the term of the contract did not exist “in truth”; see Federal Labour Court of 26.08.1988 – 7 AZR 101/88, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 124 and – more recently - Federal Labour Court of 29.07.2009 – 7 AZR 907/07 (not yet published).

<sup>35</sup> Federal Labour Court of 26.08.1988 – 7 AZR 101/88, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 124; see also – more recently – Federal Labour Court of 21.01.2009 – 7 AZR 630/07, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 727.

<sup>36</sup> See Federal Labour Court of 13.08.2008 – 7 AZR 513/07, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 27 (regarding section 14(2) of the Act).

<sup>37</sup> See most recently Federal Labour Court of 18.06.2008 – 7 AZR 214/07, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 50.

<sup>38</sup> Federal Labour Court of 26.07.2000 – 7 AZR 51/99, in: *Arbeitsrechtliche Praxis* § 1 BeschFG 1996 no 4 and Federal Labour Court of 15.08.2001 – 7 AZR 263/00, in: *Arbeitsrechtliche Praxis* § 21 BErzGG no 5.

<sup>39</sup> See Müller-Glöge in: *Erfurter Kommentar zum Arbeitsrecht*, 10<sup>th</sup> ed. 2010, § 14 TzBfG no 21.

<sup>40</sup> Federal Labour Court of 25.08.2004 – 7 AZR 7/04, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2005, p. 357.

<sup>41</sup> See most recently Federal Labour Court of 16.10.2008 – 7 AZR 360/07, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 676.

<sup>42</sup> Federal Labour Court of 12.09.1996 – 7 AZR 790/95, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 182.

it is not sufficient if the employer fixes the term of a contract due to the fact that he is concerned about future economic developments that cannot be influenced by him.<sup>43</sup> A clear case of applying section 14(1) sentence 2 no 1, on the other hand, would be if the employer intends to close down an establishment in the future and a worker is needed only temporarily in order to maintain operations until the intended point of closure.<sup>44</sup>

As for the objective ground fixed in section 14(1) sentence 2 no 2 (“term is fixed in order to make it easier for an apprentice or post-graduate to get subsequent employment”) it may be worth noting that the “subsequent employment” must in principle be one immediately following apprenticeship or graduation. If there is another employment relationship “in between”, that objective ground regularly will not apply.<sup>45</sup> On the other hand an “easing” of subsequent employment may be affirmed even if there is not more than hope of future employment (which, by the way, must not necessarily be with the employer being the party to the fixed term contract himself).<sup>46</sup>

While section 14(1) sentence 2 no 2 is of limited practical importance only<sup>47</sup> the objective ground fixed in section 14(1) sentence 2 no 3 (“worker is employed in order to substitute for another worker”) is highly relevant in practice. If a worker because of, for instance, being sick or on holiday, does not perform his work and is substituted by another, the contract of the latter can in principle be fixed in order to “bridge the gap” until the re-entry of the substituted employee. As is the case with a “temporary need for manpower” (no 1) section 14(1) sentence 2 no 3 demands a sound prognosis decision from the employer. This prognosis decision aims at the likely ceasing of the need for a replacement in the future due to the fact that the substituted worker will return. It does, on the other hand, not extend to the exact time of return. Regularly the employer is allowed to assume offhand that a worker who is replaced by another will return to his work (sooner or later).<sup>48</sup> If however the employer, on the basis of information available to him, must entertain serious doubts in this regard (the worker may have made it clear from the start that he will not return) the fixing of the term of a replacement will be unjustified.<sup>49</sup> Whether or not it is admissible to apply section 14(1) sentence 2 no 3 to situations where a worker is hired as a “permanent replacement” (for what may be a fluctuating number of other workers) is in doubt. Before the enactment of the Part-Time and Fixed-Term Employment Act the Federal Labour Court was of the opinion that 14(1) sentence 2 no 3 was not applicable to “permanent replacements”.<sup>50</sup> In recent rulings,

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<sup>43</sup> Federal Labour Court of 25.11.1992 – 7 AZR 191/92, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 1993, p. 1081.

<sup>44</sup> Federal Labour Court of 30.10.2008 – 8 AZR 855/07, in: *Arbeitsrechtliche Praxis* § 613a BGB no 359.

<sup>45</sup> Federal Labour Court of 10.10.2007 – AZR 795/06, in: *Arbeitsrechtliche Praxis* § 14 TzBfG Verlängerung no 5.

<sup>46</sup> As a consequence the fixing of a term under section 14(1) sentence 2 no 2 may be legitimate if it improves the general job perspectives of the worker on the labour market; see *Müller-Glöge* in: *Erfurter Kommentar zum Arbeitsrecht*, 10<sup>th</sup> ed. 2010, § 14 TzBfG no 33.

<sup>47</sup> In the view of the (historic) legislator this provision is of minor importance because an apprenticeship does not amount to an employment relationship. As a consequence section 14(2) sentence 2 does not stand in the way of fixing the term of a contract without an objective ground existing (on the basis of section 14(2) sentence 1).

<sup>48</sup> There is in particular no need for the employer of interrogating the worker to be replaced; see Federal Labour Court of 04.06.2003 – 7 AZR 523/02, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 252.

<sup>49</sup> Federal Labour Court of 02.07.2003 – 7 AZR 529/02, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 254.

<sup>50</sup> See for instance Federal Labour Court of 06.06.1984 – 7 AZR 458/82, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 83.

however, the court has hinted to the possibility of applying this provision in such situations.<sup>51</sup> It is sufficient in any event that there is a causal link between the need to hire a replacement and the conclusion of the fixed-term contract. It is not necessary, however that the fixed-term worker exactly performs the work of the worker who is on leave.<sup>52</sup> Nor is it required that the fixed-term worker directly or indirectly substitutes the worker being on leave.<sup>53</sup> The employer is free, in other words, to reorganise the work and to reallocate the according tasks. In court proceedings, however, he has to substantiate how the work load was spread between different workers and, in particular, that the allocation of work to be performed by the fixed-term worker is due to the work tasks redefined.<sup>54</sup> Section 14(1) sentence 2 no 3 does not only cover short-term contracts. The duration may easily last a couple of years instead.<sup>55</sup> Apart from that the application of section 14(1) sentence 2 no 3 is not merely called into question because a worker is employed repeatedly on the basis of fixed-term contracts in order to replace another worker who is inhibited from working several times.<sup>56</sup> Accordingly the employer is in principle free to answer the need of replacing a worker by concluding a series of short-term contracts. The number of fixed-term contracts as such does not result in the courts applying more rigid criteria when assessing the existence of an objective ground (though it may indicate that an objective ground is only feigned by the employer).<sup>57</sup>

The objective ground of “nature of work” (no 4) is not easily to grasp. In essence section 14(1) sentence 2 no 4 covers so-called “issues of attrition” (*Verschleißtatbestände*). “Attrition” within this meaning refers, in particular, to situations, where there is an extraordinary weakening of the capacities of a worker in his job. Employment contracts with artists may be particularly illustrative in this regard: Because there is a certain need of alternation in this area – the audience wants to see “fresh faces” every now and then – and because there is an according need on the side of the employer to enjoy some flexibility, there must be a certain room for fixing of terms with artists. It should be noted however, that the courts are reluctant to apply section 14(1) sentence 2 no 4 outside this area. For instance, it has become highly dubious to which extent section 14(1) sentence 2 no 4 justifies the fixing of terms when it comes to a contract with, for instance, the coach of a professional soccer team. In any event the courts seem to become increasingly hesitant to subscribe to the view that a coach who is longer in his job gradually loses his ability to motivate his team.<sup>58</sup>

According to section 14(1) sentence 2 no 5 a term can be fixed if the fixing serves the purpose of testing the worker. With regard to this objective ground it is important to note that in case of doubt it is assumed that a new employment contract is of unlimited duration (with

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<sup>51</sup> Federal Labour Court 25.03.2009 – 7 AZR 59/08, in *Arbeitsrechtliche Praxis* § 14 TzBfG no 58 and Federal Labour Court of 25.03.2009 – 7 AZR 34/08, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2010, p. 34.

<sup>52</sup> Federal Labour Court of 18.04.2007 – 7 AZR 255/06, in: *Arbeitsrechtliche Praxis* § 14 TzBfG Vertretung no 2.

<sup>53</sup> Federal Labour Court of 17.04.2002 – 7 AZR 665/00, in: *Arbeitsrechtliche Praxis* BAT § 2 SR 2 y no 21.

<sup>54</sup> Federal Labour Court of 15.02.2006 – 7 AZR 232/05, in: *Arbeitsrechtliche Praxis* § 14 TzBfG Vertretung no 2.

<sup>55</sup> See *Müller-Glöge* in: *Erfurter Kommentar zum Arbeitsrecht*, 10<sup>th</sup> ed. 2010, § 14 TzBfG no 36.

<sup>56</sup> Federal Labour Court of 25.03.2009 – 7 AZR 34/08, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2010, p. 34.

<sup>57</sup> Federal Labour Court 25.03.2009 – 7 AZR 59/08, in *Arbeitsrechtliche Praxis* § 14 TzBfG no 58 and Federal Labour Court of 25.03.2009 – 7 AZR 34/08, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2010, p. 34.

<sup>58</sup> Federal Labour Court of 15.04.1999 – 7 AZR 437/97, in: *Arbeitsrechtliche Praxis* § 13 AÜG no 1 (where it, however, also played a role that the team – a junior canoe racing squad – was supposed to undergo a complete change during the contract period) and Federal Labour Court of 29.10.1998 – 7 AZR 436/97, in: *Arbeitsrechtliche Praxis* § 611 BGB Berufssport no 14 (with the reasoning of the court also partly based on this fact).

specific periods of notice applying)<sup>59</sup> whereas a fixing of terms due to the purpose of testing has to be explicitly and clearly agreed upon by both parties.<sup>60</sup> There is a presumption, in other words, that no fixed-term contract with the purpose of testing the worker exists, if the parties to the contract do not clearly provide otherwise. If a fixed-term contract is concluded, however, the parties are not entirely free to determine the duration of the contract. Regularly the term of the contract may not exceed six months.<sup>61</sup> Apart from that it should be noted that the courts demand the existence of a real need for testing the employee. There is no such need, for instance, if the envisaged fixed-term contract succeeds an employment relationship between the parties during which the employer had ample opportunity to examine whether the worker is fit for the job.<sup>62</sup>

Section 14(1) sentence 2 no 6 allows for the term of an employment contract being fixed on grounds which are related to the person of the worker.<sup>63</sup> It almost goes without saying that, if interpreted extensively, this provision could become “dangerous” from the viewpoint of protecting workers against “illegitimate” fixed-term contracts. Section 14(1) sentence 2 no 6 is in general<sup>64</sup> narrowly construed by the courts however. One of the most important fields of application are constituted by cases where a contract is to be concluded with a foreign worker and it seems highly likely at the time when the contract is concluded that an existing work permit will not be extended by the competent authorities.<sup>65</sup> A wish of the worker to get nothing else than a fixed-term contract may also fall within the area of application of section 14(1) sentence 2 no 6.<sup>66</sup> Such wish may justify a fixing of the term if the facts of the individual case – no generalisations are allowed<sup>67</sup> – clearly indicate that the worker has an interest in exactly working on the basis of a fixed-term contract. This may, for instance, be the case, if the according viewpoint of the worker is influenced by obligations towards family

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<sup>59</sup> If the contract is of unlimited duration each party can in principle terminate the contract as it thinks fit. According to section 622(3) of the Civil Code the relevant period of notice is two weeks if the probation period does not exceed six months.

<sup>60</sup> Federal Labour Court of 30.09.1981 – 7 AZR 789/78, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 61.

<sup>61</sup> This period is derived from both section 622(3) of the Civil Code and section 1(1) sentence 1 of the Act on Dismissal Protection.

<sup>62</sup> Federal Labour Court 23.06.2004 – 7 AZR 636/03, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2004, p. 1333.

<sup>63</sup> According to the dominating opinion a contractual age limit may also fall within the area of application of section 14(1) sentence 2 no 6; see *Müller-Glöge* in: *Erfurter Kommentar zum Arbeitsrecht*, 10<sup>th</sup> ed. 2010, § 15 TzBfG no 56 ff (with further references); see also Federal Labour Court of 18.06.2008 – 7 AZR 116/07, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 48 and Federal Labour Court of 17.08.2009 – 7 AZR 112/08, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 1355 (“objective ground” within the meaning of section 14(1) sentence 1).

<sup>64</sup> See however Federal Labour Court of 21.01.2009 – 7 AZR 630/07, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 57 where section 14(1) sentence 1 no 6 was applied by the court on the basis of weighing the interests of the parties concerned.

<sup>65</sup> Federal Labour Court of 12.01.2000 – 7 AZR 863/98, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 217.

<sup>66</sup> According to recent findings of the Federal Statistical Bureau only 2.5 per cent of workers wished to be employed on a fixed-term basis however; see *Statistisches Bundesamt* 18.03.2010 ([www.destatis.de](http://www.destatis.de)).

<sup>67</sup> For instance, there is no general rule in the view of the court that moonlighting students would prefer fixed-term contracts over an unlimited term; see Federal Labour Court of 10.08.1994 – 7 AZR 695/93, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 162.

members. The test that has to be applied is whether or not, in case of the job offer comprising both fixed-term and unlimited term, the worker would have freely chosen the former.<sup>68</sup>

If a worker is remunerated from budget funds and these funds are – clearly and recognisably<sup>69</sup> – earmarked for fixed-term employment only, a fixing of terms may be allowed too.<sup>70</sup> To be sure the according provision (section 14(1) sentence 2 no 7) clearly leads to a preferential treatment of public employers with regard to concluding fixed-term contracts. In the recent past it has become increasingly doubtful whether section 14(1) sentence 2 no 7 is in line with European law,<sup>71</sup> because the admissibility of concluding a fixed-term contract at the end of the day is determined by the legislator who fixes the according budgetary rules.

Finally, as regards the fixing of the term that is based on an amicable settlement before a court (no 8) it may be sufficient to say that the according provision is interpreted narrowly by the courts in order to counteract misuse of that objective ground.<sup>72</sup>

## **b) Section 14(2): Limited Fixing of Terms without Objective Grounds**

### **aa) Short Duration-Contracts**

Section 14(2) contains an exception to the principle enshrined in section 14(1) according to which the fixing of a term requires an objective ground. Under section 14(2) sentence 1 the fixing of a term according to the calendar is admissible without objective grounds existing, if the duration of the contract does not exceed two years.<sup>73</sup> Within the period of two years such contract may be extended three times at most. Section 14(2) sentence 2 enshrines the so-called “prohibition of follow-up” (*Anschlussverbot*). According to this provision a fixing of the term of a contract without objective grounds is not admissible if sometime in the past an employment contract existed between the parties concerned. This provision requires the partners to the contracts on the side of the employer to be identical. The provision aims at the partner to the contract; it does not aim at the workplace occupied by the employee.<sup>74</sup> As a consequence section 14(2) sentence 2 is not applicable if a temporary worker is hired-out by a

<sup>68</sup> Federal Labour Court of 19.01.2005 – 7 AZR 115/04, in: *Arbeitsrechtliche Praxis* § 620 BGB Befristeter Arbeitsvertrag no 260.

<sup>69</sup> See in this regard Federal Labour Court of 02.09.2009 – 7 AZR 162/08, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 1257. In a recent ruling the Federal Labour Court (17.03.2010 – 7 AZR 843/08) held that the Federal Employment Agency had breached section 14(1) sentence 1 no 7 when fixing the terms of 5000 of its workers.

<sup>70</sup> See also Federal Labour Court of 16.10.2008 – 7 AZR 360/07, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 56 where the court explicitly declared to be inclined to regard a *legislative* dedication of funds being required.

<sup>71</sup> See, for instance, *Löwisch*, Vereinbarkeit der Haushaltsmittelbefristung nach § 14 Absatz 1 Nr. 7 TzBfG mit europäischer Befristungsrichtlinie und grundgesetzlicher Bestandsschutzpflicht, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2006, p. 457.

<sup>72</sup> In particular, the Federal Labour Court demands that next to an involvement of the court there must have been an open disagreement between the parties with regard to their legal relationship at the time when the settlement is reached; Federal Labour Court of 26.04.2006 – 7 AZR 366/05, in: *Arbeitsrechtliche Praxis* § 14 TzBfG Vergleich no 1. The latter requirement is supposed to ensure that the parties do not abuse the possibility fixed in section 14(1) sentence 1 no 8 by engaging a court in order to having recorded an agreement that was already reached before going to court.

<sup>73</sup> According to Federal Labour Court of 13.08.2008 – 7 AZR 513/07, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 27 section 14(2) protects employers also from claims brought by their fixed-term employees according to which their contracts must be extended due to the general principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*) because other fixed-term contracts were extended by the employer; see also *Strecker*, Der arbeitsrechtliche Gleichbehandlungsgrundsatz als Anspruchsgrundlage für die Verlängerung eines befristeten Arbeitsverhältnisses, in: *Recht der Arbeit (RdA)* 2009, p. 381.

<sup>74</sup> See Federal Labour Court of 16.07.2008 – 7 AZR 278/07, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 51.

former employer.<sup>75</sup> According to section 14(2) sentence 3 the number of possible extensions or the maximum duration of the contract may be modified on the basis of a collective agreement.<sup>76</sup> Employers and employees who are not legally bound to the collective agreement (regarding workers such workers who are not members of the according trade union)<sup>77</sup> are allowed to agree on applying the according provisions of the agreement to their employment contract (section 14(2) sentence 4).

The fixing of the term of an employment contract is only dependant on the requirements of section 14(2) sentence 1 being fulfilled. There is no additional need for the parties to the contract to expressly agree upon concluding a fixed-term contract that is not based on an objective ground.<sup>78</sup> As a consequence, section 14(2) sentence 1 may, for instance, apply if the parties in their agreement refer to a reason which forms part of the list provided in section 14(1) sentence 1 but which “upon closer legal examination” does not exist.<sup>79</sup>

Within a period of two years a fixed-term contract may be extended three times at most. It should be noted that an “extension” within this meaning does only exist if the according agreement was reached *before* the end of the original contract. An agreement reached thereafter does not qualify as an “extension” anymore but must be regarded as the conclusion of a new contract instead.<sup>80</sup> Even if not more than a single day passes between the end of the contract and the subsequent agreement between the parties there is no “extension” within the meaning of section 14(2) sentence 1 anymore.<sup>81</sup> Apart from that it is remarkable that the courts in principle reject the possibility of the existence of a mere “extension” of the fixed-term contract if the parties, apart from fixing the term of the contract, agree upon an amendment of some pre-existing terms and conditions.<sup>82</sup> In order to qualify as an “extension” the terms and conditions of the contracts may not be touched upon in other words. According to the Federal Labour Court this is even true if the modification of the contract favours the employee.<sup>83</sup> If, however, the latter agreement fixes working conditions the employee can legally claim from his employer to adhere to, there may be a mere “extension” of the original

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<sup>75</sup> See Federal Labour Court of 18.10.2006 – 7 AZR 145/06, in: *Arbeitsrechtliche Praxis* § 14 TzBfG Verlängerung no 4.

<sup>76</sup> Such collective agreements can dispose of the statutory rules even to the disadvantage of the workers. In all other areas however collective agreements can dispose of the statutory rules only if the workers are benefiting from the provisions of the agreement (section 22(1) of the Act).

<sup>77</sup> According to section 3(1) of the Act on Collective Agreements (*Tarifvertragsgesetz*) a worker is bound to such agreement if he is a member of the trade union which concluded the agreement. An employer on the other hand is bound to it, if he either belongs to the relevant employers’ association or did conclude the agreement himself.

<sup>78</sup> See most recently Federal Labour Court of 12.08.2009 – 7 AZR 270/08 (not yet published).

<sup>79</sup> Federal Labour Court of 15.01.2003 – 7 AZR 534/02, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2004, p. 400. It may however be that the parties, by mentioning a certain ground, wanted to contractually dispose of the possibility of fixing the term without an objective ground.

<sup>80</sup> Federal Labour Court of 20.02.2008 – 7 AZR 786/06 in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2008, p. 883.

<sup>81</sup> See *Maschmann*, in: Annuß/Thüsing (ed), *Teilzeit- und Befristungsgesetz*, 2<sup>nd</sup> ed., 2006, § 14 no 71.

<sup>82</sup> Federal Labour Court of 15.01.2003 – 7 AZR 534/02, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2004, 400 and – more recently – Federal Labour Court of 20.02.2008 – 7 AZR 786/06 in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2008, p. 883 (abolition of a right to terminate the contract ordinarily that formed part of the original contract).

<sup>83</sup> Federal Labour Court of 23.08.2006 – 7 AZR 12/06, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2007, p. 204. It is acknowledged by the court however that a modification of the original contract upon extension is admissible if such modification aims at conditions the parties would have agreed-upon if a contract of unlimited duration had existed. That reasoning of the court is based on the prohibition of discrimination against fixed-term workers as laid down in section 4(2) sentence 1.

fixed-term contract (instead of the conclusion of a new fixed-term contract).<sup>84</sup> Though the judicial demarcation between a new contract and the extension of the old contract may be plausible, it should be noticed that there are considerable risks involved, in particular for “small” employers: If such employers fail to realise that “in reality” they agreed on a new contract (instead of only extending the old one) they end-up with a contract of unlimited duration, because the fixing of the term without an objective reason is in conflict with the “prohibition of follow-up” as laid down in section 14(2) sentence 2 and, as a consequence, must be regarded as being void.<sup>85</sup> Prudent (or well-advised) employers, on the other hand, can avoid to “entangle” themselves in fixed-term regulation by, for instance, making sure that an intended modification of terms of the contract takes place *either before or after* the extension and in any event is not agreed-upon as part of the extension.

The “prohibition of follow-up” has been criticised by many from a policy point of view as taking the protection of workers too far. The political parties that form the present government in their “coalition agreement” expressed their willingness to abolish the “prohibition of follow-up” and to replace it with a “waiting period” of one year.<sup>86</sup> As a matter of fact it is not entirely convincing that the employer should be barred from fixing the term of a contract without an objective reason because 15 or 20 years ago an employment contract existed between the parties. The Federal Labour Court, however, is not impressed and clearly rejected the possibility of arriving at a “purposive reduction” (*teleologische Reduktion*) of section 14(2) sentence 2.<sup>87</sup>

#### **bb) Contracts Concluded by Newly Established Enterprises**

Another exception to the principle laid down in section 14(1) applies to newly established companies. According to section 14(2a) sentence 1 it is admissible to fix the term of a contract according to the calendar without objective grounds up to a period of four years from the date when a company was established.<sup>88</sup> Within the period of four years such contract may be extended as often as the parties to the contract think fit. This, however, does not hold good, if the enterprise was established in connection with a legal restructuring of companies or groups of companies (section 14(2a) sentence 2). If the term of a contract is fixed according to section 14(2a) sentence 1 the rules laid down in section 14(2) sentences 2 – 4 have to be applied accordingly (section 14(2a) sentence 4). In other words, both the so-called “prohibition of follow-up” and the rules on disposing of the statutory provisions by way of collective agreements must be taken into account when fixing the term of an employment contract with a newly established company.<sup>89</sup>

As is the case with section 14(2) the application of section 14(2a) is not dependant on the parties agreeing upon fixing the term of the contract without an objective ground existing.

#### **cc) Contracts Concluded with Older Workers**

A couple of years ago, against the backdrop of relatively high unemployment and in an effort to fight it by making it easier to conclude fixed-term contracts, the German legislator

<sup>84</sup> Federal Labour Court of 16.01.2008 – 7 AZR 603/06, in: Neue Zeitschrift für Arbeitsrecht (NZA) 2008, p. 701.

<sup>85</sup> The according stance of the courts is criticised as being too “rigid” by some German scholars; see, in particular, *Preis, Flexibilität und Rigorismus im Befristungsrecht*, in: Neue Zeitschrift für Arbeitsrecht (NZA) 2005, 714.

<sup>86</sup> Koalitionsvertrag zwischen CDU, CSU und FDP, 2009, p. 22.

<sup>87</sup> Federal Labour Court of 06.11.2003 – 2 AZR 690/02, in: Neue Zeitschrift für Arbeitsrecht (NZA) 2005, p. 218 and – most recently – Federal Labour Court of 29.07.2009 – 7 AZN 368/09 (not yet published).

<sup>88</sup> Section 14(2a) sentence 3 contains further details with regard to determining the relevant date.

<sup>89</sup> See for more details III. 3b) aa) *supra*.



changed the rules on fixed-term contracts with older workers. According to section 14(3) as it was brought into force at that time, employers could conclude fixed-term contracts with older workers – defined as workers above the age of 58 or 52, respectively<sup>90</sup> – without the need for an objective reason.<sup>91</sup> From the start this provision met with serious doubts regarding its conformity with the prohibition of discrimination because of age which is laid down, in particular, in Directive 2000/78/EC. The European Court of Justice in a judgement in the year 2005 ruled that section 14(3) in fact breached the principle of non-discrimination in respect of age, which according to the court even forms part of the so-called primary law of the EU.<sup>92</sup> This so-called “*Mangold Judgement*” of the ECJ is disputed for various reasons which partly reach far beyond labour law.<sup>93</sup> The Federal Labour Court in any event followed suit by holding that section 14(3) could not be applied anymore.<sup>94</sup> As a result of these judgments section 14(3) was eventually amended. Since then a fixed-term contract can be concluded for five years at most without objective grounds if the worker is, first, older than 52, and, second, has been unemployed<sup>95</sup> for at least four months immediately before conclusion of the contract (section 14(3) sentence 1). Succeeding fixed-term contracts are admissible as far as the period of five years is not exceeded (section 14(3) sentence 2). According to the dominating opinion this modification brings German law into line with what is required under European law.<sup>96</sup>

#### 4. Agreement on Fixing the Term in Writing

According to section 14(4), which serves the purposes of clarifying the legal situation, making proof of a fixed-term contract easier and caution the parties about the use of fixed-term contracts,<sup>97</sup> the agreement on the fixing of the term of an employment contract must be in writing. In the original draft of the Act it was foreseen that employers should notify the reason for fixing the contract to their employees. This however was later regarded as possibly asking too much from employers.<sup>98</sup> That being said, it must be noted that section 14(4) is rigidly applied by the courts. If, for instance, the parties agree on a fixing of the term of the contract orally, the agreement is regarded as null and void even if they put it into writing soon thereafter.<sup>99</sup> Only the agreement on the fixing of the term and not the contract as such needs to

<sup>90</sup> In principle the age of 58 was relevant. It was temporarily lowered to 52 however for four years (01.01.2003 – 31.12.2006). Under the original provision regarding fixed-term contracts with older workers (section 1(2) of the Act on Advancing Employment) the fixing of the term of the contract depended on the worker being more than 60 years old.

<sup>91</sup> It should be noted after all that according to former section 14(3) sentence 2 this possibility could not be used if a close factual link existed with a former unlimited contract with the same employer. Such link was legally presumed to exist if there was a gap between the two contracts of less than six months (section 14(3) sentence 3).

<sup>92</sup> European Court of Justice of 15.11.2005 – Case 144/04 [2005] ECR I-9981 (ECJ); see for more details *Schmidt*, The Principle of Non-Discrimination in Respect of Age: Dimensions of the EJC’s *Mangold* Judgment, in: German Law Journal 2005, p. 505 ([www.germanlawjournal.com](http://www.germanlawjournal.com)).

<sup>93</sup> See, for instance, *Riesenhuber*, Case: ECJ – *Mangold*, in: European Review of Contract Law 2007, p. 62.

<sup>94</sup> Federal Labour Court of 26.04.2006 – 7 AZR 500/04, in: Arbeitsrechtliche Praxis § 14 TzBfG no 23. What is more, the court declined to protect the expectations of employers who when making the offer of fixed-term contracts to older workers might have relied on German legislation being in line with European law.

<sup>95</sup> Or has been employed but received grants under certain public work schemes.

<sup>96</sup> See, for instance, *Temming*, Der Fall Palacios: Kehrtwende im Recht der Altersdiskriminierung?, in: Neue Zeitschrift für Arbeitsrecht (NZA) 2007, p. 1193.

<sup>97</sup> Federal Labour Court of 23.06.2004 – 7 AZR 636/03, in: Neue Zeitschrift für Arbeitsrecht (NZA) 2004, p. 1333.

<sup>98</sup> See for further details *Maschmann*, in: Annuß/Thüsing (ed.), Teilzeit- und Befristungsgesetz, 2nd ed., 2006, § 14 no 101.

<sup>99</sup> Federal Labour Court of 16.04.2008 – 7 AZR 1048/06, in: Arbeitsrechtliche Praxis § 14 TzBfG no 46.

be in writing however.<sup>100</sup> In case that the fixing of the term of an employment contract is void because of the according agreement not being in writing, the contract is presumed to be concluded for an indefinite period of time with specific rules applying to termination by the employer.<sup>101</sup>

## 5. End of Fixed-Term Contracts

According to section 15(1) a fixed-term contract ends automatically as soon as the end of the period of time agreed-upon by the parties (contract of employment fixed according to the calendar) has been reached. A contract of employment with a term limited by purpose ends as soon as the purpose has been achieved but not sooner than two weeks after the employer has informed the employee about the purpose being achieved (section 15(2) of the Act).

A fixed-term contract can be terminated extraordinarily according to the general rules.<sup>102</sup> According to section 15(3) a fixed-term contract can be terminated ordinarily if the possibility of an ordinary dismissal has been agreed-upon by the parties to the contract or can be derived from an applicable collective agreement (section 15(3) of the Act). If an employment contract has been concluded for the lifetime of the employee – which is an exception by far<sup>103</sup> – or in any event for more than five years, it can be unilaterally terminated by the employee upon expiry of five years with a period of notice of six months (section 15(4) sentences 1 and 2). This provision serves the purpose of protecting the personal freedom of workers who shall not be contractually bound unreasonably long.<sup>104</sup> If a fixed-term contract is sustained beyond the fixed date<sup>105</sup> or the achievement of the purpose respectively<sup>106</sup> – the employee does not stop working and the employer is taking notice of that<sup>107</sup> – it is according to section 15(5) presumed to have been extended for an indefinite period of time if the employer does not object immediately<sup>108</sup> or does not inform the employee immediately about the achievement of the purpose. This provision serves the purpose of bringing about (much needed) transparency if an employment relationship is continued by the parties without a clear agreement after having expired.<sup>109</sup>

## 6. Legal Consequences End of Invalid Fixing of Terms

In case that the fixing of the term of an employment contract is inadmissible, the contract is presumed to be concluded for an indefinite period of time with all other terms of the contract remaining unaffected.<sup>110</sup> The contract may be terminated ordinarily by the employer not before the intended end of the contract unless an ordinary termination is possible at an earlier time under the terms of the contract (section 16 sentence 1).<sup>111</sup> If the fixing of the term

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<sup>100</sup> With regard to the contract as such the provisions of the Act about the Proof of Substantial Conditions Applicable to the Employment Relationship (*Nachweisgesetz*), which requires a written statement, must be obeyed, however.

<sup>101</sup> See III. 6. *infra*.

<sup>102</sup> As laid down in section 626 of the Civil Code.

<sup>103</sup> See *Müller-Glöge* in: *Erfurter Kommentar zum Arbeitsrecht*, 10<sup>th</sup> ed. 2010, § 15 TzBfG no 18.

<sup>104</sup> See Federal Labour Court of 19.12.1991 – 2 AZR 363/91, in: *Arbeitsrechtliche Praxis* § 624 BGB no 2.

<sup>105</sup> In the case of a contract of employment fixed according to the calendar.

<sup>106</sup> In the case of a contract of employment with a term limited by purpose.

<sup>107</sup> Federal Labour Court of 18.10.2006 – 7 AZR 749/05, in: *Arbeitsrechtliche Praxis* § 14 TzBfG no 28.

<sup>108</sup> In the case of a contract of employment fixed according to the calendar.

<sup>109</sup> Federal Parliament, Printing Matter 14/4374, p. 21.

<sup>110</sup> Federal Labour Court of 18.09.2008 – 2 AZR 976/06, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2009, p. 425.

<sup>111</sup> See for the latter section 15(3).

is invalid because of the parties falling short of the requirement of the written form, the contract can be terminated even before the agreed-upon term, however (section 16 sentence 2).<sup>112</sup>

## 7. Legal Proceedings

According to section 17 sentence 1, if an employee claims that the fixing of the term of an employment contract is invalid, he must lodge his claim at the competent labour court within three weeks after the agreed-upon expiration date of the fixed-term contract. After the lapse of that period the employee is precluded from filing a claim. In case that a fixed-term contract is sustained by the parties beyond the intended expiration date the period of lodging a claim starts with the employee receiving a notification by the employer of the end of the contract due to the fixing of the term (section 17 sentence 3).

## 8. Other Provisions of the Part-Time and Fixed-Term Employment Act

According to section 18 which transposes Clause 6.1 of the framework agreement the employer is obliged to inform fixed-term workers about possible opportunities to get employment of unlimited duration. This information must not be communicated individually to the workers concerned however. Irrespective of section 18 collective agreements may exist that contain a right to preferential treatment of fixed-term workers in case of a possible hiring.<sup>113</sup>

According to section 19 which implements Clause 6.2 of the framework agreement the employer is obliged to facilitate access by fixed-term workers to appropriate training opportunities to enhance their skills, career development and occupational mobility provided that there is no conflict with urgent business reasons or according wishes of other employees. In case of conflicting demands the employer in principle enjoys some discretionary power.<sup>114</sup>

## 9. Co-Determination Issues

Fixed-term workers are regarded as workers within the meaning of section 5(1) of the Works Constitution Act (*Betriebsverfassungsgesetz*). As a consequence, they are taken into consideration when calculating the threshold above which works councils may be constituted in the establishment.<sup>115</sup> Apart from that they enjoy both the right to elect a work council (section 7) and the according right to be elected (section 8).<sup>116</sup>

Under section 99 of the Works Constitution Act the works council has to be informed if the employer wants to recruit new staff members; in a limited number of cases the works council even enjoys a certain power of vetoing the decision of the employer (so-called right to deny approval). “Recruiting” within the meaning of section 99 encompasses the hiring of temporary staff on the basis of fixed-term contracts even if it leads to short-term employment only. In addition a person is “recruited” within the meaning of the law if such person is

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<sup>112</sup> Section 16 sentence 2 is applicable even if the parties stipulated that an ordinary dismissal should be inadmissible; see Federal Labour Court of 23.04.2009 – 6 AZR 533/08, in: *Arbeitsrechtliche Praxis* § 16 TzBfG no 2.

<sup>113</sup> See Müller-Glöge in: *Erfurter Kommentar zum Arbeitsrecht*, 10<sup>th</sup> ed. 2010, § 18 TzBfG no 2.

<sup>114</sup> See Müller-Glöge in: *Erfurter Kommentar zum Arbeitsrecht*, 10<sup>th</sup> ed. 2010, § 19 TzBfG no 2.

<sup>115</sup> See also Clause 7.1 of the framework agreement. According to section 1(1) sentence 1 of the Works Constitution Act a works council may be constituted in establishments that regularly employ five workers among which at least three must enjoy the right to be elected.

<sup>116</sup> See *Richardi*, in: *Richardi* (ed), *Betriebsverfassungsgesetz*, 10<sup>th</sup> ed., § 6 no 52.

employed under a fixed-term contract and the contract is later extended.<sup>117</sup> Though the works council cannot base a denial of approval on its assessment that the fixing of the contract is not admissible,<sup>118</sup> it can deny approval if workers are at risk of facing dismissal or might suffer other disadvantages because of the intended measure without cause (section 99(2) no 3). According to the Act (section 99(2) no 3 at the end) such “disadvantage” exists in particular if an employer plans to hire a job applicant permanently without considering an equally suitable fixed-term employee. According to the language employed by the legislator the provision even applies to workers whose employment is of no more than six months duration and who accordingly do not enjoy dismissal protection yet.<sup>119</sup> This is criticised as a “lack in legal system awareness” by some German scholars however.<sup>120</sup>

As regards the case of dismissal – according to section 102 of the Works Constitution Act the works council has to be informed about a decision to dismiss a worker with a limited right of the works council to contradict – there is no co-determination right if a fixed-term contract comes to its end due to expiration of the intended period of time. In particular, the mere notification of the works council by the employer that the contract has ended does not amount to a dismissal. Similarly, there is no dismissal if the employer simply states that a fixed-term contract will not be extended.<sup>121</sup>

According to section 20 of the Part-Time and Fixed-Term Employment Act which transposes Clause 7.3 of the framework agreement the employer must inform “employees’ representatives” (in German terms the works council essentially) about the number of fixed term employees and the fixed term/unlimited term-ratio in the establishment as well as in the company.

## 10. Fixed-Term Contracts and Social Security Law

With regard to social security and unemployment insurance, fixed-term employment is “normal” employment in the sense that there is both compulsory coverage and liability to contribution. Specific rules apply to so-called “short-term” employment however: If an employment relationship is intended from the start to endure two months or 50 working days at most, no social security contributions must be paid by both employer and employee provided that neither professional employment exists nor remuneration exceeds 400 Euro per month (section 8(1) no 2 Social Code IV).<sup>122</sup> Personal income tax however has to be transferred to the tax authorities (subject to a number of conditions including whether 25 percent flat tax or individual tax rate of employee is payable). Apart from that it should be noted that fixed-term workers may continue to receive social security benefits even beyond the expiration of their contract. For instance, a worker who sustained a work accident resulting in an inability to work can claim benefits until restoration of health even if he recovers only after the contract did reach its end.<sup>123</sup>

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<sup>117</sup> Federal Labour Court of 07.08.1990 – 1 ABR 68/89, in: *Arbeitsrechtliche Praxis* § 99 BetrVG 1972 no 82.

<sup>118</sup> Federal Labour Court of 20.06.1978 – 1 ABR 65/75, in: *Arbeitsrechtliche Praxis* § 99 BetrVG 1972 no 8 (non-applicability of section 99(2) no 1).

<sup>119</sup> According to section 1(1) sentence 1 of the Act on Dismissal Protection the applicability of the Act depends on the worker employed for more than six months.

<sup>120</sup> See *Thüsing*, in: Richardi (ed), *Betriebsverfassungsgesetz*, 10<sup>th</sup> ed., § 99 BetrVG no 220.

<sup>121</sup> See *Thüsing*, in: Richardi (ed), *Betriebsverfassungsgesetz*, 10<sup>th</sup> ed., § 102 BetrVG no 16 ff (with further references).

<sup>122</sup> Sozialgesetzbuch IV.

<sup>123</sup> Federal Social Court of 26.05.1982 – 2 RU 41/81, in: *Entscheidungssammlung zum Sozialrecht* 2200 § 560 no 12.

## IV. Evaluation of the present regulation of fixed-term contracts in labour policy and future prospects

The key question of regulating fixed-term contracts is whether and to which extent such contracts should be admissible. The German legislator evidently tried to combine the best of two worlds: On the one hand, the use of fixed-term contracts is restricted by making it in principle dependant on the existence of an objective ground. On the other hand, for reasons of employment policy, the use of fixed-term contracts is somewhat facilitated. As is always the case with a combination of elements, the solution chosen by the German legislator can easily be criticised. In the view of many, trade union representatives in particular, the present regulation of fixed-term contracts is dangerous, because it leaves too much room for employers to employ workers only temporarily.<sup>124</sup> In the eye of many others there is far too less flexibility.

If the issue is flexibility it may be asked however whether it would not be preferable to tackle the according problems in the area of dismissal protection. The rules on fixing terms of employment contracts are based on the idea, developed by the courts, that dismissal protection should not be evaded. Against this background the loosening of the strict rules on fixed-term contracts may be regarded as a rather circumlocutory way of trying to bring about more flexibility.<sup>125</sup> As an alternative it could be considered, for instance, to make application of the Act on Dismissal Protection dependant on two years continuous service with the employer.<sup>126</sup> It seems however that politicians are more inclined to fiddle about the rules on fixed-term contracts rather than trying to tackle the “hot potato” of dismissal protection directly.

Apart from such fundamental issues the present regulation is characterised by a number of pitfalls from the perspective of employers in particular: Whether an objective ground will be acknowledged by a court is often very difficult to anticipate. The “prohibition of follow-up” prompts problems for employers because, for instance, even a short interval between two fixed-term contracts destroys the legal privilege of fixing the term of a contract without an objective ground. It should be borne in mind in this regard that the courts are not prepared to accept a mere “extension” of an existing fixed-term contract having taken place if the agreement between the parties was reached (a little) after the expiration of the contract. It must also be borne in mind that the courts apply the requirement of the written form rigidly. If, for instance, an employer puts an oral “extension agreement” with the employee in writing after expiration of the fixed-term contract (and may it be a single day after only), the fixing of the term is regarded as null and void and the employer ends up with a contract of unlimited duration. This is particularly hard for “small employers”, who are often not fit to fully

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<sup>124</sup> It may be interesting to note in this context that the executive committee of the Social Democratic Party recently put forward a comprehensive package of proposals aiming at amending existing labour law one of the major demands being abolishing the possibility to conclude fixed-term contracts without an objective ground.

<sup>125</sup> For more details see *Waas*, Kündigungsschutz und Befristungskontrolle: Optionen für eine Flexibilisierung des Arbeitsrechts, in: *Zeitschrift für Arbeitsmarktforschung (ZAF)* 2007, p. 99.

<sup>126</sup> This is proposed by *Preis*, Flexibilität und Rigorismus im Befristungsrecht, in: *Neue Zeitschrift für Arbeitsrecht (NZA)* 2005, 714; see also Koalitionsvertrag zwischen CDU, CSU und SPD, 2005, p. 39. In their “founding agreement” the parties to the former government, the so-called “grand coalition”, considered the idea of abolishing the possibility of fixing the term of a contract without objective ground altogether and replacing it by the possibility of an agreement between the parties to make application of statutory dismissal protection dependant on a waiting period of two years. This idea was not put into practice however.

comprehend the “niceties” of the law on fixed-term contracts. It is all the harder because even a very short-term contract may be converted into an open-ended one if the employer for instance “overlooks” the interplay between the “prohibition of follow-up” and the requirements of an “extension” of a fixed-term contract as developed by the courts. In this context it is important to stress that the Part-Time and Fixed-Term Employment Act does neither contain an exception for “small” employers nor an exemption of “short-term contracts” from its area of application. Finally, it should be noted that the danger of a disharmony between the regulation on fixed-term contracts and dismissal protection looms: A short-term contract may have to be converted into an open-ended one if the employer fails to meet the requirement of a mere “extension” of the contract and falls foul of the “prohibition of follow-up”. If, on the other hand, the employer had chosen to offer an indefinite term contract from the start he would have faced if anything reasonably short periods of notice.<sup>127</sup>

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<sup>127</sup> According to section 622(5) no 1 of the Civil Code the parties to an employment contract can dispose of the statutory period of notice altogether if a worker is employed with the purpose of merely helping-out temporarily and the relationship is not continued for more than three months.



# Fixed-Term Contracts in France

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## Introduction

For most employers, the ideal employment relationship is one that would be signed to accomplish a specific task and would automatically end once that task is accomplished. Labour law is reluctant to integrate this type of contractual relationship in its ambit, since the employee is not hired, in principle, to accomplish a precise and specific task, but to be at the employer's disposal to perform a certain type of work. Yet, the rules of labour law have more and more been adapted to integrate these kinds of work relationships, notably through the use of fixed term contracts.

The temptation of employers to hire employees through fixed term contracts rather than permanent contracts has encouraged a reaction of the law. The regulation of fixed term contracts started through contract law, that rapidly turned out to be insufficient; the only guarantee offered by the law of contract was the stability of the contract, since it could only be terminated in case of common agreement, serious breach or Act of God. This turned out to be insufficient, considering the necessity to protect workers under fixed-term contracts who were, with regard to both the employer and the labour market (high risk of unemployment after the end of the contract) in a precarious situation. Statute law on fixed term contracts started timidly in 1979. This creation of a legal regime for fixed term contracts, rather than limiting their use, boosted the practice of fixed term employment.

As a consequence, the left wing government adopted in 1982 a new statute law limiting the grounds that justify the use of fixed term contracts, and providing that the indefinite contract should remain the rule. In 1986, the movement is the other way, with an extension of the use of fixed term contracts. The list of possible grounds is suppressed, and replaced by two main rules. One according to which the fixed term contract can be signed to provide a definite task, the other stating that the conclusion of fixed term contracts cannot have the effect of occupying a durable job associated with the normal and permanent activity of the company.

A statute law of 12 July 1990, limits again the recourse to fixed term contracts, by re-introducing a list of possible grounds, and brings the regulation of fixed term contracts into line with that of temporary work contracts. The EU directive of 28 June 1999 follows the same line, but had a limited impact on French law.

Today, a vast majority of contracts of employment are still permanent contracts, but the rate is declining. Statistics demonstrate that an average of 70% of hirings are today through fixed term contracts. The attraction for such contracts must be related to the highly protective



law of unfair dismissal, that encourages some employees to conclude fixed term contracts that can be easily terminated.

## I. Reasons

The general rule is that the fixed term contracts cannot have the object or the effect of occupying durably a job associated with the normal and permanent activity of the company. This is in accordance with the EC directive that requires such contracts to be concluded for objective reasons. The limitation of possible grounds is necessary considering frequent abuses in the use of fixed term contracts. For instance, the possibility, under statute law, to sign a fixed term contract for a temporary peak in activity (*infra*) is often used at every opportunity, particularly to fill permanent jobs. It is the same for seasonal contracts that sometimes cover the entire year through a succession of seasons.

The reasons provided for by French law are the following. The employer cannot specify two separate reasons.<sup>1</sup>

### 1) Replacement

The employer can hire through fixed term contracts for the replacement of an employee who is absent, whose contract is suspended (he is sick, she is in maternity leave) or for replacements linked with the organization of the company. The law offers several possibilities. An employee with a fixed term contract is about to leave the company and he will not be replaced; someone can be hired in fixed term contracts for the period between the departure of the former employee and the arrival of the new one; the same applies to complement the work of an employee who has temporarily moved to part time work. Fixed term contracts can also be concluded for the replacement of the head of the company. As a consequence, a contract of employment can be concluded for the replacement of someone who is not an employee of the company.

The main danger concerning replacement is that the fixed term contract would become a way to regulate the lack of staff in the company. To limit such a risk, a fixed term contract can only be signed for the replacement of one employee at a time.<sup>2</sup> This employee must be hired to replace a specific employee, whose name and qualifications must be mentioned in the contract. Indeed, in two decisions of June 28, 2006, the Court of cassation has ruled out the possibility for the employer to conclude a fixed term contract with an employee for the replacement of several employees, even if they are absent in succession.<sup>3</sup>

Non respect of these limits creates the risk for the employer to see the judge requalify the relationship as a permanent one.<sup>4</sup> For instance, in a case where two employees had been hired by successive fixed term contracts for nearly ten years to compensate for absences, the Court of Cassation held that the jobs held by those concerned, maintained in the same job for several years, were associated with normal activity and standing of the company and therefore characterized indefinite labor relations.

The employer, who hires someone to replace an absent employee, is not obliged to give the replacing employee the job of the absent person. By virtue of his power of direction, he can require a permanent employee to occupy the functions of the absent person.

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<sup>1</sup> Cass. soc., 23 janv. 2008, n° 06-41.536.

<sup>2</sup> Cass. soc., 28 juin 2006, JCP S 2006, 1860.

<sup>3</sup> Op.cit.

<sup>4</sup> Cass. soc., 29 sept. 2004, n° 02-43.249, Bull. civ. V, n° 232.

## 2) Variations in the Activity of the Firm

The company may enter into a fixed-term contracts to meet a temporary increase in activity (C. trav., Art. L. 1242-2, 2o). Here lie the highest risks of abuse in the recourse to fixed term contracts, which have justified reaction by the courts and the administration. Temporary increase requires the performance of a task precisely defined, that falls outside the normal activity of the company.

The term “temporary increase in activity” is under the terms of Circular No. 18-90 of DRT October 30, 1990 a temporary increase in the regular business of the company. This covers accidental or cyclical increases in the workload that the company cannot absorb through its usual workforce. If this increase is not necessarily unique, it must nevertheless be unusual and specifically limited in time.

A typical example of temporary increase in activity is the temporary increase of activity in department stores at Christmas.

Nevertheless, launching a new product, developing a new activity, even if they occasionally cause an increase in activity do not constitute grounds comply because they fall within the normal activity of the company.

Similarly, the opening of a store carries the normal and permanent activity of the company. An employer cannot invoke the increased activity caused by this opening to hire a cashier in fixed term contract.<sup>5</sup>

A specific case is that of the occurrence in the company of an exceptional order to export, whose importance requires the implementation of means exorbitant quantitatively or qualitatively from those it ordinarily uses.

The situation described by “the exceptional order to export” is the market which it is not possible to cope by using the human potential of the usual business. These means must be either insufficient numbers or inadequate given the requisite qualifications. The increase caused by the order should extend at least six months.

Another specific case is that of urgent work, whose immediate implementation is necessary to prevent imminent accidents, organize relief measures or repair the deficiencies of equipment, facilities or buildings presenting a danger to people.

The employee then employed by fixed term contract can be assigned to a position that is not directly related to increased activity. The employer may well, under his power of direction, apply to a permanent employee to perform the tasks required by the temporary increase in activity, which may in particular require some experience.

## 3) Seasons Work

These are activities that occur every year, around the same date, according to the rhythm of seasons and the collective way of lives. A season cannot exceed eight months, so that a contract for the whole school year cannot be a fixed term contract.<sup>6</sup>

## 4) Sector Fixed Term Contracts (“CDD d'usage”)

In certain areas of activity, defined either by decree or collective agreement, it is of constant customary practice not to have recourse to indefinite contracts, by reason of the nature of the task to accomplish. The activity of the firm must be one of those in the list provided for by the decree or the collective agreement. It includes restaurants, professional

<sup>5</sup> Cass. soc., 5 Juill. 2005, No. 04-40.299.

<sup>6</sup> Rép. min. n<sup>o</sup> 29165, JOAN Q 11 juill. 1983, p. 3059.

sport, entertainment, cultural activities, broadcasting, film production, education, scientific research conducted within the framework of an international convention, an international administrative arrangement made under such an agreement, or by foreign researchers residing temporarily in France.

### **5) Welfare Reasons**

Though the primary task of the fixed term contract is to facilitate the functioning of the firm and solve temporary organizational problems, it is also used for reasons external to the company, namely welfare reasons. Several categories of people, notably the young and the older, with difficulties in finding a job, may be hired more easily through a fixed term contract.

First, there exists a fixed term contract for older people, called the “CDD senior”. It was introduced by the national agreement (ANI) of October 13, 2005 in order to promote the re-employment of older persons and enable them to acquire additional rights for the liquidation of their full pension. It is open to all employers, except those in the agricultural sector, for the employment of any person aged over 57 years. This contract may be concluded for a maximum period of eighteen months. It can be renewed once for a term which, added to the initial contract period cannot exceed thirty-six months.<sup>7</sup> It is not required to follow the waiting period in case of successive contracts.

Second, there exist fixed term contracts for young people. These are called “contrats de professionnalisation” and include both work and training.

Third, French law has created fixed term contracts for job transitions, called “contrats de transition professionnelle”. This contract, of a duration of twelve months, was created on an experimental basis. It is a device for employees threatened with economic dismissals in firms with fewer than 1,000 employees and companies close to bankruptcy. It allows beneficiaries to make a transition to a new job. Work during this transition period is provided through fixed term contracts. These contracts are for less than six months, renewable once with the same employer within a total period itself less than six months. These periods of work cannot exceed a total of nine months. The current government has called for the development of such contracts, in order to fight unemployment.

Apart from these possible reasons for recourse to fixed term contracts, the law explicitly forbids a certain number of reasons. These are the replacement of an employee whose employment contract is suspended due to a labour dispute, the performing of a particularly dangerous work, on a list established by ministerial decree, and the hiring of a fixed term employee for reason of temporary increase of activity on a post having been made redundant over the last six months

## **II. Duration of the contract**

The parties to a fixed term contract can provide for a trial period during which one can break the contract at any time without having to prove just cause. When the initial period does not exceed six months (26 weeks), duration of the trial period is one day per week and cannot exceed two weeks. When these periods exceed six months, the duration of the trial period is capped at one month.<sup>8</sup>

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<sup>7</sup> C. trav., Art. D. 1242-7.

<sup>8</sup> C. trav., Art. L. 1242-10.

The end of the fixed term contract must be specifically specified for in the contract. Renewable once, it can not exceed 18 months, including renewal, with some exceptions. This maximum is not applicable to seasonal contracts and “sector” contracts. The duration of the renewal itself may be less, equal or higher than the initial period.

French law recognizes the validity of two types of fixed-term contracts: the contract whose term is fixed precisely and the contract concluded for a specific task, whose precise date of completion is unknown.

Certain contracts necessarily fit in the first categories and must, as a consequence, be concluded from date to date. These are the temporary increase of activity, performance of a task or occasional urgent work of rescue or prevention of the occurrence of an exceptional order to export, the final departure of an employee prior to the suppression of his job, and the recruitment of certain categories of job seekers.

When the contract is entered into without specific term, it ends, in principle, once the task is achieved provided that the minimum contract period has expired. These contracts are seasonal contracts, “sector” contracts and replacement contracts. Contracts with an uncertain term (for example the replacement of an employee, whose date of return is unknown) are subject to specific rules, including a minimal period of employment. For example, it will not accept that someone is hired to replace an employee, with the expectation that it will last several weeks or months, and that the sick employee comes back the next day and takes his place back.

Any breach of the maximum length of the contract results in the requalification of the original contract in a permanent contract.

### III. Successive contracts

Successive fixed term contracts are suspicious, in that they may hide a permanent employment relationship.

#### a) For the same job

When a fixed term contract expires, it is not possible, except for certain cases, to conclude with the same employee or a different employee a new fixed term contract for identical work, before the expiration of a period, which differs depending on the length of the original contract.

For a contract for initial work of less than 14 days, renewal included, the waiting period is equal to half the length of the first contract.

For an employment contract of at least 14 days, the waiting period between contracts is equal to one third of the initial contract term.

The notion of identical work is assessed according to the nature of work entrusted to the employee and not to the geographic location of the workplace. Thus, if one employee is required through successive contracts to perform the same work in different places, the employer is also required to meet the waiting period between each.<sup>9</sup>

These rules relating to the waiting period do not apply in certain circumstances and for certain types of contracts listed in the Labour code. These are

- (1) the employee who was replaced is absent again;
- (2) Emergency work necessitated by security measures;

<sup>9</sup> Cass. soc., 31 oct. 1989, n° 86-43.137.

- (3) Seasonal jobs;
- (4) Sector contracts ;
- (5) Certain fixed term contracts for welfare reasons, namely those for employees aged over 57.

**b) With the same employee**

The succession of fixed term contracts with the same employee is also limited. Indeed, any contractual relationship that continues after the initial contract, or the renewal of the initial contract provided the maximum period of 18 months is respected, becomes of indefinite duration.

To rehire the same employee on a fixed term contract, the employer must observe a period of break between each contract.

The delay is that stated above if the same employee works on the same job (see A). The duration is not specified by law if the employee works on a different post. To avoid any subsequent requalification by the judge, it is suggested that the period of interruption should not be too brief. It depends on the duration of the employment contract that has just expired. It should also be devoid of any fraudulent intent.

The rules on successive contracts support a few exceptions. An employer may conclude with the same employee successive fixed-term contracts without interruption in the following cases:

Replacement of an absent employee or manager (employee or self-employed), seasonal employment and “sector” contracts.

These exceptions are open to criticism, with regard to the fundamental rule according to which a fixed-term contract should never be the basis for a permanent employment relationship. The Court of cassation tempers the rigor of the rule by recognizing the existence of an overall relationship of indefinite duration, when the employee was hired for all seasons or for the entire duration of a season, or if the parties had stipulated a renewal clause.

The succession of different employees on different positions does not create any difficulties.

## **IV. Formalism**

In French law, the validity of the contract of employment is not, in principle, subject to a written statement, in conformity with the general rules of civil law. For reasons of protection of employees, fixed term contracts are an exception to the rule. Statute law requires employers to submit to the employee the contract in writing, not later than two days after hiring. The contract should expressly stipulate a certain number of informations, that cover most elements of the employment relationship including the precise definition of the job and, in case of replacement, the name and qualifications of the person replaced.

Formalism is of increasing force. For a long time, the absence of writing created a rebuttable presumption of an indefinite contract. Evidence to the contrary could result from the willingness of the parties, through the examination of facts. It was difficult to prove, all the more so as indefinite contracts are the rule. Since 1996, the Court of cassation considers that the presumption cannot be rebutted.<sup>10</sup>

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<sup>10</sup> Soc. 21 mai 1996, n° 92-43.875, Bull. civ. V, n° 190.

Formalism has become so important that the employer cannot invoke before the judge a reason other than that he indicated in the contract.

If the fixed-term contract is, during its execution, modified in its substantial elements (salary, place of work, working time and job function) the modification should be a written addendum to the original contract.

The renewal of a fixed term contract must necessarily be by writing when the original contract provides only for the possibility to renew the contract or does not provide at all for the possibility of renewal.

## V. Termination of the contract

The contract automatically expires at the arrival of its term without either side having to take any initiative. The possibility to terminate the contract before the end is restrictive. For instance, it is not possible to include in the contract a term allowing one of the parties to terminate the contract unilaterally.<sup>11</sup> And the employee is not allowed to resign from the fixed term contract, except for the reasons that follow.

The grounds that justify anticipatory termination of the contract are the following:

*Mutual agreement* - The employer and employee may terminate at any time fixed-term contract by mutual agreement. The law of contract, notably the rules on integrity of consent, applies to such agreement.

*Gross misconduct* - There is no statutory definition of gross misconduct; this concept is essentially judicial. Under the case law of the Court of cassation, the misconduct alleged by the employer to justify the premature termination of a contract term or dismissal is "that which makes it impossible to maintain the employee in the company". The early termination of fixed term contract for misconduct amounts to a penalty. It is therefore subject to disciplinary proceedings. Gross misconduct is the only ground for breach of the contract for a reason proper to the employee, which means that the incapacity or inability of the employee with regard to the job cannot justify anticipatory breach.

*Act of god* - The Act of God (in French "Force majeure") is very rarely admitted, and economic difficulties of the employer do not constitute such an act.<sup>12</sup>

*The employee has been offered an unfixed term job* - The employee may terminate the contract before its term if he has been offered a job for an indefinite period. It may be a job in another company, but also in another plant of the same company. Employees must provide their employer any evidence capable of establishing the reality of the employment provided. A letter of appointment or an employment contract specifying a date of hire may be the evidence, if the indefinite nature of the contract is contained therein. In contrast, a mere declaration of intent without hiring date, or future employer's commitment is not sufficient justification. Unless the parties agree, the employee is required to comply with a notice which runs from the notification of the breach.

The early termination by the employer for a reason other than gross misconduct or "force majeure" or agreement of the parties or outside the trial period entail payment of damages in favor of the employee. The latter is entitled to a sum equivalent to the amount of remuneration remaining until the end of his contract and to compensation for termination.

<sup>11</sup> Cass. soc., 22 déc. 1988, no 85-42.208.

<sup>12</sup> Cass. soc., 20 févr. 1996, n° 93-42.663, Bull. civ. V, n° 59.

If early termination is at the initiative of the employee, he will have to pay damages to his employer, except if he has been hired through a permanent contract. Such indemnity is set by the judge according to the damage suffered.

At the end of the fixed term contract, the parties are free to decide the conclusion of a contract of indefinite duration. In this case, the employer may validly modify the employee's working conditions.

The violation of rules on fixed-term contract is not sanctioned by invalidity of the contract, or by awarding damages, but by a requalification of the fixed term contract into a permanent contract. The demand for requalification, which can be made by the employee (neither the employer, nor the judge can invoke this reclassification) is under an accelerated procedure before the judge. It covers a wide range of irregularities: absence of written statement, violation of the grounds that justify recourse to fixed-term contracts.

## **VI. Status of the fixed-term employee**

The precariousness of the position of a fixed term employee is partly compensated by a protective status, aimed at bringing closer the status of fixed term workers and that of permanent workers.

### **A. Equality of Treatment**

Under L. 1242-14 Labour code, "Unless specific legislation provides for the contrary and with the exception of the provisions concerning termination of employment contract, that are not applicable, the legal and conventional as well as those resulting from customary practice applicable to employees bound by an employment contract of indefinite duration, also apply to employees bound by a contract of fixed-term employment".

In other words, employees hired under fixed-term contracts should be treated on an equal footing with employees holding a permanent contract. They have the same rights and same obligations. They enjoy the same terms of benefits granted under statute law, collective agreement or customary practice. They cannot be excluded from an agreement or a contractual entitlement for the only reason that they are under fixed term contracts.

Thus, in firms with a working time of 35 hours, fixed-term contract employees shall also be subject to this duration.

Fixed term employees have access to all facilities (transport, canteen, showers, changing rooms, restaurant vouchers, pension scheme ...) They must also receive safety training in the same conditions as permanent employees of the company. They must, however, like all other employees, meet any conditions of service to which some rights are subordinate. Employees hired under fixed term contracts for short periods may thus be denied the benefits of a minimum duration of presence (seniority bonus, compensation for sickness absence, annual premium).

The remuneration of employees under fixed term contracts cannot be less than that would receive in the same company after the trial period, an employee under contract of indefinite duration with equivalent qualifications and occupying the same functions.<sup>13</sup>

Admittedly, the assertion of parity of treatment can be purely formal in that a number of legal rights or benefits, conventional or customary are related to durable presence within the company. However, the brevity of the job characteristic of fixed-term contracts, most often

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<sup>13</sup> C. trav., Art. L. 1242-15.

excludes the acquisition of substantial social rights, lack of seniority in the company. One can also doubt the effectiveness of the text because of the *de facto* inequality of the parties involved.

Fixed term contract employees can vote for, and be elected as workers' representatives.

### **B. Social Security**

Fixed term contract employees benefit from the same rights. To enable fixed term employees to have a level of social protection at least equivalent to those enjoyed by employees under permanent contracts, companies who have recourse to fixed term contracts owe an additional contribution. This contribution is 0.5% of the total gross remuneration paid to employees in CDD.

### **C. Information on Job Vacancies**

The employer is required to inform employees bound by a fixed contract term of the list of vacancies in the company under indefinite contracts, when such a device information already exists in the company for employees bound by a contract of indefinite duration.<sup>14</sup>

### **D. Indemnities and Sanctions**

Employees hired under fixed term contracts are entitled to an allowance to compensate their precarious situation. This allowance should normally be paid to the employee at the termination of the contract.<sup>15</sup>

The amount of this allowance shall, unless the contract or agreement is more favorable, to 10% of global gross wages due the employee.<sup>16</sup>

The sanctions of the breach of the law relative to fixed term contracts is severe. In addition to requalification of the fixed term contract as an indefinite contract and indemnities, non-compliance with provisions relating to fixed term contracts is punishable by a fine of 3,750 € to reach 7,500 € and accompanied by a prison term of six months (or one of these two penalties) in cases of recidivism (C. trav., art. L. 1248-1 et seq.).

Criminal sanctions are only applicable to certain types of breaches. These are non-compliance relating to the reasons for entering into fixed-term contracts, duration and succession of fixed term contracts; no written contract and precise definition of the pattern of use; no transmission of the contract to the employee within two days of hiring; non-observance of the principle of equal pay.

## **VII. New developments**

The fixed-term contract has been at the heart of two strongly debated legal devices. The first was recently adopted, the second, elaborated by lawyers and economists, was never adopted but raised important discussions as to the future of labour law.

### **A. The Unique Contract**

The current President of France had the idea of suppressing the opposition between fixed term and indefinite contracts by creating what has been called a "unique contract". The

<sup>14</sup> C. trav., Art. L. 1242-17.

<sup>15</sup> C. trav., Art. L. 1243-8.

<sup>16</sup> C. trav., Art. L. 1243-8.



project was severely criticized because it was moving French law towards “employment at will”, by weakening the requirement of a fair ground of dismissal.

According to the project, the contract would have been a permanent contract, in order to promote the continuous accumulation of employee rights, and avoid the effects of rupture between fixed term contracts and permanent contracts. All forms of fixed term contracts would disappear.

In case of dismissal, the legal requirements imposed on the company would be lighter (no more compulsory redeployment; no more control of the existence of an economic motive). This easing of legal requirements would be compensated by payment, at the time of termination, of indemnities proportionate to the total wages paid throughout the contract of employment. These indemnities would benefit both the employee and government.

This is the major issue. The law of unfair dismissal is strongly debated at the moment, with the idea, developed by some economists, that the difficulty to fire employees explains the reluctance of employers to hire people, and partly causes the high unemployment in France. The requirement for a fair ground of dismissal is particularly under criticism. It is notably suggested that it should be replaced by taxation, which would avoid litigation on dismissals. This criticism of dismissal law ignores the importance for the employee to be able to discuss the grounds of his dismissal. On the economic side, no serious study has proved, with certainty, that unemployment would decline through a change in dismissal law. On the legal side, it is likely that French courts would not have validated such a contract. In a recent case, the French Court of cassation considered a contract enabling the employer to terminate the contract at will during the first two years (“contrat nouvelles embauches”), as contrary to convention n°158 of the ILO. The two years period was considered unreasonable.<sup>17</sup>

## **B. The Project Contract**

Act No. 2008-596 of June 25, 2008 (OJ June 26) establishes on an experimental basis for five years, a fixed term contract whose purpose is the realization of a specific task. This contract is also called “project contract”. The contract called “Project” is designed exclusively for engineers and managers. It is governed by the rules on fixed term contracts, except if statute law says the contrary. The duration of this contract must be between eighteen months and three years.

The use of this contract is conditional on the conclusion of an industry-wide agreement or, failing that, a collective enterprise agreement. The collective agreement must define:

- The economic necessities which these contracts are likely to make an appropriate response;
- The conditions under which the employees concerned will receive a series of guarantees (outplacement, priority re-employment and access to vocational training)
- The conditions under which the employees holding such a contract have priority access to jobs with permanent contracts in the company

The contract ends with the realization of the purpose for which it was concluded, with a minimum period of two months. It is not renewable. It can be broken by either party after eighteen months, for a reasonable ground, and then on the anniversary date of its conclusion.

The possibility to terminate the contract for a reasonable ground (which is equivalent to the rule on unfair dismissals applicable to permanent contracts) is very much open to criticism.

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<sup>17</sup> Cass. soc. 7 juill. 2008, n° 07-44124.

Indeed this contract adds to the precariousness of the fixed term contract the instability of the unfixed term contract.

It is easy to see that such a contract may modify the whole structure of the French labour market, if it were applicable to all workers. At present, it is only for engineers and managers. This contract is undoubtedly attractive. You do not need to have a permanent worker, whom you must pay in the summer where you do not have any task to give him. You hire him for a specific task; then he is back to unemployment; and then again, you hire him for another task. All the law does is to require a “reasonable” period between these two contracts.

This fits very well into a new model for labour law. This model is probably one of the most discussed issues in France at the moment.<sup>18</sup>

The idea grows, because of high unemployment, that the nature of the job - fixed or unfixed term, contract of employment or independant contract - is not important anymore. That having no job is not even a problem. More precisely, the focus of labour law moves from the contract to the person. The law should protect the person, whatever the contract she possesses or wherever she has a contract or not. If you apply this idea to the fixed term contract, the main flaw of a fixed term contract, which is the absence of continuous employment, is not a problem anymore. Indeed, the law is going to care about the transition between the contract that has just finished, and the next contract. If we follow that direction, labour law and social security law will come closer, and will possibly merge into a new labour law. That labour law will not be aimed at protecting workers but at regulating the labour market (with a strong risk of instrumentalisation of legal rules).

It is difficult to imagine a model so far from the Japanese life employment model. The aim is about the same: granting a status to the individual from 16 or 18 to the retirement age. But the method is totally opposite. The employment relationship, in the new model, is not unique, and the link with the company becomes both precarious and of limited importance. What the law should do is only maintain, during your whole life, both your ability to work and enough money to live a decent life.

Let's be very careful about this model that legitimates precarious work.

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<sup>18</sup> See not. A. Supiot, *Au-delà de l'emploi*, Flammarion, 1999.



# Labour Policy on Fixed-Term Employment Contracts in Sweden

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## 1. Introduction

The theme of this 10<sup>th</sup> Tokyo Seminar is the recent decades' general increase in atypical employment, such as fixed-term, part-time and temporary agency work. The flexibilisation of working life has often been discussed in terms of labour market segmentation and the legal 'tension' between, on the one hand, permanent employment, linked to employment protection, and, on the other hand, more precarious atypical, or flexible, employment. In Europe nowadays the discussion often springs from the notion and strategy of flexicurity, and the balancing of flexibility of labour markets with the security and social protection of employees. The aim of this report is to describe and analyse the legal regulation of fixed-term employment contracts in Sweden.

Fixed-term employment has been on the rise in Sweden. In 2008, 16.1 per cent of all employees had fixed-term employment contracts, as compared to 10 per cent in 1990.<sup>2</sup> In the EU-15 countries, the corresponding average rate in 2008 was 14.1 per cent. In Sweden the incidence of fixed-term employment is higher in the service sector than in the manufacturing sector. Fixed-term employment is more common among women (in 2008 18.7 per cent) than men (in 2008 13.4 per cent), and also more common among young people (16–24 years of age) than in other age groups.<sup>3</sup> The trade union organisation rate among fixed-term employees is lower than among permanent employees (about 50 per cent as compared to 70–75 per cent).<sup>4</sup> In 2008, 26.6 per cent of all employees in Sweden had part-time employment contracts (41.1 per cent among women and 13.3. percent among men, these figures have long been stable). Despite rapid growth of temporary agency work in Sweden, today it still accounts for only about 1 per cent of the entire labour force.<sup>5</sup> In 2008, self-employment accounted for 5.3 per cent of total employment.<sup>6</sup>

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<sup>2</sup> In 2009, 661,000 employees had fixed-term employments, see SCB, *Statistisk årsbok 2010*, Stockholm 2010, p. 272.

<sup>3</sup> Fixed-term employment also seems to be more common among foreign-born than among Swedish-born employees, cf. S. Engblom, Fixed-Term-at-Will: The New Regulation of Fixed-term Work in Sweden, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 24, No 1, 2008, p. 136.

<sup>4</sup> See Engblom 2008, p. 138.

<sup>5</sup> Temporary-work agencies (and private employment agencies) were prohibited in Sweden between 1935 and 1991, in line with the ILO Convention on Fee-Charging Employment Agencies No. 96/1949 (revising

The outline of this report is as follows: Section 2 presents the background and historic developments as regards regulation of fixed-term employment contracts in Sweden and the EU. Section 3 describes and analyses the current regulation of fixed-term employment contracts in Sweden. Lastly, in Section 4, I make some concluding remarks.

## 2. Regulation of fixed-term employment contracts: background and historic developments

The Swedish industrial relations system builds on self-regulation, co-operation between the social partners, and autonomous collective bargaining. The trade unionisation rate is about 70–75 percent and the collective bargaining rate is about 90 percent. Wages and other terms and conditions of employment are generally set by collective bargaining. Collective bargaining is accompanied by well-established and strong mechanisms for information, consultation and co-determination, and workers' influence is channelled solely through trade unions in a so-called single-channel model. The 1970s witnessed an increase in legislative activity, and since then, labour law legislation is very frequent in Sweden. Membership of Sweden in the European Union since 1995 has added to this legislation, and today labour law legislation covers areas such as employment protection, non-discrimination, working time, working environment, freedom of association, collective bargaining and the right to industrial action and information, consultation and co-determination. The two real centrepieces of Swedish labour law legislation are the 1976 Co-determination Act (*Medbestämmandelagen*, SFS 1976:580), regulating central aspects of collective labour law, and the 1982 Employment Protection Act (*Anställningsskyddslagen*, SFS 1982:80), regulating central aspects concerning the entering into and the termination of employment contracts. A distinguishing feature of most Swedish labour law legislation is its 'semi-compelling' character, which allows for deviations, both to the advantage and detriment of employees, from the statutory provisions by means of a collective agreement entered into by the employer and the trade union. In this way, flexible modifications to accommodate the needs of specific industries and sectors or companies can be achieved.<sup>7</sup>

Swedish labour law in general is characterised by its uniform and extensive personal scope, and a traditionally high degree of equal treatment of different categories of employees – for instance of blue- and white-collar employees, public and private sector employees and permanent and fixed-term employees (with the exception of employment protection). There is no statutory definition of the concept of employee. However, the courts have developed a legally mandatory, and in a comparative perspective, broad concept of *employee*, covering

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Convention No. 34/1933). This prohibition was not fully implemented in practice, though. Temporary agency work was legalised in 1991, and more effectively liberalised in 1993 by the adoption of the 1993 Private Job Placement and Hiring-out of Labour Act.

<sup>6</sup> See European Commission, *Employment in Europe 1998*, Office for Official Publications of the European Communities, Luxembourg 1998, p. 162, European Commission, *Employment in Europe 2009*, Office for Official Publications of the European Communities, Luxembourg 2009, p. 156 and p. 182, K. Ahlberg and N. Bruun, Denmark, Finland and Sweden: Temporary Agency Work Integrated in the Collective Bargaining System, In: K. Ahlberg *et al.*, *Transnational Labour Regulation. A Case Study of Temporary Agency Work*, P.I.E. Lang, Brussels 2008, p. 42 and Engblom 2008, pp. 136 f.

<sup>7</sup> Cf., for example, section 2 of the 1982 Employment Protection Act and section 4 of the 1976 Co-determination Act. See M. Rönmar, Free movement of services vs national labour law and industrial relations systems: understanding the Laval case from a Swedish and Nordic perspective, In: C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies*, Vol. 10, 2007–08, Hart, Oxford 2008, pp. 493–523.

also fixed-term workers. In short, an employee can be described as a person who, on the basis of a contract, personally performs work for someone else, under his or her direction, in return for remuneration. During the 20<sup>th</sup> century, the concept of employee has continuously widened, aiming at providing additional groups of workers with the protection afforded by labour law legislation.<sup>8</sup>

The regulation of fixed-term employment contracts became an important issue in Sweden in the beginning of the 1970s. Statutory employment protection – first established through the 1974 Employment Protection Act – also required regulation of fixed-term employment contracts, to prevent circumvention of the employment protection linked to permanent employment contracts.<sup>9</sup> In comparison with many other countries, the Swedish employment protection stands out as being relatively strong, and has kept most of its basic features since 1974.<sup>10</sup> The 1982 Employment Protection Act in force today applies to all employees, whether in private or public employment (cf. section 1 of the Act), from the first day of employment.<sup>11</sup> Small companies are not exempted. The employer may dismiss an employee for personal reasons or for reasons of redundancy. The employer must have just cause (or objective grounds) for dismissal (cf. section 7 of the Act). Coupled with this basic just cause requirement are rules obliging the employer *inter alia* to negotiate with trade unions, to give notice, to provide the employee with alternative work, to apply seniority rules, and if necessary conditions are met, to re-employ dismissed employees. For example, the seniority rules are ‘semi-compelling’, and the principle of ‘last-in-first-out’ can be deviated from by means of collective agreements.

As part of the managerial prerogative – first legally recognised in 1906 in the main collective agreement of the December Compromise between the Swedish Confederation of Trade Unions (LO) and the Swedish Employers Federation (SAF) (now the Confederation of Swedish Enterprise (Svenskt Näringsliv)) – the employer, in principle, enjoys a free right to hire. This right is restricted, however, by *inter alia* non-discrimination legislation, and in the public sector, by constitutional requirements (in the state sector) for applying only objective factors such as merit and competence; and in addition (in the entire public sector) the observance of equality of all before the law and objectivity and impartiality (cf. chapter 11

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<sup>8</sup> See S. Engblom, *Self-employment and the Personal Scope of Labour Law. Comparative Lessons from France, Italy, Sweden, the United Kingdom and the United States*, European University Institute, Florence 2003 and M. Rönnmar, Sweden, In: T. Araki and S. Ouchi (guest editors), *Labour Law in Motion. Diversification of the Labour Force & Terms and Conditions of Employment*, R. Blanpain (ed.), Bulletin of Comparative Labour Relations, Vol. 53, Kluwer Law International, the Hague 2005, pp. 41–49 and pp. 157–172.

<sup>9</sup> See A. Henning, *Tidsbegränsad anställning. En studie av anställningsföreskrifterna och dess funktioner*, Juridiska Föreningen i Lund, Lund 1984, A. Numhauser-Henning, Fixed-term Work in Nordic Labour Law, *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 18, No 3, 2002, pp. 429–457, Government Bill Prop. 1973:129 *Lag om anställningsskydd m.m.*, p. 145 and Government Bill Prop. 1981/82:71 *Ny anställningsskyddslag m.m.*, p. 43. For a similar development in many European countries, see B. Veneziani, The Employment Relationship, In: B. Hepple and B. Veneziani (eds), *The Transformation of Labour Law in Europe. A Comparative Study of 15 Countries 1945–2004*, Hart Publishing, Oxford 2009, pp. 115 ff.

<sup>10</sup> Statutory employment protection in the 1974 Employment Protection Act, and later in the 1982 Act, was preceded first by the unilateral right of the employer to dismiss employees (cf. the employment at will doctrine) and later a limited, collectively bargained, employment protection, cf. Henning 1984.

<sup>11</sup> According to section 1 subsection 2 of the 1982 Employment Protection Act, some minor groups of employees are, however, excluded from the Act, namely employees in a high management position, the employer’s family members, employees working in the employer’s household, and employees who are employed for work with special employment protection or in sheltered employment. Thus, employers are not restricted by the regulation on fixed-term employment contracts in the Act when concluding employment contracts with these employees.

section 9 and chapter 1 section 9 of the Instrument of Government (*Regeringsformen*). The employment contract may be oral, written or concludent.<sup>12</sup> Not later than one month after the commencement of work by the employee, the employer must provide written information about the terms and conditions of employment; for example, whether the employment is fixed-term and the final date of employment (cf. section 6c of the 1982 Employment Protection Act).<sup>13</sup>

In the 1974 Employment Protection Act, the basic rules regarding fixed-term employment contracts were laid down – and to a large extent they still apply today.<sup>14</sup> A permanent employment contract is concluded for an indefinite period of time, and can be terminated only by means of dismissal, and then the employer must have just cause for dismissal. In contrast, a fixed-term employment contract is concluded for a limited period of time, and terminates at the expiry of the agreed term, without the need for notice (cf. section 4 of the 1982 Employment Protection Act). As a main rule, a fixed-term employment contract cannot be terminated before the agreed term has expired (with the exception of summary dismissal in case of a grave breach of the employment contract, on the part of either the employee or the employer, cf. section 4 subsection 3 and section 18 of the 1982 Employment Protection Act). Thus, in a sense, under its duration the fixed-term employment contract can be said to provide greater protection for the employee than a permanent employment contract. However, the employer and the employee can agree on a fixed-term employment contract for ‘an indefinite term, but no longer than’, enabling both the employer and the employee to terminate the fixed-term employment contract in advance, while still having to adhere to notice periods and the requirements of the statutory employment protection for just cause etc.<sup>15, 16</sup>

Employment contracts for an indefinite period – permanent employment contracts – are considered the rule, since they afford the employee employment protection (cf. section 4 of the 1982 Employment Protection Act). Fixed-term employment contracts are allowed only when agreed upon, and when specifically provided for by law or collective agreements. The party – often the employer – claiming the existence of a fixed-term employment contract bears the burden of proof.<sup>17</sup> In order for a fixed-term employment contract to be legal, the precise rules of the 1982 Employment Protection Act must be adhered to (cf. sections 4, 5 and 6 of the Act). Nevertheless, these provisions are ‘semi-compelling’, and collective agreements regulating fixed-term contracts in specific – narrower or broader – ways are frequent (cf. section 2 of the 1982 Employment Protection Act) (these collective agreement provisions may also be applied to unorganised employees or employees who are members of a trade union, but not a signatory party to the collective agreement).<sup>18</sup> This ‘semi-compelling’ character of the 1982 Employment Protection Act was strengthened in 1996, allowing such

<sup>12</sup> See K. Källström and J. Malmberg, *Anställningsförhållandet. Inledning till den individuella arbetsrätten*, 2nd ed., Iustus förlag, Uppsala 2009, pp. 104 ff.

<sup>13</sup> Cf. Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

<sup>14</sup> See Government Bill Prop. 1973:129.

<sup>15</sup> Cf. Labour Court judgments AD 1990:98 and AD 1997:42.

<sup>16</sup> See L. Lunning and G. Toijer, *Anställningsskydd*, 8th ed., Norstedts Juridik, Stockholm 2006, pp. 156 ff.

<sup>17</sup> See Lunning and Toijer 2006, pp. 156 ff., Government Bill Prop. 1973:129, pp. 144 ff., Government Bill Prop. 1981/82:71, pp. 38 ff. and Henning 1984. Cf. Labour Court judgments AD 1996:7, AD 1990:92 and AD 1988:143.

<sup>18</sup> See Lunning and Toijer 2006, pp. 75 ff. and Government White Paper Ds 2002:56 *Hållfast arbetsrätt – för ett föränderligt arbetsliv*, pp. 227 ff.

deviating collective agreements to be entered into even at the local workplace level (provided that a collective agreement concluded at the central or national level applies between the employer and the trade union) (cf. section 2 subsection 3 of the 1982 Employment Protection Act). In addition, provisions on fixed-term employment contracts in specific statutes or regulations, for example, regarding universities and higher education, have priority before the provisions in the 1982 Employment Protection Act (cf. section 2 subsection 1 of the 1982 Employment Protection Act).<sup>19</sup>

In 1974 the starting point was that each permitted form of fixed-term employment contract regulated in the Employment Protection Act should be motivated by an *objective reason*. Originally, the regulation on fixed-term employment contracts in the Act was strict, and allowed only for fixed-term employment contracts for a fixed term, specified season, or specified task, if necessitated by the particular character of the work (interpreted narrowly), for temporary substitute employment and for practical training (cf. section 5 of the 1974 Employment Protection Act).<sup>20</sup> In 1982, the scope for fixed-term employment contracts was broadened by the introduction *inter alia* of probationary employment and fixed-term employment, if necessitated by a temporary peak in the employer's workload (not exceeding a total of six months during a two-year period).<sup>21</sup>

Thus, the general trend – both as regards the frequent statutory reforms and the development in case law – has been towards increased opportunities for employers to use fixed-term employment contracts.<sup>22</sup> In 2007, before the latest and in some respects fundamental, reform of the regulation of fixed-term employment contracts (Section 3), the 1982 Employment Protection Act contained a long ‘catalogue’ of situations in which the use of fixed-term employment contracts was permissible (cf. sections 5–6 of the Act). For example, in 1996 a new fixed-term employment contract was introduced – the so-called ‘agreed fixed-term employment’ (cf. section 5a) – which could be used with regard to one and the same employer for a period of twelve months during any three-year period, and without the employer having to give any motive or objective reason for any dismissal (the employer could only employ five employees at the same time on ‘agreed fixed-term employment’). However, the trend was not entirely unequivocal. Following a heated discussion on the misuse of successive temporary substitute employments, where the permissibility of each temporary substitute employment was evaluated separately, a new provision was introduced in 2000.<sup>23</sup> When an employee had been employed by one employer as a temporary substitute for a total of three years during the last five years, the employment contract was automatically converted into a permanent employment contract (cf. section 5 subsection 2 of the 1982 Employment Protection Act).<sup>24</sup>

<sup>19</sup> Cf. Government White Paper SOU 2007:98, *Karriär för kvalitet*.

<sup>20</sup> See Government Bill Prop. 1973:129, pp. 144 ff and Henning 1984.

<sup>21</sup> See Government Bill Prop. 1981/82:71, pp. 38 ff.

<sup>22</sup> For example, the Labour Court has ‘softened’ the requirements for using temporary substitute employment and ‘project employment contracts’ (an employment contract for fixed-term, specified season or specified task, if necessitated by the particular character of the work), cf. Government White Paper Ds 2002:56, pp. 219 ff., Engblom 2008 and, for example, Labour Court judgments AD 1985:30 and AD 2000:51 (Section 3).

<sup>23</sup> Cf. Labour Court judgements AD 1978:17 and AD 1984:66.

<sup>24</sup> In 2002, in a report commissioned by the government, the National Institute for Working Life proposed a new regulatory framework for fixed-term employment. According to the proposal, the ‘catalogue’ of fixed-term contracts in the 1982 Employment Protection Act should be abolished and instead all fixed-term contracts, concluded for periods up until 18 months, should be permitted. The employment protection of fixed-term workers should be strengthened, *inter alia* by extending the right to re-employment, and employers using fixed-



The Fixed-Term Work Directive/Framework Agreement on Fixed-Term Work<sup>25</sup> was adopted in 1999, as a result of the European social dialogue, and regulated atypical work at EU level; this agreement followed the Part-Time Work Directive<sup>26</sup> and preceded the Temporary Agency Work Directive.<sup>27</sup> In the Preamble to the Framework Agreement, the parties recognise that ‘contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers’ and that ‘fixed-term employment contracts respond, in certain circumstances, to the needs of both employers and workers’. The purpose of the Directive is twofold: to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships (cf. clause 1).<sup>28</sup> In the words of Numhauser-Henning, the ‘restrictive aspect’ of the Directive can, be said to ‘evince a certain level of ambiguity, and it has been referred to as “normalizing” fixed-term work’.<sup>29</sup> The principle of non-discrimination implies that with respect to employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation, unless different treatment is justified on objective grounds (cf. clause 4). Principles of equal treatment and non-discrimination for part-time, fixed-term, and temporary agency work display a fundamental difference with regard to traditional non-discrimination regulation. Here, equal treatment is not based on the personal characteristics of the employee (such as sex, race, age, or sexual orientation) and related to the human rights discourse, but instead based on the employment contract and its form and content, and related to the flexicurity, employment policy and globalisation discourses.

When it comes to measures to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, where there are no equivalent legal measures to prevent abuse, the Member States shall introduce – in a manner which takes account of the needs of specific sectors and/or categories of workers – one or more of the following measures: objective reasons justifying the renewal of such contracts or relationships; the maximum total duration of successive fixed-term employment contracts or relationships; or, the number of renewals of such contracts or relationships (cf. clause 5). Thus, the Directive does not introduce any requirement for objective reasons for the parties’ first entry into a fixed-term employment contract.<sup>30</sup> Employers shall also inform fixed-term workers about

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term contracts for periods longer than 18 months should be made to pay an economic fee (in the long run making long-term fixed-term employment unprofitable, thereby promoting the use of permanent employment in these situations), see Government White Paper Ds 2002:56.

<sup>25</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by the ETUC, UNICE and CEEP.

<sup>26</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC.

<sup>27</sup> Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

<sup>28</sup> Cf. C. Vigneau *et al.*, *Fixed-term work in the EU. A European agreement against discrimination and abuse*, SALTSA, National Institute for Working Life, Stockholm 1999 and C. Barnard, *EC Employment Law*, 3rd ed., Oxford University Press, Oxford 2006, pp. 479 ff. Clause 3 states that for the purpose of the agreement, the term ‘fixed-term worker’ means a person having an employment contract or relationship entered into directly between an employer and a worker, where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task or the occurrence of a specific event.

<sup>29</sup> See Numhauser-Henning 2002, p. 433, cf. J. Murray, Normalising Temporary Work, *Industrial Law Journal*, Vol. 28, No 3, 1999, pp. 269–275.

<sup>30</sup> Cf. Numhauser-Henning 2002 and C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

vacancies which become available in the undertaking or establishment, to ensure that they have the same opportunity to secure permanent positions as other workers (cf. clause 6).

Together with the 1997 Green Paper on a new organisation of work, the 1998 Employment Guidelines, and the Part-Time Work Directive, the Fixed-Term Work Directive can be said to constitute the early developments in a 'build-up' of an EU flexicurity discourse and strategy.<sup>31</sup> The notion of flexicurity – the successful balance between flexibility and security – relates to Atkinson's model of *the flexible firm*, often referred to in labour market flexibility research. The flexible firm is made up of three different labour force segments. The *core group of workers* is typically offered high-quality working conditions and employment protection. Workers in the core group have firm-specific skills and are not easily recruited from outside the firm. The *peripheral group of workers* consists of workers with a looser connection to the firm. These workers have general, less firm-specific skills, and are often employed on fixed-term or part-time employment contracts. The *external group of workers*, finally, is made up of workers who are utilised, but *not* employed, by the firm, such as self-employed persons or temporary agency workers. The employer typically makes use of different flexibility strategies with regard to these labour force segments.<sup>32</sup> *Numerical flexibility* relates both to the form and duration of the employment contract and to working-time arrangements, and primarily serves the purpose of achieving greater flexibility in the number of workers employed. In focus of numerical flexibility are precisely fixed-term work, but also part-time work, and working time flexibility. *Functional flexibility* is a matter of adaptability and versatility within permanent employment relationships, and it primarily affects the so-called core group of workers. The aim of functional flexibility is to vary the content of work in relation to the changing demands of production. Finally, *financial flexibility* is concerned with making wages more adaptable to circumstances, such as the profits of the business or the employee's knowledge and efficiency.<sup>33</sup>

The much debated 2006 Green Paper on the modernisation of labour law discussed the role labour law could play in promoting growth and jobs, and advancing flexicurity. Following a report by the European Expert Group on Flexicurity, the Council adopted Common Principles of Flexicurity to be integrated into the European Employment Strategy and the Lisbon Strategy for Growth and Jobs.<sup>34</sup> Flexicurity is described at EU level as an integrated strategy to enhance, at the same time, flexibility and security in the labour market, and contains the following components: flexible and reliable contractual arrangements; comprehensive life-long learning; effective active labour market policies; and modern social security systems. Member States are to utilise different pathways to flexicurity dependent on their labour law, industrial relations, and social security systems. Flexible and reliable

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<sup>31</sup> Prominent national examples of successful flexicurity strategies and policies, often put forward by the OECD and the European Commission, are the 1999 Dutch Flexibility and Security Act and the Danish 'Golden Triangle of Flexicurity', see, for example, European Expert Group on Flexicurity, T. Wilthagen (rapporteur), *Flexicurity Pathways. Turning hurdles into stepping stones*, Brussels 2007.

<sup>32</sup> See J. Atkinson, Manpower Strategies for Flexible Organisations, *Personnel Management*, August 1984, pp. 28–31 and M. Rönmar, The Managerial Prerogative and the Employee's Obligation to Work: Comparative Perspectives on Functional Flexibility, *Industrial Law Journal*, Vol. 35, No 1, 2006, pp. 56–74.

<sup>33</sup> See Rönmar 2006.

<sup>34</sup> See European Commission, Green Paper, *Modernising labour law to meet the challenges of the 21st century*, COM(2006) 708 final, European Expert Group on Flexicurity 2007 and European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, COM(2007) 359 final.

contractual arrangements aim at reduced labour market segmentation and equal treatment of both permanent employees and fixed-term workers. Such equal treatment can be achieved through a new balance between numerical and functional flexibility, deregulation of employment protection and the creation of a ‘tenure track’ approach, and progressive employment protection, all of which are partly reflected in the Fixed-Term Work Directive. Employability and labour market transitions are also in focus.

The principle of non-discrimination in the Part-Time Work Directive and Fixed-Time Work Directive was implemented in Sweden through the creation of a new Act, the 2002 Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act (SFS 2002:293).<sup>35</sup> The Act was aligned with other Swedish non-discrimination legislation, and contains prohibitions on direct and indirect discrimination, thereby going beyond the requirements of the Directives.<sup>36</sup> The principle of non-discrimination in the Fixed-Term Work Directive is limited in that it requires the unfavourable treatment of the fixed-term worker to relate *solely* to the fixed-term employment contract, and it also enables the employer to justify even a direct discriminatory behaviour with objective grounds.<sup>37</sup> There was no explicit implementation as regards clause 5 of the Framework Agreement and measures against abuse of successive fixed-term employments. The existing regulation – building on the permanent employment contract as the main rule and a requirement for objective reasons and/or rules on maximum duration for first time and successive fixed-term employment contracts as regards, for example, temporary substitute employment, built into the ‘catalogue’ of permitted fixed-term employment contracts in sections 5–6 of the 1982 Employment Protection Act – was deemed satisfactory (Section 3).<sup>38</sup> Clause 6 and the obligation for the employer to inform fixed-term employees about any vacancies as regards permanent employment contracts or probationary employment was later introduced into the 1982 Employment Protection Act (cf. section 6f).<sup>39</sup>

<sup>35</sup> See Government Bill Prop. 2001/02:97 *Lag om förbud mot diskriminering av deltidsarbetande arbetstagare och arbetstagare med tidsbegränsad anställning, m.m.* Existing labour law legislation and collective agreements were in principle deemed, with regard to fixed-term employees, to be in line with the principle of non-discrimination of the Directive. – There is no tradition in Sweden to differentiate terms and conditions of employment between fixed-term employees and permanent employees, cf. Engblom 2008 and Numhauser-Henning 2004. – However, legislation was necessary with regard to part-time work, and in the interest of legal transparency and coherence, a common Act was created. Cf. European Commission, *Commission Staff Working Document, Report by the Commission services on the implementation of Council Directive 1999/60/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term work concluded by ETUC, UNICE and CEEP (EU-15)*, SEC(2006) 1074.

<sup>36</sup> See Numhauser-Henning 2002. Cf. section 3 on direct discrimination: ‘an employer may not disfavour an employee working part-time or an employee with fixed-term employment by applying less beneficial pay or other terms and conditions of employment than the employer applies or should have applied for employees in a similar situation who work full time or have a permanent employment contract respectively, unless the employer demonstrates that the disfavour is not related to the part-time work or permanent employment contract of the person disfavoured, indirect discrimination’ and section 4 on indirect discrimination: ‘an employer may not disfavour an employee working part-time or an employee with fixed-term employment by applying pay or other terms and conditions of employment that appear to be neutral but which in practice is particularly disadvantageous to employees working part-time or employees with fixed-term employment. However, this does not apply if the application of the terms and conditions can be justified by a reasonable goal and the means are appropriate and necessary in order to achieve the goal’.

<sup>37</sup> Cf. Government Bill Prop. 2001/02:97, p. 31.

<sup>38</sup> See Government Bill Prop. 2001/02:97, pp. 50 ff, Numhauser-Henning 2002 and Engblom 2008.

<sup>39</sup> Numhauser-Henning has pointed to a weakness in the implementation of the Directive linked to the ‘semi-compelling’ nature of the 1982 Employment Protection Act, namely the fact that the Act has not been

### 3. Current regulation on fixed-term employment contracts

The latest, and in some respects fundamental, reform of the regulation of fixed-term employment contracts entered into force on the 1<sup>st</sup> of July 2007. The reform aimed at simplifying and clarifying the regulation of fixed-term employment contracts (i.e., revising the long ‘catalogue’ of permitted fixed-term employment contracts in sections 5–6 of the 1982 Employment Protection Act), but also at meeting the need for security and involvement of employees within a flexible and efficient labour market.<sup>40</sup> Thus, the reform was set against the background of the Fixed-Term Work Directive. The centre-right government also explicitly wanted to increase the possibilities for employers to make use of fixed-term employment contracts.<sup>41</sup>

Most of the basic principles regarding the regulation of fixed-term employment contracts still remain. Thus, permanent employment is the main rule; fixed-term employment contracts have to be agreed upon, and specifically provided for by law or collective agreement. A fixed-term employment contract is concluded for a limited period of time, and terminates at the expiry of the agreed term, without the need for notice. Collective bargaining and provisions on fixed-term employment contracts in specific statutes or regulations, respectively, can both narrow and widen the scope for fixed-term employment contracts.

However, in part, the new reform represents a new stance towards fixed-term employment contracts. The long ‘catalogue’ of fixed-term contracts has been replaced by a new form of fixed-term contract – ‘general fixed-term employment’ (*allmän visstidsanställning*, cf. section 5 of the 1982:80 Employment Protection Act), supplemented only by temporary substitute employment, seasonal employment, fixed-term contracts for employees above the age of 67 years, and probationary employment.<sup>42</sup> Thus, the legal scope for fixed-term employment contracts is now broader. The employer is free to enter into general fixed-term employments, and there is no requirement for objective reasons. In principle, the employer may use only fixed-term employment contracts and conduct his or her entire business using flexible employees. However, when an employee has been employed –

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complemented with a reference to the Fixed-term Work Directive when it comes to limiting the competence of the social partners who enter into collective agreements, the way this is usually done when transposing EC Directives, see Numhauser-Henning 2002. The duty according to Clause 6(2) to as far as possible facilitate access by fixed-term workers to appropriate training opportunities to enhance their skills, career development and occupational mobility seems more or less ‘voluntary’ and has not been explicitly implemented.

<sup>40</sup> Cf. Government White Paper Ds 2002:56 and Government Bill Prop. 2006/07:111 *Bättre möjligheter till tidsbegränsad anställning, m.m.*

<sup>41</sup> This was to be seen in relation to a similar proposal, put forward by the former social-democratic government (which had also been decided by Parliament and was to enter into force on the 1<sup>st</sup> of July 2007) for a reform of the regulation of fixed-term employment contracts. This reform also aimed at simplification and clarification, but was stricter regarding the scope for fixed-term employment contracts (it provided, for example, for a so-called free fixed-term employment contract for up to 14 months during a five-year period, and a strengthened priority right to re-employment), see Government Bill Prop. 2005/06:185 *Förstärkning och förenkling – ändringar i anställningsskyddslagen och föräldraledighetslagen*, cf. Engblom 2008.

<sup>42</sup> See Government Bill Prop. 2006/07:111. Section 5 of the 1982 Employment Protection Act states: ‘A contract of employment for a fixed-term may be concluded 1. for a general fixed-term employment, 2. for a temporary substitute employment, 3. for a seasonal employment, and 4. when the employee has attained the age of 67. If an employee has been employed for a period of five years by an employer either for a general fixed-term employment for in aggregate more than two years, or as a temporary substitute for in aggregate more than two years, the employment is transformed into a permanent employment’.

in a general fixed-term employment *or* as a temporary substitute – by one employer for a total of two years during the last five years, the contract is automatically converted into an indefinite permanent employment contract (cf. section 5 subsection 2 of the 1982 Employment Protection Act).

This reform can thus be said, in line with the Fixed-Term Work Directive, to normalise the fixed-term contract for a short duration, and at the same time limit the scope for successive fixed-term employment contracts. In addition, there is a progressive build-up of rights for employees.

Principally, temporary substitute employment is only permitted – so-called *genuine* temporary substitute employment – if the employment is linked either to an employee who is temporarily absent or to a position which is temporarily free. However, in its case law, the Labour Court has ‘softened’ these requirements, and today it suffices if the temporary substitute employment in more general terms reflects the actual staffing situation, and is based on the absence of permanent employees.<sup>43</sup> The need for and use of temporary substitute employment in Sweden must also be seen in relation to Swedes’ extensive statutory rights to leave of absence from work, such as 18 months of parental leave and right to leave from work to conduct studies.

Seasonal work is permitted when it is necessitated by the special nature of the work, and most frequently used in specific sectors, such as agriculture and tourism.<sup>44</sup> Fixed-term employment is also permitted without any restrictions, when the employee is 67 years of age or older.<sup>45</sup>

In addition, section 6 of the 1982 Employment Protection Act provides for probationary employment (‘hiring on trial’), frequently used in the Swedish labour market. Probationary employment was not affected by the latest reform.<sup>46</sup> As with all fixed-term employment contracts, probationary employment must be specifically agreed upon, and is permissible only if the trial period is no more than six months. The provision on probationary employment is, however, ‘semi-compelling’. Some collective agreements limit the period from six to three months, and other collective agreements specify more closely, and sometimes also more restrictively, the conditions for using probationary employment.<sup>47</sup> If the employer or the employee does not want the employment relationship to continue, they must inform the other party to the contract, no later than the end of the trial period. If this is not done, the

<sup>43</sup> See Government White Paper Ds 2002:56, pp. 219 ff., and, for example, Labour Court judgments AD 1985:30 and AD 2002:3.

<sup>44</sup> See Government Bill Prop. 2006/07:111, pp. 24 f.

<sup>45</sup> This provision is complemented by sections 32a and 33 of the 1982 Employment Protection Act. Section 32a states that ‘an employee is entitled to remain in the employment up to the end of the month when he or she attains the age of 67’ and section 33 states that ‘an employer desiring an employee to leave his or her employment at the end of the month when he or she attains the age of 67 shall give the employee at least one month’s written notice of such desire’. According to Numhauser-Henning, these provisions are likely to be in accordance with the prohibition of discrimination on grounds of age as expressed in Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, general principles of EU law, the case law of the European Court of Justice (cf. C-144/05 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981 and C-411/05 *Palacios de la Villa* [2007] ECR I-8531) and the Swedish 2008 Non-Discrimination Act, cf. A. Numhauser-Henning, Åldersdiskriminering och några anställningsskyddsrelaterade frågor, In: K. Ahlberg (ed.), *Vänbok till Ronnie Eklund*, Iustus, Uppsala 2010, pp. 439–476. This is also the standpoint of the Swedish Equality Ombudsman.

<sup>46</sup> During a shorter period in the 1990s, the 1982 Employment Protection Act provided for 12 months of probationary employment.

<sup>47</sup> See Lunning and Tojter 2006, p. 261.

probationary employment is automatically converted into an indefinite employment contract. Thus, probationary employment differs from other forms of fixed-term employment contracts, which expire at the end of the agreed period. Inherent in the nature of probationary employment is both the employer's need to initially 'try out' the employee, and the later automatic conversion into an indefinite employment contract.<sup>48</sup>

No objective reasons are needed for the employer's use of probationary employment, and such use can therefore not be legally scrutinised in the court. In exceptional cases, the use of probationary employment may be legally challenged, for constituting a circumvention of the 1982 Employment Protection Act (cf. Labour Court judgement AD 1987:148).<sup>49</sup> In addition, the employer's termination of the probationary employment contract cannot be legally scrutinised or challenged within the framework of the 1982 Employment Protection Act. Such a termination can, however, be legally scrutinised as constituting, for example, a violation of the freedom of association (cf. Labour Court judgement AD 2004:49), or a violation of non-discrimination legislation (cf. Labour Court judgement AD 2002:102).<sup>50</sup>

In order to give the employee some respite and the possibility to discuss the situation with the employer, the employer is obliged to inform the employee, and his or her trade union, of the termination of the probationary employment contract two weeks in advance (cf. section 31 of the 1982 Employment Protection Act). The employee and the trade union have a right to consult the employer. These provisions on information and consultation are merely 'provisions of form'. A breach of these provisions is thus sanctioned only by the employer paying damages, and does not in any way affect the validity of the termination of the probationary employment contract.

Likewise, the employer is obliged to inform (give notice to) the employee and his or her trade union one month before the termination of a fixed-term employment contract concluded according to section 5 of the 1982 Employment Protection Act (general fixed-term employment, temporary substitute employment etc.), provided the employee has been employed for a total of 12 months during the last three years (cf. sections 15–17 and 30a of the 1982 Employment Protection Act). The employee and the trade union have a right to consult the employer.

An employee with a fixed-term contract (but for probationary employment), who has been employed in total for more than twelve months during the last three years with the employer, and whose employment has been terminated for reasons of redundancy, has a so-called priority right of re-employment (cf. section 25 of the 1982 Employment Protection Act).<sup>51</sup> The priority right of re-employment is on condition that the employee is sufficiently qualified, and re-employment offers are to be presented to employees in accordance with the 'last-in-first-out' principle. A priority right of re-employment exists even if re-employment of the employee implies 'crossing' the two-year limit and the fixed-term employment contract automatically being converted into a permanent employment contract.<sup>52</sup>

An employer who is bound by a collective agreement and concludes a fixed-term contract with an employee for work to which the collective agreement applies, shall notify the relevant local trade union organisation without delay. No such notice is necessary if the

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<sup>48</sup> See Lunning and Toijer 2006, pp. 259 ff. and Källström and Malmberg 2009, p. 116 f.

<sup>49</sup> See Lunning and Toijer 2006, pp. 261 ff.

<sup>50</sup> Cf. Källström and Malmberg 2009, p. 116 f.

<sup>51</sup> Specific time limits apply for seasonal employment (cf. section 25 of the 1982 Employment Protection Act).

<sup>52</sup> See Källström and Malmberg 2009, p. 118.

employment is not to exceed one month (cf. section 28 of the 1982 Employment Protection Act).

The Swedish Labour Court (*Arbetsdomstolen*) was established in 1928, originally aiming at resolving disputes relating to the collective bargaining system. Nowadays, the jurisdiction of the Labour Court is the widest possible, and encompasses all kinds of labour disputes concerning the application of labour law legislation or collective agreements. The Labour Court is a tripartite body comprised of judges with judicial background and of members representing both sides of the labour market. The representatives of the social partners constitute the majority of the court in most instances. The Labour Court acts as the Supreme Court in labour disputes. It is also the first instance in all proceedings filed by an employers' organisation or a trade union. That is to say, in the absolute majority of cases, the Labour Court serves as the first and only instance, leaving no room for appeal. (The procedure in labour disputes is regulated by the 1974 Act on Litigation in Labour Disputes (SFS 1974:371). The Labour Court tries only about 200 cases each year, so only a small proportion of all Swedish labour disputes reaches its courtroom. The main reason for this is that in order for the Labour Court to try a case, all possibilities to solve the dispute by way of negotiation must have been exhausted. Thus, negotiations both at local and national level must have been conducted, and must have failed in order for the case to be admitted to the Labour Court. As a result, many disputes are settled out of court.<sup>53</sup>

A fixed-term employment contract that has been entered into in violation of the provisions of the 1982 Employment Protection Act (for example, a temporary substitute employment contract that is not genuine) can be declared by the court as an indefinite permanent employment contract (section 36 of the 1982 Employment Protection Act) This declaration can be combined with damages, both financial and punitive (cf. section 38 of the 1982 Employment Protection Act). If the employer does not adhere to such a judgment, the court will declare the employment relationship dissolved and award the employee specific 'standardised' damages in high amounts, relative to the duration of the employment relationship (cf. section 39 of the 1982 Employment Protection Act). If the employer does not acknowledge the automatic conversion of a general fixed-term employment or a temporary substitute employment into a permanent employment contract, the employee can, for example, make a claim to have the permanent status of the employment contract established, combined with a claim for damages.<sup>54</sup>

The periods of employment spent in general fixed-term and temporary substitute employment are non-cumulative. An employee can therefore be employed for a total of four years (within a five-year period; seasonal and probationary employment may, in principle, be added to this).<sup>55</sup>

In 2007 the Swedish Confederation for Professional Employees (TCO) made a formal complaint to the European Commission as regards the Swedish State's failure to correctly implement the Fixed-Term Work Directive with regard to clause 5 and the measures to prevent abuse arising from the use of successive fixed-term employment contracts. TCO

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<sup>53</sup> In Sweden there are no labour inspectorates. Instead, a large part of the control of the enforcement of labour law legislation and collective agreements is performed by the trade unions, together with some government authorities, such as the Working Environment Authority and the Discrimination Ombudsman.

<sup>54</sup> See Källström and Malmberg 2009, p. 119.

<sup>55</sup> The Government Bill Prop. 2006/07:111 acknowledges this fact, but doubts that misuse will occur on any large scale. If, however, future and frequent misuse occur, the government states that it will investigate and contemplate future reforms.

criticised the content of the 2007 reform of the regulation of fixed-term employment contracts, *inter alia* the vast scope for general fixed-term employment without any need for objective reasons, and the effects on the non-cumulative calculation of the periods of employment spent in general fixed-term employment and temporary substitute employment. In March 2010 the European Commission made a formal notification (the second step in the infringement procedure) to the Swedish government regarding the insufficient implementation of the Directive. The Swedish government was given two months to reply.<sup>56</sup>

There is only a very limited case law concerning the principle of non-discrimination in the 2002 Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act. As of yet, no employees have had any success in claiming discrimination. As with case law from the European Court of Justice, it has been difficult to prove that a person is in a *comparable situation* (with a full-time or permanent employment), or that one has been treated less favourably *solely* on grounds of a part-time or fixed-term employment contract.<sup>57, 58</sup>

The Swedish social security system has (like the labour law system), a homogeneous and uniform character, and covers not only all categories of employees – permanent employees and fixed-term employees – but also self-employed workers. However, fixed-term employees may have greater difficulties in fulfilling the work requirements necessary in order to qualify for unemployment benefits (cf. the 1997 Unemployment Insurance Act).<sup>59</sup>

#### 4. Concluding remarks

Naturally, it is still too early (*inter alia* with regard to the lack of case law from the Labour Court) to evaluate the full effects of the 2007 reform of the regulation of fixed-term employment contracts. In line with the Fixed-Term Work Directive this reform, together with the 2002 Prohibition of Discrimination of Employees Working Part-Time and Employees with Fixed-Term Employment Act, combines to some extent, however, minor, requirements for objective reasons for the entry into fixed-term employment contracts with the setting of upper limits for the maximum duration of successive fixed-term employment contracts, and the establishing of a principle of non-discrimination.

Earlier studies show that collective bargaining (allowing for a broader or, as perhaps more often is the case, a narrower scope for fixed-term employment contracts) serves to ‘cushion the blow’ and delay the effects of statutory reforms.<sup>60</sup> One possible negative side-effect of limiting the maximum duration of successive fixed-term employment contracts –

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<sup>56</sup> Cf. TCO, *Anmälan mot Konungariket Sverige på grund av att nya regler om visstidsanställningar i Sverige innebär ett bristande genomförande av Direktiv 1999/70/EG om ramavtalet om visstidsarbete undertecknat av EFS, UNICE och CEEP*, Stockholm, 2007-06-20, Engblom 2008 and C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057.

<sup>57</sup> Cf. Labour Court judgment AD 2008:32 (wages for fixed-term and part-time employees, being advertisement producers), Labour Court judgment AD 2008:97 (vacation for fixed-term employed actors) and Case C-313/02 *Nicole Wippel v Peek & Cloppenburg GmbH & Co. KGK* [2004] ECR I-9483, see also Barnard 2006, pp. 472 ff.

<sup>58</sup> There is no specific discussion on a conflict of interest between permanent and fixed-term employees with regard to the principle of non-discrimination. The trade unions represent both permanent and fixed-term employees; however, as previously stated, the trade union organisation rate is lower among fixed-term employees than among permanent employees.

<sup>59</sup> See Engblom 2008, p. 137. The unemployment insurance system and the health insurance system etc. have been the object of much debated reforms by the current centre-right government.

<sup>60</sup> See Government White Paper Ds 2002:56, pp. 227 ff. and Engblom 2008.



especially when combined with the priority right of re-employment in case of redundancy – is the risk of employees not being offered further employment when the time limit (12 months and two years, respectively) for the priority right to re-employment and conversion of the fixed-term employment into a permanent employment is approaching. Earlier rules of a similar character have proven to have such effects in certain sectors, for example in the media sector.

The basic content of the 2007 reform – the simplification and clarification of the regulation on fixed-term employment contracts – was not disputed by the social partners. However, the trade unions criticise the upper limits for general fixed-term employment and successive fixed-term employments as being too generous. Today, in the midst of the large 2010 national collective bargaining round, the major debate in the field of employment protection revolves mostly around the existence and content of the seniority rules and the scope for employers to engage temporary agency workers following dismissals for reasons of redundancy and the risks for circumvention of the employment protection.

The Swedish regulation on fixed-term employment contracts is well in line with the current flexicurity strategy and discourse. Fixed-term employment contracts for a short duration are normalised, and employers are offered increased numerical flexibility by way of general fixed-term employment and temporary substitute employment. Employees are provided with security through upper limits for maximum duration of successive fixed-term employment contracts, and the conversion of these fixed-term employment contracts into permanent employment contracts. In addition to all this, there is a progressive build-up of rights and employment protection in the form of information, consultation and priority rights to re-employment. The ‘semi-compelling’ character of the 1980 Employment Protection Act and the scope for and use of collective bargaining as regards fixed-term employment contracts are expressions of the element of procedural flexibility inherent in the Swedish industrial relations and labour law system.<sup>61</sup>

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<sup>61</sup> Cf. Rönmar 2006.

# The Regulation of Fixed-term Employment in Japan

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## I. Introduction

Fixed-term employees and, more generally, atypical employees have been provided less employment security and employment protection than regular, permanent employees. The limited security and protection of atypical employees has become one of the most important issues of present-day Japanese labor and employment law, given that more than one-third of Japan's employees today are atypical employees. This article discusses the current state of fixed-term employees in the Japanese labor market and the legal regulations that affect them.

First, the position of fixed-term employees in the Japanese labor market and their characteristics are analyzed (section II). Then, the development and current state of legal regulations *vis-à-vis* fixed-term employment will be discussed, with the focus on limitations on the maximum allowable period for a single contract term and refusals to renew a fixed-term contract (sections III and IV). The article concludes with an evaluation of current regulations of fixed-term employment, as well as future prospects (section V).

## II. General overview of fixed-term employment in the Japanese labor market

### 1. Structure of the Japanese labor market, and the increased prevalence of atypical and fixed-term employment

#### (1) Positions of regular and atypical employees in the Japanese labor market

For years, Japan has been known for its long-term employment practices (or “lifetime employment,” though this term is now seldom used). Under this practice, regular employees (*Sei-syain* in Japanese), who are regarded as core members of a company, are typically hired just after they have graduated from school, under indefinite-term employment contracts<sup>1</sup> and as full-time employees; from there, they tend to enjoy secure and stable employment until retirement age. Law has also endorsed this practice and provided considerable employment security to regular employees.<sup>2</sup> Under the Civil Code, an indefinite-term employment contract may be terminated by either party at any time, with two weeks' prior notice (Article 627,

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<sup>1</sup> Japanese labor and employment statutes generally use the term “labor” instead of “employment” (e.g., “labor contract” rather than “employment contract”), while the Civil Code utilizes the word “employment.” These two contracts are identical in substance (see Nakakubo, *infra* note 20 at 4). In this paper, except in reference to the titles and provisions of labor and employment statutes, the term “employment” is generally used, for the convenience of international readers.

<sup>2</sup> For further English-language details on the development of employment securities given to regular employees, see Takashi Araki, *Labor and Employment Law in Japan* (2002), 18–30.

Paragraph 1 of the Civil Code), and until recently, there has been no statutory provision that generally restricts dismissal. Nonetheless, case law<sup>3</sup> has set relatively severe limits on employers' ability to exercise the right to dismiss, under the doctrine of "abuse of the right to dismiss"—where a dismissal shall be null and void if it lacks objectively reasonable grounds or if it is not recognized as socially acceptable—thus *virtually* requiring just cause for dismissal. The case law is now codified<sup>4</sup> into Article 16 of the *Labor Contract Act* of 2006.<sup>5</sup>

Nonregular and otherwise atypical employees—such as part-time employees or temporary agency workers—on the other hand, have experienced different employment practices. These employees are typically employed under a fixed-term employment contract<sup>6</sup> and are guaranteed limited employment security; an employer can simply allow the employment contract to expire at the end of its term if it no longer wishes to continue the employment relationship. As will be discussed, although case law has provided employment security to some types of fixed-term employees, the extent of the protection is rather limited.<sup>7</sup> Atypical employees are considered, both practically and legally, "buffers" against economic downturns as they allow an employer to flexibly adjust its workforce in response to changing economic situations against a background of rather severe limitations *vis-à-vis* the dismissal of regular employees with indefinite-term employment contracts. In addition, atypical employees are in most cases paid less than regular employees, enabling employers to save labor costs. In other words, atypical employment—and typically fixed-term employment as well—has functioned as an indispensable complement to the long-term employment practice of regular employees.

## (2) Increases in atypical and fixed-term employment since the mid-1990s

Both the long-term employment practice and the prevalence of atypical-employment positions in the Japanese labor market have experienced major changes since the mid-1990s.

Until 1995, employees undertaking atypical employment had been approximately 20% of all employees. Although the percentage of atypical employees had increased from 16.4% in 1985 to 20.9% in 1995—an increase of roughly 27.4%—this period also saw an increase in the absolute number of regular employees. However, the percentage of atypical employees has risen relatively sharply since then, reaching 34.1% in 2008—in other words, more than one-third of all Japanese employees are now nonregular employees. On the other hand, the number of regular employees has decreased since 1995, reaching in 2008 a level not seen since the late 1980s. It seems that the long depression in the 1990s, following the collapse of the bubble economy and the intensification of the global competition led employers to increase their use of atypical employees while limiting the number of regular employees, in order to cut costs. While long-term employment is still a fundamental characteristic of the Japanese employment system,<sup>8</sup> its prevalence is diminishing; the number of employees not

<sup>3</sup> *Shioda v. Kochi Hoso Co.*, 268 *Rodo Hanrei* 17 (S. Ct., Jan. 31, 1977). For an English translation of the summary of this decision, see Kenneth L. Port & Gerald Paul McAlinn eds., *Comparative Law: Law and the Legal Process in Japan* (2003), 566–568.

<sup>4</sup> Case law of the doctrine of abusive dismissal was first written into Article 18-2 of the *Labor Standards Act* in 2003. This provision was transferred into Article 16 of the *Labor Contract Act*, when it was legislated in 2006, without modifying its content.

<sup>5</sup> See generally Ryuichi Yamakawa, "The Enactment of the Labor Contract Act: Its Significance and Future Issues," Vol. 6, No. 2 *Japan Labor Review* 4 (2009) for the legislative history and the content of the *Labor Contract Act*.

<sup>6</sup> Araki, *supra* note 2, at 19.

<sup>7</sup> See *infra* III. 2.

<sup>8</sup> See Araki, *supra* note 2, at 18–23.

participating in this practice has been increasing since the mid-1990s, in terms of both absolute numbers and as a percentage of the total workforce.

As the number and percentage of atypical employees have increased since the mid-1990s, so too has the percentage of employees with fixed-term employment contracts. Although it is difficult to ascertain the precise numbers involved—due to differences in methodological procedures<sup>9</sup>—the following surveys provide one with a general idea of the percentage of fixed-term employees.

According to the Labor Force Survey,<sup>10</sup> the ratio of employees with fixed-term contracts<sup>11</sup> to all employees had long remained at around 10%, until the mid-1990s; since then, the percentage of atypical employees has begun to surge, and so the percentage of fixed-term employees also began to rise, albeit relatively gradually. It reached 14% in 2005 and has remained virtually unchanged since then. Another survey—namely, the 2009 Survey on the Current Situation of Fixed-Term Employment Contracts (hereinafter, the “2009 Survey”)<sup>12</sup> reports that the ratio of employees with fixed-term employment contracts to all regular employees (*Jo-yatoi* in Japanese) is 22.2%. In reality, the percentage of Japanese employees with fixed-term employment contracts is thought to be somewhere between these two figures. On the one hand, since the Labor Force Survey data regard only those employed on a temporary or daily basis as employees with fixed-term contracts and exclude employees under a fixed-term contract of more than one year, the 14% figure may be overly conservative. On the other hand, because the 2009 Survey excludes from the total population establishments with fewer than five employees—establishments in which the use of fixed-term employment contracts is less prevalent than in larger establishments—it seems that the 22.2% figure would be slightly higher than the reality.

## 2. Characteristics and attributes of fixed-term employees

To understand the characteristics and attributes of fixed-term contract workers, Japan’s Ministry of Health, Labor, and Welfare intermittently conducts surveys on the current state of fixed-term employment contracts. In the following, several features of fixed-term employment are discussed; the discussion relies mainly on two recent surveys that examine the current state of fixed-term employment contracts: the 2005 Survey on the Current Situation of Fixed-term Employment Contracts (hereinafter, the “2005 Survey”)<sup>13</sup> and the 2009 Survey.

### (1) Fixed-term employment and other types of atypical employment

As previously mentioned, regular employees are hired under an employment contract of indefinite duration, while nonregular, atypical employees are typically employed under a fixed-term employment contract, though not all nonregular employees are hired under a fixed-term employment contract. Just by being a fixed-term employee, it is highly likely that an individual is also a nonregular, atypical employee.<sup>14</sup>

<sup>9</sup> See *infra* notes 11, 15, and 18.

<sup>10</sup> Historical data no. 9 of the *Labor Force Survey*, available at: <http://www.stat.go.jp/english/data/roudou/lnindex.htm> (last accessed April 10, 2010).

<sup>11</sup> Note that, as explained in the main text below, the term “employees with fixed-term contracts” in the *Labor Force Survey* does not include employees under a fixed-term contract lasting more than one year.

<sup>12</sup> Available at: <http://www.mhlw.go.jp/shingi/2009/09/s0930-10.html> (last accessed April 10, 2010).

<sup>13</sup> Available at: <http://www.mhlw.go.jp/toukei/list/41-17.html> (last accessed April 10, 2010).

<sup>14</sup> A fixed-term employment contract is often enacted not because the job involved is a temporary or casual one, but because the employer wants to distinguish the employee from regular employees and to treat him or her as a

The 2005 Survey<sup>15</sup> reveals that 54.9% of fixed-term employees are part-time employees (*i.e.*, those whose daily working hours or weekly working days are shorter than those of the regular employees at the same workplace). In all, 17.4% of the fixed-term employees are part-time employees “in name only” (*i.e.*, their working hours or working days are basically the same as those of regular employees, but they are called “part-time employees” within the company and treated as nonregular employees, as well as distinguished from regular employees). In all, 11.0% of fixed-term contract workers are contract workers<sup>16</sup> and 7.7% are entrusted workers.<sup>17</sup> While various types of atypical employment exist under fixed-term employment contracts, part-time employment is considered the most typical form of employment involving fixed-term contracts.<sup>18</sup>

## (2) Gender, age, and types of fixed-term employees

According to the 2005 Survey, nearly two-thirds (63.7%) of fixed-term employees are female. However, the male–female ratio among the different types of fixed-term contract varies. Part-time employees and “in name only” part-time employees consist largely of women (75.0% and 67.1%, respectively), while entrusted workers are overwhelmingly male (78.8%). Contract workers almost evenly comprise men and women.

According to the 2005 and 2009 Surveys, the average age of employees with fixed-term contracts is 44.1 and 39.9, respectively. In the 2005 Survey, the age categories of 50–54 (13.1%), 40–44 (12.3%), and 60–64 (11.6%) are more prominent (*i.e.*, comprise larger percentages of workers) than other age categories. The presence of the 15–19 and 20–24 age categories is not large (1.8% and 7.8%, respectively). As for male workers, nearly one-quarter of them fall under the age category of 60–64, while about one-half (49.4%) of them are 55 years old or above. Many female workers are found within the following age categories: 40–44 (15.6%), 45–49 (13.2%), and 50–54 (15.7%).

Just as the gender distribution within each fixed-term contract worker typology is different, so too is the distribution of age categories. Nearly 40% of the male contract workers are 55 years old or above, while about one-half of all female contract workers are between the ages of 20 and 34 years. Nearly 80% of all entrusted workers are 55 years or older. As for

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nonregular employee. In other words, the initiation of a fixed-term employment contract often confers upon an employee the “status” of “nonregular employee.” See Shimada, *infra* note 60, at 859.

<sup>15</sup> The 2005 Survey divides fixed-term employees into five categories: contract workers, entrusted workers, part-time employees, “in name only” part-time employees, and other employees. Note that temporary agency workers are excluded from the survey, for unexplained reasons.

<sup>16</sup> “Contract worker” (a literal translation of the Japanese expression *Keiyaku-syain*) is quite a strange expression, since every Japanese worker works under some kind of contract. This term generally refers to those workers who are hired for their special skills or knowledge and are engaged in specific work or a project, for only a fixed period. Note that the term is a general term and does not in itself have a specific legal meaning with respect to the terms and conditions of employment.

<sup>17</sup> “Entrusted worker” (*Syokutaku-syain* in Japanese) is in most aspects similar to “contract worker.” One major difference is that this term usually refers to those who are rehired after they have reached retirement age.

<sup>18</sup> According to the 2009 Survey, which adds to the 2005 Survey typology the category of “temporary agency worker,” 34.6% of fixed-term employees are of that type; 14.1% are part-time employees and 15.5% are “in name only” part-time employees. Contract workers and entrusted workers occupy 26.0% and 6.3% of all fixed-term contract employees, respectively. Although the 2009 Survey indicates that “temporary agency worker” is the most representative form of fixed-term employment, there is the possibility that the result does not necessarily represent the true circumstances, considering the fact that the number of temporary agency workers (1.4 million in 2008) is far lower than the number of part-time employees (*i.e.*, part-time employees and “in name only” part-time employees, which together comprised a total of 8.21 million in 2008).

part-time employees—especially female part-time employees—the age categories of 40–44, 45–49, and 50–54 are more prominently represented than are the others.

In summary, the majority of fixed-term employees are female, and women (especially those aged 40–54) comprise the majority of part-time employees with fixed-term employment contracts; meanwhile, most of the male fixed-term employees are elderly and work as entrusted workers.

### **(3) The aims in enacting a fixed-term employment contract**

According to the 2005 and the 2009 Surveys, employers use fixed-term employment for three main reasons: (1) to deal with mid- to long-term business fluctuations and adjust its workforce in response thereto, (2) to reduce labor costs, and (3) to make use of experienced elderly employees. According to the 2005 Survey, reducing labor costs is a dominant impetus for employers in hiring part-time and “in name only” part-time employees; similarly, making use of experienced elderly employees is the main reason that employers hire entrusted workers. It is quite clear that one of the main reasons employers initiate fixed-term employment contracts is to ensure workforce flexibility; it is noteworthy that the 2005 Survey also shows that, in the majority of cases, fixed-term employees engage in work that is similar in scope and quality to that of permanent, regular employees.

On the part of employees, some choose fixed-term employment because working hours and working days align with their personal needs and expectations; others choose fixed-term employment because regular-employee employment is not available.

### **(4) The wages and employment stability of fixed-term employees**

In general, fixed-term employees are considered to be paid wages that are lower than those of regular employees. The 2009 Survey shows that nearly one-third of employers pay 60–80% of the wages of regular employees to fixed-term employees, and about one-quarter of employers pay 80–100% of the wages of regular employees to fixed-term employees. This tendency to offer lower wages basically applies not only to those employees who are engaged in work that is easier than that performed by regular employees, but also to those who are engaged in similar work. One exception to this trend is that employers tend to pay salaries to fixed-term employees who are hired for professional knowledge or skills that are more advanced than those of the other categories of fixed-term employees discussed above; one-third of employers pay salaries to these fixed-term employees that are even higher than those of regular employees. The 2009 Survey also shows that nearly one-half of employers do not award bonuses to fixed-term employees, and most of them do not offer retirement payments.

With regards to employment stability, it is noteworthy that although the total period of employment is longer, the contract is enacted in a much shorter term. According to the 2009 Survey, the majority of employers (54%) offer fixed-term employment contracts of six months to one year, and 20% of employers offer fixed-term employment contracts of three to six months' duration. Meanwhile, in 29% of cases, the total employment duration is one to three years; the duration is three to five years in another 29% of cases, and five to 10 years in 22% of cases. These figures suggest that fixed-term contracts are, in most cases, renewed at least several times: three to five times in 40% of cases, six to 10 times in 22% of cases, and more than 10 times in 15% of cases. It is quite exceptional when contracts are not renewed: only 6% of cases result in contracts that terminate without renewal. Since in principle contracts terminate automatically at the end of the term, fixed-term employees are vulnerable and susceptible to instability, even if the employment relationship continues for a longer period.

### III. Development and current state of regulations regarding fixed-term contracts; limitations on the maximum allowable period for single contract terms and on refusals to renew fixed-term contracts

In Japan, there has been a dearth of regulations regarding fixed-term employment. There are almost no statutory regulations *vis-à-vis* fixed-term employment—at least until recently—except for the limitation of a maximum allowable period for a single contract period. For employees under fixed-term employment contracts, under such circumstances, case law has come to provide employment security to a certain extent by restricting employers' refusals to renew contracts (*i.e.*, imposing limitations on the termination of fixed-term employment contracts at the ends of their terms). In this section, both the development and current state of regulations with regards to the maximum limit for single contract terms and termination will be discussed.

A note is appropriate, however, before turning to regulations *vis-à-vis* contract periods. The period limitation discussed below is *for each single contract*; it is *not* a limitation on the *total duration* under which a fixed-term employment relationship can continue—a limitation that is found in some EU countries.<sup>19</sup> In Japan, there is no limitation on the total duration for successive fixed-term employment contracts. Therefore, for example, although under current law, in principle parties *may not* conclude a fixed-term employment contract for more than three years (three years is the maximum limit for each contract), they *may renew* the contract repeatedly and continue the relationship beyond three years, for as long as both parties wish.

#### 1. Development of regulations regarding maximum limits for single contract terms<sup>20</sup>

##### (1) Civil law regulations on fixed-term employment contracts

In principle, both parties of a fixed-term employment contract are bound to the contract during the length of the term.<sup>21</sup> Considering that, from the viewpoint of preventing involuntary servitude and of enabling parties to accommodate changing circumstances, it was inappropriate to bind parties to a too-long contract;<sup>22</sup> as a result, the Japanese Civil Code, originally enacted in 1896, stipulated that an employment contract with a fixed term exceeding five years may be terminated by either party at any time after the first five years (Article 626, Paragraph 1).

<sup>19</sup> In practice, however, employers sometimes misunderstand the regulation as imposing a limitation on the total duration of successive employment contracts; as result, they sometimes terminate contracts that had been renewed several times, as the total duration approaches the maximum limitation stipulated in the statute. See Takashi Araki, *Rodoho* [Labor and Employment Law] 414 (2009).

<sup>20</sup> For a detailed English-language explanation of the development of regulations on the maximum limit for a single contract term, see Hiroya Nakakubo, "The 2003 Revision of the Labor Standards Law: Fixed-Term Contracts, Dismissal and Discretionary-Work Schemes," Vol. 1, No. 2 *Japan Labor Review* 4 (2004), 7–10. The description within this subsection basically relies upon the information provided in this article.

<sup>21</sup> Article 628 of the Civil Code stipulates that even if the parties enact a fixed-term employment contract, either party may immediately terminate the contract if there is a compelling reason for doing so. Many scholars consider that a presupposition of this provision is that a fixed-term employment contract cannot be unilaterally terminated during the term without a compelling reason.

<sup>22</sup> See Akira Watanabe, "Chuki Koyo to Iu Koyo Gainen ni tsuite" [On the Notion of Mid-Term Employment], in Nakajima Shigeya Sensei Kanreki Kinen Hensyu Kanko Iinkai ed., *Rodo Kankei Ho no Gendaiteki Tenkai* 71, 85 (2004).

## **(2) Development of the *Labor Standards Act* (hereinafter, the “*LSA*”) limitation on single contract terms**

### **(a) *Initiation of the LSA in 1947***

The *LSA*, which was enacted shortly after World War II, shortened the five-year limitation on a single contract term to just one year, stipulating that a fixed-term employment contract shall not encompass a period of more than one year, except in cases where the contract otherwise cites the term necessary for the completion of a certain project (Article 14). The reason for the change was that many employees were placed under unduly binding contracts prior to the end of World War II and the civil law limitation of up to five years was found to be too long.<sup>23</sup>

### **(b) *The 1998 amendment to the LSA***

For more than 50 years, the *LSA* had maintained the one-year limit for a single contract term. However, criticism emerged that the limitation was too restrictive, in that employers could not retain employees with special knowledge or skills for certain, longer periods needed for their business, even as the abusive relationships often found in the pre-war period were becoming rare. This request for deregulation led to the 1998 amendment to Article 14 of the *LSA*—the first of its kind. The revision was rather limited, however, due to strong opposition from labor representatives who said that loosening the limitation would only lead to an increase in the number of unstable and low-paying jobs. The 1998 amendment, while maintaining the principle of the one-year limitation, exceptionally allowed fixed-term employment contracts of up to three years to be enacted for: (1) employees with highly specialized knowledge, skills, or experience for a certain specific business (such as research and development), when such employees are newly hired at an establishment that faces a shortage of such employees<sup>24</sup> or (2) employees aged 60 or older.<sup>25</sup> The former exception was condemned as too restrictive, in that it was applicable only to newly hired employees (*i.e.*, renewals of contracts under this exception were not allowed) and only when an establishment was experiencing a shortage of knowledgeable, skilled, or experienced employees. In fact, a survey executed after the amendment—namely, the 2001 Survey on the Current Situation of Fixed-Term Employment Contracts—shows that only about 5% of fixed-term employees fall under exception (1) above. This led to an additional amendment in Article 14 of the *LSA*, in 2003.

### **(c) *The current law: The 2003 amendment to the LSA***

The 2003 amendment brought about two changes to Article 14 of the *LSA*, with regards to the maximum duration of a single contract term: (1) a change to the basic “one-year limit” rule and (2) the deregulation and simplification of the regulation with regards to fixed-term contracts for skilled or elderly employees.

The 2003 amendment brought about changes to the basic principle of a one-year limitation on a single contract term; the maximum allowable term was extended to three years (Article 14, Paragraph 1). Under the current provision,<sup>26</sup> parties are allowed to enact, for

<sup>23</sup> See Kazuo Sugeno, *Rodoho (Dai-8-Han)* [Labor and Employment Law] 173 (8th ed., 2008).

<sup>24</sup> Article 14, Items 1 and 2 of the *LSA* (before the amendment by *Act No. 104* of 2003).

<sup>25</sup> Article 14, Item 3 of the *LSA* (before the amendment by *Act No. 104* of 2003). This amendment sought to promote stable employment among those who looked to continue to work after they had reached the mandatory retirement age.

<sup>26</sup> Derogation from the provision is not allowed: the party may not extend the maximum allowable period stipulated in Article 14 through collective bargaining agreements or other agreement forms.



example, a three-year employment contract, even if the employee is not a particularly knowledgeable, skilled, or experienced one, or an elderly worker. Although the major driving force of the 2003 amendment was to advance deregulation,<sup>27</sup> the amendment also sought to make fixed-term employment contracts a more favorable form of employment for both employers and employees.<sup>28</sup>

However, the great concern was raised that, under the amended regulation, employees would be bound to unduly long contracts. The Diet, in consideration of this concern, added in the course of discussion provisions to the effect that the modified Article 14 would be reviewed and necessary measures would be taken after three years of implementation (Article 3 of the Supplementary Provision to *Act No. 104* of 2003), and that until such measures were taken, an employee under an employment contract for the term of more than one year might terminate it at any time, after one year had passed (Article 137 of the *LSA*). No such “necessary measures” have been taken thus far, and these tentative provisions are still in effect.

As a result, under the current law—even in cases where a three-year employment contract had been enacted, for example—the employee is free to leave after one year and the employer cannot detain him or her beyond that one-year period.<sup>29</sup>

In terms of evaluations of this amendment, scholarly opinions are divided. Some are concerned that it could lead to binding employees (*i.e.*, prohibiting their resignation) for too long a period.<sup>30</sup> Others insist that both employers and employees could benefit from an extension of the maximum period, since employers will become more eager to invest in an employee if it can retain him or her for a certain, longer period; other critics assert that the employees could enjoy more favorable and stable<sup>31</sup> employment conditions, but criticize the insertion of Article 137 as a possible disincentive for employers in offering longer-term employment contracts.<sup>32</sup>

Under the 2003 revision, the special up-to-three-years limitation for fixed-term employment contracts for skilled or elderly employees was also modified; an employer may

<sup>27</sup> See Yoichi Shimada, “Kaiko, Yuki Rodo Keiyaku Hosei no Kaisei no Igi to Mondaiten” [The Significance of and Problem with the 2003 Revision to Regulations on Dismissal and Fixed-Term Employment] 1556 *Rodo Horitsu Junpo* 4, 9 (2003); and Hiroshi Karatsu, “2003nen Rokiho Kaisei to Kaiko, Yuki Keiyaku Kisei no Arata na Tenkai” [The 2003 Revision of the *LSA* and New Development of Regulation on Dismissal and Fixed-Term Employment] 523 *Nihon Rodo Kenkyu Zasshi* 4, 9 (2004).

<sup>28</sup> Scholars insist, however, that the reason itself was not sufficient justification for changing the basic principle, since it is not clear why simply extending the maximum allowable period for the single contract term leads to a fixed-term employment contract becoming more favorable, without proposing, for example, provisions for equal treatment or for termination-related regulations. See Shimada, *supra*; and Karatsu, *supra*.

<sup>29</sup> Note that Article 137 of the *LSA* is applicable only to employees. Employers cannot terminate the contract during the term without a compelling reason (Article 628 of the Civil Code and Article 17, Paragraph 1 of the *Labor Contract Act*).

<sup>30</sup> See, *e.g.*, Shimada, *supra* note 27, at 10.

<sup>31</sup> Note that the purpose of the limitation posed by the Article 14 of the *LSA* is to prevent unduly long employment relationships (see Araki, *supra* note 19, at 411–412); Article 14 has, in itself, nothing to do with securing stable employment. However, since employment under the fixed-term contract is in principle secured during the term under Article 628 of the Civil Code and Article 17, Paragraph 1 of the *Labor Contract Act* (see *supra* note 29), a longer term derives greater stability. Note also that, under a contract with a longer term, there would be fewer occasions for the term to come to an end, thus reducing the risk of the contract renewal being refused.

<sup>32</sup> See Masahiko Iwamura et al., “Kaisei Roukiho no Riron to Un’yojo no Ryuiten” [Round-table Discussion on the Theory and the Practice of Revised *LSA*] 1255 *Jurisuto* 6 (2003), 9–10 (remarks by Prof. Takashi Araki); and Watanabe, *supra* note 22, at 92–93.

now initiate an employment contract with knowledgeable, skilled, or experienced employees or elderly employees, for terms of up to five years (Article 14, Paragraph 1, Items. 1 and 2). The 2003 *Act* removed the limitation that the provision for knowledgeable, skilled, or experienced employees is applicable only to newly hired employees and only when an establishment was in shortage of such employees. In addition, Article 137 of the *LSA*, discussed above, is not applicable to these skilled or elderly employees, in spite of the fact that they could be bound by a contract for terms longer than ordinary employees are.<sup>33</sup>

A violation of Article 14, Paragraph 1 occurs when a party enacts an employment contract that stipulates a term longer than the maximum allowable period (*e.g.*, an employment contract for five years for an ordinary employee).<sup>34</sup> The *LSA* provides a penal sanction for the violation (Article 120, Paragraph 1—a fine of not more than ¥300,000; this penal sanction is imposed only on employers).

How such a violation would affect the overall effect of a contract, however, is not stipulated in statutes and is instead left to interpretation. According to court cases<sup>35</sup> and commonly accepted views, the agreed-upon term should be shortened to fit within the limit (*e.g.*, in the case above, the term will become three years), and if the party continues the relationship beyond the limit (*i.e.*, if the employee continues to work and the employer does not object to it),<sup>36</sup> the contract will become one with an indefinite term, in accordance with Article 629, Paragraph 1 of the Civil Code.<sup>37</sup>

## **2. Development of regulations *vis-à-vis* the termination of fixed-term employment contracts**

### **(1) Development of case law regarding the refusal to renew fixed-term employment contracts**

As discussed at the beginning of this section, the *LSA* had long limited its focus on the maximum allowable term for a single contract period; it had not regulated the renewal or termination of fixed-term contracts. Under such circumstances and faced with a relatively severe restriction—by virtue of case law<sup>38</sup>—with regards to an employer’s dismissal of indefinite-term employees, fixed-term employment contracts have been used by many companies as a mechanism to cope with economic fluctuations, while securing the workforce needed for their businesses; an employer could simply dissolve the employment relationship by refusing to renew the contract (*i.e.*, allowing the contract to expire at the end of the term and choosing not to initiate a new contract), if the employer needed to reduce its workforce. However, it was considered unfair to apply this rule formalistically and thus deny employment security—even to cases, for example, where fixed-term employment contracts had been renewed repeatedly and, as a matter of fact, had become virtually indistinguishable

<sup>33</sup> For criticisms pertaining to *not* applying Article 137 of the *LSA* to these employees, *see e.g.*, Shimada, *supra* note 27, at 11; and Nakakubo, *supra* note 20, at 10 (*i.e.*, criticism in not applying the Article to elderly employees).

<sup>34</sup> Note, however, that violations of Article 14, Paragraph 1 are quite rare.

<sup>35</sup> *See e.g.*, *Kono v. Asahikawa Daigaku*, 32 *Rominshu* 502 (Sapporo High Ct., Jul. 16, 1981).

<sup>36</sup> This is often the case because, although legally speaking, the term is shortened to the statutory limit, the party believes that the contract is valid for the whole of the period that they had agreed upon.

<sup>37</sup> Article 629, Paragraph 1 of the Civil Code stipulates that in cases where an employee continues to engage in his or her work beyond the term of employment and if an employer, knowing about that continued engagement, raises no objection, it shall be presumed that a further employment contract has been entered into under conditions identical to those of the previous employment contract. It is commonly accepted that the contract term is not included in “conditions” and that the renewed employment will be one with an indefinite term.

<sup>38</sup> *See supra* note 3 and accompanying text.

from indefinite-term employment contracts. Thus, the Japanese Supreme Court came to provide employment security, to a certain extent, for employees under fixed-term employment contracts, by restricting the employer's ability to refuse to renew those contracts.

In the precedent-setting *Toshiba Yanagi-cho Kojo Case*,<sup>39</sup> two-month employment contracts—under which the plaintiffs had been engaged in basically the same work as that of regular employees—had been renewed between five and 23 times (for a total of about one to four years) in a somewhat mechanical manner, before the employer refused to renew them. Upon hiring, the employer had expressed its desire for employees to stay employed for long periods, and the plaintiffs had also believed that they could be employed for longer periods than those stipulated in the initial contract. The Supreme Court pointed out that there had been an expectation by both parties that the employment relationship would continue unless a special circumstance arose and that the contract term thereby lost its meaning substantially; the Court also held that the employment contracts in question were *virtually* indistinguishable from indefinite-term employment contracts, and that a refusal to renew such a contract was substantially tantamount to dismissal. The Court therefore applied the doctrine of abuse of the right to dismiss by analogy, and held that a refusal to renew was not acceptable unless there were objectively reasonable grounds.

The Supreme Court, furthermore, later held in the *Hitachi Medico Case*<sup>40</sup> that even where a fixed-term employment contract is *not* virtually indistinguishable from indefinite-term employment contracts,<sup>41</sup> the doctrine of abuse of the right to dismiss was still applicable by analogy, if there was the expectation that the employment relationship would continue due, for example, to the fact that the contract had been renewed repeatedly.<sup>42</sup>

## (2) The current law regarding refusals to renew fixed-term employment contracts

Thus, the Supreme Court established a rule regarding the refusal to renew a fixed-term employment contract that: (1) although in principle the contract would automatically expire at the end of the term, (2) the doctrine of abusive dismissal would be applied by analogy where (a) the contract is *virtually* indistinguishable from indefinite-term employment contracts, or (b) there is an expectation on the part of the employee that the employment relationship would continue, even if the contract were not *virtually* indistinguishable from indefinite-term employment contracts.

The courts decide whether the doctrine of abusive dismissal is applied by analogy, while thoroughly considering such factors as: (1) whether the work is of a permanent or temporary variety, (2) the number of contract renewals or the total duration of the employment relationship, (3) whether or not the procedure taken at renewal is appropriate, (4) how other employees in similar circumstances are treated at the time of renewal, and (5) whether an employer, by its words or deeds, provides an expectation that the employment relationship will be continued for a longer period.<sup>43,44</sup>

<sup>39</sup> *Maeda v. Toshiba Co.*, 28 *Minshu* 927 (S. Ct., Jul. 22, 1974).

<sup>40</sup> *Hirata v. Hitachi Medico Co.*, 486 *Rodo Hanrei* 6 (S. Ct., Dec. 4, 1986).

<sup>41</sup> In this case, unlike the employer in the *Toshiba Yanagi-cho Case*, the employer had prepared a written agreement for the next term, before it had begun; in this way, it had executed an appropriate procedure at each time of renewal.

<sup>42</sup> In this case, the two-month employment contract had been renewed five times.

<sup>43</sup> See Rodosyo Rodo Kijunkyoku Kantokuka ed., *Yuki Rodo Keiyaku no Hanpuku Koshin no Syo Mondai* [Matters Concerning the Repetitive Renewal of Fixed-Term Employment Contracts] (2000) 39–48, 143–209; and Araki, *supra* note 19, at 421. Since courts consider these factors in total—even in cases where a contract had never been renewed—the doctrine can be applied by analogy if, for example, an employer expressed upon hiring the employee its desire for the employee to work for a period longer than that stipulated by the contract. See

In cases where the doctrine of abusive dismissal is applied by analogy, the employer is required to produce objectively reasonable and socially acceptable grounds for refusing the renewal and thus terminating the employment contract.<sup>45</sup> The extent of the protection given to employees under a fixed-term employment contract at the time of renewal, however, is quite limited in comparison to the protection regular employees enjoy.<sup>46</sup> The Supreme Court demonstrated this in *Hitachi Medico Case*, *supra*, where the refusal to renew a fixed-term employment contract was in question within the context of economic redundancy, by holding that it is not unreasonable to terminate an employee under a fixed-term employment contract in advance of regular employees, in cases of economic redundancy.

If a refusal to renewal is considered inappropriate due to a lack of objectively reasonable and socially acceptable grounds, the courts consider the previous fixed-term employment contract as having been renewed.<sup>47</sup> Thus, the employment relationship continues under the employment contract, for the same term as the previous one. There is currently no system under which an employer is allowed to refuse to renew an employment contract in exchange for the payment of a lump sum of money.<sup>48</sup>

### **(3) Administrative standards regarding the initiation and termination of fixed-term employment contracts<sup>49</sup>**

Although case law has come to establish a rule that provides employment security to a certain extent, to some employees facing the contract-renewal issue, it lacks predictability. The outcome depends upon an evaluation of the facts of individual cases, and it is difficult for parties to foresee such outcomes. In order to prevent disputes regarding the legality of a refusal to renew a fixed-term employment contract, the 2003 amendment to the *LSA* added provisions that gave grounds to Japan's Ministry of Health, Labor, and Welfare to set administrative standards for enacting and terminating fixed-term employment contracts and to help employers comply through administrative advice and guidance (Article 14, Paragraphs 2 and 3 of the *LSA*).

The standards<sup>50</sup> set in accordance with this amendment require an employer: (1) to notify employees clearly upon the initiation of a fixed-term employment contract, as to whether the contract will be renewed at the time of expiration and, if there is the possibility of renewal, the

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*Tonomizu v. Ryujin Taxi Co.*, 581 *Rodo Hanrei* 36 (Osaka High Ct., Jan. 16, 1991). If, on the other hand, an employer clearly expresses from the beginning that a contract will not be renewed, the application of the doctrine by analogy shall be denied. See *X (anonymous) v. Panasonic Plasma Display Co.*, 993 *Rodo Hanrei* 5 (S. Ct., Dec. 18, 2009).

<sup>44</sup> Note, further, that once there is an expectation for the continuation of an employment relationship, recent lower courts require either a special circumstance that cancels the expectation or an agreement of the party that they no longer renew the contract, in order for the application of the doctrine of abusive dismissal by analogy to be denied. It is not sufficient for an employer simply to tell employees that their contracts will not be renewed at the next time of renewal. See *X (anonymous) v. Hotoku Gakuen*, 974 *Rodo Hanrei* 25 (Kobe Dist. Ct., Amagasaki Br. Oct. 14, 2008); and *X (anonymous) v. Kinki Coca Cola Bottling Co.*, 893 *Rodo Hanrei* 150 (Osaka Dist. Ct., Jan 13, 2005).

<sup>45</sup> See *Panasonic Plasma Display Co. Case*, *supra* note 43.

<sup>46</sup> See Fumito Komiya, "Yuki Rodo Keiyaku – Yatoidome ni kansuru Hanrei Houri no Bunseki wo Chushin to Shite (Ge)" [Analysis of Fixed-Term Employment Contracts—Focusing on a Review of Cases of Refusal to Renew a Fixed-Term Employment Contract (2)] 1556 *Rodo Horitsu Jyunpo* 14, 20 (2003).

<sup>47</sup> See *Hitachi Medico Case*, *supra* note 40.

<sup>48</sup> This is also the case for dismissal in general.

<sup>49</sup> The explanation under this subsection basically relies upon Nakakubo, *supra* note 20, at 11–13.

<sup>50</sup> See *id.*, at 12, for details of the origin of the standards.

criteria for renewal<sup>51</sup>; (2) to give at least 30 days' advance notice if it is going to refuse a renewal of contract that had been previously renewed at least three times, or under which an employee had been employed for at least one year since his or her initial hiring; (3) upon request and without delay, to issue a certificate stating the reason for refusing to renew a contract in cases referred to in (2); and (4) to make the effort to extend as long as possible the term of a contract that had been renewed at least once and under which an employee had been employed for more than one year since his or her initial hiring, taking into consideration the actual circumstances concerning the contract and the desires of the employee.<sup>52</sup>

Although the amendment in 2003 was remarkable in that it brought into the *LSA*, for the first time, provisions concerning the termination of fixed-term employment contracts, regulations that were introduced on the basis of that amendment are not strict. Rather, the amendment provides grounds only for procedural requirements, and compliance is pursued only through administrative advice and guidance—*i.e.*, no other sanctions, such as criminal penalties or modifications of contents of an employment contract, are provided. It remains to be seen, whether the standards will be effective in preventing disputes regarding refusals to renew fixed-term employment contracts.

#### **IV. The current state of regulations regarding other aspects of fixed-term employment contracts**

As discussed in the previous section, regulations regarding fixed-term employment contracts in Japan have been confined almost exclusively to matters relating to the maximum duration of a single contract term and refusals to renew contracts. Japanese law has left most other aspects of fixed-term employment contracts unregulated.

##### **1. Regulations concerning the initiation of fixed-term employment contracts**

###### **(1) No required reasons for entering into fixed-term employment contracts**

Under Japanese law, *no* specific reason is required for employers to initiate (or renew) fixed-term employment contracts with employees. Thus, fixed-term employment contracts may be initiated, for example, not only to replace employees temporarily while they are taking maternity/paternity leave, but also to recruit workers for permanent jobs. In fact, as already discussed in section I, Japanese employers often hire employees for permanent jobs on a fixed-term basis, so as to obtain or maintain employment flexibility.<sup>53</sup>

It is noteworthy, however, that although an employer may initiate a fixed-term employment contract in order to offer a position to a person on a trial basis, case law considerably narrows this possibility. In the *Kobe Koryo Gakuen Case*,<sup>54</sup> where a high school teacher had been hired under a one-year employment contract—in order to determine whether the teacher was suited for the job, but was terminated when the term expired—the Supreme Court held that unless there were special circumstances whereby the parties had clearly agreed that the fixed-term employment contract would terminate automatically at the end of the term

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<sup>51</sup> On these matters, employers are also required to inform employees of changes that have been brought about.

<sup>52</sup> As to this last point, Article 17, Paragraph 2 of the *Labor Contract Act* also requires that employers not fix an unnecessarily short term, stipulating that an employer shall give due consideration not to renew a fixed-term contract repeatedly by providing a term shorter than necessary, in light of the purpose of that employment contract.

<sup>53</sup> See *supra* II. 2. (3).

<sup>54</sup> *Asano v. Kobe Koryo Gakuen*, 44 *Minshu* 668 (S. Ct., Jun. 5, 1990).

and that the employment relationship would not continue beyond the period, the term is *not* regarded as that for the contract itself but as a probation period under a contract of indefinite duration.<sup>55</sup> Since it is in most cases unlikely that there is a *clear* agreement as to the effect referenced above (e.g., an employer tends to express a desire that the employee will continue work for long period), most fixed-term employment contracts for trial employment are considered employment contracts of indefinite terms. It is believed that employers hesitate to initiate fixed-term contracts for trial employment, due to this case law.

## (2) Clear statement of conditions concerning the contract term

Employers are obliged to clearly state, in writing, whether the employment contract has a definite or indefinite term (Article 15 of the *LSA*). Although a violation of the provision results in a penal sanction (Article 120, Paragraph 1—a fine of not more than ¥300,000), it does not follow that a fixed-term employment contract will automatically convert into an open-ended contract.

## 2. Regulations concerning renewal

As discussed in detail in section III 1, Japanese law has regulated the maximum allowable period for a single contract term. However, there are no limitations with regards to the total duration for successive fixed-term employment contracts, nor are there limitations on the number of contract renewals. The employment relationship can continue under successive fixed-term employment contracts, as long as both parties desire.

Also, as already discussed in detail in section III 2, a refusal to renew a fixed-term contract, especially when it has been renewed repeatedly, may come under the scrutiny of courts that may apply the doctrine of abusive dismissal by analogy.

## 3. Equal treatment

There is currently no statute in Japan requiring equal treatment between employees under fixed-term contracts and those under open-ended contracts.<sup>56</sup> Although Article 3, Paragraph 2 of the *Labor Contract Act* generally declares that employment contracts are to be initiated and amended with due consideration for “balanced treatment” in light of actual employment

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<sup>55</sup> In a case where the contract is construed as one with an indefinite period, termination of the contract at the end of the probation period requires an objectively rational and socially acceptable reason (*Takano v. Mitsubishi Jushi Co.*, 27 Minshu 1536 (S. Ct., Dec. 12, 1973)). See Araki, *supra* note 2 at 68, for further details.

<sup>56</sup> The *Part-Time Work Act* (the *Act on Improvement, etc. of Employment Management for Part-Time Workers*), which was significantly amended in 2007, obliges employers to give equal treatment to certain limited categories of part-time employees, compared to full-time employees, with respect to working conditions; it also requires employers to endeavor to provide “balanced treatment” to other part-time employees who do not fall into the aforementioned category (See Michiyo Morozumi, *Balanced Treatment and Bans on Discrimination – Significance and Issues of the Revised Part-Time Work Act*, Vol. 6, No. 2 *Japan Labor Review* 39 (2009) for details of the *Act*). Of course, the focus of this legislation is on whether an employee is a part-time employee or a full-time employee, and not on whether he or she is working under a fixed-term or open-ended contract. However, since fixed-term employees are often, at the same time, part-time employees and full-time employees are typically under open-ended contracts, these provisions may, *as a matter of fact*, provide some fixed-term employee protection in terms of receiving equal or balanced treatment compared to that of employees under open-ended contracts, inasmuch as they fulfill the other requirements of the *Act*. Note also, that the administrative guidelines is issued on the basis of the report of a study group on the improvement of employment management of fixed-term employees (available at: <http://www.mhlw.go.jp/shingi/2008/07/s0729-1.html> (last accessed April 10, 2010)). Those stipulate that although the *Act* is not applied to full-time fixed-term employees, they should be so treated in accordance with the spirit of the *Act*. However, this guideline is only a basis for administrative advice and guidance, and has no legal binding effect.

conditions, it does not provide direct grounds for the parties' rights and obligations, due to its abstract nature.<sup>57</sup>

#### **4. Transitions to open-ended employment**

There is no statute requiring employers to help or promote the transition of fixed-term employment into open-ended employment.<sup>58</sup>

#### **5. Fixed-term employees and social security**

Social security statutes for employees—such as the *Health Insurance Act*, the *Employees' Pension Insurance Act*, the *Workers' Accident Compensation Insurance Act*, and the *Employment Insurance Act*—in general cover “employees,” including fixed-term employees. However, fixed-term employees employed only for a short period—namely, day laborers not successively employed for more than one month since the initial hiring, workers employed for not more than two months, seasonal workers employed for not more than four months, and workers employed for temporary business of not more than six months—are excluded from coverage by the *Employees' Pension Insurance Act*. With regards to the *Employment Insurance Act*, day laborers are in principle excluded from the statute's coverage. Although fixed-term employees who work 20 hours or more per week and whose employment contract term is expected to be longer than 30 days are covered by the *Act*, they are eligible only for smaller benefit amounts than are ordinary employees, if their employment contract is expected to continue for less than one year. Fixed-term employees whose employment contracts are to continue beyond one year are treated in a manner similar to employees under open-ended contracts. A fixed-term employee is not eligible for parental leave under the *Child Care and Family Care Leave Act*, unless he or she has not been employed by the employer for at least one year and is expected to remain employed beyond the day that his or her child becomes one year old.

### **V. Concluding remarks: Evaluation of current regulations on fixed-term employment contracts, and future prospects**

Japanese law has instituted limited regulations on fixed-term employment contracts; it has, thus far, generally achieved a fairly proper balance of security and flexibility with regards to the Japanese labor market:<sup>59</sup> regular employees are now afforded enough employment security while employers are allowed the flexibility to adjust their respective workforces through the use of atypical, fixed-term employment. Under this mechanism, fixed-term employees have been afforded employment security to only a limited extent, compared to regular employees, under indefinite-term employment contracts. This might have been less problematic in times when atypical employees—including fixed-term employees—were literally “atypical” in the labor market; however, now that one out of every three employees is working as an atypical employee, it is difficult to continue to treat them as truly “atypical.” Appropriate employment security must now be provided, not only for regular employees under open-ended contracts, but also for fixed-term employees. In addition, fixed-term

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<sup>57</sup> Yamakawa, *supra* note 5, at 8–9.

<sup>58</sup> Note that the administrative guidelines referred to in *supra* note 56 advise an employer to help or promote the transition of full-time, fixed-term employees into regular employees; however, as explained in the *supra* note, this guideline is only a basis for administrative guidance and advice, and it has no legal binding effect.

<sup>59</sup> See Sugeno, *Shin Koyo Syakai no Ho* [Employment System and Labor Law] (revised ed., 2004) 250–251, 258.

employees have tended also to receive less favorable treatment, especially with regards to wages and benefits, and regulations should be considered with regards to the fairness of working conditions, especially with regards to fixed-term employees engaged in work similar to that of regular employees.

In response to the increased prevalence of atypical and fixed-term employment, many proposals for legislation have been presented recently, most of which are guided by the laws of EU countries. These proposals include, among others, requiring objective reasons to initiate a fixed-term employment contract,<sup>60</sup> placing a cap on the number of contract renewals,<sup>61</sup> introducing equal treatment between fixed-term employees and indefinite-term employees<sup>62</sup> and writing into the statute the case-law rule regarding the refusal to renew a contract.<sup>63</sup>

Japan's Ministry of Health, Labor and Welfare has also started to consider the appropriate direction of regulations on fixed-term employment, by setting up the Study Group on Fixed-term Employment Contracts.<sup>64</sup> The conclusions of the Study Group are expected to be made public in the summer of 2010, and its discussions and outcomes are now drawing close attention.<sup>65</sup>

What is important is striking a proper balance among security, fairness, and flexibility. In considering this proper balance, the position of fixed-term employment as well as that of open-ended employment within the Japanese labor market must be re-examined, including whether indefinite-term employment is a principal form of employment, and whether fixed-term employment should be considered only an exceptional one. Should fixed-term employment be considered a desirable employment option? If "yes," what form should that "desirability" take?<sup>66</sup> In designing fixed-term employment regulations, these questions must be resolved on the basis of a proper understanding of the realities that fixed-term employees face.

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<sup>60</sup> See Masao Nakajima, "Yuki Koyo Kakudai Seisaku to Hoteki Kadai" [Policies Promoting the Use of Fixed-Term Employment, and their Problems], in Satoshi Nishitani et al. eds., *Tenkanki Rodoho no Kadai* (2003) 326, 346–347; Karatsu, *supra* note 27, at 13; and Yoichi Shimada, "Yuki Rodo Keiyaku Hosei no Genjyo to Rippo Kadai" [Current Situation and Legislative Challenges of Regulations on Fixed-Term Employment], 134 *Minshoho Zasshi* 851, 871–876.

<sup>61</sup> See Shimada, *supra*, at 875.

<sup>62</sup> See Nakajima, *supra* note 60, at 347; and Tomoko Kawada, "Yuki Rodo Keiyakuho no Aratana Koso" [New Framework for Fixed-Term Employment Contract Law] 107 *Nihon Rodoho Gakkaishi* 52, 61–64.

<sup>63</sup> See Komiyama, *supra* note 46, at 23.

<sup>64</sup> The discussion of the Study Group on Fixed-Term Employment Contract is available at: <http://www.mhlw.go.jp/shingi/2009/02/s0223-12.html> (last accessed April 10, 2010). The Study Group published its "interim report" on March 17, 2010 (available at: <http://www.mhlw.go.jp/stf/houdou/2r98520000004psb.html> (last accessed April 10, 2010)).

<sup>65</sup> This is because a report of the Study Group within Japan's Ministry of Health, Labor, and Welfare is usually a starting point for future labor and employment legislation.

<sup>66</sup> See Michiyo Morozumi & Ryo Kambayashi, "Yukikoyo no Hokisei" [Law and Economics on the Regulations of Fixed-Term Employment Contracts], in Takashi Araki et al. eds., *Koyo Syakai no Ho to Keizai* (2008) 138, 161–163.





# Laws and Practice of Fixed Term Labour Contract in Taiwan

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## I. Introduction

The provisions regarding fixed term labour contract are mainly found under the Civil Code and the Labour Standards Act. The provisions regarding employment contracts under the Civil Code are largely based on the principle of freedom of contract. Thus, the provisions regarding fixed term labour contracts are quite loose. However, the Labour Standards Act (promulgated in 1984) adopts a different approach, requiring that the labour contracts should be, in principle, non-fixed term contracts, except in case of special circumstances, where fixed term labour contracts would be permitted. Therefore, for employers in Taiwan, there is little room for employing fixed term contract workers.

On the other hand, since Taiwan has not yet enacted Labour Dispatch Law, at the moment, dispatched works are not regulated by law and employers can freely employ dispatched workers. Thus, employers who are subject to the strict restrictions imposed by the Labour Standards Act can easily hire dispatched workers in lieu of fixed term contract workers. As such, there exists a correlation between fixed term contract workers and dispatched workers.<sup>1</sup>

Consequently, Taiwanese government is now pushing for the reform of the Labour Standards Act, the objective of which is twofold: (1) to loosen the current provisions on fixed term labour contracts, so as to give employers greater flexibility in employing fixed term contract workers; and, (2) to include dispatched works into the regulations, setting out the rights and obligations of employers when hiring dispatched workers.

## II. Current status regarding fixed- term contract workers

Currently, Taiwanese government does not have surveys specifically focusing on fixed term contract workers. However, each year, the Directorate General of Budget, Accounting and Statistics of the Executive Yuan (“DGBAS”) would conduct surveys on part-time, temporary or dispatched workers. Since part-time, temporary or dispatched workers are mostly fixed term contract workers, therefore, from the statistics thereof, we can generally observe the actual status of fixed term contract workers in Taiwan.

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<sup>1</sup> HUANG, Cheng-Kuan: “There is no clear employment policy in respect to issues such as how to deal with the correlation of different types of non-traditional labours based on flexible work hours (e.g. dispatched work, fixed term work, part-time work, etc.)” Please refer to “Current Status of and Difficulties in the Protection of Dispatched Workers in Taiwan (I)” by HUANG, Cheng-Kuan, *National Federation of Bank Employees Unions Newsletter*, Vol. 108, 15 December 2009.

Based on the statistics of DGBAS,<sup>2</sup> there were approximately 687,000 people engaged in part-time, temporary or dispatched work as of May 2009, which accounted for approximately 6.71% of the entire workforce. As compared to 2008, there was an increase of 37,000 people or 0.47%. In particular, there were 368,000 part-time workers, accounting for approximately 3.60% of the total workforce, increased by 57,000 people as compared to the year before, and, there were 517,000 temporary or dispatched workers, accounting for approximately 5.04% of the total workforce, increased by 19,000 people as compared to the year before.

According to the statistics based on the sex of the workers, there are 347,000 female workers engaged in part-time, temporary or dispatched works, accounting for 7.74% of the workforce in the female category, which are 340,000 people more or 5.91% higher than male workers.

In respect to the statistics based on the age of the workers, since there is a higher percentage of people between the ages of 15 and 24, who are at school, therefore, the percentage of part-time, temporary or dispatched workers among the said age group is the highest (22.81%). The percentage of part-time, temporary or dispatched workers is the lowest among the age group of 25 to 44, which accounts for only 4.67%. In terms of the level of education, there is a higher percentage for people with high school or lower education (10.17%) and there is a lower percentage for people with college degrees or above (5.6%).

With regard to the statistics based on the industry, there is a much higher rate of part-time, temporary or dispatched workers in the service industry (20.89%), followed by mining industry (16.65%). The lowest percentage is in the electricity and gas supply industry (2.14%). In terms of the occupations, there is a higher percentage among production operation personnel, i.e. 9.93%, followed by service personnel (8.74%) and the lowest among elected representatives and executive officers (0.15%).

Since the aforementioned statistics are the consolidated result of combining part-time, temporary and dispatched workers, in order to proceed with further analysis, it is necessary to clarify the number of part-time workers.<sup>3</sup> According to the Manpower Utilization Survey conducted by DGBAS, the interviewees are asked to determine by themselves as to whether they are part-time workers. In 2007, there were 252,327 part-time workers, which account for 2.5% of the total workforce. There were 366,316 people whose work hours were less than 35 hours per week, accounting for 3.6% of the total workforce. If compared with other major countries, the ratio of part-time workers to total workforce is relatively low. However, with the development of service industries and the needs for company to employ human resources with greater flexibility, it is foreseeable that the number of part-time workers will increase in the future.<sup>4</sup>

As to the current status of dispatched workers, according to a survey conducted by the DGBAS in 2006,<sup>5</sup> there are more than 120,000 dispatched workers being employed by the industrial and commercial sectors in Taiwan. A great number of them are employed in the

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<sup>2</sup> <http://www.dgbas.gov.tw/ct.asp?xItem=25795&ctNode=3580> (Last accessed on 2009/01/18).

<sup>3</sup> According to the "Reference Guidelines for Employing Part-Time Workers" published by the Council of Labour Affairs, Executive Yuan, in 2003, part-time workers refer to workers whose work hours, which are negotiated and agreed upon by the employer and the workers, are relatively shorter than the work hours of the full-time workers working in the said business entity.

<sup>4</sup> Manpower Utilization Survey by the Directorate General of Budget, Accounting and Statistics, Executive Yuan

<sup>5</sup> All data of "Industry, Commerce and Service Census of 2006" can be accessed from the following website: <http://www.dgbas.gov.tw/lp.asp?CtNode=3265&CtUnit=377&BaseDSD=7>

manufacturing industry. As of the end of 2006, there are a total of 7,676 industrial and commercial corporations employing dispatched workers, with an average number of 126,451 dispatched workers being employed per month. In particular, the manufacturing industry had the highest number of dispatched workers employed (39,103 dispatched workers). In terms of dispatched workers to employees ratio, the medical and health and social services industries have the highest ratio of 8.6%.

As explained below, the provisions related to fixed term contract workers under the Labour Standards Act are very stringent and there is little flexibility for employers to enter into fixed term contracts with the workers. On the other hand, recently, it has become quite popular in the Taiwanese labour market to employ dispatched workers. Since there is no laws regulating dispatched works, employers may freely employ dispatched workers. As such, it is possible that employers will employ dispatched workers in place of fixed term contract workers.<sup>6</sup>

### III. Laws governing fixed-term labour contracts

#### 1. Civil Code and Factory Act

The Civil Code (promulgated in 1929) only has two provisions in respect to fixed term contract and both of these provisions are related to the termination thereof. First, Article 488 of the Civil Code provides that: “If the duration of hire of services is fixed, the contract of hire of services terminates with the end of that duration (paragraph 1). If the duration of hire of services is not fixed or cannot be fixed in accordance with the nature or purpose of services, either party may terminate the contract at any time, however, if customs is in favour of the employee, such customs shall be followed (paragraph 2).” Article 489 of the same Code further provides that: “Even though the duration of the hire of services has been agreed upon, either party may, in the event of any serious occurrence, terminate the contract before the end of such duration (paragraph 1). If the occurrence as specified in the preceding paragraph be due to the negligence of one of the parties, the other party may demand for the injury from him (paragraph 2).” Thus:

1. Fixed term employment contracts will of course be terminated when the term expires. However, in case of any serious occurrence, the employer or the worker may terminate the fixed term employment contract at any time without notice, provided that, the party for whose negligence the said serious occurrence arises shall be held liable for any damage suffered by the other party.
2. The parties may freely enter into a fixed term or non-fixed term employment contracts. If the contract entered into is a fixed term employment contract, the parties may also freely determine the period of employment without any restrictions on the maximum length of the period of employment imposed thereon.

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<sup>6</sup> MA, Jing-Ru, HSU, Shiou-Hau: “There is a correlation between fixed term contracts and dispatched works... Since the criteria for a fixed term contract are quite stringent (it is only permitted if the nature of the work is not continuous and if the statutory requirements regarding temporary, short-term, seasonal or specific work are satisfied), fixed term contracts are rare in practice. As a result thereof, once an employer hires a worker, the employer must hire the said worker for life by way of non-fixed term contract. In order to maintain the flexibility with regards to the costs of human resources, in practice, many employers would opt for dispatched work,” *Commercial Times*, 20 January 2010.

Prior to the promulgation of the Labour Standards Act, the Factory Act (promulgated in 1931) was the main law regulating the labour conditions of the factory workers.<sup>7</sup> However, there were only two provisions regarding fixed term labour contracts under the Factory Act: Article 26, which provides that “Whenever a fixed term work contract expires, the said contract shall not be renewed unless the parties have agreed to the renewal thereof,” and Article 30, which stipulates that “Where any of the following occurs, the factory may terminate the contract even though the work contract has not yet expired, provided, however, that the factory shall provide termination notice pursuant to Article 27 of this Act: (1) Where all or part of the factory is closed down; (2) Where for reasons of force majeure, the factory has suspended its operation for more than 1 month; or, (3) Where the worker is not suitable for the work assigned to him/her.”

Before the enactment of the Labour Standards Act, the Factory Act is a special law of the Civil Code. Thus, in respect to fixed term contract workers to whom the Factory Act applies, the employer may terminate the fixed term work contract with notice pursuant to Article 30 of the abovementioned Factory Act.

## **2. Other Fixed Term Contracts Related Laws and Regulations**

Apart from the aforementioned provisions on fixed term contracts under the Labour Standards Act, there are also other types of fixed term labour contracts, for example:

### **1) Workers Hired under the Governmental Plan for Expanding Employment through Public Service**

In June 2003, in order to rapidly solve the unemployment issues and to provide employment opportunities with various public services, Taiwanese government promulgated and implemented the Provisional Statute for Expanding Employment through Public Service for a period of 1 year. According to Article 9 of the said Statute, the duration of the employment pursuant to this Statute shall not exceed 12 months. Article 10 of the said Statute provides that, during the period of the employment, the Labour Standards Act and the Employment Insurance Act shall not apply. The employing agency (organization) shall enter into a written contract with the employed individual according to the standards established by the central competent authority to set out terms of the employment and other matters that the employed individual should comply with. Article 11 further provides that, during the period of the employment, an employed individual shall be insured with labour insurance and national health insurance pursuant to the provisions of the laws.

### **2) Foreign Worker**

An employer may employ foreign workers pursuant to the Employment Services Act (Promulgated in 1992).<sup>8</sup> According to Article 52 of the said Act, if an employer engages a white-collar foreign worker to engage in works such as specialized or technical work or teaching, the permitted duration of the employment shall not exceed 3 years and, if it is necessary to continue to employ the said foreign worker, upon the expiration of which, the employer may apply for extension. If an employer engages a blue-collar foreign worker to engage in works such as major construction, the permitted duration of the employment shall

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<sup>7</sup> Article 1 of the Factory Act: “This Act shall apply to any and all factories that use machineries.”

<sup>8</sup> According to the statistics compiled by the Council of Labor Affairs of the Executive Yuan, until December 2009, there are 365,060 foreign workers in Taiwan, in which 185,624 people were engaged in the manufacturing industry and 168,427 people were engaged in social works.

[http://www.evta.gov.tw/content/list.asp?mfunc\\_id=14&func\\_id=57](http://www.evta.gov.tw/content/list.asp?mfunc_id=14&func_id=57) (Last accessed on 2010/01/31)

not exceed 2 years and, upon the expiration of which, the employer may apply for extension once for a period not exceeding 1 year. If a foreign worker is employed by a company with more than 5 employees, he or she shall join the labour insurance (Article 6 Paragraph 3 of the Labour Insurance Act) but cannot join the employment insurance (Article 5 of the Employment Insurance Act).

### **3) Gender Equality in Employment Act**

According to Article 16 Paragraph 1 of the Gender Equality in Employment Act, after being in service for 1 year, an employee may apply for parental leaves without salary payment before any of his or her children reach the age of 3 years old for a period until his or her children reaches the age of 3 years, provided, however, that such period of leave shall not exceed 2 years. According to Article 6 of the Regulation for Implementing Unpaid Parental Leave for Raising Children, during the period of the said worker's leave, the employer may engage workers on fixed term contract basis to provide services in place thereof.

### **4) Military Service Act**

Article 44 Paragraph 1 Item 1 of the Military Service Act provides that, during the military service period, a citizen can retain his years of service, and, upon military discharge, a citizen shall have the priority right of employment. Thus, during the period where a worker is on military service leave, the employer may engage workers on fixed term contract basis to provide services in place thereof.

## **3. Labour Standards Act**

### **1) Provisions under the Current Act**

Article 9 of the Labour Standards Act provides: “Labour contracts may be divided into two categories: fixed term contracts and non-fixed term contracts. A contract for temporary, short-term, seasonal or specific work may be considered as a fixed term contract and a contract for continuous work as a non-fixed term contract (paragraph 1). In any one of the following situations, a fixed term contract shall be deemed as a non-fixed term contract upon the expiration of the said fixed term contract: (1) Where an employer raises no immediate objection when a worker continues to carry out his/her work; or, (2) Where, despite the execution of a new contract, the prior contract and the new one together cover a period of more than 90 days and the period of time between expiration of the prior contract and execution of the new one does not exceed 30 days (paragraph 2). The preceding paragraph shall not apply in case of a fixed term contract for specific or seasonal work (paragraph 3).”<sup>9</sup>

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<sup>9</sup> The legislative reasoning for enacting Article 9 of the Labour Standards Act is: “1. A labour contract is a contract in which an employer and a worker set forth their rights and obligations. This Act is a public law, which specifically limits the scope of fixed term contract by statutory provisions, in order to assist the employer and the worker to coordinate their interests and to promote harmony in employer-worker relationships. 2. Upon the expiration of a fixed term contract, the said contract will be deemed as a non-fixed term contract under the following circumstances: (1) if, upon the expiration of the fixed term contract, an employer raises no immediate objection when a worker continues to carry out his/her work, the contract shall be deemed as extended for a non-fixed term; (2) if the prior contract and the new contract cover a period of more than 90 days and the period of time between the expiration of the prior contract and the execution of the new contract does not exceed 30 days, the contract shall be deemed as a non-fixed term contract, so as to prevent the employer from using fixed term contracts to hire workers to engage in long term work and to deprive the workers of their rights.” However, in respect to the legislative reasoning of this Act, how the limitations on the scope of fixed term labour contract would assist the employer and the worker to coordinate their interests and to promote harmony in employer-worker relationships is truly questionable. *Compilation of Draft Laws* Vol. 73, “Draft Labour

As such, the characteristics of the provisions on fixed term labour contracts under the Labour Standards Act are:

- (1) In principle, labour contracts are non-fixed term and work of continuous nature shall be deemed as non-fixed term contracts. Breach of such provision would result in a fine of more than NT\$2,000 and not exceeding NT\$20,000 pursuant to Article 79 Paragraph 1 of the Labour Standards Act.
- (2) Fixed term labour contracts can only be entered into for temporary, short-term, seasonable and specific works.
- (3) There is a mechanism that mandatorily converts fixed term contracts for temporary and short-term works into non-fixed term contracts, so as to prevent employers from repeatedly renewing the fixed term contracts for temporary and short-term works to employ temporary and short-term workers as long term workers. However, such mechanism does not apply to specific or seasonal works.

Furthermore, as to what is meant by temporary, short-term, seasonal and specific works, Article 6 of the Enforcement Rules of the Labour Standards Act clearly provides: “The temporary, short-term, seasonal and specific work referred to in Article 9 Paragraph 1 shall have the following meaning: (1) Temporary work shall mean work of an unexpected and non-continuous nature, the duration of which shall not exceed 6 months; (2) Short-term work shall mean non-continuous work that is expected to be completed within a period of time not exceeding 6 months; (3) Seasonal work shall mean non-continuous work affected by the raw materials, source of materials or sales in the market, the duration of which shall not exceed 9 months; and, (4) Specific work shall mean non-continuous work that is expected to be completed within a specific period of time, the duration of which shall not exceed 1 year unless otherwise approved by the competent authority.”

Based on the foregoing, the restrictions imposed by the Labour Standards Act on fixed term contracts are quite stringent. It is unclear as to the reasons why the Labour Standards Act adopts non-fixed term contracts as the basic principle. Scholars believed that it may be related to the supply and demand of the labour market in Taiwan before and after the enactment of the Labour Standards Act, especially since for a period of 15 years from 1981 to 1995, the labour market in Taiwan has been in a total employment status for a long time, whereby employers are troubled by the lack of workers and high labour turnover rate. Thus, it is speculated that the enactment of Labour Standards Act preferring non-fixed term contracts would perhaps be able to decrease the turnover rate of the workers.<sup>10</sup>

## **2) Definition and Determination of “Continuous Work”**

Article 9 of the Labour Standards Act provides that “a contract for continuous work [is considered] as a non-fixed term contract.” Therefore, whether a work is continuous or not becomes the criteria for determining whether an employer should enter into a non-fixed term labour contract.

However, in respect to the definition of “continuous work,” scholars pointed out that “it is referred to the work undertaken by the worker, which, in respect to the nature and operation of the business entity, requires continuity, and is not required only on occasion such as

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Standards Act (First Volume)” at pages 362 and following, “Draft Labour Standards Act (Second Volume)” at pages 932 and following, edited and published by the Secretariat of the Legislative Yuan, May 1985.

<sup>10</sup> WANG, Sung-Po, *Interpretation of the Labour Standards Act*, Edited by Taiwan Labour Law Association, September 2009, at page 80.

temporary, short-term or seasonal or only for specific purposes.”<sup>11</sup> However, the said criteria for determining continuous work are still not specific enough.

As the highest competent authority for labour affairs, the Council of Labour Affairs of the Executive Yuan (“CLA”) has always given strict interpretation to the term continuous work in order to protect the stability of employment of the workers. In its interpretive letter Tai-Lao-Tze-2-Zi No. 0011362 issued on 31 March 2000, which is most representative of how CLA interprets continuous work, it was held that: “As inquired, in respect to how to define the term ‘continuous work,’ according to the current provisions under the Labour Standards Act and the types of employment in the labour market, continuous work is the norm while non-continuous work is the exception. Moreover, under the Labour Standards Act, the protections given to workers engaged in continuous work and to workers engaged in non-continuous work are different. Thus, historically, the administrative agency has adopted a strict interpretation in respect to fixed term contract workers who are engaged in non-continuous work, so as to avoid employers from abusing workers. The term ‘non-continuous work’ referred to in the Act refers to the relevant positions derived from economic activities that an employer did not intend to maintain on a continuous basis. As to how to determine whether a position is non-continuous in practice, it would depend on the position as described in the relevant documents of the business entity (such as job description, etc.) or whether there are both fixed term contract workers and non-fixed term contract workers employed for the same position within the company to engage in the same tasks. If so, these factors shall be considered as evidence of reference in determining whether a work is continuous.”<sup>12</sup> Under the same logic, in another interpretive letter, CLA held that: “Since your company is engaged in dispatch of manpower, manpower is therefore your company's regular business. Thus, you cannot enter into fixed term contracts with the workers to satisfy the needs of your clients.”<sup>13</sup>

The aforementioned CLA interpretive Letter Tai-Lao-Tze-2-Zi No. 0011362 issued on 31 March 2000 looks at the subjective intention of an employer to continuously maintain economic activities as the criterion for ascertaining whether a work is continuous. Such criterion is uncertain. Moreover, although this interpretive letter did not explicitly define the term “continuous work,” rather, it only defines “non-continuous work.” However, by reversing this interpretation, it follows that, as long as an employer has the intention to maintain the economic activities on a continuous basis, any related position derived from such economic activities would qualify as continuous work. In other words, the scope of continuous work is quite broad. Furthermore, according to the latter part of this interpretive letter, as long as the work undertaken by a fixed term contract worker is also undertaken by a non-fixed term contract worker at the same time in the company, the said work should also be interpreted as continuous work and the employer cannot employ other workers on fixed term contract basis.

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<sup>11</sup> HUANG, Cheng-Kuan, *Labour Law (Revised Edition)*, published by the National Open University, 2001, at page 381.

<sup>12</sup> Interpretive Letter Tai-Lao-Tze-2-Zi No. 002980 issued by Council of Labour Affairs, Executive Yuan on 25 January 1999 also held that whether a work is of a continuous nature has nothing to do with the budget of the entity. Rather, it should be ascertained based on the actual scope of work. For the contents of the relevant interpretive letters and detailed comparison and analysis thereof, please refer to YANG, Shu-Ting, *A Study on the Fixed Term Labour Contracts*, Master dissertation, National Chengchi University College of Law, 2004, pages 14 and following.

<sup>13</sup> Interpretive Letter Tai-Lao-Tze-2-Zi No. 051472 issued by the Council of Labour Affairs, Executive Yuan, on 14 September 1998.



The effect of the aforementioned CLA interpretive Letter Tai-Lao-Tze-2-Zi No. 0011362 issued on 31 March 2000 is quite extensive. According to this interpretation, an employer has practically no room for employing fixed term contract workers. Some courts opposed to the strict interpretation approach adopted by CLA. In particular, in its judgment Su-Zi No. 616 in year 2002, the Kaohsiung Administrative High Court held that: "... (omitted) the determination of whether a work is specific should be based on the content of the work engaged in by a worker and not based on whether such work is the major economic activity of an employer, since, regardless of whether a worker employed by a company is fixed term or not, such worker would necessarily engage in works related to the company's major economic activity. Thus, if, according to the aforementioned CLA interpretive letter Tai-Lao-Tze-2-Zi No. 0011362 issued on 31 March 2000, when a worker is engaged in works related to the company's major economic activity, such works shall be continuous, then the provisions on specific work under the Labour Standards Act would be meaningless." In other words, the court clearly stated that it will not adopt the aforementioned CLA's interpretation and held that the determination of specific work should be based on the content of the work engaged in by the worker and should not be based on whether such work is the main economic activity of the employer.<sup>14</sup>

Overall, when a court is reviewing and ascertaining whether a labour contract is fixed term, the approach generally adopted is:

- (1) Whether a labour contract is a fixed term or non-fixed term contract should be assessed on the actual content and nature of the work contemplated under the said labour contract and should not be bound by the format in which the labour contract was entered into.<sup>15</sup>
- (2) If a work is continuous, or the nature of a work is not temporary, short-term, seasonal or specific, an employer can only enter into a non-fixed term contract with a worker. If the parties enter into a fixed term contract, the provisions regarding the fixed term shall be deemed invalid. In other words, the said contract shall be deemed a non-fixed term contract with the same terms and conditions.<sup>16</sup>

### 3) Definitions of Temporary, Short-Term, Seasonal and Specific Works

- (1) Temporary Work: According to Article 6 of the Enforcement Rules of the Labour Standards Act, "Temporary work shall mean work of an unexpected and non-continuous nature, the duration of which shall not exceed 6 months." In other words, the said work arises occasionally, not on a regular basis. Once completed, such work may or may not be required to be carried out again.<sup>17</sup>

<sup>14</sup> Professor LIN, Geng-Scheng, agreed with the reasoning of this judgment. Please refer to his publication *Review of fixed labour contract under the German Law --- Analysis of related questions under the laws of Taiwan*, Tunghai Law Review Vol. 28, at page 40.

<sup>15</sup> Supreme Court judgments Pan-Zi No. 944 in year 2004; High Court judgment Lao-Shang-Yi-Zi No. 57 in year 2007; High Court judgment Lao-Shang-Yi-Zi No. 13 in year 2009; Taipei District Court judgment Chung-Lao-Su-Zi No. 26 in year 2006; Taipei District Court judgment Chung-Lao-Su-Zi No. 36 in year 2006.

<sup>16</sup> Taichung District Court judgment Lao-Jien-Shang-Zi No. 26 in year 2007.

<sup>17</sup> LIN, Zheng-shien, *Theory and Practice of Labour Standards Act*, Jie-Tai Publishing, 2003, at pages 156 and following. In respect to further explanations regarding short-term, seasonal and specific works, please also refer to page 157 of the same publication; YANG, Shu-Ting, publication referred to in the note above at pages 25 and following.

- (2) Short-Term Work: According to Article 6 of the Enforcement Rules of the Labour Standards Act, “Short-term work shall mean non-continuous work that is expected to be completed within a period of time not exceeding 6 months.” Pursuant to the definition provided under this Article, the difference between short-term work and the aforementioned temporary work lies in the fact that short-term work is foreseeable, whereas temporary work is not.
- (3) Seasonal Work: According to Article 6 of the Enforcement Rules of the Labour Standards Act, “Seasonal work shall mean non-continuous work affected by the raw materials, source of materials or sales in the market, the duration of which shall not exceed 9 months.” For example, the production of tomatoes is seasonal. If an employer must purchase tomatoes and immediately carry out processing work between December and March every year, workers employed for such works may enter into seasonal fixed term contracts.<sup>18</sup> However, the duration of seasonal work must be within 9 months.
- (4) Specific Work: According to Article 6 of the Enforcement Rules of the Labour Standards Act, “Specific work shall mean non-continuous work that is expected to be completed within a specific period of time.” Compared to short-term work, specific work should be of a longer period and more detailed, such as the construction of dam, power station, rail road, etc., and, once the said work is completed, the workers would not be hired again. Moreover, in respect to whether specific work requires a clear commencement and completion date, (e.g. can a contract provide that “the term of this specific work contract shall commence from the date of the commencement of work and shall end when the construction ends?”), the administrative agency and the courts have different opinions regarding thereto.<sup>19</sup> Furthermore, if the length of specific work exceeds a period of 1 year, the approval of the competent authority must be obtained.<sup>20</sup> However, according to the Supreme Court, “approval” is not a criterion for the validity thereof. Thus, even if it is not approved by the competent authority, it does not necessarily convert such specific work from a fixed term contract into a

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<sup>18</sup> Interpretive Letter Tai-Lao-Tze-2-Zi No. 013495 issued by the Council of Labour Affairs, Executive Yuan, on 13 April 1998.

<sup>19</sup> The administrative agency and the courts have different opinions regarding whether specific work should have a definite completion date. In its interpretive letters Tai-Lao-Tze-2-Zi No. 19365 issued on 3 August 1998 and Tai-Lao-Tze-2-Zi No. 024846 issued on 4 June 1997, the Council of Labour Affairs, Executive Yuan, held that the so-called specific work should have a definite commencement and completion dates. However, Taiwan High Court in its judgment Lao-Shang-Zi No. 40 in year 1997 held that it is not necessary for specific work to have a definite completion date. If the date on which the specific work is completed is considered as the completion date, then the completion date for the said work can be ascertained and such contract can still be deemed as a type of fixed term contract.

<sup>20</sup> According to the Interpretive Letter Tai-Lao-Tze-2-Zi No. 001585 issued by the Council of Labour Affairs, Executive Yuan, on 15 January 1999, “According to Article 6 Item 4 of the Enforcement Rules of the Labour Standards Act, the clause ‘the duration of [specific work] shall not exceed 1 year unless otherwise approved by the competent authority’ requires the competent authority to review fixed term contracts with a longer duration so as to protect the rights of the workers and to avoid an employer from avoiding its obligations by entering into a fixed term contract with its workers.”

non-fixed term contract.<sup>21</sup>

Although Article 6 of the Enforcement Rules of the Labour Standards Act clearly defines temporary, short-term, seasonal and specific works, however, the criteria for distinguishing the aforementioned 4 types of contracts are still quite confusing:<sup>22</sup>

- (a) First, according to the definition of the said Article, temporary work and short-term work are distinguished on the basis of expectancy, whereby work that can be expected would be short-term work and work that cannot be expected would be temporary work. However, it is not clear as to how to determine whether a work is expected.
- (b) A work may be temporary, short-term, seasonal and specific all at the same time. For example, when an employer is required to employ workers to complete specific work at the last minute, such work would be temporary, short-term and specific in nature.

#### **4) Mechanism that Mandatorily Convert a Fixed Term Contract into a Non-Fixed Term Contract**

- (1) Statutory Renewal of Fixed Term Labour Contract: Article 9 Paragraph 2 Item 1 of the Labour Standards Act provides, upon the expiration of a fixed term contract, if an employer raises no immediate objection when a worker continues to carry out his/her work, the said fixed term contract shall be deemed as a non-fixed term contract. In such situation, the original contract is not terminated for the execution of a new contract. Rather, the combination of the fact that the worker continues to carry out his/her work and that the employer has implicitly agreed for the worker to continue to carry out his/her work results in a conversion of the original contract into a non-fixed term contract as prescribed by law.<sup>23</sup> However, such statutory renewal of contract does not apply to seasonal and specific works.
- (2) Consecutive Fixed Term Contract: Article 9 Paragraph 2 Item 2 of the Labour Standards Act provides, upon the expiration of a fixed term contract, despite the execution of a new contract, the prior contract and the new one together cover a period of more than 90 days and the period of time between expiration of the prior contract and execution of the new one does not exceed 30 days, the said fixed term contract shall be deemed as a non-fixed term contract. The purpose for enacting this provision is to prevent an employer from using fixed term labour contracts in lieu of non-fixed term labour contracts.<sup>24</sup> However, such statutory renewal of contract does not apply to seasonal and specific works. The legislative reasoning did not elaborate on the reasons why seasonal and specific works are excluded. The author speculates that it may be due to the fact that there would not be any work required upon the end of the season for seasonal work and upon the completion of the work for specific work.

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<sup>21</sup> Supreme Court judgment Tai-Shang-Zi No. 2578 in year 1998.

<sup>22</sup> Chih-Poung Liou and Neng-Chun Wang Studies on the Fixed Term Labour Contract and Probation Period in Taiwan, Council of Labour Affairs, Executive Yuan, 30 June 2003, at pages 29-31.

<sup>23</sup> WANG, Sung-Po, *Supra* Note 10, at page 85.

<sup>24</sup> Please refer to the aforementioned publication by HUANG, Cheng-Kuan, at page 385. WANG, Sung-Po, *Supra* Note 10, at page 85.

## 5) Comparison between a Fixed Term Labour Contract and a Non-Fixed Term Labour Contract

Although labour law scholars in Taiwan argue that fixed term contract workers should be protected by the principle of equality,<sup>25</sup> however, the Labour Standards Act does not have any provision regarding the equal treatment of fixed term contract workers and non-fixed term contract workers or any provision that require an employer to assist fixed term contract workers to convert their contracts into non-fixed term contracts. Moreover, when a company is faced with economic difficulties and had to terminate the contracts for economic reasons, the court held that an employer may choose to first layoff special fixed term contract workers, i.e. foreign workers.<sup>26</sup> Furthermore, there are also collective agreements entered into by and between some companies and their labour unions which explicitly exclude the rights of fixed term contract workers from joining the labour union,<sup>27</sup> or which, although allowing fixed term contract workers to join the labour union, require that the terms of employment must comply with the provisions of the said fixed term contract and cannot be protected by the collective agreements as do the non-fixed term contract workers.<sup>28</sup> As a result, such collective agreements do not provide the same protection to fixed term contract workers as they do to non-fixed term contract workers. It is necessary to question whether such collective agreements have violated the principle of equality under Article 7 of the Constitution. It also reflects the discrimination suffered by fixed term contract workers in the labour unions of several Taiwanese corporations.

What are the differences between the legal protection given to fixed term contract workers and that given to non-fixed term contract workers? The differences are outlined below:

- (1) Termination of Contract: When an employer wishes to terminate a non-fixed term contract, there must be either an economic cause as prescribed under Article 11 of the Labour Standards Act (e.g. losses suffered by the business entity) or disciplinary cause as prescribed under Article 12 of the Labour Standards Act (e.g. material breach of labour contract or employment rules by the worker). On the other hand, when a fixed term contract expires, the said contract shall automatically be terminated. However, if events

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<sup>25</sup> LIN, Geng-Scheng, takes the view that: "Since we recognize that the general principle of equality exists under the labour law, thus, unless there is a legitimate cause, an employer shall treat fixed term contract workers with equal rights." "Studies on Practical Issues of Fixed Term Labour Contract," *Taiwan Labour Law Association Journal* Vol. 7, at page 96.

<sup>26</sup> According to the Supreme Court in its judgment Tai-Shang-Zi No. 2339 in year 2005, "Where an employer employs a ROC worker and a foreign worker at the same time and any event prescribed under Article 11 Item 2 of the Labour Standards Act occurs, whereby the employer may terminate the labour contract with notice, if the work for which the foreign worker was engaged can be undertaken by the ROC worker who is willing to undertake such work, in order to protect the right to work of the ROC citizens, the employer shall not terminate the employment of the ROC worker and continue to employ the foreign worker, so as to provide employment opportunities to the ROC citizens."

<sup>27</sup> In 2009, when the author was commissioned by the Council of Labour Affairs, Executive Yuan, to conduct a research on collective agreements, it was found that the collective agreement between the most representative steel company in Taiwan and its labour union forbid workers from joining the labour union of the said company.

<sup>28</sup> It was found in the research mentioned in Note 27 above that according to the collective agreement entered into by a certain public-owned sugar corporation and its labour union, although fixed term contract workers were permitted to join the labour union of the said corporation, however, it required that the terms of employment be based on the said fixed term contracts. There was an obvious differential treatment granted to non-fixed term contract workers.

prescribed under Article 11 (termination of employment due to economic cause) and Article 12 (termination of employment due to disciplinary cause) of the Labour Standards Act or under the aforementioned Article 489 (serious occurrence) of the Civil Code, an employer may still terminate the fixed term labour contract prior to the expiration thereof.

- (2) Notice of Termination: When an employer terminates a non-fixed term contract, according to Article 16 of the Labour Standards Act, the employer shall give 10-day, 20-day or 30-day prior notice depending on the years of services of the worker; Whereas, when an employer terminates a fixed term contract, the employer does not need to provide prior termination notice. However, if the employer terminates the fixed term contract prior to the expiration thereof, the employer should still provide termination notice.<sup>29</sup>
- (3) Severance Payment: When an employer terminates a non-fixed term contract, according to Article 17 of the Labour Standards Act, the employer shall pay the worker a severance payment based on the years of services of the worker, which is equivalent to 1 month of the average monthly salary for every year of service.<sup>30</sup> On the other hand, when a fixed term contract expires, the employer does not have any obligation to pay for severance payment. However, according to the interpretive letter issued by CLA, if the employer terminates the contract prior to the expiration thereof, the employer shall pay for severance payment to the worker.<sup>31</sup>
- (4) Retirement Pension: Under the Labour Standards Act, a fixed term contract worker cannot receive retirement pension. However, upon the enactment of Labour Pension Act (promulgated in June 2004), the amounts of retirement pension received by non-fixed term contract workers and fixed term contract workers are the same. The promulgation of Labour Pension Act is a very important milestone in the protection of fixed term contract workers' retirement pension. As elaborated below, the Labour Pension Act provides a protection to the fixed term contract workers in respect to retirement pension. Such protection greatly shortens the gap in terms of employment conditions between non-fixed term contract workers and fixed term contract workers. It is also an important step by Taiwanese government in loosening the current restrictions imposed on fixed term labour contracts under the Labour Standards Act.

In respect to workers' retirement pension regime, Article 53 of the Labour Standards Act provides: "A worker may apply for voluntary retirement under either of the following conditions: (1) Where the worker attains the age of 55 and has worked for 15 years; (2) Where the worker has worked for more than 25 years; or (3) Where the worker attains the age of 60 and has worked for 10 years." Article 57 of the same Act further provides:

<sup>29</sup> LIN, Geng-Scheng, *Supra* Note 25, at page 104.

<sup>30</sup> However, according to Article 12 of the Labour Pension Act promulgated in June 2004, the calculation of severance payment has been changed and the severance payment is calculated on the basis of 1/2 of the average monthly salary for each year of service, provided that the total severance payment shall not exceed an amount equivalent to 6 months of the average monthly salary.

<sup>31</sup> Interpretive Letter Lao-Tze-2-Zi No. 0920070419 issued by the Council of Labour Affairs, Executive Yuan, on 24 December 2003.

“Workers’ years of service shall be limited to years of employment by the same business entity.” From the foregoing, it is clear that, since the period of employment of a fixed term contract worker is quite short, in reality it is not possible for the said worker to continuously work for the same business entity for more than 10 years. Thus, under the Labour Standards Act, a fixed term contract worker cannot receive retirement pension.<sup>32</sup>

The Labour Pension Act drastically reformed the aforementioned retirement pension regimen under the Labour Standards Act, changing it into a portable pension fund system. In other words, irrespective of whether it is a fixed term contract worker or a non-fixed term contract worker, even if the worker changed employer, each of the said employer shall set aside a pension reserve for each worker employed on a monthly basis, the amount of which shall not be less than 6% of the worker’s monthly salary (Article 14 Paragraph 1). When the worker reaches the age of 60 and has worked for more than 15 years, upon his/her retirement, he/she is entitled to monthly pension payments. However, if the worker retires before he/she has worked for less than 15 years, he/she shall be entitled to a lump sum pension payment (Article 24 Paragraph 1). Since the Labour Pension Act adopts a portable personal account regime, workers who have reached the age of 60, regardless of whether they are fixed term contract workers or non-fixed term contract workers, as long as their total years of services in several work place are more than 15 years, they will be entitled to monthly pension payments. If their years of services are less than 15 years, they shall still be entitled to a lump sum pension payment.

- (5) Labour Insurance: Pursuant to Article 6 of the Labour Insurance Act, employers shall procure labour insurance for workers over the age of 15 and below the age of 60 regardless of whether the workers are fixed term contract workers or non-fixed term contract workers.
- (6) National Health Insurance: Pursuant to Article 8 of the National Health Insurance Act, employees of publicly or privately owned enterprises or institutions shall join the National Health Insurance, regardless of whether the workers are fixed term contract workers or non-fixed term contract workers.
- (7) Employment Insurance: Pursuant to Article 5 of the Employment Insurance Act, a worker of ROC nationality over 15 years of age and under 60 years of age shall join the employment insurance. According to Article 10 of the same Act, the employment insurance benefits include: unemployment payment, early re-employment incentives, vocational training living allowances and national health insurance subsidies for unemployed insured.

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<sup>32</sup> The average years of service are 114 months for a male worker working for the same employer and 93 months for a female worker working for the same employer. Thus, in reality, even for non-fixed term contract workers, often they are unable to receive the retirement pension under the Labour Standards Act because their years of service did not reach the statutory retirement standards. Thus, the retirement pension scheme as prescribed under the Labour Standards Act has been widely criticized and led to the enactment of Labour Pension Act in 2004. Please refer to the Directorate General of Budget, Accounting and Statistics, Executive Yuan, for the statistics on the average years of service of workers <http://www.dgbas.gov.tw/ct.asp?xItem=25795&ctNode=3580> (Last accessed on 2010/01/20).

Article 11 of the same Act further provides that if the insured has joined the employment insurance for at least 1 year within 3 years before his/her cancellation of the insurance as a result of involuntary resignation from work<sup>33</sup> and if the insured is capable of working and willing to continue to work, where the said worker is unable to find work or arrange for vocational training within 14 days after he/she applied for job placement, the said worker shall be entitled to unemployment payment.

How do the abovementioned provisions apply to fixed term contract workers? Article 11 Paragraph 2 of the Employment Insurance Act provides that an insured who resigned from work due to the expiration of a fixed term contract, who was unable to find work within 1 month, and whose contract had lasted for more than 6 months within 1 year after the resignation, shall be deemed to have involuntarily resigned from work. In such case, the preceding Paragraph of the same Article shall apply *mutatis mutandis* to the said insured. In other words, where a fixed term contract worker complies with the requirements set forth under this Paragraph, he/she shall be entitled to the same employment insurance benefits as a non-fixed term contract worker.

From the foregoing explanation, the pension fund, labour insurance, health insurance and employment insurance are the same for both fixed term contract workers and non-fixed term contract workers. The main differences lie in the protection given in respect to the termination of labour contract (however, if an employer wishes to terminate a fixed term contract prior to the expiration thereof, the employer must have legitimate ground as prescribed by law and cannot terminate at will), notice of termination (when an employer wishes to terminate a non-fixed term contract, the employer must provide prior notice) and the severance payment (wishes to terminate a non-fixed term contract, the employer must pay a severance payment to the worker). Consequently, the protections given to fixed term contract workers and non-fixed term contract workers under the labour law in Taiwan are in fact quite similar.

#### **IV. Direction of reform of laws on fixed term contracts**

In view that the provisions on fixed term labour contracts under the Labour Standards Act are overly strict, CLA has begun to discuss the loosening of the provisions in the past few years<sup>34</sup> and had established a Labour Standards Act Reform Group in 2009<sup>35</sup> to conduct

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<sup>33</sup> Article 11 Paragraph 3 of the Employment Insurance Act: The so-called involuntary resignation under this Act refers to the resignation by the insured due to the closing down, relocation, suspension of business, dissolution or bankruptcy of the entity procuring the insurance therefor or as a result of the occurrence of any one of the events prescribed under Article 11 (termination of employment due to economic cause), Proviso of Article 13 (An employer shall not terminate the employment of a worker on maternal leave or on leave for medical treatment, unless the business of the employer cannot continue to operate for reasons of natural disasters, emergency or force majeure and prior approval has been obtained from the competent authority), Article 14 (termination of employment by a worker due to the employer's breach of the labour contract) and Article 20 (termination of employment due to the restructure or change of ownership of a business entity) of the Labour Standards Act.

<sup>34</sup> For example, commissioning Chih-Poung Liou and Neng-Chun Wang in June 2003 to carry out the research mentioned in Note 22 above.

<sup>35</sup> Members of the Labour Standards Act Reform Group include professors, judges and attorneys. The author is also a member thereof.

review of the Act. On 11 January 2010, CLA announced the Draft Amendments to the Labour Standards Act (“Draft Amendments”)<sup>36</sup>, soliciting comments and opinions from the public.

The main purpose of the Draft Amendments is to amend Chapter 2 of the Labour Standards Act on “Labour Contracts,” seeking to (1) loosen the current provisions on fixed term labour contracts, and (2) regulate dispatched works. The background of such policy is: On the one hand, the provisions on fixed term labour contract are too strict, as a result of which employers have basically no room to hire fixed term contract workers. On the other hand, since dispatched work is not regulated by the laws, employers can freely engage dispatched workers. As such, dispatching work has become very popular in the recent years. It can also be said that there is a close connection between fixed term labour contract and dispatched work. It is therefore necessary to enact laws to regulate dispatch work, so as to prevent employers from illegitimately employ dispatched worker. Moreover, if the current strict provisions on fixed term labour contract are loosened up, there would be greater room for employers to hire fixed term contract workers.

Article 9 of the Draft Amendments provides:

**“Article 9** Labour contracts shall be non-fixed term contracts. However, in any one of the following situations, an employer may enter into a fixed term contract with the workers:

- (1) Where, in order to complete work within a specified period of time, it is required to employ additional workers and the period of employment exceeds 2 years, approval from the competent authority must be obtained.
- (2) Where it is required to hire workers for the provisional needs of business operation and the period of employment is within 1 year.
- (3) Where the salary of a worker is paid from the budget for Government Employment Programs and the relevant program clearly provides that a fixed term contract may be entered into, provided that the period of employment is within 1 year.
- (4) Where a worker is hired to replace another worker who has stopped carrying out his/her work due to statutory requirement or agreement with the employer and the period of employment exceeds 3 years, approval from the competent authority must be obtained.

A dispatching business entity shall not enter into a fixed term contract with the dispatched workers based on the grounds as prescribed in Items 1 and 2 of the preceding Paragraph.

In any one of the following situations, a fixed term contract shall be deemed as a non-fixed term contract:

- (1) Upon the expiration of the contract, where an employer raises no immediate objection when a worker continues to carry out his/her work.
- (2) Upon the expiration of the fixed term contract entered into pursuant to Paragraph 1 Item 2, where a new contract is entered into in accordance with this item and the prior contract and the new contract together cover a period of employment for more than 1 year and the period of time between

<sup>36</sup> [www.cla.gov.tw/cgi-bin/Message/MM\\_msg\\_control?mode=viewnews...](http://www.cla.gov.tw/cgi-bin/Message/MM_msg_control?mode=viewnews...)



the expiration of the prior contract and the execution of the new contract does not exceed 30 days.

- (3) Where the period of employment under Paragraph 1 Item 1 or the said period exceeds 2 years after the extension thereof and was not approved by the competent authority.
- (4) Where the period of employment under Paragraph 1 Items 2 and 3 exceeds 1 year.
- (5) Where the period of employment under Paragraph 1 Item 4 exceeds 3 years and was not approved by the competent authority.

Upon entering into a fixed term contract, an employer shall notify worker in writing of the period and content of the employment.”

The key amendments to and the reasons for the said amendments can be summarized as follows:<sup>37</sup>

- (1) The principle of non-fixed term labour contracts as adopted by the current Act is maintained, however, the current provision “a contract for continuous work [is considered] as a non-fixed term contract” will be deleted. The reasoning behind this amendment is that “the term ‘continuous work’ as referred to in the original provision is an uncertain legal concept. There is no equivalent concept of ‘continuous work’ under the relevant laws of countries such as Germany, Japan and Korea. Although such concept has been put to practice under our legal system, it nevertheless remains a gray area.”
- (2) The provision that divides fixed term labour contracts into four types--- temporary, short-term, seasonal and specific--- is deleted. The underlying reasoning for such deletion is that “As these four categories of work are highly similar, in practice, the nature of some works may involve several characteristics of fixed term works as listed in the original provision, as a result of which it is difficult to ascertain which category the said work belongs to and to interpret such works.”
- (3) According to the Draft Amendments, grounds for establishing fixed term labour contracts are limited to the followings:
  - i. Specific Work (where the period of employment exceeds 2 years, approval from the competent authority must be obtained). In respect thereto, the Draft Amendments maintain the provision under the current Labour Standards Act. However, the period of employment is extended from 1 year as originally prescribed to 2 years.
  - ii. Provisional Work (the period of employment is within 1 year). In respect thereto, the Draft Amendments use the concept of provisional work to cover temporary, short-term and seasonal works as prescribed under the current Labour Standards Act and extend the period of employment to 1 year.
  - iii. Workers Hired under the Government Employment Programs (the period of employment is within 1 year). As stated above, the current Labour Standards Act failed to regulate fixed term labour contracts for such type of work, a provision regarding which is explicitly included in the Draft Amendments.
  - iv. Replacement Work (where the period of employment exceeds 3 years, approval from the competent authority must be obtained). As explained above, the Labour Standards Act did not provide for unpaid parental leave for raising children as prescribed under the Gender Equality in Employment Act. If a worker gives birth

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<sup>37</sup> *Supra* Note 35.

consecutively, then the maximum period of unpaid parental leave for raising children may exceed 3 years. In order to balance the nature of the work and the protection of the replacement workers' right of work, the Draft Amendments specifically provide for such situation.

- (4) A new provision is included whereby, fixed term labour contracts shall be considered as non-fixed term labour contracts if the period of employment for the aforementioned specific or replacement works is expired but the competent authority's approval has not been obtained, so as to facilitate the competent authority's supervision and monitoring thereof.
- (5) The provision on statutory renewal is maintained. In other words, upon the expiration of a fixed term labour contract, if an employer raises no immediate objection when a worker continues to carry out his/her work, the labour contract shall be deemed as a non-fixed term labour contract.
- (6) The provision on consecutive contracts is maintained: where a new contract is entered into for the provisional needs of business operation upon the expiration of a fixed term labour contract and the prior contract and the new contract together cover a period of employment for more than 1 year and the period of time between the expiration of the prior contract and the execution of the new contract does not exceed 30 days, the labour contract shall be deemed as a non-fixed term labour contract.
- (7) A dispatching business entity shall not enter into a fixed term contract with the dispatched workers for specific work or for the provisional needs of the business. The legislation reasoning is that "this provision is added in the Draft Amendments in order to maintain the employment relationship between dispatched workers and the dispatching business entities on a long term employment basis and to maintain the stability of dispatched workers' employment, so as to prevent a dispatching business entity requiring a dispatched worker to enter into a fixed term contract on the basis of the dispatching period and to avoid its obligations as prescribed in the provisions under the Labour Standards Act regarding termination of contract, severance payment and retirement pension."<sup>38</sup>
- (8) In order to clarify the legal relationship, an obligation requiring employers to notify fixed term contract workers of the period of employment and scope of work in writing is added to the Draft Amendments.

The main difference between the provisions regarding fixed term labour contract under the aforementioned Draft Amendments and the provisions under the current Labour Standards Act is the removal of the requirement of "continuous work." In other words, as long as an employer can prove that a newly hired worker is "additional worker" or is hired for "provisional needs," the employer may hire the said worker on a fixed term labour contract basis. Since the threshold for fixed term labour contract has been reduced, employers will have more flexibility in hiring fixed term contract workers.

Although the aforementioned provisions are only Draft Amendments proposed by CLA and are far away from being enacted, however, after the announcement of the Draft Amendments, the labour union groups immediately opposed the proposed extension of the

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<sup>38</sup> Several court judgments held, in protection of dispatched workers, that a labour contract entered into by a dispatching company and a dispatched worker is a continuous non-fixed term contract and should not be affected by the result of whether the dispatch contract between the dispatching company and its client company is fixed term or not. E.g. Kaohsiung District Court Judgment Lao-Jien-Shang No. 4 in year 2007, Kaohsiung District Court Judgment Lao-Jien No. 62 in year 2006, Kaohsiung District Court Judgment Lao-Jien No. 24 in year 2006, etc.

period of fixed term labour contracts from 1 year to 2 years. In respect to such opposition, CLA said that it will reconsider.<sup>39</sup>

## V. Conclusion

According to Article 9 of the Labour Standards Act, labour contracts shall be based on the principle of non-fixed term contract and the law strictly limits the room for an employer to enter into a fixed term labour contract. However, looking at the labour market in Taiwan, the turnover rate of workers are quite high and the length of time of a worker being employed by the same employer is quite short. As such, it is debatable as to whether such legislation is appropriate. In particular, since dispatched works are not regulated while the law strictly imposes restrictions on employers' choice in entering into fixed term contracts, in a way, it forces employers to employ dispatched workers as an alternative to the strict restrictions.

In order to promote the flexibility of employing fixed term contract workers in the labour market and at the same time to rectify the loophole of unregulated dispatched work, Taiwanese government announced the Draft Amendments to the Labour Standards Act in January 2010, seeking to provide greater flexibility to the labour market. Although there is still a long way to go from getting the Draft Amendments enacted, it is nevertheless worthwhile to keep our eyes open on the development of this Draft Amendments in the near future.

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<sup>39</sup> *United Daily Evening News*, 8 January 2010, at page 3.

# Labour Policy on Fixed-Term Employment Contract in Korea

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## I. Introduction

### 1.1. Research Objectives

As of March 2008, according to a report entitled “Research on economically active people”<sup>1</sup> by the Korea National Statistical Office (Statistic Korea), the number of temporary employees in Korea totals 5,638,000 and accounts for 35.2 percent of total salaried employees (15,993,000 people). Fixed-term workers total 2,293,000 or 40.7 percent of total temporary workers. Compared to the statistics of March 2007 before the enforcement of the Act on the Protection, etc. of Fixed-Term and Part-Time Employees (hereafter referred to as the Irregular Workers Protection Law), the number of both fixed-term employees who have relatively good working conditions and temporary employees who are able to repeatedly renew their contracts has declined. However, the number of temporary employees, those who have relatively inferior working conditions or who cannot expect to have continuous work, has increased sharply. Therefore, it can be interpreted that since the enforcement of the fixed-term employee Act, the overall circumstances of employment have deteriorated.

Among total salaried employees,<sup>2</sup> an irregular employee’s wages are 65.3 percent of a regular employee’s salary. Furthermore, only 40 percent of irregular employees receive social insurance. The conditions faced by irregular employees such as employment insecurity, low wages, increments in the intensity of labor, and exclusion from social insurance or company welfare, are inferior compared with those of their regular employee counterparts. This makes it difficult for an irregular employee to lead a decent life. These problematic situations bring about not only the competition of low wages among employees, but also perpetuate the gap and conflicts between the rich and poor or regular and irregular workers.

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<sup>1</sup> Salaried workers are categorized into regular, temporary and day-workers in “Research on economically active people” by Statistic Korea. Since the economic crisis of 1997, in accordance with increase of temporary employees and day-workers, it was requested to conduct a detailed analysis on these workers and grasp new types of working arrangements such as a dispatched or contract company worker. Moreover, due to rapid changes, the situation of industrial and occupational employment transfers must be understood. Therefore, since 2000, new items have been included in the existing “Research on economically active people” and further research has been conducted.

<sup>2</sup> The ratio of temporary employees to total salaried workers varies between organizations which publish this statistic since each organization bases the statistic on different criteria. As of August 2006, the Ministry of Labor stated that ratio is 35.5 percent, Statistic Korea reports it to be 46.3 percent and according to Korea Labour and Society Institute, the ratio is 55 percent (the Ministry of Labor (2006/12), *Explanation of the Irregular Workers Protection Law*, p.3; Kim, Yoosun (2006/11). “Actual situation and Size of temporary employee”; Statistic Korea, *Research on economically active people*; Korea Labour & Society Institute (2006/8), *Labor and Society*, No.115).

To settle these situations and problems, the Korean government has enacted legislation which protects irregular employees. The Economic and Social Development Commission (formerly called the Korea Tripartite Commission) has discussed and collected diverse opinions from all of society since 2001 and then submitted the bill to the National Assembly. After several years of controversy, the Irregular Workers Protection Law was passed by parliament in November 2006 and came into effect from July 2007. The main purpose of this new law is to reduce the discrimination and abuse of temporary employees amid a deepening polarization of the labor market.

## **1.2. Research Scope and Methodology**

This research will compare and analyze the diverse legal issues that are involved in the Irregular Workers Protection Law, which has been in effect since 2007. This research also has the purpose presenting remedial measures for legislative policy. To achieve these research purposes, the contents of the Irregular Workers Protection Law and the actual management of the discrimination correction system will be analyzed here. I will then discuss the peculiarities and problems with this law and offer some suggestions related to future remedial measures.

This research constitutes five chapters. The first chapter introduces the research questions. Chapter 2 (II) considers the issue of discrimination against temporary employees. We will first examine the general concept of an irregular employee and then look at various categories of irregular employees. Chapter 3 (III) examines each law in relation to the prohibition of discriminatory treatment as a review of the revised Irregular Workers Protection Law. This chapter also provides a deeper look into the characteristics and main contents of the discriminatory prohibition legislation for irregular workers and then inspects the problems regarding all legislation pertinent to existing temporary employees. As the main discourse of this research, Chapter 4 (IV) pinpoints the problems with the existing the Irregular Workers Protection Law and offers logical solutions. The Conclusion, Chapter 5 (V), summarizes the main arguments and offers suggestions for new legislation for discriminatory prohibition regulations.

The significance of this research is that it provides an examination of the problems connected with discriminatory prohibition regulations of temporary employees and then suggests relevant solutions.

## **II. Present conditions and aspects of discrimination of temporary employees**

### **2.1. The Present Conditions of Temporary Employees**

#### **2.1.1. The Actual Situation of Temporary Employees**

According to the data of the Ministry of Labor, which is based on “Research on economically active people”<sup>3</sup> of March 2008 by Statistic Korea, the number of temporary employees accounts for 33.8 percent compared to regular employee counterparts (66.2 percent) within the same period. This is the lowest ratio since the beginning of the investigation in August 2008, and shows us that the increment of the number of irregular workers, which had been sharply increasing by approximately 800,000 every year since 2002, has lessened.

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<sup>3</sup> Statistic Korea (2008/3), *Research on economically active people*.

Meanwhile, although the number of irregular employees has slightly increased (26,000 people, 1.1 percent), the percentage of temporary employees among salaried workers has gone from 36.6 percent in 2005 to 35.5 percent in 2006. This is a result of the increase in wage earners (383,000 people, 2.6 percent).

Then, while the size and ratio of irregular work is decreasing little by little from the peak of 2005, the size and ratio of dispatched workers, contract company workers, and home based workers are rising. Intra-subcontract work is also increasing, though the exact statistics are unknown.<sup>4</sup>

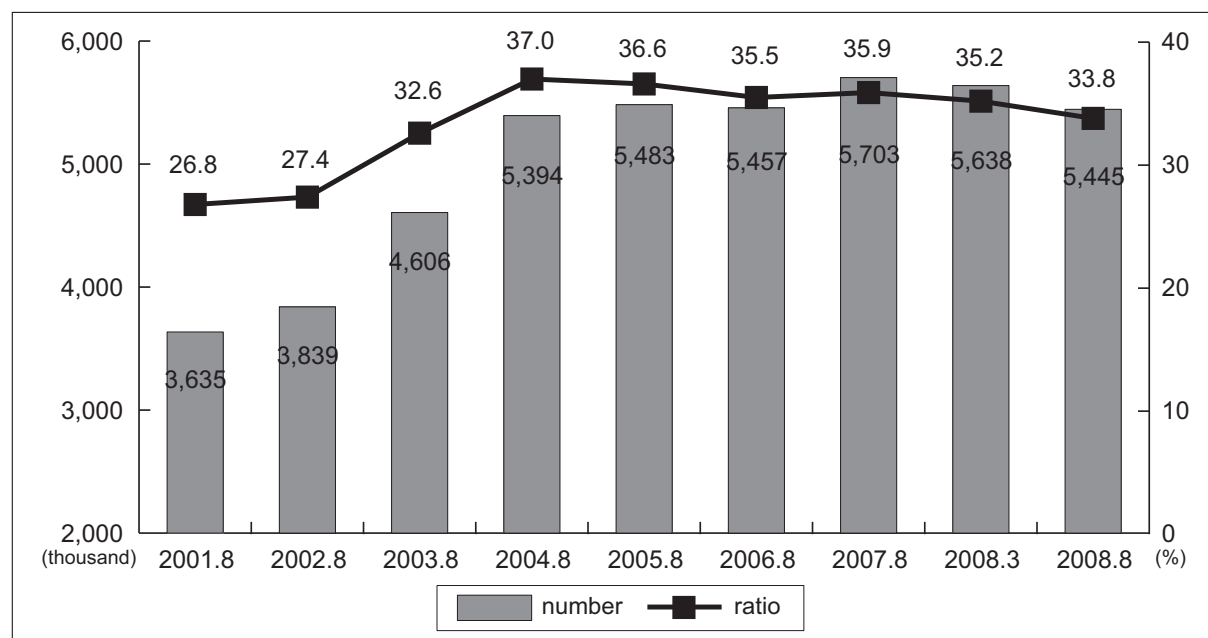
**Table 1: Changes of Regular and Irregular Employees**

	2005	2006	2007	2008 (August)
Total				
Regular	63.4%	64.5%	64.1%	66.2%
Irregular	36.6%	35.5%	35.9%	33.8%

Notes: “Research on economically active people” by the Korea National Statistical Office.

According to Table 1, as of August 2008, we can see that irregular workers account for 33.8 percent of the total salaried workers, and the number of this type of worker is roughly 5,455,000. Since 2004 (37.0 percent), the ratio of irregular workers compared to wage workers is smoothly changing from 34 to 36 percent.

**Figure 1: Size and Ratio of Temporary Employees**



Notes: “Research on economically active people” by Korea National Statistical Office.

<sup>4</sup> Eun, Soomi (2007), “Strategic Choice of Labor and Management to Solve the Problems of Temporary Employee, the Issue and Problem in accordance with Enforcement of the Irregular Workers Protection Law”, Korea Industrial Relations Association-Korea Society of Labor Law-The Korean Labor Economic Association joint policy debate, pp.59-62.

## **2.1.2. The Actual Employment Situation and Main Peculiarity of the Temporary Employee Situation**

### ***A. Necessity to Recognize the Actual Situation***

Although the main objective of the Irregular Workers Protection Law is to protect an irregular worker, under the existing conditions, this objective is not being carried out. Furthermore, contrary to this law's purpose, irregular workers are visibly suffering damage as a result of the law.

Only a law which precisely reflects social reality and is then enacted to improve societal problems could be considered valid. The situations surrounding the Irregular Workers Protection Law, however, are the reverse owing to a lack of proper reflection on social reality. In other words, while the law can remedy some social problems, it might be useless if it is greatly removed from the social reality. Therefore, having an accurate understanding of the social reality is an essential element in order to create a law which is necessary and relevant to the bettering of society.

### ***B. The Actual Situation of Labor and Management and the Category of Temporary employees***

#### **a. The actual situation of labor and management and the reasons behind the increase of temporary employees**

Enterprises make efforts to adjust in order to take advantage of radical changes in the environment and overcome fierce competition. Therefore, one of management's main objectives is to be flexible and prompt.

Enterprises already have the know-how to survive in the current worldwide competition, they have enforced the core competence that enables them to lead the economy, and they have restructured their businesses through decisive outsourcing and the disposal of non-core business. This kind of effort can also be seen in the personnel restructuring of companies, which stresses the recruitment and maintenance of the best employees in order to achieve core competence as the strategy to differentiate themselves. Non-core competence is disposed of through cost reduction, and scarce competence is made up strategically by enhancing productivity and securing a flexibility of manpower. This consolidated corporate and personnel management strategy is a "must" to survive in a competitive period.<sup>5</sup> The utilization of the temporary employee under the current situation meets the demands of the times and is realistic for survival. Thus, the increase of irregular work reflects a limitless competition arising from globalization and is part of a trend that we cannot afford to ignore due to the dramatic changes of technology and market environment. This is also an immediate cause of social polarization.<sup>6</sup>

#### **b. Reasons for the Difficulties of Conversion into Regular Employees**

There are five reasons why irregular employees have difficulties in being converted into regular employees.

First, as compliance with employment adjustments and cost are the primary factors that influence the utilization of temporary employees, a low number of temporary employees are converted into regular workers. In other words, from the viewpoint of the enterprise, it is

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<sup>5</sup> Lee, Jingyu (2007/7), "The Solution of the Discrimination Problems against Temporary Employee from the Management and HR", *Labor Legislation*, No.194, p. 43.

<sup>6</sup> Lee, Dalhyu (2006), "The Polarization solution from Social Law and Law School", *Treatise on Labor Law*, Vol.9, Korea Society of Comparison Labor Law, p.12.

difficult to convert an irregular worker into a regular worker since this would involve an increase in wages and the added cost of welfare benefits. Thus, if the enterprise cannot discriminate against an irregular employee in accordance with the Irregular Workers Protection Law, this eventually leads to the ascension of personnel expenses and the deterioration of corporate competitiveness. Owing to this problem, we can see not only the deterioration of corporate competitiveness but also the possibility of corporate bankruptcy.

Second, if an irregular employee is converted into either an employee with a non-fixed term contract or a regular employee, according to the Irregular Workers Protection Law, an enterprise will not be able to adjust or easily cut down the number of employees during difficult times. This will be a burden to an enterprise in the end. At the same time, the recognition of employees regarding this is vital to solving these kinds of problems. If it is possible to replenish these rising costs and prevent the deterioration of competitiveness (due to lack of flexibility over employment), with the improvement of technology and productivity, these problems will be solved.

Third, temporary employees are usually employed in vulnerable and less competitive businesses such as small businesses or medium-sized enterprises, so this is a factor which renders their jobs insecure. In addition, some factors, such as low education levels, low technical skills, low individual competence (foreign language or computer skills, etc.), a less competitive age spectrum and the like, make it hard to convert them into regular employees.

Fourth, the rate of participation in job training of temporary employees is very low, and the opportunity for career development, which could help them to convert into being a regular employee, is also very scarce. This is because the policies for the active labor market as they apply to irregular employees, such as free education for prompt re-employment, employment support services for less employable people, etc. are insufficient.

Lastly, as in the case of Germany and France, the practice of converting employees (based on an evaluation) into regular employees after they have been employed as temporary workers, has not been set up in Korea. This is because temporary employees, such as interns or unilateral contract workers, have been abandoned as “disposable” workers due to the economic recession and the youth unemployment problem.

### **c. Main Characteristics of Temporary Employees**

When examining the most representative working conditions, such as wages and working hours, we can learn more concerning the actual employment situations of temporary employees. The average working hours per week of a temporary employee is 90.4 percent of that of a regular employee in 2005, and there is no actual difference between regular and irregular employees in terms of working hours except for part-time employees, whose working hours are clearly shorter. Nevertheless, there is a huge difference in wages between temporary and regular employees.

The main characteristics of temporary employees are as follows: first of all, the percentage of fixed-term employees which accounts for highest proportion (44.4 percent) among the types of irregular employees shows a tendency to become permanent, though this figure is higher than in other countries.<sup>7</sup> At the same time, the amount of part-time work is increasing.<sup>8</sup> However, the percentage of part-time work is lower than that of other countries.<sup>9</sup>

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<sup>7</sup> Korea: 14.7% (2008/8), US: 4.0% (2003), Japan: 12.8% (2003), Germany: 12.7% (2003).

<sup>8</sup> From 807,000 (2002) to 1,229,000 (2008/8).

<sup>9</sup> Korea: 12.6% (2008/8), US: 13.0% (2003), Japan: 24.9% (2003), Germany: 17.6% (2003).



Atypical work is also increasing slightly<sup>10</sup> and contract company work, in particular, shows a continuous increase.<sup>11</sup>

## 2.2. Discrimination problems of Temporary Employees

### 2.2.1. Statement of the Problems

From the aspect of an enterprise, hiring a temporary employee rather than employing a regular one can secure employment flexibility and contribute to cost efficiency. On the other hand, although there are positive aspects of rendering employees a flexible time schedule at their work, low wages and inferior working conditions cause serious problems not only to the individual worker but also to society as a whole. In spite of having equal or similar work to that of regular employees, temporary employees have been treated with discrimination in terms of their wages and other working conditions. Thus, such low wages and employment insecurities form a class of poor laborers, which causes the labor market to polarize. This, in turn, worsens the income distribution system as well. These factors act to impede social integration, as can be seen in recent examples such as Ssangyong Motor and Kumho Tire.

Employers prefer to hire temporary employees due to the attractive low personnel expenditure of pay and dismissal costs. The employer ends up discriminating against irregular employees owing to these factors. Moreover, it is obvious that the management-labor disputes resulting from the controversy about equality will have a negative influence on corporate management from a long-term point of view. Despite these factors, discrimination against temporary employees has persisted. To address these problems, we will discuss working conditions and employment insecurity, which are the main areas of discrimination of temporary employees with a focus on time-fixed employees.

### 2.2.2. Problems of Discrimination in Working Conditions (the Problems of Equal Pay for Work of Equal Value)

The term “working condition” refers to any treatment of workers such as the prohibition of discriminatory treatment in relation to a labor contract. Conditions such as wages, working hours, accident compensation, safety and health, fringe benefits, and dismissal, are included in working conditions.<sup>12</sup> The most crucial of these is wages. If a worker is discriminatorily and unfairly paid, it threatens their security in terms of supporting their dependent family. It also means a devaluation of certain workers in the labor force - the damaging of a worker’s dignity and a violation of their human rights. Therefore, the core factor of equal treatment is “the principle of equal pay for work of equal value.”<sup>13</sup> Article 32, Clause 4 of the Constitution stipulates that employers shall not discriminate against workers on the ground of gender, and that equal wages must be paid for equal work to male and female workers. Article 6 of the Labor Standards Act also prescribes that employers pay equal wages for work of equal value. The principle of equal pay for work of equal value also stipulates that workers be paid equal wages not only for equal work but also for work which is evaluated as being equivalent. This originated from the concept that female workers should be paid the same wages as males for work that is considered to be of equal value. In other words, when male

<sup>10</sup> From 12.6% (2001) to 13.3% (2008/8).

<sup>11</sup> 332,000 (2002) → 413,000 (2004) → 431,000 (2005) → 499,000 (2006) → 584,000 (2007/3) → 593,000 (2007/8) → 617,000 (2008/3) → 641,000 (2008/8).

<sup>12</sup> Lee, John (2009), *The World of Labor Law*, HUFS Press, p.80.

<sup>13</sup> Korean Confederation of Trade Unions (2004), *White Paper on Infringement of Basic Labor Right of Temporary Employee I-II*, p.11.

and female workers are conducting different duties, if their duties have a value that is equal, employers have to pay them equal wages. This provision has enlarged the sphere of the equal treatment principle as regards workers' wages and has affected labor relations.<sup>14</sup>

### **III. Main contents of the irregular workers protection law**

#### **3.1. The Scope of Application and the Limitation of Employment Period in the Irregular Workers Protection Law**

##### **3.1.1. Scope of Application in the Irregular Workers Protection Law**

The term "fixed-term employee" refers to an employee who has signed a labor contract whose period is fixed (Article 2, Clause 1). The fixed-term employee is opposed to the notion of regular employee, and temporary employee, part-time employee and contract employee are included in this fixed-term employee.

A fixed-term employee is also an employee. Therefore, he/she is applied to not only Labor Standards Law and the Trade Union and Labor Relations Adjustment Act which basically apply to an employee to but also the Irregular Workers Protection Law.

This law shall apply to all businesses or workplaces employing not less than five workers: Provided that this law shall not apply to a business or workplace which employs only relatives living together and to a worker who is hired for domestic work (Article 3, Clause 1). However, with respect to businesses or workplaces employing four workers or less, some of the provisions of this law may apply to them as prescribed by the Presidential Decree (Article 3, Clause 2), and then with respect to State and local government agencies, this law shall apply to them regardless of the number of workers they ordinarily employ (Article 3, Clause 3).

##### **3.1.2. Limitation of Employment Period in the Irregular Workers Protection Law**

To protect a fixed-term employee, an employer may hire a fixed-term employee for a period not exceeding two years. If an employer hires a fixed-term employee for more than two years, the fixed-term employee shall be considered as a worker who has made a labor contract with no fixed term.

Therefore, as well as in the case of the labor contract which is signed more than two years, in the case of the sum of the periods which exceeds two years as a result of repeated fixed-term labor contracts shall also be a labor contract which has made a labor contract with no fixed-term. However, if an employer hires a fixed-term employee by setting a certain period of time, this case is not applicable to the restriction of two years.

On the contrary, an employer may hire a fixed-term employee for a period in excess of two years where: (1) The period needed to complete a project or particular task is defined; (2) The fixed-term employee is needed to fill a vacancy arising from a worker's temporary suspension from duty or dispatch until the worker returns to work; (3) The period needed for a worker to complete schoolwork or vocational training is defined; (4) The fixed-term labor contract is made with the aged as defined in Article 2 Subparagraph 1 of the Aged Employment Promotion Act; (5) The job requires professional knowledge and skills or the

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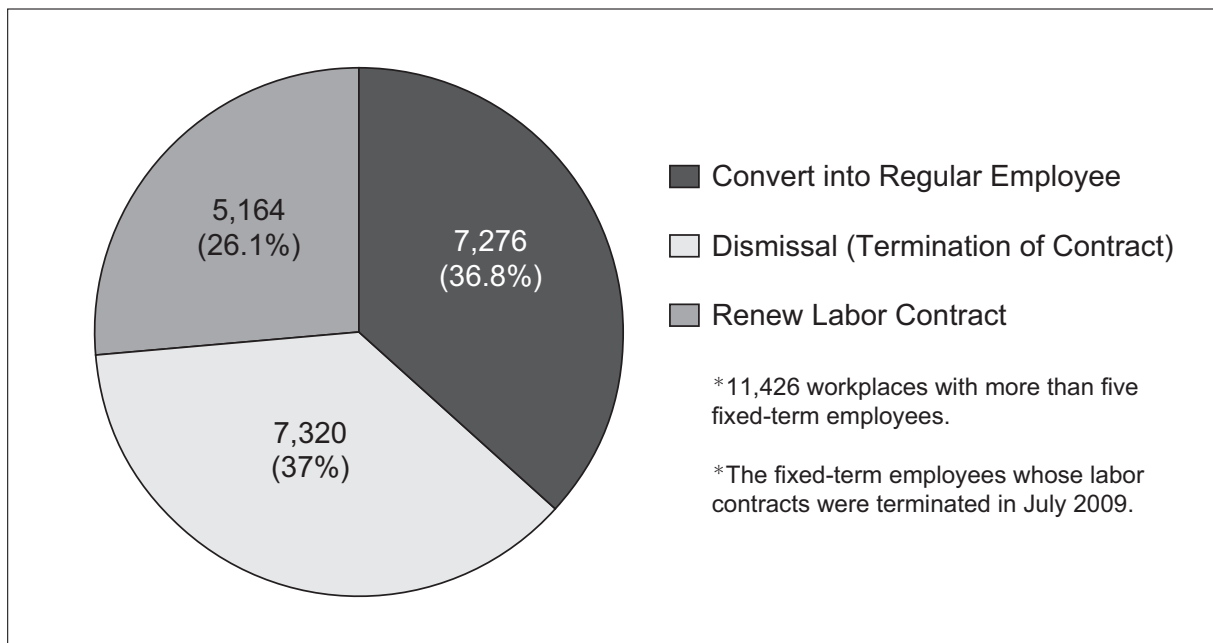
<sup>14</sup> Kim Ellim (2003), "The Issue on the Principle Equal Pay for Work of Equal Value", *Labor Law*, Korea Society of Labor Law, p.6.

job<sup>15</sup> is offered as part of the government's welfare or unemployment measures as prescribed by the Presidential Decree; or (6) There is a rational reason equivalent to those described in subparagraphs 1 through 5 and prescribed by the Presidential Decree.

### 3.1.3. Conversion into Workers under a Contract without a Fixed-Term

If an employer intends to make a labor contract without a fixed term, he/she shall make efforts to preferentially hire fixed-term employees who are engaged in the same or similar kinds of jobs in the business or workplace concerned (Article 5).

**Figure 2: The Actual Situation of Fixed-Term Employee (As of September 2009)**



According to the Ministry of Labor, out of the fixed-term employees (19,760 people) whose labor contracts were terminated in July 2009 (second year of the enforcement of IWPL), 36.8% (7,276) were converted into regular employees, 26.1% (5,164) are working continuously by renewing their fixed-term labor contracts and 37% (7,320) lost their employment because of the termination of labor contract. The targets of this statistics were 14,331 workplaces where more than five fixed-term employees are employed, however, 11,426 workplaces responded to this survey.

<sup>15</sup> Article 3, Clause 1 of Enforcement Decree of the Irregular Workers Protection Law:

The "cases in which a job requires professional knowledge and skills as prescribed by the Presidential Decree" refer to those falling under any of the following subparagraphs:

1. In cases where a person, who holds a doctoral degree (including those obtained in a foreign country), is engaged in the relevant field;
2. In cases where a person, who holds a national technical qualification of a technician level is engaged in the relevant field; or
3. In cases where a person, who holds a professional qualification specified in qualified architect, controller, certified public accountant, certified public labor attorney, patent agent, lawyer, certified public appraiser, tax accountant, doctor and aerial navigator etc., is engaged in the relevant field.

## 3.2. Main Contents and Characteristics of the Application of the Discriminatory Prohibition Law to Irregular Workers

### 3.2.1. Characteristics of the Application of the Discriminatory Prohibition Law to Irregular Workers

Next, we will examine some characteristics<sup>16</sup> of the Discriminatory Prohibition Law in regards to irregular employees. First, the discriminatory prohibition regarding a temporary employee is stipulated as a special law. That is to say, this discriminatory prohibition became regulated for the protection of temporary workers as a matter of legislation.<sup>17</sup>

Second, discriminatory prohibition is applicable to matters concerning wages but has the potential of being applied to a larger sphere of working conditions as well. The larger sphere of working conditions will be applicable to money or valuables but wages, education or transfer orders, promotion and retirement or dismissal and the like, which is applied with the gender equal employment and legal sexual discrimination. And yet the scope of recruitment and employment are not matters of concern for discriminatory prohibition since these factors belong to stages that precede contracting.

Third, the number of applicants requesting a redress and the subjects of application for the redress of discriminatory treatment<sup>18</sup> are limited. The applicants for a redress are limited to temporary employees and the subjects of application are also limited to the unfavorable treatment on the ground of being a temporary employee. Therefore, if regular workers are treated with discrimination, they cannot apply for a redress in accordance with this regulation of the law.

Fourth, the laws relating to temporary employees stipulate that an employer cannot discriminate against a worker on account of their being a temporary employee, and also prescribe the cause-and-effect relationship as the essential condition. These discriminations result from the reason for hiring irregular workers in the first place, and the discrimination directly influences this causal relationship from an objective view. Therefore, the discriminatory treatment is judged on the basis of the existence of discriminatory treatment which consequently resulted, without reference to whether the employer has a subjective intention to discriminate or not. Thus, the employers have to prove the existence of a justifiable reason for the discriminatory treatment.

Finally, the regulation of discrimination prohibition on fixed-term or part-time employees and dispatched workers is abstract. Thus, depending on how this regulation is interpreted and operated, it will be a potent influence on labor-management relations. This is closely related to how to handle the judgments toward the selection of workers who are able to compare with other workers and justifiable reasons for discrimination. For instance, to judge the discrimination prohibition toward dispatched workers, other worker who is employed in an equal or similar kind of works is needed to compare with dispatched worker. Therefore, it is paid close attentions to examine the justifiable reasons to judge.

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<sup>16</sup> Park, Jonghee (2006/11), "A Study on Criteria of Judgment of Discrimination Prohibition against Temporary Employee and its operation", *Journal of the National Labor Relations Commission*, p.61.

<sup>17</sup> Act on The Protection, etc. of Fixed Term and Part-Time Employees, amended by Act No. 8372, Apr. 11, 2007.

<sup>18</sup> The period of application for discrimination correction is limited to three months from the date when the discriminatory treatment occurred (exclusion period, Article 9 Clause 1 of the Irregular Workers Protection Law). For more details, see Park, Jonghee (2006), *op. cit.*, p.261.

### 3.2.2. Main Contents of the Discriminatory Prohibition Law as it Applies to Irregular Workers

#### *A. Act on the Protection, etc. of Fixed-Term and Part-Time Employees*

##### **a. The Significance of Article 8, Clause 1**

The term “fixed-term employee” refers to an employee who has signed a labor contract whose period is fixed regardless of the contract period. The essence of a labor contract is to fix terms regarding matters such as the continuation and termination of a contract. Matters such as setting a revision period for wages and the use period are not related to the core purpose of a contract and therefore cannot be considered as part of a fixed-term labor contract.<sup>19</sup> On the other hand, Article 8 of this law stipulates that “an employer shall not give discriminatory treatment against fixed-term employees on the ground of their employment status compared with other workers engaged in the same or similar jobs under a labor contract without a fixed term in the business or workplace concerned.”<sup>20</sup> Article 8, Clause 1 of this law states that the status of fixed-term employee in this type of contract is recognized, so the contract itself is not discriminatory. This means that an employer shall not discriminate against a fixed-term employee on the grounds of employment status. Given this, we can examine the definition of “discriminatory treatment” through Article 2, Clause 3 of the law.

The term “discriminatory treatment” refers to unfavorable treatment in terms of wages and other working conditions that is given without any justifiable reason. Therefore, discriminatory treatment as prohibited by Article 8 of the law would be (1) a discriminatory treatment against a fixed-term employee, (2) on the ground of their being a fixed-term employee, (3) with no justifiable reason for this discrimination. Thus, if an employer discriminates against a fixed-term worker, it would necessitate other justifiable reasons, not the reason of a fixed-term worker. In Korea, there are diverse aspects of systematic discrimination such as wages, position, and group of occupation, so it would be difficult to determine and enumerate the detailed criteria called for in the legislation.

##### **b. The Examination of Article 8, Clause 1**

Whether a discriminatory treatment has occurred is determined from the stance of the fixed-term employee, and whether there is a justifiable reason is judged from the stance of the employer. The justifiable reasons which employers can legitimately insist on regarding wages and the differences of working conditions are general conditions such as duty, competence, skill, qualifications, responsibility, authority, achievement, career, educational background, seniority, and age. Moreover, these are the factors related to the evaluation of labor and they also determine wages. To consider justifiable reasons beyond these sorts of factors, it is

<sup>19</sup> A worker who is in a trial period or on probation is not a fixed-term employee. However, a worker would be a fixed-term employee when he/she makes a contract as a fixed-term worker and whether the purpose of working is trial or probation. In short, it would be judged whether the purpose to set the period in labor contract of a trial or probation worker is for a continuance period or for a trial or probation period. And then, a worker would be a fixed-term worker, although the purpose of setting the period is not only for a continuance period but also for another reason.

<sup>20</sup> **Article 8 (Prohibition of Discriminatory Treatment)**

(1) An employer shall not give discriminatory treatment against fixed-term employees on the ground of their employment status compared with other workers engaged in the same or similar jobs under a labor contract without a fixed term in the business or workplace concerned.

(2) An employer shall not give discriminatory treatment against part-time workers on the ground of their employment status compared with full-time workers who are engaged in the same or similar kinds of jobs in the business or workplace concerned.

essential to check factors which determine or reflect the wages and working conditions in the business or workplace. As a result, if the differences of wages and working conditions occur due to certain factors that are relevant to the determination of wages and working conditions, they may be deemed as rational reasons. On the other hand, if an employer treats a fixed-term employee unfavorably compared with a regular employee based on factors which are irrelevant to the particular factors which determine wages and working conditions, it would be considered that there is no rational reason for such treatment.

### **c. The Significance of Article 8, Clause 2**

Article 8, Clause 2 of this law stipulates that an employer shall not give discriminatory treatment to part-time workers on the ground of their employment status compared with full-time workers who are engaged in the same or similar kinds of jobs in the business or workplace concerned. This is same way that an employer is prohibited from giving discriminatory treatment against fixed-term employees on the ground of their employment status in Article 8, Clause 1.

Incidentally, this law does not aggressively protect the right of equal treatment of a fixed-term and part-time employee, and rules inactively prohibiting undue discriminatory treatment against a fixed-term and part-time employee compared with a regular employee. In short, this provision essentially takes the form of a prohibition rule.

To prohibit a discriminatory treatment means that a legal action of employer or employer's introduction which is based on the legal action would be invalidated, there is some problem how to create legal relations after the invalidation. This connotes various probabilities, so it cannot be solved just by granting the right of equal treatment to fixed-term or part-time employees. In most cases, it can be accomplished by guaranteeing a temporary employee the benefits of equal treatment which would be equivalent to those granted to a regular worker. In some cases, however, the legal effect of discrimination prohibition would be practiced by replacing a regular worker's unreasonable benefits which he/she gets compared with a temporary employee.

### **d. Consideration on Article 18 of the Labor Standards Act**

The criteria or other matters to be considered for the determination of working conditions of part-time employees are stipulated in the labor contract, calculation of wages, overtime work, leave and application of leave, the making and changing rules of employment, and the like. However, working conditions for part-time workers shall be determined on the basis of the relative ratio of their working hours computed in comparison with those of full-time workers engaged in the same kind of job in the same workplace. Thus, although the protection of working conditions of part-time employees by the principle of relative ratio of their working hours is not contained in Article 8, Clause 2 of the Irregular Workers Protection Law, it is guaranteed in Article 18 of the Labor Standards Act.

In this manner, what is important is that the protection of the relative ratio of working hours of part-time workers is taken to grant their right of equal treatment. A part-time employee is able not only to raise an objection to an employer in respect to the unfair treatment, but also to protect the equal treatment which is based on Article 18 of the Labor Standards Act and to demand a benefit in return for the labor service offered.<sup>21</sup> Therefore, it is important that Article 18 of this law be applied to the Irregular Workers Protection Law as

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<sup>21</sup> Article 8, Clause 1 of Act on Equal Employment and Support for Work-Family Reconciliation stipulates that an employer shall pay equal wages for work of equal value in the same business.

this article explicitly secures the right of equal treatment in legislation toward a part-time employee in contrast with a fixed-term employee or a dispatched employee.

In short, Article 8, Clause 2 of the Irregular Workers Protection Law aims to prohibit the discriminatory treatment of a part-time employee. However, since Article 18, Clause 1 of the Labor Standards Act is based on the relative ratio of working conditions, when discriminatory treatment is inflicted upon a part-time worker on the grounds of working conditions, a part-time worker would be able to exercise the right of equal treatment in accordance with Article 18, Clause 1 of the Labor Standards Act.

### **3.3. Actual Management Situation and Evaluation of the Discrimination Correction System**

#### **3.3.1. The Procedures of Discrimination Correction against Temporary Employees**

The National Labor Relations Commission (NLRC)<sup>22</sup> is in charge of cases relating to the discrimination of temporary and fixed-term employees. The LRC (the Labor Relations Commission) is a consensus-based administrative body composed of tripartite representatives of employees, employers, and public interest committees respectively. The LRC is an independent quasi-judicial body that concentrates mainly on mediating and adjudicating labor disputes between labor and management regarding interests and rights. Its sphere of undertakings has been enlarged to cover individual disputes such as dismissal disputes since the revision of labor law in 1987. Recently, the LRC has been dealing with the redress of discriminatory treatment against temporary employees in companies as part of the implementation of the Irregular Workers Protection Law.

When a discrimination case is accepted, the LRC organizes a Discrimination Correction Committee (DCC) composed of three public interest commissioners and an investigator in charge to investigate the real question at issue. It then has the DCC judge whether or not an actual discriminatory treatment occurred. If it has, the DCC orders the redress of discrimination through an inquiry.

Before the adjudication, the DCC refers to the opinions from the employee's and employer's commissioners who attend this inquiry, and then issues a redress order if it adjudicates that the application of discriminatory redress in question has validity. If it determines that the application of discriminatory redress is unfounded, it dismisses the application for redress.

As part of the redress procedure in a discrimination case, a mediation may be conducted by the application of both parties or one party concerned, or one's authority. When a party agrees to follow the arbitration decision in advance and applies to the LRC for arbitration, it can then receive an arbitration procedure. Furthermore, when both of the parties concerned accept a mediation proposal once they have arrived at the mediation or when they get the arbitration decision, it shall have equal weight to a conciliation reached in the courts in accordance with the Civil Procedure Act. At this point, when it fails to reach arbitration, the DCC shall make a decision through an inquiry.

#### **3.3.2. The Present Condition of Redress of Discrimination against Temporary Employees**

The discrimination correction system has been conducted from 1 July 2007 to 30 June

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<sup>22</sup> The National Labor Relations Commission (2009), *The LRC settles labor disputes*.

2009 with a total of 2,152 cases accepted and handled. Among them, 588 cases (27.5 percent) arrived at a redress order or mediation; the number of rejected or dismissed cases was 684 (32.0 percent); and the cases which ended in a withdrawal of the case totaled 867 (40.5 percent). The main reasons for the rejection of cases are: (1) that there is no employee compared with other employee and (2) that there is a rational reason for the discrimination. The reasons for dismissal are mostly because: (1) there is disqualification as applicant requesting a redress and (2) the application is being made past the deadline of the application period. Of the 867 cases which withdrew, 765 withdrew with an amicable settlement and 102 made a simple withdrawal. The number of employees who applied for this discrimination correction system is 4,747 (the NLRC calculation), the employees of 2,230 (49.4 percent) can improve their discrimination through a redress order or an advice (for more details, redress order (1,459), rejection (1,173), dismissal (174), mediation (771), withdrawal (939)).

**Table 2: The Current State of Discrimination Correction**

(2009.6.30)

	The number of applications	The Number of Cases Handled							Processing
		Total	Subtotal	Redress order	Rejection	Dismissal	Mediation	Withdrawal	
<b>Total</b>	2,152	2,139 (100.0%)	758	102 (4.7%)	594 (27.8%)	90 (4.2%)	487 (22.8%)	867 (40.5%)	13
<b>NLRC (number)</b>	61 (2,592)	58 (2,473)	51 (2,412)	21 (1,433)	20 (946)	10 (33)	2 (10)	5 (51)	3 (119)
<b>RLRC (number)</b>	2,091 (4,747)	2,081 (4,516)	734 (2,806)	80 (1,459)	574 (1,173)	80 (174)	485 (174)	862 (939)	10 (231)

Notes: The National Labor Relations Commission (2009).

NLRC= National Labor Relations Commission

RLRC= Regional Labor Relations Commission

(number) is the number of employees

As of 30 June 2009, when we look at the application cases for the correction of discrimination in terms of the forms of employment, of the total 4,747 applications (the RLRC calculation), the number of the fixed-term employees is 4,564 (96.1 percent); the number of the non-fixed-term employees is 122 (2.6 percent); and the dispatched employees total 61 (1.3 percent). The greater portion of non fixed-term employees are not fixed-term employees but employees under labor contracts without a fixed-term.

Lastly, we can classify the contents of discriminatory treatment in the applications for discrimination correction. Most of the complaints are in regards to a bonus or performance-related pay, and those account for 2,023; the issue of basic salary or various allowances is involved in 354 cases; and the number of complaints regarding fringe benefits is 37; retirement pension is involved in 8 cases; lastly, the contents of other working conditions account for 70 cases.

### 3.3.3. Evaluation

It has been two years since the discrimination correction system was enacted. Contrary to



all expectations, there have only been a small number of applications so far and the percentage of redress order decisions is very low. The reason for this is based on realistic and institutional factors. The realistic factors are that it is difficult for a temporary employee to apply for a redress of discrimination and maintain his/her employment relations. Moreover, a temporary employee might lose the chance of application due to seeking employment or re-employment after the termination of the employment relationship. The institutional aspects relate to the exclusion period, the scope of applicants, etc. In particular, there are also management reasons that the LRC did not take effective actions to handle discrimination correction in the early stage of the system's enforcement.

On the other hand, these days, discrimination correction decisions tend to be more active compared to earlier from the standpoint of the new legal principles in the NLRC. For instance, from the viewpoint of labor contract period, there are modified decisions from the stance denying a qualification as applicant. Also, the NLRC are gradually giving shape to the principle of judgment and the consideration factor in relation to the problem whether there is compared with an employee. Nonetheless, the objective standards by which to judge whether what is the main duty or core duty are insufficient for judging equality or similarity of work. Moreover, it is imperative to reconsider problems such as the existence of other employees compared with temporary employees.<sup>23</sup>

## **VI. Problems with the irregular workers protection law and their solution**

### **4.1. Problems with the Discrimination Prohibition Regulation against a Fixed-Term and a Part-Time Employee**

#### **4.1.1. Problems of the Discrimination Prohibition Regulation against a Fixed-Term Employee**

Article of 8 of this law stipulates that an employer shall not give discriminatory treatment against fixed-term employees on the ground of their employment status compared with other workers engaged in the same or similar jobs under a labor contract without a fixed term in the business or workplace concerned (Clause 1). An employer shall not give discriminatory treatment against part-time workers on the ground of their employment status compared with full-time workers who are engaged in the same or similar kinds of jobs in the business or workplace concerned (Clause 2).

At this point, it is necessary to consider the characteristics of regulation. Regulation might be a confirmative regulation which regulates a concrete context of the principle of equal pay for work of equal value, or it might involve the regulation of policy. The problem of whether a fixed-term or part-time serves as a rational reason to discriminate, and to prohibit the discrimination against a temporary employee, though the labor productivity is low in proportion to the term, is a preferential policy toward a temporary employee. These problems bring to light the fact that regulation is compatible with the Korean Constitution.

Moreover, on account of this kind of regulation which considers as an employment actually, this factor renders a wage system to the system of allowance for long-service. In other words, an employer does not hire a fixed-term employee over two years, and then hire a

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<sup>23</sup> Park, Sookun (2009/12/4-5), "Temporary Work and Law in Korea: Focusing on Contract Employee and Dispatched Employee", Forum of Temporary Employee in Korea and Japan.

fixed-term employee repeatedly at stated intervals and apply a salary class system to the temporary employee. On all such occasions, the temporary employee would be a new recruit, so her/his career cannot be acknowledged. The salary class system is actually a rational wage system, so the temporary employee cannot assert discrimination concerning this.

In the end, there are problems as regard to how these regulations can be applied in reality. The enterprises which can endure these sorts of wage increases can protect a temporary employee pursuant to these regulations of discrimination prohibition. However, the enterprises which cannot endure wage increases might dismiss a temporary employee or force the employee to work under previous working conditions. These kinds of problems worsen the polarization of workers.

## **4.2. Solutions for a Fixed-Term Employee**

### **4.2.1. Fair Compensation for Work**

The occurrence of conflict in dialectical community relations in the effort to realize the personality as worker of labor and management is an inevitable phenomenon. However, the cross recognition between labor and management is indispensable to minimizing this conflict. Thus, the fair compensation of the labor value of the worker is a prerequisite. This is why the Labor Law is the law with which to fairly secure the value of labor under capitalism.

Therefore, the active enhancement of an enterprise's productivity is required to guide the economic interests of labor and management in the direction of coexistence and co-prosperity. When a worker concentrates on productive growth and an employer puts forth his/her whole energy to this achievement, the labor and management can develop a cooperative relationship rather than one full of struggle. The employee's basic intention to work should be to accomplish the productivity growth of the firm and the employee should try to enhance the quality of products and productivity with a diligent and faithful attitude. The employer should make a greater effort to improve the quality of a worker's life and company's profits in order to positively influence their outcomes. Therefore, a fair compensation system must be constructed and the community and enterprises must take a leading role to achieve this system.<sup>24</sup>

### **4.2.2. Prohibition of Intra-subcontract**

An intra-subcontract could be prohibited for the effectiveness of the Irregular Workers Protection Law. However, this would be inharmonious with the economic order at which the Korean Constitution aims. In other words, the economic order of free markets, which is based on the private ownership of the means of production or the private property system, and the principle of free competition guarantee the free economic activity and creativity of an individual or a private enterprise to the maximum. Moreover, the maximization of efficiency through active free economic activities and free competition to pursue profits is appropriate to improving the economic situation and producing wealth.<sup>25</sup> Therefore, the prohibition of an intra-subcontract would contribute to the increase of personnel costs and further deteriorate the competitiveness of the company. It is possible to reject such a provision based on the logic of capitalism. However, if prohibiting the intra-subcontract yielded labor productivity high enough to offset the increase in personnel cost, such a prohibition might be permissible. As

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<sup>24</sup> Choi, Jongtae (2005), *The Win-Win Relationship between Labor and Management and The Fair Compensation System*, SNU Press, p.21.

<sup>25</sup> Kye, Heeyeol (1995), *Constitutional Study (I)*, Pakyoungsa, pp.344-346.

mentioned above, if the prohibition of the intra-subcontract is an appropriate measure by which to promote public interest, it could also be recognized.

#### **4.2.3. Relief System for Dismissal for Managerial Reasons (Solutions through the Structural Reform of Public Enterprise and Attracting Foreign Capital)**

An enterprise usually wants to try to avoid the Irregular Workers Protection Law since it brings about inflexibility of the labor market and increases the cost burden. It would be a method to choose one between the flexibility of labor market and the cost burden increase to solve the problems of the regulation of discrimination prohibition in this law. In short, it is to delete the discrimination prohibition system or to erase the regulation to transfer from an irregular worker to a regular worker.<sup>26</sup>

Or, it would be a method to relieve the regulation of dismissal for managerial reason, by keeping the regulations of discrimination prohibition and transferring to regular worker. The urgent managerial needs which are requisite for the dismissal for managerial reason do not need to be limited to avoid business bankruptcy, according to the fact that the downsizing measures in the enterprise is actually conducted by the economic reason which is the deterioration of business results, technical reason such as the improvement of productivity, the change of work form to cope with the recovery of competitiveness and the introduction of new technologies and the reason of industrial structural change which is brought from these technological innovations. And then there is the court's decision<sup>27</sup> that it shall be deemed that an urgent managerial need exists when the downsizing of employees is admitted to have rationality from an objective point of view.

In this way, the regulation of discrimination prohibition and the transfer regulation cause a burden to management<sup>28</sup> of an enterprise or business. Hence, if an employer can easily dismiss a worker for a managerial reason, it would not be a problem to adhere to the regulation of discrimination prohibition and the transfer regulation, particularly if a public enterprise has high costs and low effectiveness, such as a 30 percent reduction in labor productivity, while wages are 30 percent higher compared to their private enterprise counterparts. Moreover, since their retirement can be secured once they enter the company, the employees in a public enterprise have a tendency to hold onto their vested power rather than performance based work, so the efficiency declines compared to their private enterprise counterpart. Therefore, prior to the problem of discrimination prohibition toward a temporary employee, it is imperative to reform public enterprise to solve the problems of temporary employees and youth unemployment. Since this is also the reason<sup>29</sup> that a foreign company cannot invest in the Korea domestic market, not only public enterprises but also private enterprises have to try to deregulate the employee dismissal to create employment. That will permit a resolution to the problems of temporary employees and youth unemployment and

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<sup>26</sup> According to "Research on economically active people by type of working" which is released in 26<sup>th</sup> October 2007 by Statistic Korea, the number of temporary employees of August 2007 accounts for 5,703,000 and it is increasing 4.5 percent (24,6000) compared with August 2006 (5,457,000). The reasons to increase are that more workers are choosing a temporary work. In other words, employers are thinking that it does not matter to raise employees' wages if they can ensure flexibility. On the other hands, employees are thinking that they do not care to be a temporary worker if they can get good treatment rather than to be a regular worker (Hankyung Newspaper (2007/10/26)).

<sup>27</sup> Supreme Court Decision 90Nu9421 Delivered on May 12, 1992, Supreme Court Decision 92Da16973 Delivered on August 14, 1992.

<sup>28</sup> Case of Samick Construction Co., Ltd., Supreme Court Decision 87DaKa2132 Delivered on May 23, 1989

<sup>29</sup> The Financial News (2006/12/19).

invigorate foreign investment in Korea's domestic market. Thus, if this kind of job creation can expand the amount of regular jobs, we can more realistically solve the problems regarding discrimination against temporary employees.

#### **4.2.4. Concrete Social Insurance System for the Protection of Temporary Employees**

Korea is based on the principle of capitalism and if we consider that human beings differ from each other in terms of ability, and we recognize the need for some methods by which to survive in a global economy in the age of limitless competition, generating the category of a temporary employee might be inevitable.

Similarly, if the appearance of temporary employees is an inevitable phenomenon, a concrete system should be put in place to settle the problem of poverty caused by the social polarization typically experienced by temporary employees. First of all, creating a definite system requires knowledge of what it takes to foster human dignity. The maintenance and continuation condition and the development condition are generally necessary to realize human dignity.<sup>30</sup>

The former of the maintenance and continuation condition is realized by the public assistance system in the Social Security Law. In other words, this is "a minimum of material security" which is said by the Constitutional Court of Korea,<sup>31</sup> the extent of a minimum of material security would be different according to the ability of nations; however, for the more specific instance, people should be secure beyond the level of material security of the army. Of course, health is also required at this level of material security.

The latter, the development condition calls for a system of self-development under the premise of the former system. Education is imperative for self-development in a specialized society which is complicated and diverse. Therefore, a free education system is needed and to settle temporary employee problems, it is necessary to provide the opportunity for a temporary worker to be promoted to a regular worker through education and training. In other words, the training of a temporary employee would be required in order for such an employee to change their status from an irregular worker to a regular worker. Moreover, an education system also needs to be in place for the education and making of a professional worker. Although a worker is participating in job training, her/his status is still that of a temporary worker, and if she/he does not get the potentiality of development, job training will not gain popularity. Thus, it is required to reward the wages according to the level of a worker's skill, which is procured through job training.<sup>32</sup>

Finland serves as a good example of this. However, if a system like that of Finland were applied to Korea, there might be tax resistance. When we take a broad of view, however, tax is a measure through which to preserve human dignity and the stabilization or peace of the society. Therefore, it would be necessary for people to change their viewpoints regarding tax.

### **4.3. Legal and Institutional Improvement Measures of the Discrimination Correction System**

#### **4.3.1. Enlargement of the Scope of Workers who are Entitled to Application for Discrimination Correction**

<sup>30</sup> Lee, Dalhyu (2000), "The Idea of Social Security Law in Constitution", *Research on constitutional study*, Vol.6 No.2, Korean Constitutional Law Association, p. 208.

<sup>31</sup> Constitutional Court of Korea Decision 93Hun-ga14 Delivered on July 21, 1993.

<sup>32</sup> Hankyung Newspaper (2008/6/4), Editorial.

It is difficult for a temporary employee, who is in a vulnerable employment category, to demand the redress of discriminatory treatment and take the risk of employment insecurity. Therefore, to overcome the limitations of the discrimination correction system and enhance its effectiveness, the scope of the temporary workers who are entitled to apply for discrimination correction must be widened for the workers concerned or the labor union. If the duty of the non fixed-term worker (who is transferred from being a temporary worker) is similar to the former work which he/she was doing as a temporary worker, and if he/she experiences some form of discrimination compared to the other workers in the workplace of the employer, it would be able to improve the discriminatory practice of company by including the non fixed-term employee in question, who apply to a temporary worker, to the applicants who can apply for the discrimination correction on the grounds of the active meaning of the Irregular Workers Protection Law.

#### **4.3.2. Reinterpretation of the Application Period of Discrimination Correction and Discriminatory Treatment**

Article 9 of the Irregular Workers Protection Law stipulates that a worker shall not apply for discrimination correction if three months or more have passed since the day when the discriminatory treatment occurred. At this point, the clause “the day when the discriminatory treatment occurred” refers to the discriminatory treatment received by the worker compared with other workers. Since a temporary employee may have only a limited knowledge concerning what a regular worker’s wages or other working conditions are, it may take a considerable period of time for the temporary employee to recognize that he/she has been treated with discrimination. Therefore, it is necessary to revise “the day when the discriminatory treatment occurred” to “the day when he/she perceives that he/she has been treated with discrimination.” In addition, there must be some compensation for the deficit of this law until this provision comes to a legislative settlement.

#### **4.3.3. Simplification to Elucidate Concrete Reasons when Applying for Discrimination Correction**

In actuality, a temporary employee has some difficulties in gaining access to information regarding an employer’s complicated wage system, fringe benefits, and other working conditions. In addition, an employer can impede the effectiveness of the discrimination correction system by putting a greater burden on an employee when he/she applies for discrimination correction. In consideration of these points, a statement very clearly indicating that there has been discriminatory treatment against the temporary employee (the applicant) must be provided.

#### **4.3.4. Flexible Management of the Area of Discrimination Prohibition Subjects**

When the discrimination correction is judged, each Labor Relations Commission has a different interpretation regarding the problems of including money and other goods which are arbitrarily provided by an employer’s direction among the wages or other working conditions (objects which prohibit the discrimination against a temporary employee). Some Labor Relations Commissions passively interpret it. In general, although the payment regulation is not included in the rules of employment, a collective agreement, and the like (if the money and other goods are provided to all employees in accordance with custom so that it makes an employee anticipate that the payment will indeed be received by him/her as a socially accepted idea), it is deemed that the working condition is formed. Thus, money and other

goods arbitrarily provided to employees should be included when judging matters pertaining to the prohibition of discrimination against a temporary worker.<sup>33</sup>

#### **4.3.5. Omission of the Selection of Other Employees Compared with when the Discrimination is Obvious**

Pursuant to Article 8 of the law, other workers engaged in equal or similar jobs under a labor contract without a fixed-term in the business or workplace concerned must be compared with temporary workers. However, when it is obvious that there is any discrimination against a temporary worker such as being excluded from treatment which has been applied to all workers, it should make it possible for the temporary worker to apply for discrimination correction, though other specific workers have not been selected as a basis of comparison.

## **V. Conclusion**

The problems faced by temporary employees are no longer merely the problems of minority groups. Since the issues of temporary employees have been raised, there have been no conclusive solutions, though there has been a great deal of research and discourse conducted in diverse fields. It would be difficult to accomplish employment security by fixed legislation. If it were, the core issue would be that it is indeed very difficult to arrange secure working conditions for temporary workers in the Korean labor market.

The discrimination problems of temporary employees start from the discriminatory treatment they receive compared with regular workers even though temporary workers are performing equal or similar work or work similar periods. Temporary workers are given discriminatory treatment or disadvantages compared with regular workers, and when we see the actual employment situations of temporary workers, it becomes apparent that they are given an inferior status compared with their regular worker counterparts. Moreover, if an employer gives unreasonable treatment to a temporary worker such as lower wages or the limitation of welfare benefits on the grounds of the characteristics of a temporary worker's duty (which is considered to be relatively simple or repetitive), the temporary worker's position might degenerate to being deemed as an unwelcome job. As a result, the temporary employee who is working the job in question has to do tasks which are physically hard and dirty, and this can cause labor productivity to deteriorate. The temporary worker might also find it difficult to cooperate with labor and management since the work is recognized as an unwelcome job. Therefore, it is necessary to get a special judicial review regarding the appropriateness of the Irregular Workers Protection Law, although if there is a gap between wages level through a separation of occupation group according to occupational category. There should be no discrimination involved in legally employing a temporary worker in a business or workplace.

In particular, we must judge whether an employer discriminates against a temporary worker compared with a regular worker who is engaged in equal or similar work in terms of wages, working hours, legal allowance, bonus, pension, accident compensation, and allowance. However, the Ministry of Labor interprets that it is not applicable to unfavorable

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<sup>33</sup> There are no legal grounds by which to interpret the working conditions that are the subject of application for discrimination correction by limiting the essential and important working conditions such as wages. Furthermore, by enlarging the area of discrimination prohibition in addition to wages, the current legislation needs to interpret that other fringe benefits can be the subject of discrimination correction.

discrimination reasons when the long service allowance is not provided to a temporary employee. If an employer provides differential performance-related pay which is based on a fair standard and differential incentive pay which is considered a gratifying reward or rewards for contribution to future work, the Ministry of Labor considers that it does not apply to unfavorable discrimination reasons as well.<sup>34</sup> Therefore, the purpose of the discrimination prohibition system is not that the working conditions of temporary employees have to be the same as the working conditions of regular employees. Rather, this system prohibits giving unfavorable treatment against a temporary employee without any rational reasons. In short, discriminatory treatment against a temporary employee is permissible if there are rational reasons such as the gaps of labor productivity and differences of expertise between a temporary and a regular worker. The problems of discriminatory treatment against a temporary worker would not occur if the equal wages system with regular workers were applied to temporary workers; if standard working hours and overtime work were equally applied to temporary employees and regular workers; if an employer applied the bonus and performance-related pay (based on a base salary or conservation payment except for retirement pension) equally to a temporary and regular worker; and if the conditions of social insurance or fringe benefits for regular workers were also applied to temporary employees. In other words, the overall working conditions, which include not only wages and working hours, etc., are what need to be improved - and this is the object of discrimination correction and social security allowances.

In conclusion, the problems of temporary employees are complex and there is more than one side to the issue. Therefore, it is problematic to merely consider temporary work as negative. Nevertheless, if a temporary employee is brought to the market without any protective devices, while there may be some advantages such as increased employment (dropping the unemployment rate in the short-term), in the long term, it runs a heavy risk of decreasing labor productivity and deteriorating the quality of a worker's life by substituting it for regular work. Thus, to settle these problems of temporary employees, each political party should avoid merely sticking to the political merits and demerits of advantageous legislation. A prompt revision of the Irregular Workers Protection Law, which was revised in 2007 to solve the problems of current temporary employees and to secure the temporary worker to lead a decent life, must be accomplished.<sup>35</sup>

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<sup>34</sup> The Ministry of Labor (2007/6), *Introduction to the Discrimination Correction System*, p. 2.

<sup>35</sup> Lee, John (2006/4/6), *Is There No Solution Concerning the Temporary Worker Problems*, Seoul Economic Newspaper (editorial).

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# Practice and Problems: the Fixed-term Employment Contract in China

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## Introduction

From the establishment of the People's Republic of China (PRC) in 1949, the laws and legal system of Republic of China (1911-1949) were totally abolished and abandoned, because PRC was established through revolution. The Chinese employment and labor law today started from 1949. In 1950s PRC began to implement Planned Economy. Under the Planned Economy Period (1953-1979), there was no fixed-term employment in the state-owned enterprises, the only permitted enterprises at that time; there were only regular employment (lifelong employment) and temporary employment. For the regular employees, the working conditions, such as wage, working time and other conditions were set by the state, while for the temporary employees, they were set through negotiations.

From the adoption of the policy of reform and opening to the outside world, the private economy started to develop quickly in China. Although the state-owned enterprises and other forms of enterprises all operated in the Chinese market at the same time, the employment regulations that applied to them were different. The state-owned enterprises inherited the regular employment system of the Planned Economy and began to swift to the fixed-term employment from 1986, while the private enterprises mainly hired workers under fixed-term employment contracts.

The Labor Law of China was promulgated in 1994, and put into force on January 1, 1995, aiming to establish new regulations suiting the development of market economy. In accordance with Labor Law of China, those who could have the chance to enter into an open-ended employment contract were very limited. Most of the employees in China worked under fixed-term employment contract in China.

The practice of fixed-term employment contract has resulted from the swift growing of private economy, the reform to the state-owned enterprises and the carrying out of Labor Law of China. The domination of fixed-term employment contract for about 12 years (1995-2007) has caused lots of problems in the labor protection and the labor relation was getting worse. Therefore, Labor Contract Law of China (LCL), which came into force in 2008, is trying to stabilize the labor relation in China and change the fixed-term employment practice in China, which has caused lots of objections from employers and some scholars. This essay will introduce and discuss the problems concerning the fixed-term employment contract, including the current situation, the problems and the future of it.

## I. General overview of the fixed-term employment in the labor market

### i. Present state of the fixed-term employment

In present China, most of the employees are working for the employers under the fixed-term employment contracts except for employees of government agencies, though there is no accurate national number of the percentage of the fixed-term employees among the whole labor force. According to the official report, the number of fixed-term employees has been decreasing while the number of open-ended employees has been increasing since the enforcement of Labor Contract Law of China (hereinafter referred to as LCL).<sup>1</sup> Before the enforcement of LCL, according to the research of the scholar in 2005, 70% of employment contracts were fixed-term contracts, among which the short term employment contracts dominated; 80% of the employment contracts were within a term of three years and most of them were within one year. The percentage of open-ended employment contracts was different in state-owned enterprises and non-state-owned enterprises. In the state-owned enterprises, only 20% of the employees worked under open-ended employment contracts. In the non-state-owned enterprises, the number was 3%.<sup>2</sup> In a survey conducted by All China Federation of Trade Union in ten cities in 2006, among 5,000 employees questioned, 85.2% of whom was under fixed-term employment contracts, of which 83.2% was from a period from one to three years and 36.7% was within one year.<sup>3</sup>

Some investigations in the provincial level have indicated the changes brought about by the new regulations of LCL. According to an investigation in October, 2008 in Zhongshan City of Guangdong Province, where the enterprises were mainly privately owned, only 4% of the employees worked under the open-ended employment contract. Although the percentage of open-ended employment contracts is still very low, some investigations show that the period of the fixed-term employment contracts has been prolonging. In April, 2008, Labor and Social Security Bureau of Guangdong Province, one of the industrially developed provinces in China, conducted a sample investigation to 5,000 enterprises, and the result showed that the employment contracts under one year decreased from 67% to 40% compared with the number in the year of 2007; that the employment contracts over three years increased from 8.7% to 26%; that in the city of Zhongshan only 14.3% of the employment contracts were under a period of one year; and that the percentage of employment contracts over three years was 71%.<sup>4</sup> From those facts, it can be concluded that the period of fixed-term employment contract tends to be prolonging after the enforcement of LCL since January 1, 2008, though the percentage of the fixed-term employment contracts is quite high in China.

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<sup>1</sup> Cao Qitai, dean of Legal Affair Office of State Council, said in a news conference on September 19, 2008 that since the enforcement of Labor Contract Law of China from January 1, 2008, there is an obvious decrease in the number of fixed-term employment contract under one year and an increase in the fixed-term contract over three to five years, and also there is an increase in the percentage of open-ended employment contract. Please see: 《无固定期限劳动合同不是“铁饭碗” 半年企业劳动合同签订率逾九成》, [http://news.southcn.com/china/zgkx/content/2008-09/20/content\\_4609500.htm](http://news.southcn.com/china/zgkx/content/2008-09/20/content_4609500.htm)

<sup>2</sup> 张建国: “推进劳动合同制度实施, 切实维护职工合法权益”, 2006年2月北京市劳动和社会保障法学会2005年年会论文。

<sup>3</sup> 王全兴、黄昆: 无固定期限劳动合同的是与非, 《法学家》2008年第2期。

<sup>4</sup> A report by Xinhua News Agency on Oct.9, 2008, please see: [http://news.xinhuanet.com/newscenter/2008-10/09/content\\_10171997.htm](http://news.xinhuanet.com/newscenter/2008-10/09/content_10171997.htm)

## ii. The problems caused by short fixed-term employment contract in China

The domination of fixed-term employment in present China since 1995 when Labor Law of China was first enforced has resulted in some serious problems in China before the enforcement of LCL. Although the situation is changing since the enforcement of LCL from 2008, the following problems still exist.

The first problem is that the interests of the employees could not be well protected under fixed-term employment. The human resources of China are too abundant and the unemployment rate is quite high. Under this situation it is not easy for a common worker to find a job. Once a worker gets employed and enters into a fixed-term employment contract with an employer, he will always hope the contract could be renewed after the expiration. Under such circumstance, if the employer infringes the rights of the employee, such as not paying the overtime work payment or the social insurance premium for the employee, the employee usually chooses to give up his rights in return for a chance of the renewal of the employment contract. If an employee chooses to bring a suit against his employer for the infringement of his rights and interests, he will definitely lose the chance of having his employment contract renewed.

The second problem is that the fixed-term contract practice has been resulting in the continuing rise of the labor disputes. Fixed-term employment contract resulted in the wide spread of infringements to the rights of the workers, which in return resulted in the continuing rise of the labor disputes in the past 20 years. In 1995 there were 33,030 labor dispute cases brought to the labor arbitration tribunals,<sup>5</sup> and in 2000, five years after the Labor Law of China entered into force, there were 135,000 cases brought to the labor arbitration tribunals, in which 423,000 employees were concerned. In 2007 there were 350,182 cases brought to the labor arbitration tribunals, 3.7 times of the number in 2000 and 15 times of the number in 1995, and 650,000 workers were involved in the labor disputes.<sup>6</sup> In 2008 the number even reached 693,465. According to the statistics from Supreme Court of China, in 2008 there were more than 280,000 cases concerning labor disputes, 93.93% increase from the year of 2007. The fast increase in labor dispute cases indicates that the contradictions in the labor relations are increasing, and labor relations are worsening rather than improving. Professor Zheng Gongcheng in Renmin University, also a member of Standing Committee of People's Congress of China, drew a conclusion based on his investigation in Guangzhou that "In fact the labor disputes brought to the labor arbitration tribunal and courts are only a small part of the cases of rights infringement. Those that have not been brought to the labor arbitration tribunal and courts are far more numerous."<sup>7</sup> For example, lots of workers have no legal social insurance. An investigation on rights protection for migrant workers conducted by the Zhejiang Provincial Union indicated that less than 20% of the workers had got their pension, and this investigation did not include the small enterprises or the construction industry, in which the estimated percentage would be even lower. Private enterprises only choose to buy pensions for some of the employees, such as the relatives of the employers, medium-level managers, technicians and staff in distribution. This report also showed that for other forms of social insurance like those of industrial injury, medicine, and unemployment, the percentage was even lower than that of the pension.<sup>8</sup>

<sup>5</sup> 劳动和社会保障部 国家统计局:《1995年度劳动事业发展统计公报》。

<sup>6</sup> 劳动和社会保障部 国家统计局:《2007年度劳动和社会保障事业发展统计公报》。

<sup>7</sup> 马蔚:《劳动争议:期待跨越“60天”》,《工人日报》,2004年6月26日。

<sup>8</sup> 吴亮、赵东辉、李国龙:《调查:农民工享受社会公共资源提供保障制度状况》, [http://news.xinhuanet.com/newscenter/2004-11/24/content\\_2254909.htm](http://news.xinhuanet.com/newscenter/2004-11/24/content_2254909.htm)

The third problem is that the short fixed-term employment contract results in the high mobility of the labor force in the enterprises, which also hinders the training programs of enterprises. Under the short fixed-term employment contract, the employees could not expect a stable employment, so whenever there is a better chance, the employee is more likely to transfer to another company. According to the statistics in the 1990s, about a quarter of the staff will quit their job within the first year of their employment. Under this situation, the employer is reluctant to train employees. Usually whenever an employee is well trained, he will expect higher salary. They will look for chances of higher salary in the market outside the company if they cannot get higher salary from the employer who has provided training for them.

The fourth problem is that the practice of fixed-term employment contract is unfavorable for China to transform from a farming country to the industrialized country. For the past more than 20 years, China has been quickening its steps to the industrialization; more than 120 million migrant workers come to find jobs in the city. But few of such a huge amount of people can get stable jobs, which would be a big problem to the Chinese society.

From the perspective of economic development, the fixed-term employment contract system is not favorable for the industrialization for China. In the process of industrialization, lots of migrant workers would certainly move into the cities to work and live. However, under the employment system, the employers try to force the labor back to the countryside after their 'golden age' of usefulness expires. But the past 30 years' experience has shown that it is not possible to force the second generation migrant workers back, (while it is possible for the first generation, because they have had the farming experience). So that is why the employment system should be changed to make it possible for the migrant workers to stay in the cities.

The fifth problem which has been brought about the fixed-term employment is that it has made the labor relation in the state-owned enterprises become worse. Before the employment reform in 1986, the labor relation in the state-owned enterprises was basically harmonious. Theoretically, the workers were the masters of the state-owned enterprises, because they enjoyed lifelong employment and the power to supervise the management of the enterprises. Also there were limits on the salaries of the managements. After the employment reform, the "masters" gradually became "employed workers", and the limits on the salaries of the managements were also abolished. The supervision over the enterprises from the employees was gone with the reform.<sup>9</sup> Under such situation, some managers became corrupted. Some cases are unbelievable. For example, a state-owned wireless production factory in northwest China went bankruptcy in 1996. The later investigation revealed that the factory director embezzled 1,930,000 Yuan to buy and decorate his own house, 195,000 Yuan to buy stocks; that he provided 20,000,000 Yuan to guarantee for other natural persons and enterprises; and that he lent 330,000 US dollars to a Hong Kong businessman, which was not reprieved. Such a factory leader was only dismissed from his office and no other punishments were given to him. After his dismissal, the Hong Kong businessman "lent" a "BUICK" to him for his personal usage.<sup>10</sup> Another case is that a collective-owned enterprise in a county in Zhejiang Province suffered a loss of capital of 1,130,000 Yuan, and 118 workers could not get their

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<sup>9</sup> 徐小洪：劳动者：从“主人翁”向“雇佣劳动者”的转变，载常凯主编：《中国劳动关系报告——当代中国劳动关系的特点和趋向》，中国劳动社会保障出版社，2009年3月第1版，第65页。

<sup>10</sup> 田惠：《腐败不除，企业难活》，《改革月报》，1998年9月，第46页。转引自：徐小洪著：《冲突与协调——当代私营企业的劳资关系研究》，中国劳动社会保障出版社2004年版，第106页。

wages for 18 months, for which a retired worker committed suicide by drowning himself in a river. However, the enterprise director bought a car and cheated a bonus of 100,000 Yuan and he was even promoted to vice Bureau leader.<sup>11</sup> These are the two extreme cases, from which we can see to what extent the leaders have embezzled the state-owned assets and exploited the workers in the reform of state-owned enterprises.

### **iii. The relationship among fixed-term employment contract, open-ended employment contract and atypical employment**

Although open-ended employment contracts and fixed-term employment contracts exist simultaneously at the same time in China, the problem is that the small percentage of the open-ended employment contracts cannot function in the way it should do. As mentioned above, the percentage of the open-ended employment contract is quite low. It can be imagined that only those employees who are essential to employer could get the chance of lifelong employment. But actually those employees are always very competitive in the labor market. It is usually quite easy for them to get a secured job. So the actual situation is that those who work under the open-ended employment contract are the high-level core employees in the private enterprises, and high-level or former lifelong employees in the state-owned enterprises. Therefore, those who have weak bargaining power and are in a high demand of the open-ended employment contracts could not get the lifelong employment. However, those who have the strong bargaining power and are not in a high demand of the protection could get the lifelong employment. From this perspective, it can be concluded that fixed-term employment contracts dominate the Chinese labor market and a small percentage of employees who work under open-ended employment contract could not play its due role in labor protection.

Also, in China, the lack of effective collective bargaining system has made those who work under open-ended employment contract unable to enjoy the stable employment. Sometimes, they need to jump to the other company to get a better payment. There are many cases on this and the cases which have drawn lots of attention from the public are those concerning the resignation of the civil aviators. In 2006 only, there were over 100 civil aviators resigning from their employers. In August, 2007, in Wuhan Branch Company of China Eastern Airlines, thirteen civil aviators resigned from the company and then the company sued them for compensation up to 105 million Yuan.

A labor law professor comments that the essence of the resignation of civil aviators and jump to another company results from that the state-owned monopoly in the market is breaking down and private companies are competing to get the rare resources.<sup>12</sup> With the background of the rapid development of Chinese economy and because of the quick development of civil aviation industry, the newly established civil aviation companies are in great need of experienced civil aviators, so they need to get some from other state-owned companies.

The civil aviators of the state-owned companies complain that their salaries are relatively low and they have not got enough time to rest.<sup>13</sup> Those cases indicate that without the collective bargaining system, even the high-level employees who have open-ended

<sup>11</sup> 楼民展：《虚报利润 厂长升官发财有术 亏损百万 百名职工生机无着》，《浙江工人日报》，1998年11月28日。转引自：徐小洪著：《冲突与协调——当代私营企业的劳资关系研究》，中国劳动社会保障出版社2004年版，第106页。

<sup>12</sup> 王全兴、粟瑜：飞行员劳动关系协调的思路转换，《中国劳动》2008年第6期。

<sup>13</sup> 胡庆波：飞行员PK海航：我要辞职《法律与生活》2008年第12期。



employment contract with the company cannot realize their demands in wage raise. The lifelong employment itself could not provide a sound protection for the employee without the collective bargaining system. If they cannot get their salaries raised within the company, they will try to jump to other companies for higher salary.

The atypical employment in China, which includes dispatched laborers, part-time laborers, family service laborers etc., has been increasing for the past more than ten years under the Chinese background of economic reform and labor market reform. So the atypical employment practice in China now is different from foreign developed nations, in which the atypical employment has been growing under different background.

The labor dispatching began to emerge in China at the end of 1970s, when the employees of foreign enterprises and agencies in China shall be sent through labor agencies of the government out of the consideration of national security. With the development of economy and labor regulation, the labor dispatching has changed a lot.<sup>14</sup> For example in August, 1984, Shanghai Foreign Service Co. Ltd. expanded the scope of dispatching from foreign agencies and joint ventures to state-owned and private enterprises. In the medium cities such as Hefei, Anhui province there were also some labor dispatching services in 1980s, when the labor agencies of the government began to dispatch workers to work in the enterprises and charged some management fee which was about 15% of the dispatched worker's wages.

After the enforcement of Labor Law, labor dispatching began to flourish because Labor Law has put more obligations upon employer. Under this circumstance, many employers have tried to evade the trouble resulting from entering an employment contract with the employees. Therefore, more and more employers began to use dispatched workers. It is estimated in 2006 there were about 120 labor dispatching service companies in Guangdong Province, and 26,518 labor dispatching service companies in whole China, among which 18,010 were run or approved by the labor administrations of the governments. It is estimated that there had been about 25 millions dispatched workers in China by 2006.<sup>15</sup>

Those phenomena have caught the attentions of the legislators in the process of LCL legislation. In December, 2005, He Luli, vice Chairman of National Congress of China, made a report to the National Congress about the enforcement of Labor Law, in which she suggested that researches should be conducted on labor dispatching and labor dispatching should be regulated. In the LCL legislation many scholars suggested that labor dispatching should be strictly limited in China.<sup>16</sup> This kind of advice seemed be accepted. LCL has limited the scope of labor dispatching to generally the temporary, auxiliary or substitute job post.

But the problem is that there is no clear definition on the meaning of "temporary, auxiliary or substitute" and the meaning of the word "generally." In drafting Regulations for the Implementation of LCL, there were attempts to strictly interpret the meaning of "temporary, auxiliary or substitute." But just at that time when the draft was under discussion, the financial crisis burst out and the Chinese economy was greatly affected, so when the Regulations for the Implementation of LCL was enforced, the interpretations of the meaning of "temporary, auxiliary or substitute" were deleted, so as to create a favorable situation for the enterprises.

Under such situation, labor dispatching begins to grow more rapidly because the

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<sup>14</sup> 何小勇：我国劳动派遣现状及法律规制，《法治论丛》2006年7月。

<sup>15</sup> 何小勇：我国劳动派遣现状及法律规制，《法治论丛》2006年7月。

<sup>16</sup> 常凯、李坤刚：必须严格规制劳动者派遣，《中国劳动》2006年第3期。

limitations on fixed-term employment contract and the open-ended employment contract are stricter than before in accordance with the regulation of LCL. So in order to avoid establishing a direct employment relationship, many companies choose to use dispatched workers. This kind of practice is very common especially in the state-owned monopoly industries, such as in petroleum company, petrochemical corporation, electric company, telecommunication company, etc. As mentioned above, the reform in employment and salary in the state-owned enterprises has resulted in the formation of interest groups in the companies. A small group of core employees have got the control of the company and tried to exploit others by using dispatched workers and other methods. In some of this kind enterprises, dispatched workers are larger in number than those who are directly employed.

Another reason of the prevailing use of dispatched workers is that the anti-discrimination law is not adequate and there is no sound anti-discrimination system in China, although Labor Law of China stipulates that employees shall not be discriminated against in employment, regardless of their ethnic community, race, or religious belief (Article 12). Further more, Employment Promotion Law adds that sex discrimination is prohibited (Article 3). But the problem is that even if the discrimination is proven, the damage compensation fee that the applicant could get is very limited in China. For example, in *Gao v. Bidechuangzhan Co. Ltd.*,<sup>17</sup> where the applicant was proven to have been discriminated in health, the applicant was only compensated with 17,572.75 Yuan, plus 2,000 Yuan compensating for pain and suffering caused therein. Many other applicants are not so lucky. In Sichuan Province one who claimed in height discrimination was denied by local court.<sup>18</sup> The real situation is that the employment discrimination is widespread, while the cases concerning employment discrimination are very limited, which can explain the reason why all airline companies choose to use dispatched flight attendant without fearing that they will be sued for age discrimination.

The part-time laborers began to emerge in the 1990s. In 2006, it was estimated that there were about 40-50 million part-time workers in China.<sup>19</sup> Before the national legislation, there were some regulations by the governments of municipal cities, such as in Beijing and Chongqing. On May 30, 2003, Ministry of Labor and Social Security enacted and enforced Guidelines on the Employment of Part-time Laborers,<sup>20</sup> which defines the part-time workers as those who work no more than 5 hours a day and 30 hours a week.

In 2007, LCL contains the new regulations on part-time workers, which defines the part-time labor as an employee who generally averages not more than 4 hours of work per day and not more than an aggregate 24 hours of work per week for the same Employer (Article 68). In accordance with LCL the two parties to part-time labor contract may conclude an oral agreement and they may not stipulate a probation period (Article 70). Also it is stipulated that

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<sup>17</sup> 高某诉彼得创展公司, 见: 《北京乙肝歧视案劳动者胜诉 单位道歉并赔偿》, <http://news.enorth.com.cn/system/2008/05/26/003314804.shtml>

<sup>18</sup> 中国人民银行成都分行于 2001 年 12 月 23 日在《成都商报》上刊登《中国人民银行成都分行招录行员启事》规定, 男性身高在 168 公分、女性身高在 155 公分以上, 生源地不限。原告蒋韬为四川大学法学院 2002 届学生, 不符合被告的上述规定, 以被告身高歧视条件侵犯了原告享有的宪法赋予的担任国家公职的平等权为由, 起诉到四川省成都市武侯区人民法院。被告在法院受理此案以后取消了身高限制规定, 原告请求法院依法确认被告的被告具体行政行为违法。受案法院认为, 原告蒋韬提起的诉讼, 不属于行政诉讼法规定的受案范围, 不符合法定的起诉条件, 裁定驳回原告蒋韬的起诉。

<sup>19</sup> 姜颖: 《非全日制劳动和灵活就业》, 载常凯主编: 《劳动合同法立法理论难点解析》, 中国劳动社会保障出版社, 2008 年 2 月第 1 版。

<sup>20</sup> 《劳动保障部关于非全日制用工若干问题的意见》, 劳社部发 [2003] 12 号。

either of the two parties may terminate the employment by making notice to the other party at any time and no severance pay shall be paid by the employer to the employee upon termination of the use of the labor (Article 71).

From the regulations cited above, we can see that the part-time employees in China nearly have no equal protection with other employees. Also, according to the Guidelines on the Employment of Part-time Laborers, the part-time employees need to pay for social insurance premium by themselves (the industrial injury premium is by the employer). Under such regulation, only those who could not find a full-time job will choose part-time jobs. After the enforcement of LCL, the number of part-time employees in China has been increasing, for the regulations of the full-time employment are strict. Under full-time employment, the employers need to pay compensation to the employees when the employment terminates or the employee gets discharged. Under this situation, more and more employees have been reduced to part-time employment from full-time employment.

## **II. Historic developments of fixed-term contract regulations**

### **i. The employment system under the planned economy**

The Planned Economy had the following main characteristics: first, all the enterprises were owned and operated by the state. The enterprises needed only to accomplish the productive tasks assigned by the country; second, the enterprises did not buy anything: the raw materials, powers and workers were all allocated to them by the state; third, the enterprises did not sell any products: they just gave all they had produced to the state, and the state put them in the stores, and the customers bought them with coupons.

The employment system under the fixed economy was characterized as regular workers with the following features: first, the regular workers were recruited and employed by the state and were assigned to work in state enterprises, and they were not employees of the enterprises; second, once recruited, the workers enjoyed lifelong employment, which was later called “iron bowl,” meaning that those workers would never lose their jobs during employment all throughout their lives; third, the working conditions and terms were set by the state instead of individual enterprises, for the enterprises did not have markets and profits as explained above. This kind of regular employment systems met the needs of the Planned Economy, and would have to be changed together with the reform of the Planned Economy.

The regular employment under the Planned Economy brought about the following main problems: first, the worker was fixed to a certain position and lacked mobility, which made it extremely difficult for workers to transfer to different enterprises; second, the lifelong employment and the fixed wage standards set by the state made the workers have no motivation to work. No matter what the contributions a worker had made to an enterprise, his wage was the same; third, employment opportunities were extremely unequal. Under the regular employment system, only those people with urban residence certificates could be workers, and those who lived in the rural area could only be farmers. When a regular worker retired, his position was allowed to be substituted by one of his children. This policy meant that workers and farmers were all lifelong positions: no matter how hard one worked, it was hard for people to change their fate. In this way, the productivity of the working people was greatly suppressed.

### **ii. China’s reform to the regular employment system**

When China began to adopt the policy of reform and opening up to outside world, the

free market began to come into being. Against this background, state-operated enterprises gradually entered into the free market and became self-operating enterprises. Under these circumstances, China began the new movement of “smashing the three irons,” which meant to change the practices formed under the Planned Economy Period, such as lifelong employment (iron bowl), the unchangeable posting (iron chair) and the fixed wage system (iron wage).

After the state-owned enterprises entered into the market, the workers became employees of the enterprises instead of the state. Other systems were also gradually changed, such as the wage system and the employment contract system. At that time, enterprises obtained their rights to allocate profits, and the workers began to get wages in accordance with their contribution to the enterprises. On July 12, 1986, the State Council implemented the Temporary Regulations on the Employment Contract in the State-owned Enterprises, which stipulated that the state could only recruit contract workers instead of regular workers for the state-owned enterprises. But the existing regular workers could still keep their lifelong employment as an exception. This exception only lasted about ten years. In 1996, one year after Labor Law of China entered into force, there was a national campaign for signing employment contracts, which required that all the employees of the enterprises sign employment contracts with their employers.

One more thing we need to know about the employment system under the Planned Economy is that there were temporary workers as well as regular workers. In the operation of an enterprise, there is always some need for some temporary workers. So when the regular workers could not meet the need, the state-operated enterprises would hire temporary workers. These workers were similar to the contracted workers today in that their wage, working time and other conditions were set through negotiations of the parties.

From the beginning of the reform to the economic system and the adoption of the policy of opening to the outside world, the non-state-owned enterprises, such as private enterprises, joint venture enterprises and foreign enterprises, started to emerge and develop quickly in China. Although the state-owned enterprises and non-state-owned enterprises operated in the Chinese market side by side, the employment regulations that applied to them were different. The state-owned enterprises inherited the regular employment system of the Planned Economy, while the non-state-owned enterprises established the employment relationship with the employees based on contracts.

Before 1992 when Deng Xiaoping made his southern tour, there had been controversies over which path was suitable for socialist development. After the tour it was determined that China would develop in the direction of constructing a socialist *market* economy. This accelerated the drafting of the Labor Law of China. From 1995, the Labor Law of China was enforced, which ended the discrepancy in employment based on the nature of enterprises.

### **iii. The fixed-term employment established by Labor Contact Law of China in 1995**

After prolonged drafting and discussion, the Labor Law of China was promulgated in 1994, and put into force on January 1, 1995. The enforcement of Labor Law of China ended the situation under which the state-owned enterprises and non-state-owned applied different employment regulations based on the differences in the investment types. This shows that China is determined to construct a labor market suitable for the market economy.

The law establishes the rights and obligation system for employed workers. Article 3 of Labor Law of China stipulates that “Laborers shall have the right to be employed on an equal basis, choose occupations, obtain remuneration for their labor, take rest, have holidays and leaves, obtain protection of occupational safety and health, receive training vocational skills,

enjoy social insurance and welfare, and submit applications for settlement of labor disputes, and other rights concerning labor as stipulated by law. Laborers shall fulfill their labor tasks, improve their vocational skills, follow rules on occupational safety and health, and observe labor discipline and professional ethics.” Thus the contents of the workers’ rights are clearly stipulated.

The aim of Labor Law of China is to abolish the old employment regulations and establish new regulations which suit the development of market economy. Under the Labor Law of China, only those who have been working in establishments for more than 10 years have the right to request to sign an open-ended employment contract with the employers. Faced with such requirements, the employers have several options: (1) agree to sign an employment contract with an open-ended term, (2) refuse to sign an open-ended employment contract and offer to sign a fixed-term employment contract, and (3) if the employees refuse to sign a fixed-term employment contract, the employers have the right to refuse to continue the employment after the existing contract terminates.

The strict requirements for the open-ended term contract and the regulations that the fixed-term contract can be randomly decided by the employer and employee have had the result that all employers (prior to the passage of the ECLC) have chosen to sign fixed-term contracts. For most employees, their employment contract is a one-to-three-year contract. Though each of their contract periods is short, their employment relationship is long.

### **III. Current regulations and problems concerning fixed-term contracts**

#### **i. Current regulations concerning fixed-term contracts**

With the purpose of solving the problems caused by the domination of fixed-term employment, LCL has established new rules on the open-ended employment contracts. Article 14 of LCL provides that the following employees can get a lifelong employment: (1) the employee has been working for the employer for a consecutive period of not less than 10 years; (2) when his employer introduces the employment contract system or the state-owned enterprise that employs him re-concludes its employment contracts as a result of restructuring, the employee has been working for the employer for a consecutive period of not less than 10 years and is less than 10 years away from his legal retirement age; or (3) prior to the renewal, a fixed-term employment contract is concluded on two consecutive occasions and the employee is not characterized by any of the circumstances set forth in Article 39 and items (1) and (2) of Article 40 hereof.<sup>21</sup> Also, the employer shall enter into a written employment

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<sup>21</sup> Article 39 An Employer may terminate an employment contract if the Employee: (1) Is proved during the probation period not to satisfy the conditions for employment; (2) Materially breaches the Employer’s rules and regulations; (3) Commits serious dereliction of duty or practices graft, causing substantial damage to the Employer; (4) has additionally established an employment relationship with another Employer which materially affects the completion of his tasks with the first-mentioned Employer, or he refuses to rectify the matter after the same is brought to his attention by the Employer; (5) causes the employment contract to be invalid due to the circumstance specified in item (1) of the first paragraph of Article 26 hereof; or (6) Has his criminal liability pursued in accordance with the law.

Article 40 An Employer may terminate an employment contract by giving the Employee himself 30 days’ prior written notice, or one month’s wage in lieu of notice, if: (1) after the set period of medical care for an illness or non-work-related injury, the Employee can engage neither in his original work nor in other work arranged for him by his Employer; (2) The Employee is incompetent and remains incompetent after training or adjustment of his position.

contract with the employee within one month from the date on which it starts using the employee (Article 10). If an employer fails to conclude a written employment contract with an employee within one year from the date on which it starts using the employee, the employer and the employee shall be deemed to have already concluded an open-ended employment contract (Article 14).

Many contents of the above requirements are still not very clear, such as what “a consecutive period of not less than 10 years” means,<sup>22</sup> and what “two consecutive occasions” means in practice. Different interpretations of the requirements of open-ended enterprises have already existed in China. For example, High Court of Shanghai Municipal City has issued “Some Opinions concerning the Problems in the Application of CLC.” Article 4 (2) reads that “If an employee chooses to sign a fixed-term employment contract while he is qualified to sign an open-ended employment, in accordance with Article 14 of ECLC and Article 11 of Enforcement Regulation of ECLC, the fixed-term employment contract is effective. The fixed-term employment contract ends when it terminates.” Article 4 (4) reads that “Article 14 paragraph 2 (3) of ECLC means that after the employer and employee have continuously signed a fixed-term employment contract twice, when they negotiate to sign the third contract, the employee is entitled to sign an open-ended employment contract.” These interpretations are not in accordance with the common understanding of the meaning of the wording.

In order to make the open-ended employment contract system be adopted by the employer, LCL introduces a new rule, which provides that where the employee does not agree to renew the fixed-term employment contract if the conditions offered by the employer are the same as or better than those stipulated in the current contract, the fixed-term employment contract terminates when the time expires. However, if the employer does not agree to renew the fixed-term employment contract while the employee hopes to renew the fixed-term employment contract, the employer needs to pay compensation fees (Article 46(5)). The standards of compensation fees are based on the number of years an employee has worked for the employer — at the rate of one month’s wage for each full year worked. Any period of not less than six months but less than one year shall be counted as one year. The severance pay payable to an employee for any period of less than six months shall be one-half of his monthly wages (Article 47). Comparatively, the employer shall pay the same amount of compensation fees when the employees working under open-ended employment contract are discharged, and that means the costs for contract termination are the same for the employer regardless of the fact that whether an open-ended employment contract or a fixed-term employment contract is entered into.

For all the three types of employee discharging which includes, disciplinary dismissal, no-fault dismissal and economic dismissal, as far as the conditions of employee discharging are concerned, the requirements are the same for both employees under fixed-term employment contracts and employees under open-ended employment contracts. However, there are two different rules providing special protections for those who have worked for the employer for a long time — one is that those who have worked for the employer for a long time are free from dismissal except for disciplinary dismissal;<sup>23</sup> the other is that the employee

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<sup>22</sup> In the end of October, 2007, Huawei Company in Shenzhen asked all those employees who had worked for more than 8 years in the company to file an application to quit his job and the company would compensate them for their resignation, and would re-employ them after their resignation. In this way Huawei Company tried to evade its liability to enter into open-ended employment contracts with the employees.

<sup>23</sup> If an employee has been working for the employer continuously for not less than 15 years and is less than 5

under open-ended employment contract enjoys better protection when the economic dismissal occurs.<sup>24</sup>

Except the rules that mentioned above, there is no special protection for those who are under open-ended employment contract. Therefore, the open-ended employment could be terminated if the employer is determined to do so. In accordance with LCL, for those who are wrongfully discharged in violation of LCL, the employer shall pay damages to the employee at twice the rate of the severance pay provided for in Article 47 hereof (Article 87). According to this, if an employee under an open-ended employment contract is wrongfully discharged, there is no possibility for him to return to his former position, while he shall only be compensated in accordance with the rule in Article 87. It is obvious that an individual employee who is even under open-ended employment contract is surely to lose his job if the employer is determined to fire him.

Theoretically, fixed-term employees and employees under open-ended employment contract enjoy equal treatment. Actually, fixed-term employees are treated equally in the private enterprises; while in the state-owned enterprises, the former lifelong employees, especially those who are in the high level still take themselves as masters of the enterprises and take the fixed-term employees as employees of the company and should not be equal with them. This kind of situation is prevailing especially in the monopolized state-owned enterprises.

Currently, there is no law requiring employers to help fixed-term workers with transition to open-ended employment, such as offering information about vacant permanent positions, training opportunities. As for the social insurance, fixed-term employees and employees under open-ended employment contract have the same rights and equal protection in accordance with the laws. However, because the employees under open-ended employment contract are always the high-level employees in a company, their rights in social insurance are well protected. The social insurance interests of the fixed-term employees are not as well protected as the employees under open-ended employment contracts. Some enterprises only pay social insurance premium for the important employees and ignore the rights of common employees. However, the situation is changing better for LCL has raised the cost of infringing the interests of employees.<sup>25</sup>

One other aspect that needs to be mentioned is that LCL sets up an order for firing employees. Article 41 of LCL stipulates that when reducing the workforce, the employer shall retain with priority persons: (1) who have concluded with the employer fixed-term employment contracts with a relatively long term; (2) who have concluded open-ended employment contracts with the employer; or (3) who are the only ones in their families to be employed and whose families have an elderly person or a minor for whom they need to provide. Therefore, the employees who have concluded with the employer fixed-term employment contracts with a relatively short term will be the first to be laid off.

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years away from his legal retirement age, he shall not be discharged in accordance with the requirements listed in Article 40 or Article 41 hereof (Article 42 (5)).

<sup>24</sup> Article 41 provides that “When reducing the workforce, the Employer shall retain with priority persons: (1) Who have concluded with the Employer fixed-term employment contracts with a relatively long term; (2) Who have concluded open-ended employment contracts with the Employer; or (3) Who are the only ones in their families to be employed and whose families have an elderly person or a minor for whom they need to provide.”

<sup>25</sup> In accordance with Article 38, if an employer does not pay for the social insurance premium for an employee, the employee can quit his job with notifying the employer in advance; after that the employee can ask the employer to pay for the social insurance premium and the severance compensation. However, under the normal condition, an employer need not to pay for the severance compensation if an employee quits his job.

## ii. The opinion of the scholars on the fixed-term employment contract in China

In the process of LCL legislation, the draft of LCL was open for public opinions for one month, in which 191,849 pieces of opinions were gathered from the public through web, letters and newspaper articles. The problem of fixed-term employment contract was one of the hot issues that drew the attention of the public. Some wrote letters complaining that they had to sign employment contract once a year, some even four times one year. In answering the questions from the journalists, Li Yuan, dean of administration law of Law Office of People's Congress, said that LCL would try to settle the problems.<sup>26</sup>

Many Chinese labor scholars have voiced their opinions on the fixed-term regulations. Some scholars believe that open-ended employment contract system does not suit China. For example one professor holds the viewpoint that in accordance with the new regulations in LCL the continuity of employment contract will be a unilateral and mandatory action decided by the choice of the employees, which is in violation of LCL, for Article 3 of LCL stipulates that the conclusion of employment contracts shall comply with the principle of free will. The function of welfare is conflicted with the function of economics of the enterprises. It is unfair to force an enterprise to enter into open-ended employment contract. The stability of labor relation will be a heavy burden for the enterprises and will not be favorable for the mobility of employees and for more employees to get employed.<sup>27</sup>

Other scholars believe that the changes in fixed-term employment regulation in the LCL are right. Professor Ye Jingyi of Peking University believes that in designing the regulations on employment contract it should be kept in mind that the stability of employment should be one of the aims. Some regulations are necessary to limit the employers to kick the employees out after using out the golden ages of them.<sup>28</sup> Professor Li Kungang believes that the practice of short fixed-term employment has resulted in many problems and this practice has no social fairness and should be changed.<sup>29</sup> Professor Chang Kai advocates expanding the scope of open-ended employment contract. He believes that the short fixed-term employment contract has resulted in the instability of labor relations and the unfavorable situation for the protection of the interests of the laborers.<sup>30</sup>

## IV. Evaluation of current regulations on fixed-term contracts in labor policy and future prospects

### i. The open-ended employment contract: a common practice in China in the future?

The changes in fixed-term employment contract, which were first suggested by the scholars as Professor Dong Baohua noted,<sup>31</sup> are based on the experience and the changes in the labor relation of the last 12 year (1995-2007). It is hoped that the labor relations could be more stable and labor relation could be more harmonious through limiting the scope of fixed-term employment contract. However, employers have been used to the freedom in hiring the employees and terminating the employment at will. They need some time to adjust

<sup>26</sup> 《劳动合同法草案征求民意情况发布会(实录)》 <http://news.sohu.com/20060421/n242931963.shtml>

<sup>27</sup> 董保华：论我国的无固定期限劳动合同，《法商研究》2007年第6期。

<sup>28</sup> 转引自《今年“萝卜”不怕“坑”，劳动合同法改变职场规则》，<http://www.people.com.cn/GB/54816/54827/4014858.html>

<sup>29</sup> 李坤刚：劳动合同法中的抑制与平衡，《中州学刊》2005年第6期。

<sup>30</sup> 许浩：《劳动合同法》草案二审：常凯、董保华再争锋，《中国经济周刊》2007年第3期。

<sup>31</sup> 董保华：论我国的无固定期限劳动合同，《法商研究》2007年第6期。



their employment policies and get used to the new regulations. It is also good to see that some enterprises have come to understand the positive function of open-ended employment contract. At present, there are examples that some enterprises even enter into open-ended employment contracts with all the employees.<sup>32</sup>

As mentioned in the first part of this essay, the new rules seem to function well. Many enterprises have changed their former practice of only signing one year employment contract with the employees and start to sign contracts with periods of three or four years. In the future, if the labor dispatching is strictly limited to the “temporary, auxiliary or substitute” job positions, if the part-time employees are better protected, and if the discrimination in employment is strictly prohibited, the fixed-term employment in China will be further limited and more employees will work under open-ended employment contracts.

Judging from the present situation, the employment relationship tends to be more stable than in the past. However, will the open-ended employment contracts become the prevailing practice in employment in China? The answer, as the author sees it, is negative for several reasons: first, the conditions for terminating open-ended employment contracts and the conditions for terminating fix-term employment contracts are the same and are not strict; second, in accordance with the LCL<sup>33</sup> and Labor Law of China,<sup>34</sup> many termination conditions of employment contract shall be established in enterprise regulations, which are mainly decided by the employer; third, it is very hard for Chinese collective bargaining system to be really established in the near future. Therefore, no collective force could be formed to help change the situation. Professor Wang Quanxing holds the similar opinion on this and he said in China the fixed-term could not be automatically transited to open-ended employment contract like in some foreign countries.<sup>35</sup>

## **ii. The objections from the enterprises and the efforts to comfort them from the government**

After the promulgation of LCL, there has been lots of criticism from enterprises. It is reported that about 70% of enterprise owners are against the open-ended employment and hope to return to the rules established in Labor Contract Law of China in 1995, and there was some news reporting that an influential entrepreneur suggested abolishing the open-ended employment in China.<sup>36</sup>

Under such a situation, the government has been endeavoring to explain that open-ended employment contract system is not equal to the lifelong employment under Planned Economy Period. Article 18 of Enforcement Regulation of CLC repeatedly lists the thirteen situations already existed in LCL under which the labor relation can be terminated, trying to show that open-ended employment is not lifelong employment.

The government is satisfied to see that the merits of the current rigid regulations concerning fixed-term employment contract: the period of the employment contract has been prolonged and some even have obtained the opportunity of entering into open-ended employment contracts with employers. However, as mentioned in this essay, more employees

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<sup>32</sup> It is reported that in the city of Zhongshan in Guangdong Province, a company has entered into open-ended employment contracts with all the employees of over 1500.

[http://news.xinhuanet.com/newscenter/2008-10/09/content\\_10171997.htm](http://news.xinhuanet.com/newscenter/2008-10/09/content_10171997.htm)

<sup>33</sup> Article 4 and Article 39 (1), (2).

<sup>34</sup> Article 4 of Labor Law of China.

<sup>35</sup> 王全兴、黄昆：无固定期限劳动合同的是与非，《法学家》2008年第2期。

<sup>36</sup> 多位委员建议：取消无固定期限合同，[http://www.xdzjw.com/Article/ShowArticle/49512\\_1.html](http://www.xdzjw.com/Article/ShowArticle/49512_1.html)

have lost the chance of establishing a direct employment relation with employers and have been pushed to the position of dispatched labors, and even some workers have been forced to be part-time laborers for balanced employment system have not been established in China.

### iii. The future of fixed-term employment contracts in China

Although many enterprise owners hope to return to the fixed employment system of Labor Contract Law of China in 1995,<sup>37</sup> most of the scholars do not support their opinions. However, some suggestions have been put forward from the scholars to improve the defects in fixed-term employment system. Professor Wang Quanxing suggests that it should be clearly stipulated that those actions which try to avoid the compulsory obligations shall be void in accordance with Article 58.1. (7) of General Principles of Civil Law of China and Article 52 (3) of Contract Law of China.<sup>38</sup> One researcher suggests that rules need to be established for open-ended employment contract in mandatory continuity of employment, termination protection and compensation for the breach of employment, which should be different from the rules for fixed-term employment contract.<sup>39</sup> Another researcher suggests that the requirements for mandatory open-ended employment contract should consider the continuity nature of the job position.<sup>40</sup> Dr. Xie Zengyi suggests that there should be a rule concerning the circumstance under which no specific employment period is concluded in the employment contract.<sup>41</sup> Judging from the present situation, the aims of stabilizing and harmonizing labor relations will be maintained and there may be some interpretations for the fixed-term employment and open-ended employment in the future from authorities.

## Concluding remarks

In order to understand the legal system of labor and employment, it is necessary to keep in mind that China is still in the initial stage of industrialization. During this development period, China is basically an interest-oriented society, in which all are striving for their own interests and profits. Also, the Chinese government legislates for the interests of the nation too. In this period, the two things that Chinese government cares about most are economic development and social stability. The legislation of LCL and the efforts to limit the scope of fixed-term employment contracts in it are based on the situation that the labor relations are getting worse and the stability of the society may be influenced. Therefore, China is trying to stabilize the labor relation by limiting the scope of the fixed-term employment contract and by raising the employers' cost when infringing the legal interests of the employees.

Also, it needs to understand that the labor law system under the market economy has only a very short history starting from the year of 1995. At that time it was believed that short fixed-term contract was favorable for the economic development. After the problems emerged, the LCL is trying to bring it to another direction. In all, China is exploring to construct a labor law system suitable for Chinese economic development. LCL can be seen as an experiment in the process of constructing such a system. As mentioned in this essay, some favorable situations have been brought about by the fixed-term employment. However, will the future of the fixed-term employment of China be so greatly limited that the open-ended employment

<sup>37</sup> 多位委员建议：取消无固定期限合同，[http://www.xdzjw.com/Article/ShowArticle/49512\\_1.html](http://www.xdzjw.com/Article/ShowArticle/49512_1.html)

<sup>38</sup> 王全兴、黄昆：劳动合同法律适用的若干规则，《北方法学》2009年第3期。

<sup>39</sup> 陈红梅：无固定期限劳动合同若干问题的法律探讨，《中国劳动关系学院学报》2009年第2期。

<sup>40</sup> 李坤刚：劳动合同经济补偿金的功能、性质和制度完善，《阅江学刊》2009年第2期。

<sup>41</sup> 谢增毅：对劳动合同法若干不足的反思，《法学杂志》2007年第6期。

contract will become a common practice? The answer, the author of this essay believes, depends on the future changes in the labor relation of China.

# Fixed-Term Work in Australia

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Over the past couple of decades, the phenomenon of non-standard work in Australia has attracted increased attention. This has been driven by growth in the number of workers now working under non-standard arrangements, and a fear that such arrangements entail deficiencies in employment security, income security, representational rights and workplace health and safety compared with the standard employment relationship which prevailed in the postwar decades. The 'standard' employment relationship generally refers to work that is undertaken pursuant to a contract of employment, that was full-time, full-year and of indefinite duration terminable by reasonable notice, and undertaken for one employer on that employer's premises.<sup>1</sup> 'Non-standard' employment relationships deviate from standard employment along one or more dimensions, and thus include self-employment and independent contracting, part-time work, casual work, fixed-term work or agency-based work. These forms of employment are structurally heterogeneous and not mutually exclusively; as the term *non-standard* implies, they are best defined by what they are not.<sup>2</sup> Fixed-term employment accounts for a minor, though significant, part of the phenomenon of non-standard work in Australia. The regulatory status of fixed-term employees in Australia has been complicated in recent years in that the federal industrial relations statute was substantially re-written in 1996, 2006 and again in 2009.

## I. General overview of fixed-term employment in the labour market

### (a) *How many, and who?*

Employees on fixed-term contracts comprise those employed for a specified period or for the duration of a specific task. Yet it is difficult to measure accurately the numbers of Australian employees that fall into this category of restricted tenure employment. Current Australian statistical practice is to develop a taxonomy of mutually exclusive employment forms.<sup>3</sup> Workers are first divided into 'employees' and 'own account' workers. 'Employees' are further divided into 'workers with leave entitlements' and 'workers without leave entitlements'. Workers with and without leave entitlements are further divided into those with

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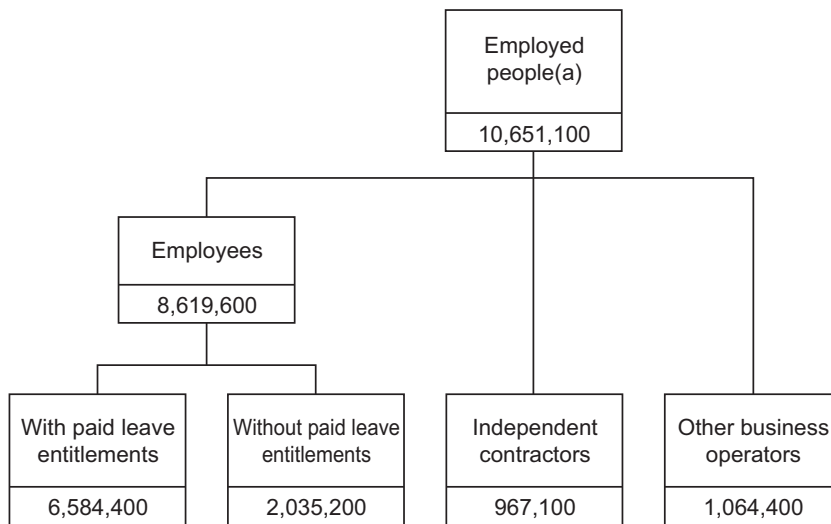
<sup>1</sup> See, eg, E Cordova, 'From Full-time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour relations?' (1986) 125 *International Labour Review* 641; G Bosch, 'Towards a New Standard Employment Relationship in Western Europe' (2004) 42 *British Journal of Industrial Relations* 617.

<sup>2</sup> L Vosko, 'Gender Differentiation and the Standard/Non-Standard Employment Distinction: A Genealogy of Policy Interventions in Canada' in D Juteau (ed), *Social Differentiation: Patterns and Process*, University of Toronto Press, Toronto, 2003.

<sup>3</sup> Australian Bureau of Statistics, *Forms of Employment*, Cat no 6359.0, November 2008.

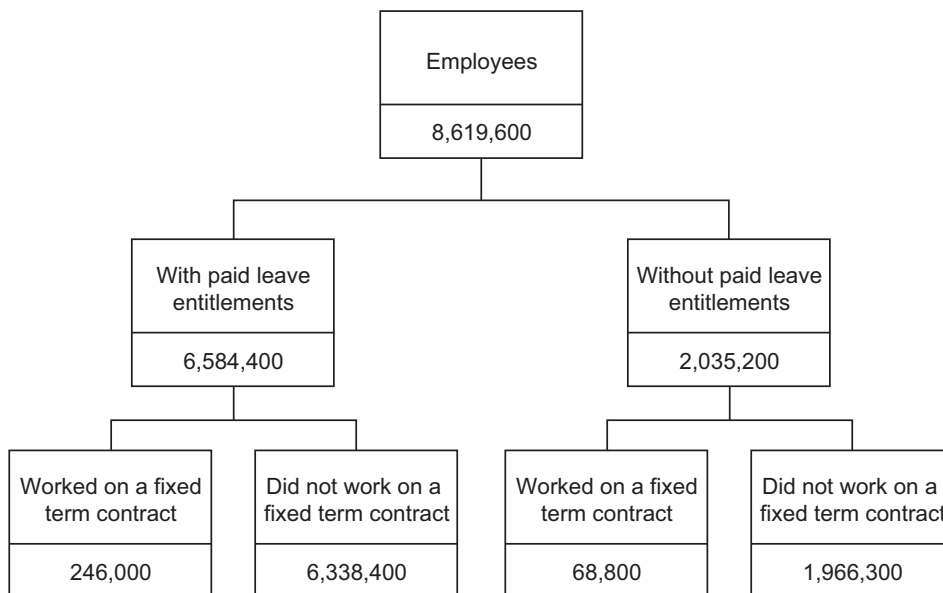
a fixed term contract and those with an ongoing contract. (The categories of ‘workers with leave entitlements’ and ‘workers without leave entitlements’ reflect a peculiar aspect of Australian labour regulation which I will return to below).

**Figure 1: from FOES 2008**



(a) Excludes people who were contributing family workers in their main job.

**Figure 2: from FOES 2008**



A Forms of Employment Survey ('FOES') using this taxonomy was first conducted in August 1998, then in 2001, 2004 and 2006, and has been conducted on an annual basis since. The most recently reported survey, conducted in 2008, found 3.6 per cent of all employees (or 2.9 per cent of all employed persons) to be fixed-term.<sup>4</sup> According to the FOES data, the number of fixed-term employees increased from 1998 to 2001, then declined to 2004, and rose again to 2008.<sup>5</sup> However, fixed-term employees as a proportion of employees has remained relatively stable, with a slight decline from 2001.

However, other attempts to calculate the incidence and prevalence of fixed term employment at various times in the past decade or so have produced some markedly divergent results. An irregular ABS survey on employment arrangements and superannuation (ie, pensions) which used the same taxonomy and survey question as regards fixed-term work as that used in FOES came up with consistently higher figures: 286,000 fixed-term employees in 2000 and 588,800 fixed term employees (6.5 per cent of employees) in 2007,<sup>6</sup> compared with the 190,800 identified by the FOES in 2001 and the 314,800 in 2008. Furthermore, panel data from the Household, Income and Labour Dynamics Australia ('HILDA') survey, sponsored by the federal Department of Families, Housing, Community Services and Indigenous Affairs, produces higher numbers still, estimating fixed-term employees as accounting for 8.7 per cent of employees in 2001 and 7.9 per cent in 2004.<sup>7</sup>

**Table 1: from Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market*, Commission Research Paper, Melbourne, 2006**

HILDA		2001	2002	2003	2004
Fixed-term employees <sup>a</sup>	'000	651.0	722.6	675.1	643.3
As a proportion of employees <sup>b</sup>	%	8.7	9.4	8.5	7.9
As a proportion of employed persons	%	7.1	7.7	7.1	6.6

<sup>a</sup> Persons aged 15 years and over. <sup>b</sup> Excluding persons who answered 'other' to the question about their contract of employment.

Source: Productivity Commission estimates based on the HILDA survey, 2001-04, release 4.0.

<sup>4</sup> Ibid.

<sup>5</sup> The growth between 1998 and 2001 may be partially explained by the fact that the 1998 survey only enquired as to whether an employee's employment had a finishing *date*, whereas subsequent surveys have asked whether the employment has a finishing date *or event*. The survey goes on to ask whether the finishing date or event is less than five years away, and whether the reason for having a finishing date or event is that the employee is on a fixed-term contract.

<sup>6</sup> Australian Bureau of Statistics, *Employment Arrangements and Superannuation, Australia*, Cat no 6361.0, June 2000; Australian Bureau of Statistics, *Employment Arrangements, Retirement and Superannuation, Australia*, Cat no 6361.0, April – July 2007.

<sup>7</sup> M Wooden and D Warren, *The Characteristics of Casual and Fixed-Term Employment: Evidence from the HILDA Survey*, Melbourne Institute Working Paper No 15/03, University of Melbourne, 2003; Productivity Commission, *The Role of Non-Traditional Work in the Australian Labour Market*, Commission Research Paper, Melbourne, 2006, p 130.

The difference between the employment arrangements and superannuation surveys and the FOES is probably attributable to the fact that although both surveys made similarly worded inquiries as regards fixed-term employment, the employment arrangements and superannuation survey was conducted by personal interview, whereas the FOES follows the Any Responsible Adult ('ARA') method, whereby information about all members of a household is obtained from the first responsible adult with whom the interviewer makes contact, and as a result survey respondents may not be well-informed about the employment arrangements of other household members. The use of the ARA method would also explain some of the divergence between the FOES data and the HILDA data, with HILDA data obtained from personal, face-to-face interviewing with each household member.<sup>8</sup> Further, it is likely that fixed-term employees who expect their contract to be renewed may not report to the ABS that their contract had a finishing date or event, again giving an under-estimation of the prevalence of fixed term contracts.<sup>9</sup> The alternative approach taken by HILDA is simply to ask workers which employment arrangement best characterises their job: permanent or ongoing; casual; or fixed-term. The HILDA questionnaire in fact does not define fixed-term employment at all, whether by reference to a finishing date or event, or completed task, or in terms of expectation of renewal, and it is unclear whether relying on self-identification in this way could lead to either under- or over-estimation of the number of fixed-term employees.<sup>10</sup>

Survey data from the late 1990s suggested that compared with ongoing employees, fixed-term employees are more likely to be female, young, and working in professional occupations in the education, health and cultural and recreational services sectors and twice as likely as ongoing employees to be employed in the public sector.<sup>11</sup>

***(b) The relation between fixed-term employment and other non-standard working arrangements***

Regardless of which of the competing estimates one chooses, what is clear is that fixed-term employees as a proportion of the workforce are outnumbered by independent contractors (around 10 per cent of employed persons), part-time workers and, much more significantly, by employees 'without leave entitlements'. This last group experienced particularly strong growth from the mid-1980s to the mid-1990s, and moderate growth thereafter, and now account for around 60 per cent of non-standard work.<sup>12</sup>

<sup>8</sup> Productivity Commission, above n 7, p 131.

<sup>9</sup> That is, the FOES asks workers whether their job has a set finishing date and only then goes onto ask whether this is because it is a fixed-term contract: see n 5, above.

<sup>10</sup> Productivity Commission, above n 7, p 132.

<sup>11</sup> M Waite and L Will, *Fixed-Term Employees in Australia: Incidence and Characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra, 2002. Note that these differences between fixed-term employees and ongoing employees are not as marked as the differences between casual workers and ongoing employees: Wooden and Warren, above n 7. On casual employees, see the discussion in the following section. HILDA survey data from 2003 showed fixed-term workers accounted for 17 per cent of employment in the education sector, 16.6 per cent in cultural and recreational services, 12.5 per cent in government administration and defence, and nearly 10 per cent in health and community services: Productivity Commission, above n 7, p 145.

<sup>12</sup> See I Campbell, 'Australia: Institutional Changes and Workforce Fragmentation' in S Lee and F Eyraud (eds), *Globalization, Flexibilization and Working Conditions in Asia and the Pacific*, Chandos Publishing, Oxford, 2008, p 134.

This last category needs to be explained. A regulatory artefact of the early Australian award system and the largely pre-industrial economy of the first decades of the twentieth century is the notion of a ‘casual’ worker who is denied basic entitlements. From the 1920s the Australian arbitration court expressed a preference that workers be hired on ongoing contracts. But broad swathes of the workforce remained employed outside of ongoing contracts. These included those working regularly for extended periods at the one trade which was seasonal in nature (eg, shearers, meat preservers, flour millers); those working regularly for extended periods at the one trade but with a series of different employers such that the year was broken by periods of looking for the next job (eg, builders labourers); and those working at the one trade in chronically overstocked trades and who were thus subject to the call system (eg, waterside workers). As well, provision was made so that even in those trades considered regular, ‘casual hands’ could be taken on to meet periods of increased demand (eg, coal miners, textile workers).<sup>13</sup> In these cases, the general principle of ongoing hiring was modified, but with the workers being paid an hourly pay rate with a ‘loading’ that was meant to ensure they received a similar annual income to a worker engaged in ongoing, uninterrupted employment.<sup>14</sup> Thus a broad and heterogenous group called ‘casual’ existed outside of weekly hire provisions, defined largely by their access to a ‘casual loading’. As ongoing employees were granted rights to various forms of leave — most notably annual leave — ‘casual’ employees were in turn denied these.<sup>15</sup> From the early 1980s Australian national statistics distinguished between ‘permanent’ and ‘casual’ employees precisely by measuring the presence or absence of leave entitlements.

However, the contrasting language of ‘casual’ and ‘permanent’ was somewhat confusing. The term ‘casual’ told us little about the employee’s length of tenure or regularity of hours and income. This was because ‘casual’ employment had begun to refer to what employees *got*, by way of leave entitlements, rather than what they *did*,<sup>16</sup> and by the last decade of the twentieth century a significant proportion of ‘casuals’ were working fairly stable and predictable hours for the one enterprise over long periods. Rather than use casual labour as supplementary labour in fluctuating periods of peak demand, in many sectors employers have recently made significant use of casual employment provisions, notwithstanding that the true

<sup>13</sup> See Commonwealth of Australia, Royal Commission on National Insurance, *Second Progress Report: Unemployment*, Parl Paper No. 79 (1926-28), pp 7-8; G Anderson, *Fixation of Wages in Australia*, Macmillan, Melbourne, 1929, p 490.

<sup>14</sup> See, for the first example of the Arbitration Court’s approach, *Waterside Workers Award* (1914) 8 CAR 53. The Court would consider the ‘normal conditions of an industry and the earnings of men of average competency engaged in that industry’. If work averaged out over a year meant they would earn less than the annual equivalent of the basic wage, the court calculated the appropriate hourly loading: Anderson, above n 13, p 490. By the second half of the 1920s, this higher rate was written into awards covering wharf workers, builders’ labourers, shearers, flour mill workers and those working in the meat export and sugar industries.

<sup>15</sup> One week’s annual leave, when introduced, was seen as accruing at one day for every two calendar months of service: see the *Commercial Printing Award* at (1935) 36 CAR 760-61. The Arbitration Court declined to extend annual leave to casual employees on the grounds that employees who were getting a casual loading on the basis of pleading ‘intermittency’ could hardly claim to also be in need of the rest and recuperation required by continuous or permanent employees and which it was annual leave’s purpose to address: see *Ship Carpenters and Joiners Case* (1942) 48 CAR 279.

<sup>16</sup> J Buchanan, ‘Paradoxes of Significance: Australian Casualisation and Labour Productivity’, Paper presented to ACTU, RMIT and Age Conference, *Work Interrupted: Casual and Insecure Employment in Australia*, (Melbourne, 2 August 2004).



nature of the contract may be for regular part-time or full-time employment.<sup>17</sup> While the growth in casual employment partly reflects a growth the type of work arrangements that characterise, say, the hospitality or retail industries, the significant proportion of casuals working fairly stable and predictable hours for the one enterprise over long periods suggests many employers are not so much seeking to avoid long-term attachments to employees as seeking to avoid the regulatory obligations that go with such attachments.<sup>18</sup> Equally unsatisfactory with the statistical dichotomy between ‘permanent’ and ‘casual’ workers was that most fixed-term employees, not being ‘casual’, were included within the category of ‘permanent’. The more recent statistical nomenclature of employees ‘with/without leave entitlements’ now better reflects the survey question.<sup>19</sup>

Some mention need also be made as regards agency work. Agency work represents one way firms might source workers for a fixed term. The use of agency ‘temps’ grew in the postwar labour market as a way of allowing enterprises to source holiday replacement workers. In this guise, the focus was often on secretarial work. Also, agency work has been common for a long time in other sectors, such as nursing and theatrical employment, and attempts to commercialise domestic service provision by hiring out daily domestic workers date from the interwar period and have become again become increasingly common.<sup>20</sup> The use of short-term temporary work to provide enterprise flexibility both during temporary vacancies or when demand temporarily increases is still a major factor driving the use of labour hire, and agencies now offer a range of staff beyond the categories that originally dominated the agency sector. In the late 1980s, also, specialist firms arose to offer contract labour as a replacement for existing employees in a number of highly unionised and dispute prone industries such as building, construction and shearing.<sup>21</sup> By constructing the legal relationships between the worker and the agency on the one hand and the host enterprise on the other in such a way that the worker was not an employee of either the agency or the host enterprise, agency labour could be used as a way of undermining union control and providing staff at highly competitive rates of pay.<sup>22</sup>

In many instances, however, a person is engaged either as an ongoing, fixed term or casual employee of an agency and is then on-hired by that agency under a commercial

<sup>17</sup> On the relationship between the award category of ‘casual’ and the underlying contract of employment, see the discussion in A O’Donnell, ‘Non-Standard Workers in Australia: Counts and Controversies’ (2004) 17 *Australian Journal of Labour Law* 89 at 97ff.

<sup>18</sup> Buchanan, above n 16. See also R Owens, ‘The “Long term or Permanent Casual”: An Oxymoron or a “Well Enough Understood Australianism” in the Law’ (2001) 15 *Australian Bulletin of Labour* 118.

<sup>19</sup> One further problem with the old statistical collection was the inclusion of owner-managers of incorporated enterprises in the count of casual employees. That is, although the principle of separate legal corporate personality means a formal contract of employment may exist between a legal corporate entity and its proprietor or controlling shareholder, and such an owner-manager is unlikely to give themselves paid leave, the resulting ‘employee’ in such a circumstance appears not to share the legal and organisational subordination we associate with the traditional employee. Moreover, a consequence of classifying many owner operators of an incorporated business as ‘casual employees’ and those of an unincorporated business as ‘own account’ workers is that shifts in the relative numbers of each category may reflect less changes in people’s actual work arrangements as changes in the ease and advantages of incorporating limited liability companies. More recent survey data separates out owner-managers of incorporated enterprises as a stand alone grouping.

<sup>20</sup> See B Higman, *Domestic Service in Australia*, Melbourne University Press, Melbourne, 2002, p 108.

<sup>21</sup> R Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working Paper No 76, ACIRRT, University of Sydney, Sydney, 2002.

<sup>22</sup> *Building Workers Industrial Union of Australia v Odco* (1991) 29 FCR 104; C Fenwick, ‘Shooting for Trouble? Contract Labour Hire in the Victorian Building Industry’ (1992) 5 *Australian Journal of Labour Law* 237.

agreement to another business that then controls the conduct of that employee's work for its own ends. So although there is no formal employment relationship between the worker and the user or host enterprise, many agency workers are engaged by the agency on a casual rather than a permanent basis.<sup>23</sup>

The most recent figures from the FOES indicate 131,400, or 1.2 per cent of all employed persons, are agency workers. This represents a drop from the 2002 figure of 161,800 workers. Again, the HILDA data yields a higher figure, with estimates of 276,400 agency workers (3 per cent of employed persons) in 2001 and 301,000 (3.1 per cent of employed persons) in 2004, and is generally accepted as a more accurate measure.<sup>24</sup>

### **(c) Fixed-term Employment and 'Temporary' Work in Australia**

Definitional problems with the category of 'casual' employees in particular make it difficult to get an overall estimate of temporary work in 'Australia'. Fixed-term work can definitely be regarded as a subset of temporary employment, but confusion also arises because the contractual distinction between indefinite contracts terminable by notice and fixed-term contracts might not accurately capture the vernacular distinction between 'temporary' and other jobs. Actual or expected job tenure can be influenced by a host of extra-regulatory and extra-contractual factors (including the business cycle, technological change, workers' choices to quit, etc.). However, rather than reflecting actual tenure or even contractual duration, the juxtaposition between temporary and permanent employment that characterises much discussion in labour law has purchase, I would suggest, primarily as a way of highlighting differences in employment protection. There is a case to be made, then, in reaching a count of temporary employment in Australia, to aggregate those jobs which, regardless of their extended tenure (or prospect of extended tenure), grant relatively unfettered power to the employer to terminate by virtue of the job's regulatory classification. This would include fixed-term jobs; those casuals who are excluded from protection from unfair dismissal; and all employees serving less than the minimum term before qualifying for protection against unfair dismissal: six months for general employees, and 12 months for employees of a small business (ie, a business that employs fewer than 15 employees).<sup>25</sup> Arguably, if we accept that 'permanency' has been important as the main channel for building up a host of core industrial entitlements, including paid leave and notice provisions, then 'temporary' or non-permanent work could be defined to encompass all work which does not attract such entitlements — that is, casual work in general, along with work that is of actual limited contractual duration.<sup>26</sup>

<sup>23</sup> NSW Department of Industrial Relations, *Labour Hire Task Force: Final Report*, p 27.

<sup>24</sup> Australian Bureau of Statistics, above n 3; Productivity Commission, above n 7, p 139; P Laplagne et al., *The Growth of Labour Hire Employment in Australia*, Productivity Commission Staff Working Paper, Melbourne, 2005, pp 37-38.

<sup>25</sup> See n 55, below. This means the position of nominally 'permanent' workers on indefinite contracts who haven't accrued enough service to reach the threshold may be as precarious as casual or fixed-term workers in terms of ongoing job security: an important point made by J Tham, 'Towards an Understanding of Standard Employment Relationships under Australian Labour Law' (2007) 20 *Australian Journal of Labour Law* 123.

<sup>26</sup> J Burgess and I Campbell, 'Casual Work in Australia and Temporary Work in Europe: Developing a Cross-National Comparison' (2001) 15 *Work, Employment and Society* 171. In contrast, the OECD has shifted from relying on figures for casual employment *per se* as a measurement of 'temporary' work in Australia which gave Australia an extraordinarily *high* incidence of temporary employment (see, eg, 'Recent Labour Market Developments and Prospects' [1996] *OECD Employment Outlook*) to relying solely on the figures for fixed-term work and excluding casual employees from the count altogether, thus giving Australia a very *low* incidence of

**(d) Fixed Term Work in Historical Perspective**

It is difficult to get trend data as to the incidence of fixed-term work. We have already noted, for example, that from the early 1980s to the late 1990s, the category of fixed-term work was subsumed by the statistical category of ‘permanent’ work. Since then we have seen the incidence of fixed-term work remain relatively stable.

Putting fixed-term work in a longer-run perspective, we can observe that the nature of Australian economic development meant that the standard employment relationship, whilst, as noted above, emerging from regulatory initiatives in the first half of the 20<sup>th</sup> century, only became predominant after the Second World War. Prior to that period, rural employment, the meat and flour industries and building work in the construction industry were characterised by seasonal fluctuations; the boot trade and textile industries relied extensively on short-time work and rostering; and continuous work in the steel industry was supplemented by casual employment of men seeking work gathered at the smelter gates.<sup>27</sup> This volatile labour market, based on the prevalence of small, technologically unsophisticated workplaces, operating on batch production, with seasonal instability in many industries, dated back to at least the late nineteenth century. Whereas some clerical and supervisory staff, or employees of certain large organizations, may have enjoyed ongoing employment,<sup>28</sup> workers on the shop floor tended to bear the brunt of fluctuations, with women and juveniles in particular providing a large pool of short-term, casual labour.<sup>29</sup> Large mass production firms remained the exception: by the 1920s family-owned and managed firms still dominated the economy, with the average number of wage earners per establishment in Australia in 1929 only 15.6.<sup>30</sup> Contracts for the supply of labour were often organised in such a way as to transfer the risk of shortage of work onto the worker through piece work arrangements,<sup>31</sup> or by characterising the work

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temporary employment by international standards (see ‘Taking the Measure of Temporary Employment’ [2002] *OECD Employment Outlook*). Leah Vosko also excludes casuals from her count of temporary employment in Australia (except for those casuals employed through a temporary help agency): L Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment*, Oxford University Press, Oxford, 2010, pp 132 and 239. Neither approach seems particularly satisfactory. In the OECD’s case, the collection of data on temporary work from other OECD countries explicitly allowed for the enumeration of ‘on call’ workers as well as those on fixed-term contracts, but in the case of Australia the incidence of ‘on call’ work appears as zero. It seems odd to claim that Australia, with its high rate of casual employment, has no ‘on call’ workers amongst those designated ‘casual’, although the number would be difficult to quantify. Moreover, if we take differences in levels of employment protection as the distinguishing feature between ‘temporary’ and ‘permanent’ work then Australia’s limited use of fixed-term contracts, as indicated by the OECD data, probably reflects the fact that most forms of casual employment offer alternative means for employers to both access a pool of ‘on call’ workers and evade the reach of employment protection legislation.

<sup>27</sup> Commonwealth of Australia, Royal Commission on National Insurance, above n 13, pp 7-8.

<sup>28</sup> A Seltzer and A Sammartino, ‘Internal Labour Markets: Evidence From Two Large Australian Employers’ (2009) 49 *Australian Economic History Review* 107.

<sup>29</sup> J Lee and C Fahey, ‘A Boom for Whom? Some Developments in the Australian Labour Market, 1870-1891’ (1986) 50 *Labour History* 1; S H Fisher, ‘An Accumulation of Misery’ (1981) 40 *Labour History* 16

<sup>30</sup> C Wright, *The Management of Labour: A History of Australian Employers*, Oxford University Press, Melbourne, 1995, p 16. Comparable figures for Canada were 25.3; for the United States, 41.9. In any case, early factory production often merely brought under one roof artisans who continued to labour in a self-contained way as contractors, and the distinction between the ‘inside worker’ and the outworker was not clearly fixed: Wright, pp 18-19; G Linge, *Industrial Awakening: A Geography of Australian Manufacturing 1788-1890*, (1979) pp 203, 298, 482.

<sup>31</sup> *Amalgamated Miners’ Association, Wrightville v Great Cobar Ltd* [1907] AR(NSW) 53 at 57-58.

relationships as a leasing arrangement,<sup>32</sup> partnership<sup>33</sup> or a contract for purchase and sale.<sup>34</sup> The economy as a whole remained oriented predominantly toward primary production, with the rural sector providing 60 per cent of the national product even in the 1930s, which implied seasonal fluctuations as regards both the distribution and processing of a wide range of products.

It was only by the 1940s that long-term employment relations progressively displaced forms of intermediate labour subcontracting, casual labour and so on. The need to rationalise production and limit absenteeism and turnover during World War II and acute labour shortages after the War meant that labour management practices changed markedly during the 1940s.<sup>35</sup> The offer of long-term stable employment, greater job security, rewards for seniority, common enterprise policies with company-wide job descriptions and procedures, formalised work rules and pay scales and centralised personnel departments that regularised both external hiring and internal promotion, were seen as ways to attract and retain all grades of labour and to reduce industrial unrest resulting from trade unions' increased bargaining power and became generalised from the late 1940s onwards.<sup>36</sup>

## II. Historic development of fixed-term contract regulations

The regulation of fixed-term work in Australia has proceeded through a mix of contractual principles, statutory intervention and the operation of industrial awards and collective agreements. The nature of the underlying contract is perhaps where the notion of a 'fixed term' seems to have greatest conceptual purchase: under ordinary contractual principles a contract for a specified period or for the completion of a specified task will automatically end when the period expires or the task is completed, without any requirement that either party terminate it.<sup>37</sup> Whether employment continues depends on there being a new contract put in place. Any attempt to terminate a fixed term contract before its expiry (absent grounds for summary termination, mainly involving employee misconduct) will amount to a breach of

<sup>32</sup> *Re Kahn* [1904] AR(NSW) 387, where hairdressing proprietors entered agreements with journeymen hairdressers whereby the former leased chairs to the latter, took the entire takings and retained a proportion as 'rental' while paying the 'balance' to the journeymen. The court concluded the relationship was thereby one of lessor and lessee rather than employer and employee.

<sup>33</sup> *Henwood v Holmes* [1910] AR(NSW) 451.

<sup>34</sup> V Clarke, *The Labour Movement in Australasia: A Study in Social Democracy* (first published 1906, 1970 ed) 197-198.

<sup>35</sup> Wright, above n 30, pp 44-50.

<sup>36</sup> *Ibid.*, pp 50-65. Another response, prevalent in the automotive and steel industries, was to rely on a steady stream of newly-arrived immigrant labour to address the problem of high turnover: C Lever-Tracy and M Quinlan, *A Divided Working Class: Ethnic Segmentation and Industrial Conflict in Australia*, Routledge, 1988, pp 103, 196-7; R Tierney, 'The Pursuit of Serviceable Labour in Australian Capitalism: The Economic and Political Contexts of Immigration Policy in the Early Fifties, with Particular Reference to Southern Italians' (1998) 71 *Labour History* 137.

<sup>37</sup> C Sappideen et al., *Macken's Law of Employment*, 6th ed, Lawbook Co, Sydney, 2009, p 333. B Creighton and A Stewart, *Labour Law*, 4th ed, Federation Press, Sydney, 2005, give contemporary examples of fixed-term contracts: term of employment of personal assistant to MP impliedly linked to MP's term of office: *Wilson v South Australian Superannuation Board* (1995) 62 IR 83; seasonal employment may be linked to season: *Watson v Elson* [2003] SAIRCComm 33.

contract giving rise to damages,<sup>38</sup> unless the fixed term contract also provides for termination before expiry given an agreed period of notice.<sup>39</sup>

At one level, the notion of the fixed-term contract only makes sense in the context of there being scope for open-ended contracts of indefinite duration. In the 19th century contracts of hiring could be of long or short duration and where there was no express duration there was a presumption of yearly hiring. It was only with the demise of the presumption of yearly hiring by the second half of the nineteenth century that contracts with no express duration were presumed to be of indefinite duration terminable by notice. What counted as adequate notice depended on employee status, industry custom and payment period.<sup>40</sup> In fact, as Freedland has pointed out, according to this typology the ‘notice rule’ seems integral to the concept of the contract of employment of ‘indefinite’ duration. But once this is recognised, the conceptual distinction between the two types of contract is muddled: indefinite contracts, in the absence of any procedural restraints on termination, can be thought of as rolling fixed-term contracts in which the term is defined by the period of notice. That is, the employer is just as free to exercise the power of termination by notice (which might be quite short) as it would be to exercise a power of non-renewal of a fixed-term contract.<sup>41</sup>

These contractual understandings of the employment relationship have always in Australia existed within, and have been modified by, the context of statutory provisions. Up to the close of the nineteenth century, much wage-dependent labour was covered by master and servant legislation.<sup>42</sup> The legislation tended to enforce fixed-term contracts, with strong sanctions against workers absconding prior to the expiration of their term. However, the length of contracts could vary markedly. In the second half of the 19<sup>th</sup> century, urban employment was probably dominated by weekly to monthly hirings, whereas three to six month contracts were the norm in rural areas. Thus in the cities, workers were less likely to run foul of the legislation for absconding, and most actions under the legislation in the cities

<sup>38</sup> The amount of damages usually awarded would be equal to the amount the employee would have earned if the contract had continued until its fixed term.

<sup>39</sup> Creighton and Stewart, above n 37, at para [15.07]. Once a broad and unconditional right to terminate a fixed-term contract prior to expiry (eg, by giving notice) is granted in the contract, it may be inappropriate to say that such a contract is for a specified period, in that its duration becomes indeterminate rather than specified. However, the term ‘fixed term contract’ might still be applicable, as there is a fixed ‘outer limit’ to the duration of the contract. This may seem like a largely semantic point at this stage, but it takes on significance when we consider fixed-term employees protection under unfair dismissal legislation, below, at nn 57-58.

<sup>40</sup> S Churches, ‘The Presumption of a Yearly Term in a General Contract of Employment and the Plight of the Modern Manager or The Black Death and the Malady Lingers On’ (1978) 10 *University of Queensland Law Journal* 195; S Jacoby, ‘The Duration of Indefinite Employment Contracts in the United States and England: A Historical Analysis’ (1982) 5 *Comparative Labor Law Journal* 85.

<sup>41</sup> M Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003, pp 307-308.

<sup>42</sup> Master and servant legislation was imported into the Australian colonies in the nineteenth century, but the colonial Acts tended to be cast wider in their coverage than the British Acts, to be more coercive and to specify harsher penalties. Sections of the labour force that fell outside of British statutes were included in the colonial laws, including dressmakers, laundresses and skilled rural labourers such as shepherds: see M Quinlan, ‘Pre-Arbitral Labour Legislation in Australia and Its Implications for the Introduction of Compulsory Arbitration’ in S Macintyre and R Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890-1914*, Oxford University Press, Melbourne, 1989, pp 31-32; M Quinlan, ‘Australia, 1788-1902: A Workingman’s Paradise?’ in D Hay and P Craven (eds), *Masters, Servants and Magistrates in Britain and the Empire, 1562-1955*, University of North Carolina Press, Chapel Hill, 2004.

were employee-initiated actions to recover wages, whilst in rural areas employer-initiated actions for absconding were more common.<sup>43</sup>

In the first decade of the twentieth century the masters and servants regime was overtaken by the establishment of compulsory arbitration of industrial disputes. A federal arbitral tribunal was established in 1904, initially called the Arbitration Court, more recently the Australian Industrial Relations Commission. The result of arbitration was a legally binding determination of employers' and employees' respective rights and duties known as an award. Awards set a range of minimum standards that had quasi-judicial force: most importantly wage rates, but also overtime rates, allowances, standard hours, leave entitlements and, as we have seen, forms of hiring, amongst a range of other matters. Awards were usually multi-employer in kind, so the fixing of wages and conditions was overwhelmingly centralised and uniform across industries and occupations. In practice, the application of award standards did not depend on whether an employee was a trade union member or not.

The prevalence of fixed-term employment was largely eclipsed under award regulation. As I have noted, early award regulation attempted to systematise terms of engagement according to the nature of working arrangements. Where the 'normal conditions' of work were regular and continuous, the Arbitration Court expressed a preference for 'weekly hire' provisions. The typical weekly hire clause provided for the payment of a weekly wage, with payment for public holidays and absence from work on account of ill health for up to six days per year, with employment terminable by a week's notice on either side (while preserving the common law right to summarily dismiss for misconduct, neglect of duty, malingering etc).<sup>44</sup> While some awards still gave recognition to casual hiring, it was cast as the exception. Weekly hiring came to signify a kind of 'permanent' or open-ended employment and by the late 1920s applied to core workforces comprising blacksmiths, engineers, carpenters and joiners in shops, coopers, wool workers, manufacturing grocers' employees, timber workers, furniture trades employees, liquor and allied trades employees, storemen and packers and workers in the printing industry, clothing industry, meat industry and food preserving industry.<sup>45</sup>

As we've seen, employing someone 'casually' outside of the weekly hire provisions involved the employer paying a loading. But awards did more than this as regards casual and other forms of non-standard employment. As well as imposing a casual loading, many awards up until the 1980s specified proportional limits or quotas on the number of casual workers, confined casual employment to part-time hours, and sometimes set restrictions on how long and under what conditions casuals could be used. Awards were also used to restrict the proportion of fixed-term jobs relative to full-time, ongoing employment or to limit the maximum duration of fixed-term appointments.<sup>46</sup>

In 1987 Australia moved toward a two-tier system of wage bargaining in which the second tier of wage increases was determined on an enterprise-by-enterprise basis according to restructuring and efficiency principles. Many of these second tier agreements allowed for the increased use of non-standard employment and restrictions on the use of non-standard

<sup>43</sup> R McQueen, 'Master and Servant Legislation in the 19th Century Australian Colonies' in D Kirkby (ed), *Law and History*, vol 4, School of Legal Studies, La Trobe University, 1987.

<sup>44</sup> See *Australian Timber Workers' Union v John Sharp and Sons Ltd* (1920) 14 CAR 811 at 887, 836.

<sup>45</sup> Anderson, above n 13, p 491.

<sup>46</sup> See the examples given in J Romeyn, *Flexible Working-Time Arrangements: Fixed-Term and Temporary Employment*, Industrial Relations Research Series, No 13, Department of Industrial Relations, 1994, pp 97-99.

employment were relaxed or removed. A range of new employment statuses were provided for in some awards, such as ‘seasonal’ or ‘short-term’ employment which attracted annual leave and sick leave entitlements. In the first half of the 1990s the Labor government pressured the federal tribunal to adopt enterprise bargaining and legislated specifically for union and *non-union* based agreements in the 1993 amendments to the *Industrial Relations Act*. As a result there began a steady evolution of bargaining at workplace level and enterprise agreements began to open up more flexible arrangements in the scheduling of work, and in the ordinary hours of work, and in the use of part-time, casual and fixed-term labour.

The award-making powers of the federal tribunal were substantially constrained by the *Workplace Relations Act 1996* enacted by the incoming Liberal/National Coalition government. ‘Type of employment’ remained one of twenty ‘allowable’ award matters under the Act, but the federal tribunal was expressly precluded from using this provision to make an award limiting the ‘number or proportion of employees that an employer could employ in a particular type of employment’.<sup>47</sup> Instead, enterprise-level collective agreements were increasingly utilised to regulate the circumstances in which non-standard contracts may be used. Examples included limits on the total period of employment under successive fixed term contracts, and provisions giving fixed-term or casual contract workers an option to convert to continuing employment, and attempts to set the terms and conditions of staff supplied to the enterprise through labour hire agencies.

Legislative changes in 2006 went further. The federal statute gave more or less open-ended power government to make regulations that could prescribe prohibited content in *agreements*. The resulting regulations were highly prescriptive about what the parties to an employment relationship could and could not bargain for. Prohibited material included dismissal protection, certain union security arrangements and, importantly, terms that restricted or regulated the conditions of temporary agency workers.<sup>48</sup>

### III. Current regulations and problems concerning fixed-term contracts

#### (a) *Regulating the use of fixed-term employment*

Many of the features of the 2006 legislation have been repealed since the election of a federal Labor government at the end of 2007. The Australian Industrial Relations Commission has been replaced by a new body, Fair Work Australia, which is able to make

<sup>47</sup> *Workplace Relations Act 1996* (Cth) s 89A(4). See, eg, *National Tertiary Education Industry Union v Australian Higher Education Industrial Association* (1997) 74 IR 326, cited in A Forsyth, ‘The European Framework Agreement on Fixed-term Work: An Australian Perspective’ (1999) 15 *The International Journal of Comparative Labour Law and Industrial Relations* 161 at 166: the union claim for giving fixed-term employees in the higher education sector the right to convert to continuing status; imposing limits on the circumstances in which fixed-term contracts could be utilised; and granting fixed-term employees entitlement to notice and severance pay were upheld in the final award, but not the union’s claim for the maintenance of an acceptable ratio of fixed-term to permanent employees.

<sup>48</sup> *Workplace Relations Act 2006* (Cth) s 356; Workplace Relations Regulations 2006, reg 8.5, 8.6, 8.7, and 8.8). The inclusion of prohibited content did not render the agreement void, but the offending clause was unenforceable. A person could be fined for recklessly including prohibited content in an agreement or even proposing its inclusion: see A Stewart, *Stewart’s Guide to Employment Law*, 2nd ed, Federation Press, Sydney, 2009 at 8.25.

industry awards.<sup>49</sup> The ‘safety net’ underpinning collective bargaining now comprises ten statutory employment standards together with ten standards drawn from these industry-sector awards. Terms relating to ‘type of employment’ are again permissible in awards, and now there is no restriction on Fair Work Australia’s powers to set limits on the numbers or proportion of employees that an employer may employ in a particular type of employment. Awards and agreements containing provisions covering fixed-term or fixed-project employment often provide that such work should be limited to replacements for people on extended leave (such as maternity leave or sabbatical leave); limited to a certain time period; used for full-time or a part-time employees who declare an intention to retire and request a fixed-term contract expiring on or around the relevant retirement date (ie a ‘pre-retirement contract’; and/or that certain funds not be used for permanent employment.<sup>50</sup>

However, award conditions now do not apply to ‘high income’ employees — the relevant threshold is set by regulation, and commenced at \$108,300 in July 2009 and is indexed annually.

Collective agreements can only deal with ‘permitted matters’, which includes matters pertaining to the relationship between an employer and its employees.<sup>51</sup> Accordingly, an agreement should be able to regulate the terms on which fixed-term employees are engaged, but an outright prohibition on their engagement is likely to be held not to be a matter pertaining to the employment relationship.<sup>52</sup>

So the position in Australia now is that the use of fixed-term contracts can be regulated on an industry or occupational basis, via awards, or on an enterprise basis, via collective agreements.<sup>53</sup> A comment should also be made as regards penalties for employer breaches of awards and agreements. Penalties are limited to fines, or orders for payments to employees where there is under-payment. Accordingly, if a person is engaged as a fixed-term employee in circumstances not permitted by a collective agreement, for example, there is no capacity for a court to order the employer to treat the fixed-term employment as continuing employment. Instead, the employer will incur a monetary penalty but the fixed-term employee’s employment can still be validly terminated in accordance with the terms of the contract.<sup>54</sup>

### ***(b) Regulating the conditions of fixed-term employees***

As noted above, minimum labour standards are now guaranteed for most Australian workers in award entitlements and legislated standards (the latter are referred to as the National Employment Standards or ‘NES’). Better terms and conditions can be negotiated collectively. The most important of these standards or rights are:

- Minimum wages;
- Annual recreation leave;

<sup>49</sup> Because the Constitutional basis of Fair Work Australia’s powers have changed, there is no longer a requirement that the award be made in settlement of an industrial dispute.

<sup>50</sup> CCH, *Australian Employment Law Guide*, [6-580].

<sup>51</sup> *Fair Work Act 2009* (Cth), s 172(1).

<sup>52</sup> See Stewart, above n 48, at 8.28-8.29.

<sup>53</sup> An example is the 2009 collective agreement at my own institution of higher education, which has 11 pages of terms dealing with the engagement of fixed-term employees, including limits on the circumstances which allow for their engagement, notice provisions, severance provisions, advancement and circumstances in which a fixed-term employee has the right to further employment. However, it is difficult to know how many agreements actually make provision for fixed-term employment and its regulation. In 1999, 7.7 per cent of agreements were estimated to have such provisions: Forsyth, above n 47.

<sup>54</sup> *NTEIU v University of Wollongong* [2002] FCA 31.



- Sick leave;
- Carers and personal leave;
- Long service leave;
- Redundancy pay;
- Unpaid parental leave;
- Community service leave;
- Notice periods required to terminate the employment relationship;
- Maximum weekly hours of work plus reasonable additional hours;
- Flexible working arrangements; and
- Unfair dismissal protection and protection from discriminatory dismissal.

Generally, workers who are ‘employees’ are entitled to protection by these laws. Paid annual and personal/carer’s leave accrues progressively during an employee’s year of service. For fixed-term and fixed-task contracts, paid annual leave and personal/carer’s leave must be provided during the period of service. Fixed-term and fixed-task employees are also entitled to unpaid carer’s leave and unpaid compassionate leave under the NES.

In this way fixed term employees, in terms of the benefits, look more like ongoing employees than they do casual employees.<sup>55</sup>

### ***(c) Termination and the application of unfair dismissal regulation***

As mentioned, the *Fair Work Act 2009* (Cth) allows employees to bring a complaint that the termination of their employment was ‘harsh, unjust or unreasonable’, that the required notice period was not given, or that the termination was based on certain ‘prohibited grounds’ (usually to do with unlawful discrimination). However, not all employees are covered by these provisions. Fixed-term and fixed-task employees are generally excluded from the federal unfair dismissal provisions of the *Fair Work Act 2009*, which provides that employees engaged under an employment contract for a specified period of time or task, whose employment terminates at the end of the time or task, will not be taken to have been ‘dismissed’.<sup>56</sup> However, as already noted,<sup>57</sup> in some circumstances, a fixed-term contract will not be for a ‘specified period of time’ and hence not the type of contract which is excluded by the Act. The distinction between a contract for a ‘specified period of time’ and a ‘fixed-term contract’ applies where a fixed-term contract contains a notice of termination clause or some other provision which provides for a broad or unconditional right of termination during the contract’s term. In such a case, the contract cannot be considered a contract for a ‘specified time’, but will still be classed as a fixed-term contract. Similarly, the courts have held that contracts which contain provision for early termination will be prevented from being characterised as contracts for a ‘specified task’, even though they may still be fixed-task

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<sup>55</sup> Casual workers are also excluded from provisions such as unfair dismissal protection; parental leave entitlements; flexible work arrangements; annual leave; redundancy pay, although workers who are engaged on a systematic basis for a twelve month period and expect continuous employment may fall outside the category of true casual employee and be eligible for these benefits.

<sup>56</sup> *Fair Work Act 2009* (Cth), s 386(2)(a). This exclusion has characterised federal unfair dismissal protections since they were introduced in legislation in the early 1990s and reflect the terms of the ILO Convention on the Termination of Employment on which the provisions were originally modelled.

<sup>57</sup> See above, at n 39.

contracts.<sup>58</sup> Furthermore, where a fixed-term employee is dismissed prematurely (that is, before the end of the contract's term), then the exclusion will not apply. Thus a worker with a genuine 'specified time' or 'specified task' contract enjoys a strong degree of certainty as to his or her tenure. For short-term contracts, this may put the worker in a stronger position than someone with an ongoing or 'permanent' contract, as the latter can be dismissed with notice prior to their completing the requisite period of minimum service required by the unfair dismissal provisions.<sup>59</sup> By contrast, if a fixed-term contract does allow for termination by notice, then the employee enjoys the same protections against unfair dismissal as an ongoing employee — subject, again, to having met the requisite period of minimum service.

The legislation also provides that fixed-term employees are not excluded if a substantial purpose of the employee's engagement under the fixed-term or fixed-task contract was to avoid the employer's obligations under the unfair dismissal provisions.<sup>60</sup>

In some limited circumstances, where there is a series of consecutive fixed-term contracts coupled with an expectation of further employment and the employer does not provide such further employment, the employment may, depending on the exact circumstances, be regarded as continuous rather than fixed-term or fixed-task, and thereby not be excluded from the unfair dismissal provisions.<sup>61</sup>

Under the *Fair Work Act*, employees engaged for a specified term or task are excluded not only from unfair dismissal protection, but also from two other termination protections contained in the NES: minimum notice of termination and redundancy pay.<sup>62</sup> They are also excluded from the provisions requiring employers to notify and consult with unions before implementing redundancies in the workplace.<sup>63</sup>

#### **(d) A note about temporary migration**

Access of non-residents to Australia is governed by the Migration Act 1958 (Cth) and the Migration Regulations 1994 (Cth). The Australian immigration program has generally been geared toward permanent settlement rather than temporary 'guestworker' schemes. Yet the dominant trend in international migration in the past few decades has been for temporary movements to increase at the expense of permanent settlement.<sup>64</sup> Much of this movement has been of low-skilled temporary workers, and Australia has rarely sought to recruit such workers in significant numbers.<sup>65</sup> Consistent with other initiatives to internationalise the Australian economy, the rules relating to the temporary entry of skilled labour into Australia were radically simplified in 1996, establishing a single 'business temporary entry' visa class,

<sup>58</sup> *Esam and Organ v SPC Ardmona Operations Ltd* (2005) 56 AILR ¶100-345(16).

<sup>59</sup> See above, n 25.

<sup>60</sup> *Fair Work Act 2009* (Cth) s 386(3).

<sup>61</sup> *D'Lima v Board of Management of Princess Margaret Hospital for Children* (1995) AILR 3-173; but cf. *Department of Justice v Lunn* (AIRC, PR974185, 27 November 2006).

<sup>62</sup> *Fair Work Act 2009* (Cth) s 123. The normal scale of payments for redundancy is found at s 119(2).

<sup>63</sup> *Fair Work Act 2009* (Cth) s 534(1)(a). For the standard requirements regarding consultation, see ss 530-533.

<sup>64</sup> T Rod and L Williams, 'Migration Intensification in the APEC Region 1981-1994' in P J Lloyd and L Williams (Eds), *International Trade and Migration in the APEC Region*, Oxford University Press, Melbourne, 1996.

<sup>65</sup> This contrasts with other countries of 'permanent settlement' such as the United States and New Zealand, which have made provision for the importation of temporary low-skilled labour from specific source countries: Mexico in the case of the United States; Pacific island nations in the case of New Zealand. Mention should be made, however, of young holiday makers who are granted working rights within Australia and who are often prepared to undertake low-skilled and low-paid work.

subdivided into short-term entry visas (for three months or less) and long-term entry visas (between three months and four years).<sup>66</sup> In the case of long term business entry, an employer must apply for acceptance as a sponsor, lodge a nomination describing the activities to be undertaken by the sponsored immigrant worker, and the sponsored immigrant must then apply for a visa on the basis of the sponsorship. The employer must also make a number of undertakings relating to compliance with Australian industrial relations laws and conditions of employment.<sup>67</sup>

Once sponsorship has been approved, overseas recruits are nominated according to the nature of the activity they are to perform. Employers can recruit foreign workers to perform a 'key activity', that is, an activity essential to the overall operations of the employer and which requires specialised skills or knowledge.<sup>68</sup> If the employee is found to perform such a key activity, then the requirement of labour market testing (ie, advertising for an Australian worker) is waived. The scheme expressly excludes unskilled activities, or activities in the skilled trades and professions where there is an oversupply of practitioners. Since September 2009 the nominated salary for the position must also adhere to obligations regarding market salary rates for Subclass 457 visa holders: that the terms and conditions of employment provided to primary Subclass 457 visa holders are no less favourable than the terms and conditions provided to Australians to perform equivalent work in the workplace at the same location. In contrast to permanent entry which is 'capped' each year, there are no restrictions on the number of temporary arrivals in any given year.

***(e) A note about the Australian Public Service***

The Australian Public Service (ie, civil service) has traditionally had its employment relations regulated by a separate statutory regime. In the last decades of the twentieth century, the Service underwent substantial organisational and cultural change.<sup>69</sup> The Liberal/National Coalition government introduced a bill in 1997 which aimed to give agency heads unconstrained powers of engagement and termination, including the right to terminate fixed-term contracts by notice. However, the bill was amended and the resulting *Public Service Act 1999* (Cth) and Public Service Regulations 1999 specified ongoing employment as the usual basis for engagement and allowed for regulations both limiting the circumstances in which fixed-term contracts could be used and prescribing the grounds or procedure applicable to the termination of non-ongoing contract.<sup>70</sup> The *Act* states that fixed-term employment should not be used for positions where the need for the work to be done is ongoing. Where the period or the duration of the task is reasonably estimated to exceed 12 months, access to employment must be offered to all eligible members of the community, the vacancy must be advertised in the Commonwealth Gazette and competitive selection processes must be followed. In contrast, an employee can be engaged on a fixed-term basis for up to 12 months without a vacancy being advertised and following a selection process that involves only an objective assessment

<sup>66</sup> There remains, however, a range of employment-related temporary entry visas for various specialised positions such as visiting academic, media and film staff, religious worker, public lecturer, sport, entertainment, foreign government agency and so on: see Schedules 1 and 2 of the Migration Regulations 1994 (Cth). The numbers arriving under such visas are relatively small.

<sup>67</sup> Migration Regulations 1994 (Cth), reg 1.20D(2).

<sup>68</sup> Ibid, Division 1.4A.

<sup>69</sup> See P Weeks, 'The Reshaping of Australian Public Service Employment Law' in P Weeks and M Pittard (eds), *Public Sector Employment in the Twenty-First Century*, ANU e-press, 2007

<sup>70</sup> Ibid, p 29.

of the person's suitability.<sup>71</sup>

Prior to 1977, Heads of Departments were appointed to permanent positions, and could only be dismissed because of misconduct. If a department was abolished, the person would be redeployed elsewhere in the Service.<sup>72</sup> Since 1977, Heads have been appointed for a fixed-term of up to five years, although during the 1980s there was a presumption that at the end of a term, Heads (by this stage called Secretaries) would be rotated between Departments. Since 1994, at the expiry of a Secretary's term there has been no obligation to find a position for the former Secretary. In the absence of a new appointment, the former Secretary is retired from the Service.<sup>73</sup>

By 30 June 2001, non-ongoing employment (defined as persons engaged for either a specific term or a specific task, or for duties that were irregular or intermittent) accounted for 9 per cent of employment in the Service. This represented a fall in the incidence of non-ongoing employment from 13.7 per cent of Public Service employment in 1993.<sup>74</sup>

#### IV. Conclusions

The regulation of fixed-term work in Australia has attracted much less attention than the regulation of casual work. The latter in Australia is much more prevalent as a form of non-standard employment, and also entails more significant derogations from the 'standard employment relationship' than does fixed-term employment. Nevertheless, regulatory strategies as regards fixed-term employment do largely track those as regards casual employment. In particular, the move from relatively centralised award-based regulation toward collective bargaining at the enterprise level, along with a greater ideological emphasis on the competitiveness and efficiency of business, and a desire to increase employment by offering flexible work arrangements to those otherwise excluded from labour market participation, have resulted in a shift in the approach of Australian labour law to the issue of non-standard employment, although current trends produce a complex picture.

Australian labour law has largely moved from trying to restrict the prevalence of fixed-term work to trying to somehow harmonise entitlements as between certain groups of workers. The result has been a form of what Vosko calls 'standard employment relationship'-centrism<sup>75</sup> — that is, the more non-standard workers' work arrangements begin to 'look like' standard work arrangements — especially as regards the duration and regularity of their work relationship — the more they are extended many of the entitlements and protections associated with standard employment. So systematic and regular casuals are granted unfair dismissal protection, as are those fixed-term employees whose actual underlying work arrangements suggest an ongoing employment relationship but whose engagement has been constructed as a sham series of fixed-term engagements.

Fixed-term employment thus becomes normalised, but subject to the proviso that fixed-term employees obtain many of the equivalent benefits as comparable ongoing employees.<sup>76</sup> Of course, the 'comparable' ongoing employee will be one who has been in ongoing employment for a similar duration to the fixed-term contract, and to the extent that benefits

<sup>71</sup> Waite and Will, above n 11, p 7.

<sup>72</sup> Weeks, above n 69, p36.

<sup>73</sup> Ibid, p 37.

<sup>74</sup> Waite and Will, above n 11, p 17.

<sup>75</sup> Vosko, above n 26.

<sup>76</sup> Cf. J Murray, 'Normalising Temporary Work' (1999) 28 *Industrial Law Journal* 269,

accrue with *continuity* of service, the fixed-term employee will be denied these in many instances, depending on the duration of the fixed-term contract.<sup>77</sup> Further, the most prominent area where the fixed-term employee will usually not share the entitlements enjoyed by an employee with an ongoing contract is that regarding protection against dismissal and redundancy.

In contrast to this general phenomenon, in some sectors unions have reiterated an approach based on the limitation of fixed-term work, using collective agreements to regulate the circumstances in which recourse can be had to fixed-term work by employers (although outright prohibition or quotas are unlikely due to the permitted content of collective agreements), along with notice provisions and/or certain rights to convert to ongoing work. This has involved a conscious strategy on the part of trade unions to bargain around issues to do with precarious and non-standard work rather than merely pursue better entitlements for a core of standard workers, and has been most apparent in those sectors where fixed-term work became most prevalent, such as higher education.<sup>78</sup> One problem with the current approach, as mentioned, is that where a fixed-term contract is made in breach of the terms of a collective agreement, there is no inherent jurisdiction under the federal industrial relations statute to deem such a contract to be one of indefinite duration. Further, the problems associated with entitlements based on continuity of service remain unless addressed by a general or, at least, sectoral scheme of portability of entitlements.

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<sup>77</sup> In some instances, where there is a succession of fixed-term contracts *with the one employer*, the employer and employee may agree that entitlements accrued under an earlier contract be carried over to the succeeding contract.

<sup>78</sup> As we saw, the *Public Service Act (Cth)* also regulates recourse to fixed-term work in the civil service.

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