

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.¹ 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.² 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

¹ 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.

² 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.³ 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,⁴ 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.⁵ 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.⁶ 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;⁷ 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.⁸ 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 1991.⁹ 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

³ 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).

⁴ 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.

⁵ Sly and Stillwell, n 4 above at 347.

⁶ 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).

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

⁸ 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.

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

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

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.¹¹ More precisely, the regulation of fixed-term contracts ‘reflects’ the level of regulation concerning dismissal.¹² 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.¹³ 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.¹⁴ Unfair dismissal¹⁵ 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’.¹⁶ 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.¹⁷ 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.¹⁸

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

¹⁰ Green, n 7 above.

¹¹ 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).

¹² Schömann et al. n 8 above at 24.

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

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

¹⁵ Section (s) 95 (1) of the Employment Rights Act (ERA) 1996.

¹⁶ ERA 1996, s 98(3).

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

¹⁸ 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 2006.¹⁹ 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.²⁰ 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.²¹ 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 2000.²² 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.²³ Agency work is regulated and governed by the Employment Agencies Act 1973,²⁴ which was mainly designed to facilitate the establishment of agencies, and the Conduct of Employment Agencies and Employment Businesses Regulations 2003.²⁵ 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.²⁶ 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.²⁷ Case law tended to assume a contract *sui generis* between the employment business and the worker.²⁸ 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.²⁹ 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.³⁰ It

¹⁹ 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.

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

²¹ 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.

²² 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.

²³ Schömann et al. n 8 above at 3.

²⁴ As amended.

²⁵ SI 2003/3319, replacing SI 1976/715.

²⁶ Deakin and Morris, n 17 above at 153-157.

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

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

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

³⁰ 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 work³¹ 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,³² 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 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.³³ 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.’³⁴

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,³⁵ 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’.³⁶ However, between 1997 and 2007, a decline in the proportion of temporary employees was evident in

³¹ OJ L 327, 5.12.2008.

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

³³ Tremlett and Collins, n 32 above.

³⁴ Kersley et al. n 6 above at 81.

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

³⁶ P. Nolan and G. Slater, *The Labour Market: History, Structure and Prospects*, in P. Edwards (ed), *Industrial Relations: Theory and Practice*, 2nd 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 2009.³⁷ 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

³⁷ 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.³⁸

Finally, available research on the terms and conditions of temporary workers in Britain reveals them to encounter a range of disadvantages.³⁹ 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.⁴⁰ 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.⁴¹ However, other research by Gallie *et al.* reports that temporary work is the single most significant predictor of job insecurity.⁴² 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 workers⁴³ 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.’⁴⁴

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.⁴⁵ For instance, casual workers and temporary workers in seasonal personal and protective work are in relatively

³⁸ 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.

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

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

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

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

⁴³ 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.

⁴⁴ McCann, n 1 above at 105.

⁴⁵ 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.⁴⁶ 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.⁴⁷ 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.⁴⁸

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’.⁴⁹ However, in contrast to the situation in most Western European countries⁵⁰ 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*.⁵¹ 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.⁵²

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

⁴⁶ Sly and Stillwell, n 4 above at 351.

⁴⁷ 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.

⁴⁸ Gallie et al., n 42 above.

⁴⁹ Barnard and Deakin, n 18 above at 18.

⁵⁰ See the analyses by Lokiec, Ronmar and Waas in this volume.

⁵¹ 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*, 24th 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.

⁵² McCann, n 1 above at 9.

Court of Appeal in *BBC v Ioannou*,⁵³ 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.⁵⁴ 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.⁵⁵ 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',⁵⁶ 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).⁵⁷ During the time when the legislation was considered, a debate took place about the necessity and desirability of fixed-term contracts.⁵⁸ 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.⁵⁹ In quantitative terms, 22 per cent of male and 29 per cent of female workers were excluded from the coverage of the legislation.⁶⁰ 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.⁶¹

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.⁶² 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.⁶³ Lorber observes that it is not entirely clear why the facility for such a

⁵³ [1975] ICR 267.

⁵⁴ *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.

⁵⁵ Deakin and Barnard, n 18 above.

⁵⁶ ERA 1996 s.95 and ERA 1996 s.136.

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

⁵⁸ Barnard and Deakin, n 18 above at 121.

⁵⁹ McCann, n 1 above at 9.

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

⁶¹ *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.

⁶² 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.

⁶³ 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.⁶⁴ 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.⁶⁵ 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.⁶⁶ 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 1999⁶⁷ 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'.⁶⁸

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.⁶⁹ 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.⁷⁰ 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

women in temporary contracts (*R v Secretary of State for Employment, ex parte Seymour-Smith* [1994] IRLR 448 (DC)). However, in *Whiffen v Millhams 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.

⁶⁴ 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.

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

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

⁶⁷ SI 1999/1436.

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

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

⁷⁰ Casey, n 2 above at 504.

and other personal characteristics employed in permanent jobs.⁷¹ 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.⁷²

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.⁷³ 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.⁷⁴ 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.⁷⁵

3. Current regulation concerning fixed-term work

3.1 General approach

The regulatory reforms, as introduced by FTER,⁷⁶ 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.⁷⁷ 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'.⁷⁸ 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

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

⁷² 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.

⁷³ 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).

⁷⁴ Deakin and Morris, n 17 above at ss 3.18 – 3.38.

⁷⁵ McCann, n 1 above at 107.

⁷⁶ SI 2002/2034, as amended.

⁷⁷ 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).

⁷⁸ 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.⁷⁹ 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.⁸⁰ 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’.⁸¹ By comparison, the Regulations controversially only apply to employees,⁸² even though the term ‘worker’ is defined in British law for the purpose of other legislation;⁸³ thus individuals, whose working relationships operate in a semi-autonomous manner, and casual workers are excluded.⁸⁴ 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;⁸⁵ people employed within certain government and European Union supported training programmes;⁸⁶ people in work experience placements of one year or less as part of a higher education course;⁸⁷ members of the armed forces,⁸⁸ and agency workers⁸⁹ 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.⁹⁰

⁷⁹ Directive, clause 1.

⁸⁰ TUC Press Release 17 March 1999 www.tuc.org.uk.

⁸¹ 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).

⁸² 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.

⁸³ ERA 1996, s 230.

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

⁸⁵ FTER, reg 20.

⁸⁶ FTER, reg 18(1).

⁸⁷ FTER, reg 18(2).

⁸⁸ FTER, reg 14.

⁸⁹ FTER, reg 19.

⁹⁰ *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),⁹¹ 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.⁹² 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.⁹³

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.⁹⁴ 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.⁹⁵ 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.⁹⁶ In *Adelener*,⁹⁷ the ECJ held that a national rule which provided that

⁹¹ *Allen v National Australia Group Europe Ltd.* [2004] IRLR 847.

⁹² FTER, reg 11.

⁹³ 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).

⁹⁴ 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.

⁹⁵ 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.

⁹⁶ 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.

⁹⁷ *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.⁹⁸ 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.⁹⁹

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.¹⁰⁰ The employee who considers that he/she is permanent may present an application to the employment tribunal for a declaration to that effect.¹⁰¹

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.¹⁰² 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*.¹⁰³ 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*¹⁰⁴ and *Del Cerro*.¹⁰⁵ 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’.¹⁰⁶

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.¹⁰⁷ In a more recent decision, the Court of Appeal held that the Secretary of State

⁹⁸ Deakin and Morris, n 17 above at 417.

⁹⁹ Deakin and Morris, n 17 above at 418.

¹⁰⁰ FTER, reg 9 (1).

¹⁰¹ FTER, reg 9(5).

¹⁰² FTER, reg 8(2)(b).

¹⁰³ 101486/08, 23 May 2008.

¹⁰⁴ N 97 above.

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

¹⁰⁶ N 103 above, para 98.

¹⁰⁷ 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.¹⁰⁸

Further, the employer can vary the effect of reg 8 through a collective or workforce agreement.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ The possibility for ‘bargained adjustments’¹¹² 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.¹¹³

The scope of reg 8 was considered in *Ball v University of Aberdeen*.¹¹⁴ 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.¹¹⁵ In the university sector there appear to be only one agreement which formally varies the terms of Regulation 8. The agreement at Imperial

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

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

¹¹⁰ FTER, reg 8(5).

¹¹¹ Barnard and Deakin, above n 18 at 129.

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

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

¹¹⁴ N 103 above.

¹¹⁵ 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.¹¹⁶

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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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,¹²⁰ and to access to training.¹²¹ 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.¹²² 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.¹²³

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

¹¹⁶ Barnard and Deakin, n 18 above at 134.

¹¹⁷ 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).

¹¹⁸ 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.

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

¹²⁰ FTER, reg 3(2).

¹²¹ FTER, reg 3(2).

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

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

which the [relevant] pay or other benefit is calculated', applies.¹²⁴ 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.¹²⁵ Case law illustrates that pay and pensions are issues where fixed term employees tend to be treated differently.¹²⁶ In *Coutts and Co Plc and Another v Cure and Fraser*,¹²⁷ 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*,¹²⁸ 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.¹²⁹ Further, they apply only to treatment 'on the ground that the employee is a 'fixed-term employee'.¹³⁰ 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',¹³¹ and work or are based at the same establishment. But in *Biggart v the University of Ulster*,¹³² 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*,¹³³ 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'.¹³⁴ 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

¹²⁴ FTER, reg 3(5).

¹²⁵ 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.

¹²⁶ Lorber, n 82 above at 316-317.

¹²⁷ [2005] ICR 1098.

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

¹²⁹ FTER, reg 19.

¹³⁰ FTER, reg 1(3)(a).

¹³¹ FTER, reg 2(1)(a).

¹³² N 122 above.

¹³³ [2006] UKHL 8.

¹³⁴ N 122 above, para 58.

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

The prohibition of less favourable treatment is not an absolute principle since the discrimination can be justified on objective grounds.¹³⁷ This notion is not defined in the Directive, but has been the subject of interpretation in recent ECJ decisions.¹³⁸ 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).¹³⁹ The adoption of a 'package approach' is arguably incompatible with the approach taken to equal pay under EC law and the Equal Pay Act 1970.¹⁴⁰ 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'.¹⁴¹ 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.¹⁴² 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.¹⁴³ 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.¹⁴⁴ Dismissal is

¹³⁵ 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.

¹³⁶ 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).

¹³⁷ FTER, reg 3(3).

¹³⁸ *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).

¹³⁹ FTER, reg 4.

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

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

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

¹⁴³ FTER, reg 7.

¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸ However, there are certain implications in the area of pensions.¹⁴⁹ 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

¹⁴⁵ FTER, reg 6.

¹⁴⁶ Barnard and Deakin, n 17 above at 126-127.

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

¹⁴⁸ 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).

¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹ 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.¹⁵²

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.¹⁵³ This is in contrast to the equivalent regulatory measures

¹⁵⁰ 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.

¹⁵¹ McColgan, n 81 at 195.

¹⁵² 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.

¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶ 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;¹⁵⁷ 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 2008/2009.¹⁵⁸ 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.¹⁵⁹

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

¹⁵⁴ DTI, n 39 above, annex 2.

¹⁵⁵ McCann, n 1 above at 178-179.

¹⁵⁶ 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.

¹⁵⁷ 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.

¹⁵⁸ 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/>

¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ Segmented labour market theorists have long recognised this sort of phenomenon.¹⁶² 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.¹⁶³ The education unions, more particularly, have run campaigns on behalf of fixed-term workers.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶

¹⁶⁰ Barnard and Deakin, n 18 above at 126.

¹⁶¹ Casey, n 2 above at 504.

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

¹⁶³ 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.

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

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

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