



# The Regulation of Fixed-term Work in the United Kingdom

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# The extent of temporary work in the UK



- Fixed-term work: working relationships in which individuals are hired under contracts specified to subsist for a fixed period of time
- Labour Force Survey (LFS): increase of fixed-term contracts (FTCs) in the 1990s (50% of all temporary workers in 1997) and then decrease (44% in 2007)
- But LFS may not capture the extent of non-standard work and may lead to under-counting of fixed-term employees, who regard their jobs as ‘permanent’ even though the contracts are fixed-term (see Burchell et al., 1999)

# Characteristics of fixed-term workers



- 41.6% men and 46% women on FTCs
- FTCs more common for black and Asian employees
- Predominance of fixed-term contracts in lower managerial and professional categories
- Significant expansion of FTCs in health and education
- FTCs' drawbacks: lower pay, no access to pensions and sick pay, job insecurity, restricted access to training
- But differences between workers on the basis of different working patterns, length of tenure and occupation

# Evolution of regulation concerning fixed-term work



- No statutory limits on the duration and renewals of fixed-term contracts
- Introduction of the concept of fixed-term work via the unfair dismissal legislation
- But qualifying periods to unfair dismissal and redundancy payment rights
- Waiver of rights to claim unfair dismissal rights and redundancy compensation
- But entitlement to certain protections, mainly anti-discrimination and, more recently, minimum wage, working time and human rights

# Council Directive 99/70/EC on fixed-term work



- General principles and minimum requirements relating to fixed-term work across the EU
- Purpose:
  1. to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;
  2. to establish a framework to prevent abuse arising from the use of successive FTCs or relationships
- But FTCs respond, in certain circumstances, to the needs of both employers and workers

# Fixed-term Employee Regulations (FTER) 2002



- Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI 2002/2034
- Narrow scope of application (only employees and *not* workers, regulation 1(2))
- Wider definition of fixed-term contract (also task contracts and those that terminate on the occurrence or non-occurrence of a specific event)
- Abolition of the waiver option for redundancy compensation but maintenance of the two-year qualifying period

# FTER – the right to an indefinite contract (1)



- Regulation 8: use of successive FTCs limited to four years of continuous employment
- Continuous employment: interpreted in the light of ECJ case law (*Adelener*, C-212/04 [2006] IRLR 716)
- But no specification of the length of the first contract nor requirement of objective justification when a FTC is concluded
- Instead, the continued use of FTCs can be justified on objective grounds (regulation 8(2)(b) but no definition of the term in FTER

# FTER – the right to an indefinite contract (2)



- *Ball v University of Aberdeen* (S/101486/08): the tribunal ‘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’ (para 98, emphasis added)
- *Duncombe and others v Secretary of State* [2009] WLR (D) 364: the nine year rule of employment of teachers seconded by the Department of Children, Schools and Families to work in the schools did not meet the objective justification required by the Directive and FTER



# Bargained adjustments through collective/workforce agreements



- Collective negotiation of a FTC policy agreement between the employer and the union/employee representatives (regulation 8(5))
- The agreement can specify the maximum period of FTCs; the maximum number of renewals; and a more detailed objective justification defence
- *Ball v University of Aberdeen* (S/101486/08): Joint Negotiating Committee for Higher Education Staff (JNCHES) guidance did not fall within the terms of regulation 8(5).



# Principle of equal treatment

- Right not to be treated less favourably (regulation 3): a fixed-term employee has the right not to be treated less favourably than a comparable permanent employee
- Scope: the terms of the contract and any other detriment by any act or deliberate failure to act of the employer
- But narrow definition of comparator (*Biggart v University of Ulster* (00778/05))
- Principle subject to objective justification defence (regulations 3 and 4)

# Empirical evidence on the impact of FTE in the labour market



- Decline of the percentage of FTCs in use for academic staff (from 45% in 2003/2004 to 35% in 2008/2009, HESA)
- Limited take up of autonomous negotiations that lead to collective agreements
- Trade unions: attempts to represent fixed-term workers (mostly in the higher education sector)
- Increase in pay of fixed-term workers during the period 2002-2004; but no substantive change in the training levels and no improvement in weekly pay for seasonal and casual employees (Green, 2008)



# Conclusions

- Considerable impact of the Directive in UK labour law
- But lack of compliance of FTER 2002 with the Directive
- Evolution of case law towards employment protection
- Still limited evidence of quantitative and qualitative improvements in practice
- FTCs in line with the labour market flexibility model of the UK