Neutral Citation: [2013] IEHC 404

THE HIGH COURT

[2012 No.373 MCA]

IN RE THE PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT 2003

BETWEEN

AN POST

APPELLANT

AND

FINBARR MONAGHAN AND DEIRDRE WADE

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered on 26th day of August 2013.

Application
1. This case is an appeal on a point of law. The appellant maintains that the Labour Court erred in law and seeks a declaration to that effect in respect of its determination that:-

(i) The respondents' right to equal treatment in respect of their employment conditions was contravened in circumstances where voluntary severance/voluntary early retirement schemes which were available to permanent employees were not applicable to the respondents by virtue of the fact that they were fixed-term workers;

(ii) the appellant could not rely on its need to incentivise permanent employees to leave employment voluntarily, in circumstances where those permanent employees currently enjoy security of tenure and cannot be made compulsorily redundant.

Factual background
2.1 The appellant appeals on a point of law against a decision of the Labour Court pursuant to s.15 (6) of the Protection of Employees (Fixed-Term Work) Act 2003 (hereinafter "the 2003 Act") . The respondents are fixed term workers within the meaning of the 2003 Act and were employed by the appellant on a series of fixed-term contracts the last of which ended on the 30th September, 2011. The first named respondent was continuously employed by the appellant from the 6th October, 2008, until the 30th September, 2011, and the second named respondent was similarly employed from the 20th October, 2008, to the 30th September, 2011.

2.2 The appellant sought expressions of interest in a voluntary severance/voluntary early retirement scheme (hereinafter "VS/VER scheme") by notice dated the 20th August, 2010. There are two parts to the VS scheme- VS1 and VS2. The respondents sought to apply under VS1 which is available to those having more than one year but less than five years service reackonable for pension. The scheme however is restricted to permanent employees of the appellant who were paid enhanced redundancy payments. The respondents were excluded from the scheme and they received statutory redundancy payments only. The first named respondent received a payment of €3,169.70 and the second respondent received €3,225.93. The first named respondent accepted his payment on the 3rd February, 2012, and signed the relevant documentation. The second named respondent has refused to accept her cheque or to sign the relevant documentation.

2.3 The respondents claim that they should have been treated in an identical manner to comparable permanent employees for redundancy purposes, entitling them to avail of the terms of the VS1 scheme.

2.4. The Civil Public and Services Union (CPSU) on behalf of the respondents lodged a complaint in this regard with the Labour Relations Commission on the 9th December, 2011, in which the respondents claimed that the appellant was in breach of s. 6(1) of the 2003 Act. The complaints were heard by the Rights Commissioner on the 27th February, 2012, and his decision issued on the 14th May, 2012. It found that the appellant was in breach of s.6 (1) of the Act. Each respondent was awarded the terms of the VS1 scheme. For the first respondent this amounted to €10,784.63 and for the second respondent it was €11,011.67.

2.5 The appellant appealed this decision to the Labour Court on the 7th June, 2012.The appellant submitted that the Rights Commissioner erred in law and in fact in concluding that either complaint was well founded.

The appeal was heard before the Labour Court on the 4th September, 2012. By determination dated the 21st September, 2012, the Court dismissed the appeal and affirmed the decision of the Rights Commissioner that the respondents had been treated less favourably than their comparators and that such treatment had not been objectively justified. It is against this determination that the appellant now appeals to this Court.

Appellant's Submissions
3.1 Comparators;

A comparable permanent employee is defined in s.5 of the 2003 Act.

The appellant argues that the respondents were not treated differently to the comparators, Mrs Dredge and Mrs Mooney, as fixed-term workers. The circumstances between them were not the same therefore there could have been no discrimination. Although the respondents and their two named comparators were engaged in the same or similar work and were both employed by the appellant, the respondents claim an entitlement pursuant to the appellant's Voluntary Severance 1 Scheme(hereinafter "VS1 scheme") whereas the two named comparators had expressed an interest in availing of the Voluntary Severance 2 Scheme (hereinafter "VS2 scheme"). Furthermore, the appellant argues that the Labour Court did not compare like with like as the two comparators (and indeed many other applicants for the VS scheme) are not entitled to receive statutory redundancy payments as they pay a reduced rate of PRSI (class D1).The respondents however, pay the full rate of PRSI (class A) and are entitled to, and were in fact paid, a redundancy lump

sum.

The appellant accepts that the High Court in *UCC v Bushin* [2012] IEHC 76 ruled that an *ex gratia* redundancy payment represents a "condition of employment" for the purposes of s.6 of the 2003 Act. However it is argued that that decision involved comparing the plaintiff with someone who was being made compulsorily redundant in another educational institution and who was therefore entitled to redundancy payments. In the instant case the payments made to the respondents' two named comparators are not enhanced redundancy payments since neither comparator was, as a matter of law, entitled to a statutory redundancy payment. Thus, the appellant submits that *Bushin* does not bind the Court as it is factually different to this appeal.

The appellant asserts that different outcomes can be expected if the facts are different and this does not mean there has been a difference in treatment. They further contend that if the Court were to find that a difference in treatment had been made there were objective reasons for any difference of treatment that there may have been.

3.2 Objective grounds for less favourable treatment;

The 2003 Act transposes the provisions of Directive 99/70/EC concerning the framework agreement on fixed term work. The preamble to the framework agreement annexed to the Directive recognises the general principle of non-discrimination "needs to take account of the realities of specific national, sectoral and seasonal situations". This principle is described in clause 4(1) of the Directive as:-

> "In respect of 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."

Clause 4 is implemented by s.6 of the 2003 Act which provides:-

> "6 (1) Subject to subsection (2) and (5), a fixed-term employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable permanent employee.
>
> (2) If treating a fixed-term employee, in respect of a particular condition of employment, in a less favourable manner than a comparable permanent employee can be justified on objective grounds then that employee may, notwithstanding subsection (1), be so treated."

The appellant argues that the provisions of the VS/VER schemes are justified by the legitimate objective pursued. The appellant must reduce staffing levels to meet the challenges facing its business. Rather than resort to compulsory redundancies a reduction in staff numbers has been achieved through the use of the incentivised VS/VER schemes. The appellant argues that this is currently the only method available to it to reduce staff levels i.e. secure the attainment of its objective, otherwise than through natural wastage. It argues that it does not go beyond what is necessary in order to attain it and therefore is proportionate.

It is submitted that permanent staff on such schemes receive lump-sum payments-not because they are permanent staff-but because the appellant has encouraged and incentivised those individuals to voluntarily forfeit their positions. The scheme does not apply to fixed-term workers, such as the respondents, it is argued, as their employment terminates at an agreed date. Neither respondent has any entitlement to remain in the appellant's employment after the determination of their contract and there is therefore no need for the appellant to incentivise their departure from its service.

The Labour Court, it is submitted, unconvincingly distinguished the circumstances of this case from the case of *Sunday Newspapers Ltd. v. Kinsella & Bradley* [2008] E.L.R. One of the issues in that case was if the complainant fixed-term employees had been treated in a less favourable manner than comparable permanent employees when they had been offered voluntary severance packages by their employer based on the earnings they would have received up to the expiration of their fixed-term contracts whereas permanent employees had been offered a minimum of one year's salary based on the fact they would cease working at the age of 65.

Smyth J. held at para. 2 of his judgment that the Labour Court had erred in law in finding that the applicant's complaints were well founded. He held that the complainants as fixed-term employees were treated "differently but in no less favourable a manner to a comparable employee" since their ceasing to work with the company would occur with the passage of time regardless of whether they reached 65.

The appellant submits that similar considerations apply to the facts of this case.

However, the appellant submits that if this Court decides that the Labour Court did not err in law in concluding that the respondents were treated less favourably than comparable permanent employees, there are clear objective grounds justifying the less favourable treatment.

3.3 Appeal of a point of law;

Section.15 (6) of the 2003 Act provides that:-

> "(6) A party to proceedings before the Labour Court under this section may appeal to the High Court from a determination of the Labour Court on a point of law and the determination of the High Court shall be final and conclusive."

The appellant submits that certain information regarding the comparators was not considered by the Labour Court. It is of the view that this Court is not restricted to considering only points of law and may consider mixed issues of fact and law in the appeal before it. It argues therefore that this information should be taken into account by the Court. In this it relies on the Supreme Court decision in *Castleisland Cattle Breeding Society Ltd v. Minister for Social and Family Affairs* [2004] 4 IR 150, which was a statutory appeal under the Social Welfare (Consolidation) Act where Geoghegan J. held at p.158.

> "Clearly, on the authorities the High Court or this court on appeal is entitled to consider whether it was open to the appeals officer to come to the decision which she did arrive at and, if not, whether the evidence conclusively established that Mr. Walsh was an independent contractor. If so, the High Court or this court on appeal can make a declaration to that effect. A statutory appeal on a question of law is not a judicial review and a question of law includes the question of whether the evidence supports only one conclusion."

The Supreme Court gave further consideration to the nature of such appeals in the case of *NUI Cork v. Aherne* [2005] IESC 40,

McCracken J. under the paragraph "questions of law" stated:-

> "The Respondents submit that the matters determined by the Labour Court were largely questions of fact, and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this Court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by the Labour Court and ought or ought not to have been taken into account by it in determining the facts, is clearly a question of law, and can be considered on an appeal under s.8(3)".

Thus in the present case it is submitted that this Court is entitled to examine the question of whether certain matters ought or ought not to have been considered by the Labour Court in determining the facts of this case as well as determining whether there has been an error of law.

Respondents' Submissions
4.1 Discrimination;

The VS/VER scheme states:-

> "All staff are eligible to apply under these schemes provided that they are members of the An Post Main Superannuation Scheme".

The respondents were members of this scheme. The scheme provides for benefits in respect of voluntary severance for permanent employees depending on the length of reckonable service. The respondents contend had they been permanent employees they would have been eligible for payments under the VS1 scheme but as they were fixed-term workers they were excluded and eligible for statutory payments only. Clause 1 of the framework agreement on fixed-term workers annexed to Directive 99/70/EEC provides that the purpose of the Directive is to improve the quality of fixed term work by ensuring the application of the principles of non-discrimination.

The appellant at para. 4.1 of its outline written legal submissions to the Labour Court stated that:-

> "The An Post Voluntary Severance and Voluntary Early Retirement Schemes are only available to permanent staff and where a surplus staff situation exists."

The Court found in *UCC v. Bushin* [2012] IEHC 76 that this type of scheme was a condition of employment. In his decision Kearns P. stated at p.11:-

> "I am also satisfied that the Labour Court was correct in law in finding that an ex gratia redundancy payment represented a 'condition of employment' within the meaning of the Act".

It appears therefore that it is a condition of employment which is only available to permanent employees and temporary workers are discriminated against as they cannot access it.

Later in his judgment, Kearns P. found that the claimant was denied an *ex gratia* payment on the basis that she was a fixed-term worker holding at para. 26 of the judgment that :-

> "Ex gratia payments were made to valid comparators. There was thus no possibility of her receiving some different, but no less favourable treatment. The contention advanced by the appellants is predicated entirely on the status of the respondent as the fixed term employee and as such is, in my view, precluded by s. 7(1) of the Act."

The Labour Court found the exclusion to be *prima facie* less favourable treatment and the respondents submit that this was a correct analysis of the situation. They argue that they are in an analogous situation to *UCC* and have no possibility of receiving different but no less favourable treatment as they were entirely excluded from consideration under the VS/VER scheme.

The appellant places reliance on *Sunday Newspapers Limited* (cited above) however the respondents submit that that case differs from this appeal since in that case the respondents did in fact have access to the scheme. The respondents refute the appellant's assertion that they did not have access, not because of their status as fixed term employees, but because of the need to encourage permanent staff to voluntarily forfeit their positions. It is submitted that a reason based on the fact that they were not permanent staff is fundamentally the same as excluding them because they were fixed-term workers.

4.2 Absence of justification on objective grounds;

In order to justify unfavourable treatment it must be on objective grounds. Although objective grounds are not defined in the Directive, Section 7 (1) of the 2003 Act provides that:-

> "(1) A ground shall not be regarded as an objective ground ... unless it is based on considerations other than the status of the employee concerned as a fixed-term employee and the less favourable treatment which it involves for that employee (which treatment may include the renewal of a fixed-term employee's contract for a further fixed term) is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose".

Thus three elements must be established in order to justify less favourable treatment;

> (i) The impugned treatment must be for the purpose of achieving a legitimate objective;
>
> (ii) Such treatment must be appropriate and necessary for achieving that objective;
>
> (iii)The treatment cannot be based on considerations of the status of the employer e.g. as fixed-term employees.

In this case the legitimate objective cited is the need to incentivise permanent workers to leave employment. Even if it is accepted that the objective of the appellant is legitimate for the purposes of the 2003 Act, the principle of proportionality must be satisfied and

the respondents argue that it has not been by the scheme at issue. It is argued that it was neither appropriate nor necessary to exclude fixed-term employees from the VS/VER scheme because their contracts would end in order to achieve the objective. The exclusion of the respondents from a scheme to which permanent employees were entitled access constitutes less favourable treatment of fixed-term employees. The legislation does not permit this and it cannot be viewed as an objective ground. The Labour Court determined:-

> "Section 7 of the Act provides, in effect, that a ground shall not be regarded as an objective ground for the purposes of section 6(1) of the Act unless it is based on considerations other than the status of the employees concerned as a fixed-term employee. The operative consideration relied upon by the [appellant] to justify the different treatment in issue in this case is indissociable from the [respondents'] status as fixed-term employees. Consequently it cannot be relied upon as an objective ground..."

Even if the appellant believed that the scheme could not achieve its objective without excluding fixed-term employees, alternative versions of the scheme could have been devised which would not have excluded fixed-term employees. For example, the respondent submits, the objective could have been achieved by designing payments to reflect remaining potential service. The scheme could have been opened to all with the respondents and those in like situation being compensated for no more than what is left in the term of their contract e.g. in the case of a five year contract where the employee is let go after three years they would be compensated based on the remaining two years of work. It is submitted that permanent workers would have been no less incentivised if such a scheme had been opened to fixed term workers also. No evidence has been given that any consideration was given to such alternative forms of the scheme which could have applied in a non-discriminatory way to all employees. It is not permissible to simply exclude the respondents from the scheme and the negative impact of the scheme on fixed-term workers is therefore entirely disproportionate to its objective and that objective cannot be accepted as legitimate.

It is clear from the relevant jurisprudence that the status of workers as fixed-term workers cannot be a justification for unfavourable treatment.

The ECJ in its judgment in *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* (case c-212/04) stated at paras. 69-70 in respect of objective reasons that:-

> "In those circumstances, the concept of 'objective reasons' within the meaning of clause 5(1)(a) of the Framework Agreement, must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable in that particular context of justifying the use of successive fixed term employment contracts. Those circumstances may result, in particular from the specific nature of the tasks for the performance of which such contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from the pursuit of a legitimate social policy objective of a member state".

Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud (case-C307/05) concerned retrospective recognition of length of service allowances granted to permanent employees but from which the complainant had been excluded because she was a fixed-term worker. The CJEU again stressed the precise and concrete requirements of "objective reasons" citing *Adeler* and stating at para.58 that the concept:-

> "....requires the unequal treatment at issue to be justified ...and is necessary for that purpose."

In the joined cases of *Rosa María Gavieiro(C-444/09) Ana María Iglesias Torres (C-456/09) v Consellería de Educación e Ordenación Universitaria de la Xunta de Galicia* (cases C- 444/09 and C-456/09), which concerned the exclusion of fixed-term teachers from pay increments to which permanent teachers were entitled the defendant government argued that the justification for the treatment of the fixed-term workers was that their employment was temporary. The court rejected this circular argument and stated clearly that the temporary nature of fixed-term work is not capable of constituting an objective ground within the meaning of the framework directive. It held at paras. 54-57:-

> " 54. As to the question whether the temporary nature of the employment of certain public servants may, in itself, amount to an objective ground within the meaning of clause 4 of the framework agreement, the Court has already held that the concept of objective grounds in point 1 of that clause must be understood as not permitting a difference in treatment between fixed-term workers and permanent workers to be justified on the basis that the difference is provided for by a general, abstract national norm, such as a law or collective agreement (*Del Cerro Alonso*, paragraph 57).
>
> 55. That concept requires the unequal treatment at issue to be justified by the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose (*Del Cerro Alonso*, paragraph 58). Those factors may result, in particular, from the specific nature of the tasks for the performance of which fixed-term contracts have been concluded and from the inherent characteristics of those tasks or, as the case may be, from pursuit of a legitimate social-policy objective of a Member State (see, as regards clause 4(1) of the framework agreement, *Del Cerro Alonso*, paragraphs 53 and 58; as regards the concept of 'objective reasons' in clause 5(1)(a) of the framework agreement, *Adeneler and Others*, paragraphs 69 and 70, and the order of 24 April 2009 in Case C-519/08 *Koukou*, paragraph 45).
>
> 56. By contrast, reliance on the mere fact of the temporary nature of the employment of staff of the public authorities does not meet those requirements and is therefore not capable of constituting an 'objective ground' within the meaning of clause 4(1) of the framework agreement.
>
> 57. A difference in treatment with regard to employment conditions as between fixed term workers and permanent workers cannot be justified on the basis of a criterion which, in a general and abstract manner, refers precisely to the term of the employment. If the mere temporary nature of an employment relationship were held to be sufficient to justify such a difference, the objectives of Directive 1999/70 and the framework agreement, recalled at paragraphs 47 and 48 of this judgment, would be negated. Instead of improving the quality of fixed-term work and promoting the equal treatment to which both Directive 1999/70 and the framework agreement aspire, reliance on such a criterion would amount to perpetuating a situation that is disadvantageous to fixed term workers. "

In the case under appeal different conditions were applied to the fixed-term and permanent employees, the conditions for the former being less favourable -as was the case in *Gavieiero*. The only objective justification being advanced by the appellant is that the

employment of the respondents was not permanent. It is an argument the respondent submits which in a similar vein to *Gavieiro* incorrectly seeks to rely on the fixed-term nature of the employment of the respondents' employment as a justification for the treatment at issue.

4.3 The role of High Court on an appeal on a point of law;

It is submitted that there is no identifiable error of law and no unsustainable finding of fact disclosed in the Labour Court determination at issue. The Labour Court based its decision on findings of fact having considered the relevant evidence before it. The respondents submit that all material information was laid before the Labour Court. It notes that no assertion is made by the appellants that the Labour Court's determination was not supported by evidence nor that its conclusions were irrational. Therefore, the respondents assert there is no legitimate or proper reason for this Court to interfere with the decision of the Labour Court.

Many authorities set out the narrowness of the function of the Court on a point of law and the respondents rely on *Horan v. CWS-Bosco Ireland Limited* [2012] IEHC 524 where Murphy J. reviewed in detail the law relating to appeals on a point of law stating at para.7.4:-

> "The function of the High Court in reviewing the decision of specialist Tribunals is well summarised in Kerr's Termination of Employment Statutes (January 2012) at pp 1-79:
>
> > '.....[i]n considering whether to allow an appeal against a decision of such a Tribunal, the High Court must consider whether the body based its decision on an identifiable error of law or an unsustainable finding of fact'."

They also rely on *Henry Denny and Sons (Ireland) Limited, trading as Kerry Foods v. The Minister for Social Welfare* [1998] 1 I R 34 where Hamilton C.J. held at pps. 37-38.:-

> "I agree with the judgments about to be delivered but I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review. "

In *Denise Wilton v. Steel Company of Ireland Ltd.* [1999] 10 E.L.R. 1 O'Sullivan J. also considered the function of the High Court in hearing an appeal on a point of law and set out the difference between a substantive appeal and an appeal on a point of law, observing at p.5 that:-

> "I would make it clear, of course, that it is no part of my function to test the strength or weaknesses of such arguments. This is not a court of appeal, but only a court of appeal on a point of law, which is an entirely different matter. No argument was made on behalf of the plaintiff that the Labour Court was irrational in reaching its decision and therefore it is not for this Court to weigh the strengths or weaknesses of the arguments or evaluate its determination thereon."

The respondents note that in the case at issue the appellants have introduced new evidence regarding the comparators, Mrs Mooney and Mrs Dredge, wherein they argue that they had applied for a different scheme to the scheme the respondents sought. This information was not presented to the Labour Court. The respondents argue that this Court cannot have regard to new facts in an appeal and if the Labour Court did not (or was not in a position to) determine a matter this Court should not now determine that issue since this case relates to a point of law only. They further contend that since the Labour Court never heard the evidence it cannot be argued that it made an error on a point of law in relation to same.

The principle that arguments should not be advanced in an appeal on a point of law where the Labour Court never heard or considered those arguments was considered by Laffoy J. in *The Minister for Finance v. Una Mc Ardle* [2007]IEHC 98 where she held at p.7 that :-

> "Counsel for the defendant submitted that it is not open to an appellant on an appeal on a point of law from the determination of the Labour Court under s.15 (6) of the Act to present arguments as to the legal position which were not addressed to the Labour Court, citing two authorities on appeals from the Information Commissioner: The decision of this Court (Mc Kechnie J.) delivered on 11th May 2011 in Deely v The Information Commissioner; and the decision of this Court Smyth J.) delivered on 31st May 2005 in South Western Area Health Board v. Information Commissioner. In my view, that submission must be correct in point of principle ,at any rate where the legal issue is whether the first instance decision maker (in this case the Rights Commissioner) or the appellant decision maker (in this case the labour Court) had jurisdiction to make the relevant decision."

The respondent therefore submits that the decision of the labour Court should be upheld.

Decision

5. This is an appeal on a point of law from a decision of the Labour Court. I will deal first with the role of the Court in such an appeal. It is plainly a limited role. The Court may only intervene where it finds that the Tribunal based its decision on an identifiable error of law or an unsustainable finding of fact. The Court should be slow to interfere with the decisions of the Labour Court because it is an expert administrative Tribunal. See *Henry Denny & Sons. v. The Minister for Social Welfare* [1998] 1 I R. 539. Unless a claim of irrationality is sustained, the Court cannot weigh the strengths or weaknesses of the arguments or evaluate its determination thereon. See *Wilton v. Steel Company of Ireland Ltd.* [1999] ELR 1, (O'Sullivan J., p. 5). The Court may, however, examine the basis upon which the Labour Court found certain facts. It can consider whether certain matters ought or ought not to have been considered or taken into account by the Labour Court in determining the facts. See *NUI Cork v. Ahern* [2005] IESC 40 (McCracken J.).

The law

5.1 Clause 1 of the Framework Agreement on Fixed-Term Work annexed to Council Directive 1999/70/EC of the 28th June, 1999, provides that the purpose of the Directive is, *inter alia*, to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination. Clause 4.1 of the Agreement provides:

> "In respect of 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."

"Objective grounds" are not defined in the Directive.

The Directive is implemented into Irish law by the Protection of Employees (Fixed-Term Work) Act 2003. The relevant provisions of the 2003 Act are as follows:

> "Section 6(1) Subject to subsections (2) and (5), a fixed-term employee shall not, in respect of his or her conditions of employment, be treated in a less favourable manner than a comparable permanent employee.
>
> (2) If treating a fixed-term employee, in respect of a particular condition of employment, in a less favourable manner than a comparable permanent employee can be justified on objective grounds then that employee may, notwithstanding subsection (1), be so treated.
>
> (3) A period of service qualification relating to a particular condition of employment shall be the same for a fixed-term employee as for a comparable permanent employee except where a different length of service qualification is justified on objective grounds.
>
> (4) For the avoidance of doubt, the reference in this section to a comparable permanent employee is a reference to such an employee either of the opposite sex to the fixed-term employee concerned or of the same sex as him or her.
>
> (5) Subsection (1) shall, in so far, but only in so far, as it relates to any pension scheme or arrangement, not apply to a fixed-term employee whose normal hours of work constitute less than 20 per cent of the normal hours of work of a comparable permanent employee.
>
> (6) The extent to which any condition of employment referred to in subsection (7) is provided to a fixed-term employee for the purpose of complying with subsection (1) shall be related to the proportion which the normal hours of work of that employee bears to the normal hours of work of the comparable permanent employee concerned.
>
> (7) The condition of employment mentioned in subsection (6) is a condition of employment the amount of benefit of which (in case the condition is of a monetary nature) or the scope of the benefit of which (in any other case) is dependent on the number of hours worked by an employee.
>
> (8) For the avoidance of doubt, neither this section nor any other provision of this Act affects the operation of Part III of the Organisation of Working Time Act 1997."

Section 7 provides:

> (1) A ground shall not be regarded as an objective ground for the purposes of any provision of this Part unless it is based on considerations other than the status of the employee concerned as a fixed-term employee and the less favourable treatment which it involves for that employee (which treatment may include the renewal of a fixed-term employee's contract for a further fixed term) is for the purpose of achieving a legitimate objective of the employer and such treatment is appropriate and necessary for that purpose.
>
> (2) Where, as regards any term of his or her contract, a fixed-term employee is treated by his or her employer in a less favourable manner than a comparable permanent employee, the treatment in question shall (for the purposes of section 6 (2)) be regarded as justified on objective grounds, if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment."

5.2 The appellant contends that the workers in question were excluded from the scheme not because they were fixed-term workers but because of the need to incentivise permanent staff to leave early positions in which they could remain until 65 years of age. The scheme was to compensate them for the years of service they would forgo. Did this exclusion treat the respondents in a less favourable manner than the permanent staff that are accepted as the true comparators? Clearly it did. The scheme would have resulted in a better payment to them had the scheme applied and the appellant itself makes the case that they were excluded because of their status as fixed-term workers.

5.3 The real question for the Court is whether s. 7 applies. In short, was the exclusion justified by virtue of a legitimate objective and was the exclusion an appropriate and necessary one? See *Adeneler & Ors. v. Ellinikos Organismos Galaktos* (case c-212/04). It seems to me, and I do not think it was in issue, that the overall objective of trying to voluntarily reduce the number of staff is, in the circumstances, a legitimate one. Consequently, the first question is answered affirmatively. It is a legitimate objective. But was the exclusion appropriate and necessary? This should be examined on a proportionality basis. Thus, the Court must address the second question. Was the exclusion the minimum unfavourable treatment necessary to enable the appellant obtain its objective? In its decision, the Court did not directly address this question. I think this Court can and should do so in order to finally resolve this matter. The objective is to reduce labour costs within An Post. Thus incentivising any workers to leave early is obviously going to move towards that end. Fixed-term workers have, under the Framework Agreement, annexed to Council Directive 1999/70/EC of the 28th June, 1999, a right to benefit from a principle of non-discrimination. To this end, Clause 4.1 thereof states;

> "In respect of 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."

Thus, the default position is one of non-discrimination and no less favourable treatment. In paragraph 4.4 to 4.10 of their submissions herein, the appellant sets out its reasons for less favourable treatment. It claims at 4.14 that the scheme chosen was the only means suitable to secure the objective. The respondents argue that there is a less unfavourable means. They point to a rather obvious one. The scheme could have allowed for the application to fixed term workers so as to buy out any remaining years of their contracts. This was argued at the hearing, seems eminently sensible and a fair solution and no argument was raised against it. In my view, this answers the question addressed. The means chosen by An Post was not the minimum unfavourable treatment required in order to achieve the legitimate objective. As it went beyond what was necessary, it failed the applicable test.

Whilst the Labour Court's grounds are more narrow than this, nonetheless I can find no error in the result it actually produced in its

determination. The appeal, therefore, is refused.