
STATUTORY RULES OF NORTHERN IRELAND

2002 No. 298

Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002

PART I

GENERAL AND INTERPRETATION

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 and shall come into operation on 1st October 2002.

(2) In these Regulations –

“the 1996 Order” means the Employment Rights (Northern Ireland) Order 1996⁽¹⁾;

“collective agreement” means a collective agreement within the meaning of Article 2(2) of the Industrial Relations (Northern Ireland) Order 1992⁽²⁾;

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

“employee” means an individual who has entered into or works under or where the employment has ceased, worked under a contract of employment;

“employer”, in relation to any employee, means the person by whom the employee is or where the employment has ceased, was employed;

“fixed-term contract” means a contract of employment that, under its provisions determining how it will terminate in the normal course, will terminate –

(a) on the expiry of a specific term,

on the completion of a particular task, or

(b) on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal bona fide retiring age in the establishment for an employee holding the position held by him,

and any reference to “fixed-term” shall be construed accordingly;

“fixed-term employee” means an employee who is employed under a fixed-term contract;

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

“pro-rata principle” means that where a comparable permanent employee receives or is entitled to pay or any other benefit, a fixed-term employee is to receive or be entitled to such proportion

(1) S.I. 1996/1919 (N.I. 16)

(2) S.I. 1992/807 (N.I. 5)

of that pay or other benefit as is reasonable in the circumstances having regard to the length of his contract of employment and to the terms on which the pay or other benefit is offered;

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

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

(3) The Interpretation Act (Northern Ireland) 1954(3) shall apply to these Regulations as it applies to an Act of the Northern Ireland Assembly.

Comparable employees

2.—(1) For the purposes of these Regulations, an employee is a comparable permanent employee in relation to a fixed-term employee if, at the time when the treatment that is alleged to be less favourable to the fixed-term employee takes place –

- (a) both employees are –
 - (i) employed by the same employer, and
 - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and
- (b) the comparable employee works or is based at the same establishment as the fixed-term employee or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

(2) For the purposes of paragraph (1), an employee is not a comparable permanent employee if his employment has ceased.

PART II

RIGHTS AND REMEDIES

Less favourable treatment of fixed-term employees

3.—(1) A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee –

- (a) as regards the terms of his contract; or
- (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) Subject to paragraphs (3) and (4), the right conferred by paragraph (1) includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to –

- (a) any period of service qualification relating to any particular condition of service,
- (b) the opportunity to receive training, or
- (c) the opportunity to secure permanent employment in the establishment.

(3) The right conferred by paragraph (1) applies only if –

- (a) the treatment is on the ground that the employee is a fixed-term employee, and

(b) the treatment is not justified on objective grounds.

(4) Paragraph (3)(b) is subject to regulation 4.

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

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

(7) For the purposes of paragraph (6) 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.

Objective justification

4.—(1) Where a fixed-term employee is treated by his employer less favourably than the employer treats a comparable permanent employee as regards any term of his contract, the treatment in question shall be regarded for the purposes of regulation 3(3)(b) as justified on objective grounds if the terms of the fixed-term employee’s contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee’s contract of employment.

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

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

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

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

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

(a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement, or

(b) that the written statement is evasive or equivocal,

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

(4) This regulation does not apply where the treatment in question consists of the dismissal of an employee, and the employee is entitled to a written statement of reasons for his dismissal under Article 124 of the 1996 Order(4).

Unfair dismissal and the right not to be subjected to detriment

6.—(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part XI of the 1996 Order(5) if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(4) Article 124 was amended by the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order (Northern Ireland) 1999 (S.R. 1999/277), Article 3 and by the Employment Relations (Northern Ireland) Order 1999 (N.I. 9), Article 11 and paragraph 6 of Part III of Schedule 4, and is amended by these Regulations, Schedule 2, paragraph 3(5)

(5) Part XI is amended by these Regulations, Schedule 2, to extend the circumstances in which, under Article 127, an employee is treated as dismissed for the purposes of that Part

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

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

(a) that the employee has –

- (i) brought proceedings against the employer under these Regulations;
- (ii) requested from his employer a written statement under regulation 5 or regulation 9;
- (iii) given evidence or information in connection with such proceedings brought by any employee;
- (iv) otherwise done anything under these Regulations in relation to the employer or any other person;
- (v) alleged that the employer had infringed these Regulations;
- (vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations;
- (vii) declined to sign a workforce agreement for the purposes of these Regulations, or
- (viii) being—

(aa) a representative of members of the workforce for the purposes of Schedule 1, or

(bb) a candidate in an election in which any person elected will, on being elected, become such a representative,

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

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

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

(5) Paragraph (2) does not apply where the detriment in question amounts to the dismissal of an employee within the meaning of Part XI of the 1996 Order.

Complaints to industrial tribunals etc.

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

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

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

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

(4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2)(a) –

- (a) where a term in a contract is less favourable, that treatment shall be treated, subject to paragraph (b), as taking place on each day of the period during which the term is less favourable;
- (b) a deliberate failure to act contrary to regulation 3 or 6(2) shall be treated as done when it was decided on.

(5) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of paragraph (4)(b) to decide not to act –

- (a) when he does an act inconsistent with doing the failed act; or
- (b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to have done the failed act if it was to be done.

(6) Where an employee presents a complaint under this regulation in relation to a right conferred on him by regulation 3 or 6(2) it is for the employer to identify the ground for the less favourable treatment or detriment.

(7) Where an industrial tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable –

- (a) making a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates;
- (b) ordering the employer to pay compensation to the complainant;
- (c) recommending that the employer take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

(8) Where a tribunal orders compensation under paragraph (7)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to –

- (a) the infringement to which the complaint relates, and
- (b) any loss which is attributable to the infringement.

(9) The loss shall be taken to include –

- (a) any expenses reasonably incurred by the complainant in consequence of the infringement, and
- (b) loss of any benefit which he might reasonably be expected to have had but for the infringement.

(10) Compensation in respect of treating an employee in a manner which infringes the right conferred on him by regulation 3 shall not include compensation for injury to feelings.

(11) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Northern Ireland.

(12) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(13) If the employer fails, without reasonable justification, to comply with a recommendation made by an industrial tribunal under paragraph (7)(c) the tribunal may, if it thinks it just and equitable to do so –

- (a) increase the amount of compensation required to be paid to the complainant in respect of the complaint, where an order was made under paragraph (7)(b); or

- (b) make an order under paragraph (7)(b).

Successive fixed-term contracts

8.—(1) This regulation applies where –

- (a) an employee is employed under a contract purporting to be a fixed-term contract; and
- (b) the contract mentioned in sub-paragraph (a) has previously been renewed, or the employee was employed by the same employer on a fixed-term contract, or on a series of successive fixed-term contracts, before the start of the contract mentioned in sub-paragraph (a).

(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if –

- (a) the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and
- (b) the employment of the employee under a fixed-term contract was not justified on objective grounds –
 - (i) where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;
 - (ii) where that contract has not been renewed, at the time when it was entered into.

(3) The date referred to in paragraph (2) is whichever is the later of –

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

(4) For the purposes of this regulation Chapter III of Part I of the 1996 Order shall apply in determining whether an employee has been continuously employed, and any period of continuous employment falling before the 10th July 2002 shall be disregarded.

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

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

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

Right to receive written statement of variation

9.—(1) If an employee who considers that he is to be regarded, by virtue of regulation 8, as a permanent employee requests in writing from his employer a written statement confirming that the contract is to be so regarded, he is entitled to be provided, 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.
- (2) If the reasons stated under paragraph (1)(b) include an assertion that there were objective grounds for the engagement of the employee under a fixed-term contract, or the renewal of such a contract, the statement shall include a statement of those grounds.
- (3) A written statement under this regulation is admissible as evidence in any proceedings before a court, an industrial tribunal and the Commissioners of Inland Revenue.
- (4) If it appears to the court or tribunal in any proceedings –
- (a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement, or
 - (b) that the written statement is evasive or equivocal,
- it may draw any inference which it considers it just and equitable to draw.
- (5) An employee who considers that, by virtue of regulation 8, he is a permanent employee may present an application to an industrial tribunal for a declaration to that effect.
- (6) No application may be made under paragraph (5) unless –
- (a) the employee in question has previously requested a statement under paragraph (1) and the employer has either failed to provide a statement or given a statement of reasons under paragraph (1)(b), and
 - (b) at the time the application is made the employee is employed by the employer.

PART III

MISCELLANEOUS

Restrictions on contracting out

10. Article 245 of the 1996 Order⁽⁶⁾ (restrictions on contracting out) shall apply in relation to these Regulations as if they were contained in that Order.

Amendments to primary legislation

11. The amendments in Part I of Schedule 2 to these Regulations shall have effect subject to the transitional provisions in Part II of the Schedule.

Liability of employers and principals

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

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

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

- (a) doing that act; or

⁽⁶⁾ Article 245 was amended by the Employment Rights (Dispute Resolution) (Northern Ireland) Order 1998 (N.I. 8) and by the Employment Relations (Northern Ireland) Order 1999, Article 40 and Schedule 9

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

PART IV

SPECIAL CLASSES OF PERSON

Crown employment

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

(2) For the purposes of paragraphs (1) and (3) a person is in “Crown employment” only if –

- (a) he is in employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision, and
- (b) having regard to the terms and conditions under which he works, he would be an employee if he was not in Crown employment.

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

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

Armed forces

14. These Regulations –

- (a) do not apply to service as a member of the naval, military or air forces of the Crown, but
- (b) do apply to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996(7).

Police service

15.—(1) For the purposes of these Regulations, the holding, otherwise than under a contract of employment, of the office of constable or an appointment as a police cadet shall be treated as employment, under a contract of employment, by the relevant officer.

(2) In this regulation “the relevant officer” means –

- (a) in relation to a member of the Police Service of Northern Ireland or the Police Service of Northern Ireland Reserve, the Chief Constable;
- (b) in relation to a person holding office under section 9(1)(b) of the Police Act 1997(8) (police members of the National Criminal Intelligence Service), the Director General of the National Criminal Intelligence Service; and

(7) 1996 c. 14

(8) 1997 c. 50

- (c) in relation to any other person holding the office of constable or an appointment as a police cadet, the person who has the direction and control of the body of constables or cadets in question.

PART V EXCLUSIONS

Apprentices

16. These Regulations shall not have effect in relation to a fixed-term employee who is employed under a contract of apprenticeship.

Government training schemes etc.

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

- (a) a scheme provided to him under arrangements made by a Northern Ireland Department, or
- (b) funded in whole or part by an Institution of the European Community.

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

(3) For the purpose of paragraph (2) “a higher education course” means –

- (a) in Northern Ireland, a course of a description referred to in Schedule 1 to the Further Education (Northern Ireland) Order 1997⁽⁹⁾.
- (b) in Scotland, a course of a description falling within section 38 of the Further and Higher Education (Scotland) Act 1992⁽¹⁰⁾; and
- (c) in England and Wales, a course of a description referred to in Schedule 6 to the Education Reform Act 1988⁽¹¹⁾;

Agency workers

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

(2) In this regulation “agency worker” means any person who is supplied by an employment business to do work for another person under a contract or other arrangements made between the employment business and the other person.

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

⁽⁹⁾ 1998 c. 40

⁽¹⁰⁾ 1992 c. 37; section 38 was amended by the Education (Scotland) Act 1996 (c. 43), Schedule 5, paragraph 9

⁽¹¹⁾ S.I. 1997/1772 (N.I. 15)

Sealed with the Official Seal of the Department for Employment and Learning on 24th September 2002.

L.S.

R. B. Gamble
A senior officer of the
Department for Employment and Learning