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Getting in a fix on the expiry of a contract (UK)

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Article By
Marianne Parkinson
Squire Patton Boggs (US) LLP
Employment Law Worldview

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As we know, where an employee is engaged under one or a series of fixed-term contracts for a period of over 2 years, they acquire the right not to be unfairly dismissed. It is also the case that non-renewal of a fixed-term contract will count as a dismissal under the ERA 1996. An employee whose fixed-term contract expires without its being renewed or extended will therefore have the same rights as a permanent employee on dismissal and the employer must tread carefully.

In *Royal Surrey County NHS Foundation Trust v Drzymala* last month, the EAT upheld the Employment Tribunal's finding that an employee had been unfairly dismissed when her fixed-term contract was not renewed, largely because the Trust had initiated discussions about possible alternative employment some months before the contract expired, but then failed to see these through.

Ms Drzymala was a locum consultant employed by the Trust on a series of six-month contracts since November 2011. In April/May 2014, she applied for a permanent position in the hospital but was unsuccessful. In the discussions about her unsuccessful application, the Trust had informed Ms Drzymala that it might be possible for her to continue working for the Trust as a "specialty doctor" – a permanent position (albeit lower-ranking than a consultant). She heard nothing further on this front and indeed the Tribunal found that the Trust had deliberately avoided the topic of alternative employment after this point.

On the expiry of Ms Drzymala's last contract in September 2014, the Trust informed her that it would not be renewed. In the letter confirming the non-renewal, the Trust did not inform her of her right to appeal against that decision nor did it make any mention of possible alternative employment, either as speciality doctor or anything else.

Ms Drzymala brought a claim for unfair dismissal, which was upheld by the Tribunal. It found that whilst the expiry of a fixed-term contract was of course a potentially fair reason for dismissal (by reason of SOSR), the fact that the Trust had made mention of possible alternative employment but then seemingly abandoned these discussions was enough to make the dismissal unfair. Another factor was that the Trust did not give Ms Drzymala the right to appeal until after her employment had terminated – meaning that any appeal was by that stage essentially worthless (although there would actually be nothing in law to prevent a retrospective re-employment without loss of earnings or break in continuity).

The Trust appealed to the EAT, which upheld the Tribunal's finding of unfair dismissal. The EAT said that it accepted that there is no general obligation on an employer to discuss alternative employment on the expiry of a fixed-term contract. In this case, the EAT placed emphasis on the fact that the Trust had initiated discussions about potential permanent roles but then shut them down; this change of direction and retreat from its previous position was an important pointer to the unfairness of the dismissal.

Lessons for employers

1. Our view is that employers would be wise not to rely on the EAT's concession that there is no obligation to search for alternative employment in this scenario. In any discussion about whether it was reasonable in all the circumstances to dismiss (a key part of the unfair dismissal test) there must also inevitably be some consideration, however brief, of whether there is any alternative. Maybe it wouldn't take long to answer

that question, but it is pretty brave not to ask it. Before any SOSR dismissal, therefore, employers should conduct a consultation process akin to the latter stages of a redundancy consultation, as part of which they consider whether suitable alternative employment is available for that employee. It would be prudent to take a similar approach on the expiry of a fixed-term contract where the employee has the right to claim unfair dismissal.

2. Where the employee is given the right to appeal against her dismissal, the failure to do so in a timely manner was important in this case. The main focus of an appeal in fixed-term cases must be whether suitable alternative employment is available. [The employee may also try to appeal on the grounds that their contract should be renewed, but if that is not viable then the principal avenue of appeal must be that there is another job for the employee to move into.] An appeal which excluded looking at alternatives would be all a bit pointless, it might be thought.
3. It is to be presumed that the Trust did not pursue the speciality doctor option because it became aware for some reason or another that Ms Drzymala wouldn't get it and it didn't want the difficult conversation which might ensue. There is nothing in looking for alternatives which requires the employer to be successful, so if it had made that call to tell her the option wasn't a runner, her claim would almost certainly have failed. So don't be shy of telling a fixed-term employee that you have looked at alternatives but have found nothing suitable. Much better that than ducking the conversation and then coming unstuck like the employer here.