**30 March 2011**

**PRESS SUMMARY**

**Duncombe and others (Respondents) v Secretary of State for Children, Schools and Families (Appellant) [2011] UKSC 14**

**JUSTICES:** Lord Rodger, Lady Hale, Lord Mance, Lord Collins, Lord Clarke

## BACKGROUND TO THE APPEAL

This appeal is concerned with the employment, by the Secretary of State for Children, Schools and Families, of teachers to work in the European Schools. These are schools set up to provide a distinctively European education principally for the children of officials and employees of the European Communities. The Staff Regulations, made by the Board of Governors pursuant to the Convention defining the Statute of the European Schools, limit the period for which teachers may be seconded to work in those schools to a total of nine years (or exceptionally ten). This is made up of an initial probationary period of two years, and a further period of three years, which is renewable for a further four years ('the nine year rule').

The principal question in the appeal is whether these arrangements can be objectively justified, as required by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) ('the Fixed-term Regulations'). This was the measure chosen by the United Kingdom to implement Council Directive 1999/70/EC concerning the framework agreement on fixed-term work ('the Fixed-term Directive'). The effect of regulation 8 is that a successive fixed-term contract is turned into a permanent employment unless the use of such a contract can be objectively justified.

Mr Fletcher was employed by the Secretary of State and seconded to work in the European School in Culham, Oxfordshire, from 1 September 1998 until 31 August 2008. After his two year probationary period, he was employed for a further three year period, extended for a further four years, and then an additional one year. In 2007, he claimed that he was a permanent employee by virtue of regulation 8.

Mr Duncombe was a teacher at the European School in Karlsruhe, Germany, from January 1996 until 31 August 2006. He too was employed under a series of fixed term contracts to reflect the nine year rule. He brought claims in the Employment Tribunal for wrongful dismissal or pay in lieu of notice, unfair dismissal and a declaration that he was a permanent employee.

The Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal all held that the use of the successive fixed-term contracts is not objectively justified.

## JUDGMENT

The Supreme Court unanimously allows the appeal, holding that it was objectively justified to employ these teachers on the current fixed term contracts and accordingly that these were not converted into permanent contracts by the operation of regulation 8 of the Fixed-term Regulations. Lady Hale gives the leading judgment.

## REASONS FOR THE JUDGMENT

The teachers' complaint is not against the three or four periods comprised in the nine year rule but against the nine year rule itself. In other words, they are complaining about the fixed-term nature of their employment rather than about the use of the successive fixed-term contracts which make it up. But that is not the target against which either the Fixed-term Directive or the Regulations are aimed. Employing people on single fixed-term contracts does not offend against either the Directive or the Regulations. **[23]**

The targets against which the Directive and Framework Agreement were directed were discrimination against workers on fixed-term contracts and abuse of successive fixed-term contracts in what was in reality an indefinite employment. It is not suggested that the terms and conditions on which the teachers were employed during their nine year terms were less favourable than those of comparable teachers on indefinite contracts. **[24]**

It is not the nine year rule which requires to be justified, but the use of the latest fixed-term contract bringing the total period up to nine years. And that can readily be justified by the existence of the nine year rule. The teachers were employed to do a particular job which could only last for nine years. The Secretary of State could not foist those teachers on the schools for a longer period, no matter how unjustifiable either he or the employment tribunals of this country thought the rule to be. The teachers were not employed to do any alternative work because there was none available for them to do. **[25]**

It is not a question of whether the Staff Regulations 'trump' the Directive. There is no inconsistency between them. The Staff Regulations are dealing with the duration of secondment, not with the duration of employment. **[26]**

**15 July 2011**

**PRESS SUMMARY**

**Duncombe and others (Respondents) v Secretary of State for Children, Schools and Families (Appellant) (No. 2) [2011] UKSC 36**
*On appeal from the Court of Appeal (Civil Division) [2009] EWCA Civ 1355*

**JUSTICES:** Lord Rodger, Lady Hale, Lord Mance, Lord Collins, Lord Clarke

## BACKGROUND TO THE APPEAL

The case relates to the unusual employment status of teachers employed by the Secretary of State for Children, Schools and Families to work in the European Schools. These are schools set up to provide a distinctively European education principally for the children of officials and employees of the European Communities. The main issue in the appeal was whether the terms of that employment fell foul of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) which implemented Council Directive 1999/70/EC concerning the framework agreement on fixed-term work. The Supreme Court handed down judgment on 30 March 2011 allowing the appeal of the Secretary of State on that issue: [2011] UKSC 14. The Court reserved judgment in the cross-appeal of the teachers. The issue in the cross-appeal is whether their employment is covered by the protection against unfair dismissal conferred by section 94(1) of the Employment Rights Act 1996.

## JUDGMENT

The Supreme Court allows the cross-appeal. Lady Hale delivers the judgment of the court. The employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal. The case will return to the Employment Tribunal.

The application of the Ministry of Defence for permission to appeal on this point in the cases of *Ministry of Defence v Wallis and Grocott* [2011] EWCA Civ 231 will be dismissed.

## REASONS FOR THE JUDGMENT

It is common ground that the basic principle was laid down by the House of Lords in *Lawson v Serco Ltd* [2006] UKHL 3, [2006] ICR 250. It is also common ground that these teachers' employment does not fall within either of the specific examples given in *Lawson* of people employed by British employers to work outside Great Britain who would be protected from unfair dismissal. The question is whether there are other examples of the principle, of which this is one. **[3]**

These cases do form another example of an exceptional case where the employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that they should enjoy protection from unfair dismissal. This depends upon a combination of factors. First, their employer was based in Britain; and not only based here but the Government of the United Kingdom. Second, they were employed under contracts governed by English law; the terms and conditions were either entirely those of English law or a combination of those of English law and the international institutions for which they worked. Third, they were employed in international enclaves, having no

particular connection with the countries in which they happened to be situated and governed by international agreements between the participating states. Fourth, it would be anomalous if a teacher who happened to be employed by the British government to work in the European school in England were to enjoy different protection from the teachers who happened to be employed to work in the same sort of school in other countries. **[16]**

**NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at:**
www.supremecourt.gov.uk/decided-cases/index.html