

15 Staff Appointments in the National Gallery of Ireland

- 15.1** Under the Appropriation Acts, the National Gallery of Ireland is supplied with an annual grant for its salaries and expenses. Dáil approval and authority for this expenditure is given in the annual Appropriation Acts. In addition, the National Gallery is required to secure the sanction of the Department of Public Expenditure and Reform in relation to employment of new staff. The issue of formal sanction in respect of voted expenditure is an essential element of the procedure for the management and control of public expenditure.
- 15.2** The Gallery operates under a governance and management system originally approved under the terms of the National Gallery Act 1854. The Act has been amended from time to time to provide for additional requirements. Under the 1854 Act, the Governing Body's role includes appointment of employees "subject to such regulations and conditions as they (the Governing Body) think proper".

Appointment of Director

- 15.3** In late 2010, the need to appoint a new Director to the Gallery was established.
- 15.4** The Board of Governors and Guardians of the National Gallery has responsibility for the appointment of the Director. It is not involved in recruitment of other staff. In recruiting the Director, the Board appointed members to a Search and Selection Committee that was managed under the auspices of the Public Appointments Service (PAS). The Committee included a nominee of the Department of Arts, Heritage and the Gaeltacht and an independent chairperson.
- 15.5** In January 2011, the Department of Public Expenditure and Reform¹ sanctioned the recruitment of a new Director. The sanction contained a number of specific conditions which included that
- the post should be filled at the level of Principal Officer higher grade, with no additions on the basis of a fixed term five year contract
 - the draft contract of employment should be cleared by the Department of Public Expenditure and Reform
 - the services of the PAS should be used in the recruitment of the Director.
- 15.6** An open competition was held by PAS in April 2011. The post was advertised in relevant international media. A booklet provided for the information of candidates included the details of the post and outlined the terms and conditions of the employment. The salary details were in line with the conditions outlined in the sanction. The salary scale is set out in Figure 15.1. No information was provided in relation to removal expenses.

¹ Functions in relation to staff appointments and salary approval previously held by the Department of Finance were transferred to the Department of Public Expenditure and Reform when it was established in June 2011.

Figure 15.1 Salary scale — Principal Officer higher grade, with effect from 1 January 2010

Scale	Salary
Point 1	€85,957
Point 2	€89,399
Point 3	€92,853
Point 4	€96,295
Point 5	€99,236
Long service 1	€102,335
Long service 2	€105,429

Source: Department of Public Expenditure and Reform

- 15.7** Following an interview process, the Committee made a recommendation to the Board, which in turn authorised the offer of appointment.
- 15.8** Following negotiations between the Gallery, the Department of Arts, Heritage and the Gaeltacht and the Department of Public Expenditure and Reform, appointment of the Director at a salary commencing at the fifth point on the scale was sanctioned. However, this sanction was specifically subject to
- no additional benefits, in cash or in kind, being payable, other than reasonable vouched removal expenses to relocate to Ireland i.e. no performance related award, no company car, etc.
 - no removal expenses to be paid to relocate elsewhere upon expiration of the contract.
- 15.9** In November 2011, an offer was made to an overseas candidate which included the sanctioned rate of pay and that reasonable vouched expenses would be paid if incurred in relocating to Ireland.
- 15.10** In addition to the sanctioned rate of pay, the new Director received a further payment in 2012 of €40,000, net of tax and Pay Related Social Insurance for removal expenses. This payment was made from non-Exchequer sources available to the Gallery, not from the Vote.
- 15.11** Of the €40,000 in removal expenses paid, supporting vouchers to the value of €3,700 have been received to date. Following tax advice, the Gallery grossed the unvouched element of the expense payment to €87,454 for tax purposes, with the grossed up cost also being paid out of the non-Exchequer resources of the Gallery.
- 15.12** The Gallery's Audit and Risk Committee discussed the contractual issues regarding the appointment of the new Director and it recommended that the Board of the Gallery give formal approval for the use of Gallery own funds in meeting 'non-salary costs' as required.

Views of the Chair of the Board

- 15.13** The Chair of the Board stated that the sanction allowed for the payment of reasonable relocation expenses, which, in the Board's view, could be properly defined in this case as that level of expenses payment that would make a candidate from overseas no worse off in taking up the post than a person already domiciled in Ireland. She also stated that the Board was obliged to determine what was 'reasonable' when it came to relocation expenses for a candidate taking up a position and relocating from overseas. The nature of the property market along with the dysfunctional nature of the banking system in Ireland made family relocation unattractive for a senior mid-career professional. This was compounded by the fact that the contract was for five years only. The resolution was to recognise that the relocation would be on-going over five years and that the expenses of travel would need to be met in order to achieve the outcome where the overseas candidate would be "no worse off in taking up the post than a person already domiciled in Ireland". She stated that the operation of this arrangement on relocation expenses will be subject to annual audit by the Gallery's internal auditor. The first of these audits, covering the initial months after appointment, was conducted in September 2012 with the next one due in the coming months. The Gallery's intention is that these audits will ensure that the expenses associated with travel from abroad are fully vouched.

Conclusion

- 15.14** The payments approved by the Board did not comply with the sanction issued by the Department of Public Expenditure and Reform.

Award of Contracts of Indefinite Duration to Gallery Staff

- 15.15** The Gallery recruited 30 staff as Security Attendants on a contract basis when the Gallery's new Millennium wing was opened in 2002. All these staff were employed on fixed term/specified purpose contracts, in accordance with the sanction prescribed by the Department of Public Expenditure and Reform. During the period 2002-2011, the Gallery obtained approval to recruit some of these staff on a permanent basis, others left and some of these were replaced on a permanent basis. The result was that there were 15 staff on fixed term/specified purpose contracts which expired in the period July to September 2011. The staff concerned were then made redundant.
- 15.16** Six of those staff made claims for 'contracts of indefinite duration' under the terms of the Protection of Employees (FTW) Act 2003.¹
- 15.17** The National Gallery had employed these staff on a series of four fixed term contracts of employment between January 2002 and September 2011. The first contract of employment (January 2002 — June 2005) stated "the specific purpose of this contract is that you are employed to secure the National Collection at the National Gallery incorporating the Millennium Wing, on a temporary basis until such time as refurbishment commences at the National Gallery's historic buildings under the Gallery's Development Plan. When this occurs, the specified purpose hereunder will cease and accordingly your employment will terminate in accordance with Clause 2. It is not possible to estimate when the specified purpose of your contract will cease but your employment will not in any event continue beyond 30 June 2005 and therefore you are accepting this offer of employment on the strict understanding that the nature of your employment is temporary".

¹ The statutory provisions in relation to such contracts are explained in Figure 15.2.

Figure 15.2 Contract of Indefinite Duration

A fixed term contract is a contract of employment where the end date of the contract is known at the outset. A specified purpose contract is a contract of employment which terminates on the occurrence of a specific event or cessation of a specific purpose.

The term 'contract of indefinite duration' (CID) is generally used to describe an employment contract that has lasted (or is intended to last) more than 52 continuous weeks. The term CID comes from the Protection of Employees (Fixed-Term Work) Act 2003. That Act prohibits the use of successive fixed-term contracts and provides that an employee is entitled to a CID once he or she has been on fixed-term contracts for more than four years, unless there is objective justification to keep the employee on fixed-term contracts.

Subsection 9(3) of the Protection of Employees (Fixed Term Work) Act 2003, states that "where any term of the fixed term contract purports to contravene [subsection 9(1) or 9(2)], the term shall have no effect and the contract concerned shall be deemed to be a contract of indefinite duration."

Subsection 9(1) indicates that where a fixed term employee completes or has completed his or her third year of continuous employment with an employer, the fixed term contract may be renewed by that employer on only one occasion and any such renewal shall be for a fixed term of no longer than one year.

Subsection 9(2) indicated that where a fixed term employee is employed on two or more continuous fixed term contracts, the aggregate duration of the contracts shall not exceed four years.

Objective grounds are described in Section 7(1) in the following terms. "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."

- 15.18** The second contract (June 2005 to March 2011) had similar wording and specifically included "Your employment will terminate automatically without any right to notice on the commencement of refurbishment". During this time, the Gallery was awaiting approval to proceed with its master development plan. As part of the plan, it was envisaged that sections of the Gallery would be closed for long periods and therefore, there would be reduced requirement for Security Attendants.
- 15.19** Refurbishment of the Gallery commenced in the Dargan Wing in March 2011. However, the refurbishment works were being undertaken on a phased basis, therefore, the services of these staff was required for a further short period, pending the commencement of refurbishment in other parts of the Gallery.
- 15.20** Two other contracts were given to cover the period from March to June and June to September 2011.
- 15.21** From March 2009, the Gallery was in regular discussions with the Department of Public Expenditure and Reform for additional attendant staff on a permanent basis as a result of natural wastage.

15.22 The Gallery has stated that, it sought legal advice at all stages of recruitment and contract renewal beginning in 2002 and ending in 2012, and complied precisely with all advice provided. Throughout the period, the legal firm advised that, although the legislation was relatively new and un-tested, the Gallery had a strong case and would probably be able to successfully defend any claims.

Labour Court Hearing

15.23 From July 2011 onwards, complaints were made by six staff to the Rights Commissioner in relation to employment rights. Each of the outcomes differed but the decisions of the Rights Commissioner were appealed by the six staff members to the Labour Court in December 2011. The cases were heard during summer 2012.

15.24 In respect of the first three cases heard, the Court determined in September 2012 that

- the specified purpose contract of employment set in June 2005 was not justified on objective grounds (within the meaning of Section 7(1) of the Act) and was deemed a contract of indefinite duration
- the fixed term contract of employment offered in June 2011 was not justified on objective grounds and was deemed a contract of indefinite duration
- the Gallery could not claim that the contracts did not meet a 'fixed and permanent need' for the Gallery.

15.25 The Court ordered the Gallery to

- reinstate the staff members into their employment with effect from the date of the termination of their employment
- pay the staff members any arrears of pay due to them less any amount of monies paid to them by way of redundancy pay they had already received
- award them €3,000 each in compensation.

15.26 The Gallery decided that it should reinstate all six staff in December 2012. The costs involved are

- legal costs — €124,509
- reinstatement costs — €281,426 i.e. salary arrears from the date of redundancy (a net payment was made after taking account of redundancy payments already paid)
- compensation costs — €15,000.

In addition, there are legal costs for one of the claimants currently in dispute. A negotiated settlement is anticipated before the end of 2013.

15.27 According to the Gallery, due to subsequent staff departures, the employees who were taken back are required by the Gallery and are productively employed.

Conclusion

- 15.28** The Gallery incurred expenditure in the region of €420,000 in relation to the reinstatement of the six Security Attendants, including arrears of salary for the fifteen month period when the attendants had been made redundant. There are also long term costs for the State as these employees accrued pension rights from the commencement of the contracts.
- 15.29** Issues involving contracts of indefinite duration also arise elsewhere in the public sector. This is a particular issue in relation to employees in the third level education sector.