

EMPLOYMENT ADVICE

The rights of fixed-term employees

advice and information for members

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Introduction

Staff employed on fixed-term contracts (FTCs) now have more employment rights than is realised by many managers (and, for that matter, by many individual employees). Following the introduction of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations in 2002 (see page 9) and the Dispute Resolution Regulations in 2004, FTC employees have broadly similar (although not precisely comparable) rights to their colleagues on 'permanent' or 'open-ended' contracts. Their rights now include:

- the capacity to claim unfair dismissal;
- an entitlement to a hearing before termination;
- the right to a redundancy payment – and to consultations as to redundancy;
- claiming parity of treatment with comparable permanent colleagues;
- the entitlement to claim a permanent contract after four years' service.

This booklet offers a concise and common-sense guide to these rights.



What is a fixed-term contract?

Perhaps we should start by clarifying precisely what we mean by being employed on a fixed-term contract (FTC): a FTC is defined as one which ends on a specific date or on the completion of a particular task, or on the occurrence (or non-occurrence) of a particular event. In legal terms, therefore, there is no difference between a 'temporary' and a 'fixed-term' contract.

Historically, there was a category of contracts, known as 'specific task' or 'limited term' contracts (which were prevalent in higher education and were often geared to external funding sources), where a person was employed only until the end of a named course or until the completion of a particular project. Staff on these contracts were not covered by employment protection rules (since they were not regarded as true FTCs); however, the law has changed and employments on this basis are now included in the definition of FTCs so that staff on these contracts now have the same protections as other fixed-term employees.

And for the sake of clarity, a contract is not prevented from being a 'fixed-term' by the inclusion of a clause entitling one or both sides to terminate it early by giving notice.

Rights of notice

Staff on FTCs who have a stated termination date (e.g. 'your period of employment will be 1 September 2006 to 31 August 2007') do not have to be given specific separate notice that their contract will come to an end at the stated date, since they are already regarded as having been notified of the date that the employment is anticipated to finish. In this respect, their rights are different from those of their 'permanent' colleagues, who have an entitlement to be given a minimum period of notice.

However, if an employer wishes to bring a FTC to an end *earlier* than the notified termination date, then notice must, of course, be given.

Fixed-term contracts and (unfair) dismissal

Non-renewal

It is crucial to understand that the law regards an employer's failure to renew a FTC on the same terms at its expiry as a dismissal, which (provided the employee has the required one year's continuous service to qualify for a claim) may potentially be challenged as an unfair dismissal in an Employment Tribunal.

'Unfair dismissal'

Despite its name, 'unfair dismissal' is not primarily about the *fairness* of a dismissal. In practice, it is essentially concerned with whether the termination was, in broad terms, a reasonable decision. Note that, to claim unfair dismissal, the employee must have been employed for at least *one year*. In unfair dismissal claims, the Tribunal effectively asks two key questions:


- 1 Did the employer have a **valid reason** for the dismissal? In the case of FTCs, the termination will frequently be for one of two valid reasons, either for:
 - **redundancy**; or
 - **some other substantial reason** for justifying a dismissal, such as the predicted need for the fixed-term employment (for example, covering for another employee's temporary absence) has come to its anticipated end.
- 2 Normally, and more significantly, the Tribunal will ask, did the employer **act reasonably** in dismissing the employee?

The bare fact that the expired contract was offered as a temporary post (and accepted on that basis) will not, on its own, justify its non-renewal as necessarily fair. Nevertheless, many FTCs issued for valid reasons which are made clear to the employee (such as covering a maternity leave or secondment, or fulfilling a genuine short-term need such as a research contract) will give rise to fair dismissals on their expiry under the heading *some other substantial reason* cited above, provided the employer **acts reasonably**.

'Acting reasonably'

In the case of FTC non-renewals/dismissals, 'acting reasonably' normally includes:

- **Consulting/warning the employee** Although no formal notice of the termination of a FTC is strictly required, because the employee has already been notified of its ending date (see 'Rights of notice' on page three), the employer should demonstrate reasonableness by alerting the individual to the forthcoming end of the contract (see also 'Hearings and appeals' on page five).
- **Considering alternative employment** There is no requirement on the employer to create a job, or necessarily to appoint the employee to an available vacancy, but reasonableness certainly requires notification to the individual of available opportunities and giving them reasonable consideration for posts they are suitable for and/or apply for.



Sometimes a ‘permanent’ vacancy arises for the post which an individual is currently undertaking on a temporary/fixed-term basis. In this situation (perhaps unfortunately for the FTC employee), they do not acquire an automatic right to claim the permanent job if the same post is advertised for ‘established’ status. However, the individual is certainly entitled to be given *reasonable consideration* for it.

Hearings and appeals

The Dispute Resolution Regulations 2004 now oblige employers in all cases of dismissal (including the non-renewal of a FTC) to at least a minimum **‘three-Step’ dismissal procedure:**

- **Step one** To send *written notification* to the employee of the ‘circumstances’ leading the employer to contemplate termination, and invite them to a meeting/hearing;
- **Step two** To convene a *personal hearing* (before the decision is made) in advance of which the employee must have been told the basis for the above ‘circumstances’ and must have been given a reasonable opportunity to consider their response. This is followed by notification of the decision and of the right of appeal; and
- **Step three** To give an opportunity to appeal at a further hearing (not necessarily before the dismissal takes effect), after which the employee is informed of the final decision.

The employee is entitled to be accompanied at these hearings.

NB If the employer fails to observe these requirements, then, provided the employee has the required one year’s service to claim unfair dismissal, the dismissal will be judged automatically unfair.

This new statutory obligation is requiring many employers to alter their traditional policies, which in many cases have not in the past involved giving fixed-term staff the right to a hearing before termination.

Qualifying for employment rights

To be able to claim unfair dismissal, an employee must have been employed for *one full year* when their employment ends. Similarly, to qualify for a redundancy payment, staff must have been continuously employed for two full years at the point of departure.


Continuity of employment

Employees can link together successive periods of employment under FTCs to form one unbroken period of continuous employment. In several circumstances, they can 'bridge gaps' in employment:

- **Adjoining contracts** If successive contracts are 'end-on' to each other (e.g. one ending on 31 August and the next beginning on 1 September) the employment is regarded as continuous;
- **Successive weeks** Where two contracts finish and start in successive calendar weeks (e.g. one contract ending on 31 August and the next beginning on, say, 6 September) there is no break in continuity, since the law entitles employees during their period of employment to count the whole of any week during the whole or part of which a contract subsists. Because the employee was employed for at least part of each of the two successive calendar weeks, both weeks count in assessing continuity of employment. This can enable an employee to bridge a gap between contracts of nearly two weeks between FTCs.
- **Re-employment after redundancy** Where an employee is made redundant, but a further contract with the same (or an associated) employer is offered before the end of the previous one and it begins within four weeks of its expiry, no dismissal is deemed to occur and the gap in continuity is 'bridged';
- **'Temporary cessation of work'** If there is a period in which there is no contract, and the employee is not being paid, but the break in employment is due to a 'temporary cessation of work', such as an academic vacation, then continuity is nevertheless preserved, provided that the breaks are relatively short in the context of the whole period of employment.

'Waiver' clauses

Historically, legislation permitted the employers of staff on FTCs to include 'waivers' in their contracts which significantly reduced employees' employment rights. For employees with FTCs of one year or more, the waiver could exclude the right to claim unfair dismissal if the contract was not renewed when it expired. In the case of FTCs of two years or more that were not renewed, it could remove rights both to unfair dismissal and to redundancy payments. To be valid, the contract containing the waiver had to be signed by the employee concerned.



The current position is that an employee can no longer sign away his or her right to claim unfair dismissal in contracts made or renewed since October 1999 and neither can they sign away the right to claim a redundancy payment in contracts made or renewed since October 2002. Waivers in contracts made before those dates remain valid for the remainder of the contract in question.

In short, these unwelcome waivers of employment rights are a 'dying breed'.

Fixed-term contracts and redundancy

What is redundancy?

For these purposes, a redundancy arises when an employee is dismissed (or a FTC is not renewed) wholly or mainly because *'the requirements of the business for employees to carry out work of a particular kind ... have ceased or diminished'*.

Redundancy payments

Where a FTC was to cover the absence of an existing employee (e.g. while they are away sick, on maternity leave or secondment, etc.) and it is not renewed, no redundancy will normally arise, since there is not considered to be a diminution in overall requirements for employees.

However, the non-renewal of a FTC, which was created for a particular additional purpose that has come to an end (such as a new course or a research contract), may well be a redundancy dismissal. If so, this gives rise to a right to a redundancy payment (provided the employee has the necessary two years' continuous service). The fact that a FTC's conclusion was anticipated in advance will not affect the entitlement to a redundancy payment. The employer's need for his/her services has still 'ceased or diminished' even though both parties knew that this would happen.

Redundancy consultations

Note also that the non-renewal of multiple FTCs on grounds of redundancy, where there are more than 20 dismissals/non-renewals at one establishment within a 90-day period, will trigger the requirement for the employer to undertake collective redundancy consultations with recognised unions or workplace representatives. This obligation is sometimes overlooked by management in further and higher education institutions.

The fixed-term employees regulations

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 came into force in October 2002. The Regulations implement the 1999 European Union Fixed-Term Contracts Directive, whose purpose is:

- “to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination; and
- to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships.”

The Regulations provide two significant new protections for fixed-term staff:

- the right to claim equality of treatment with permanent colleagues; and
- the entitlement to claim a permanent contract after four years’ service.

The right to equal treatment

The central new entitlement introduced by the Regulations, which is simple to state but potentially complex in its interpretation and application in practice, is:

“A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee.”

This right is subject to the two provisos:

- 1 that the treatment is on the grounds that the worker is a fixed-term employee (i.e. as opposed to arising from some other issue), and
- 2 that the treatment is not justified on objective grounds.

Note that the Regulations cover only employees (those under a contract of employment), not other workers, such as those engaged through an agency.

‘Comparable permanent employees’

To pursue a claim for equal treatment, the fixed-term employee must be able to identify a ‘comparable permanent employee’. To be comparable, the comparator must be:

- employed by the same employer;
- engaged in the same or broadly similar work¹ - having regard, where relevant, to whether they have a similar level of qualifications and skills; and
- based at the same establishment (or, if there is no permanent employee there, at another of the employer’s establishments).

¹The necessity for the comparator to be engaged in ‘the same or broadly similar work’ has created difficulties in the past for fixed-term staff who might have contemplated making a claim for equality, since they struggled to find a permanent colleague who was a true ‘comparator’. However, a significant House of Lords case in March 2006, has now confirmed that even though permanent staff may have additional duties beyond those undertaken by employees engaged on a fixed-term basis, they may still be ‘engaged in the same or broadly similar work’ as their temporary colleagues (i.e. they may therefore be appropriate comparators), if the core tasks of the two groups are the same. As a result, it may now be possible, for example, for temporary (e.g. termly, ‘sessional’ or ‘visiting’) lecturers in further or higher education institutions to claim a comparison with more established permanent colleagues if they do not receive equal benefits.

Note that temporary agency workers cannot compare themselves under the Regulations with 'in-house' permanent employees, since they are not employed by the same employer.

Being 'treated less favourably'

Less favourable treatment can arise in three ways:

- 1 via differences in **contractual terms**, such as rates of pay, entitlements to benefits (such as holidays) and access to pension schemes, training, or opportunities to 'secure any permanent position in the establishment';
- 2 by being subjected to any **detriment** on the grounds of fixed-term status (examples would include the denial of opportunities for promotion, or, as has unfortunately been common in schools and colleges in the past, automatic selection of staff on FTCs for redundancy). However, as a Court of Appeal decision made clear in 2005, the mere employment of staff on a FTC (as opposed to a permanent) basis is not regarded under the Regulations as being 'less favourable treatment'. This means that fixed-term employees cannot challenge their contractual status on the basis that just being employed on a temporary basis is itself a detriment.
- 3 by '**victimisation**' (either by dismissal/imposition of a detriment) for having taken action under the Regulations.

Where a comparison is to be made to assess whether 'less favourable treatment' arises, a 'pro-rata principle' applies, unless it is inappropriate, i.e. the fixed-term employee is entitled to receive the same proportion of pay (or a benefit) as is reasonable bearing in mind the length of the contract and the basis on which the pay or benefit is offered.


Justification

The Regulations enable employers to defend a claim of less favourable treatment if they can show that the difference in treatment is 'justified on objective grounds'. This is not clearly defined in the Regulations, but the DTI's Compliance Guidance suggests that objective justification will arise only where the less favourable treatment:

- is to achieve a legitimate objective (e.g. a genuine business objective);
- is necessary to achieve that objective; and
- is an appropriate way to achieve that objective.

One example of justification given in the Guidance is where the cost of offering a benefit to the fixed-term employee would be disproportionately high.

The Regulations provide that less favourable treatment as to individual contractual terms will be taken to be objectively justified if the fixed-term employee's contract



'taken as a whole' is no less favourable than the comparator's. This effectively means that a 'swings and roundabouts' defence based on the overall package of the comparator's benefits is available to employers.

Enforcing your rights

An employee who considers that s/he has suffered less favourable treatment in comparison with a permanent colleague is entitled to request a written statement from the employer giving particulars of the reasons for this treatment, which (needless to say) is admissible in Tribunal proceedings. The employer must provide this within 21 days. However, refusal of the statement does not give rise to a separate claim to the Tribunal and no specific penalty is imposed on the employer, apart from the drawing of inferences.

Claims for breach of the right to equal treatment must be made to the Employment Tribunal within three months from the date of the less favourable treatment. For this purpose, a term in a contract is treated as taking place on each day when it operates (i.e. it is regarded as operating on a continuous basis).

The Tribunal can award the following sanctions:

- issue a declaration as to the complainant's rights;
- issue a recommendation for the employer to take action to obviate or reduce the adverse effect on the claimant within a specified time;
- award compensation. No maximum limit is set, but (unlike in sex/race discrimination claims) there is no compensation for injury to feelings.


Further rights for fixed-term employees

Information on vacancies

Extending the right (see page 10) not to be disadvantaged as to opportunities to 'secure any permanent position' there is a further entitlement for the fixed-term employee to be 'informed by his employer of available vacancies in the establishment.' This is defined as the employee having a reasonable opportunity of reading an advertisement in the course of his employment, or being given reasonable notification of the vacancy in some other way.

Conversion to permanent status

Significantly, the Regulations also provide that from July 2006, where employees have been employed on a series of continuous, successive FTCs for four years or more, they are entitled to be regarded as permanent – unless the employer can show an objective justification for their continuing fixed-term status. However, there is no right to conversion to permanency in the case of a first FTC, as opposed to a series of contracts, no matter how long it is.



This means that, since July 2006, staff with at least four years' continuous service on FTCs can now claim a permanent contract. The process is for the employee to write to the employer calling for a written statement confirming their permanent status, or alternatively giving the objective reasons why the contract remains fixed-term. Again the statement must be provided within 21 days. If an employee has to proceed with a claim in an Employment Tribunal to establish a right to a permanent contract, this claim must be registered whilst they are still in employment.

It is not yet clear what circumstances Tribunals will regard as objectively justifying the continuance of employment on a fixed-term basis. One example might be where the employment is under the control of, or directly dependent on funding from, an external third party. However, it will almost certainly not be acceptable for employers to justify keeping staff on FTCs after four years merely for their own convenience or to maintain staffing flexibility.

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