

NASUWT

Temporary Contracts

Temporary Contracts

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 came into force on 1 October 2002. The Regulations give fixed-term employees the right in principle not to be treated less favourably than permanent employees of the same employer doing similar work. The right, which is exercisable by complaint to an employment tribunal, applies where the less favourable treatment is on the grounds that the employee is fixed term and is not justified on objective grounds.

The purpose of the Regulations and the EU Directive is to prevent the misuse of fixed-term contracts. Such contracts have been rife in the education sector. Schools should be discouraged from employing staff on fixed-term contracts; they should be required to provide the employee with an objective reason for so doing, e.g. maternity or sickness cover. Jobs which are intended to be permanent (and NASUWT defines these as being for more than one year) should be filled by permanent contract holders rather than by fixed-term contracts which are then renewed.

Under these Regulations the three types of temporary contract that applied in the UK (fixed term, specific task, and future event) are now all known as fixed-term contracts. The fixed-term contract was one which specified a start date and end date. The specific task contract was commonly used in education for those teachers engaged to cover for a teacher on maternity leave or long-term sick leave. Some teachers who were assigned to a particular pupil with a statement of special educational need could also be given this type of contract. The future event was sometimes used for teachers employed on projects financed by specific government grants and commonly had a clause in them which stated employment would continue until such time as the grant was withdrawn. In the past when specific task and future event contracts ended there was no dismissal and so teachers could not claim unfair dismissal or a redundancy payment. This has now changed since the ending of all such contracts will now be a dismissal.

The Regulations also prevent employers from using a succession of fixed-term contracts by limiting such contracts to a maximum period of four years. The contract will be deemed to be permanent after four years unless it can be objectively justified. However, the four-year period will only begin to accrue from 10 July 2002.

Fixed-term employees on contracts of two or more years will no longer be able to waive their statutory right to receive redundancy payments if they are made redundant at the end of their contracts. This will apply to contracts signed, extended or renewed after the Regulations came into force. However, waivers agreed before 1 October 2002 which relate to contracts

entered into before that date will remain in force unless the contract is renewed or extended on or after that date.

What is a fixed-term contract?

Under the Regulations a fixed-term contract is any contract of employment that will terminate:

- on the expiry of a specific term;
- on the completion of a particular task;
- on the occurrence or non-occurrence of any other specific event other than the attainment of retiring age.

Permanent employees are defined in the Regulations as those employees who are not employed under a fixed-term contract. Agency workers are specifically excluded from these Regulations.

Limiting the use of successive fixed-term contracts

An employee on a fixed-term contract will be regarded as permanent if all the following apply:

- the current fixed-term contract has been renewed or the employee was previously employed on a fixed-term contract before the start of the current contract;
- the employee has been continuously employed under fixed-term contracts for four or more years from 10 July 2002;
- at the time of the renewal a fixed-term contract was not justified on objective grounds.

The four-year limit can be varied up or down by collective or workforce agreements.

Comparable employee

Fixed-term employees will have the right not to be treated less favourably than comparable permanent employees because they are fixed term, unless the different treatment can be objectively justified.

A comparable permanent employee is someone who works for the same employer in the same establishment, doing the same or broadly similar work. If no comparable permanent employee works in the same establishment a fixed-term employee can use a comparator in another of the employer's establishments.

Teachers employed by the LEA will be able to use comparators in other LEA schools in the same authority. This will not apply to teachers in voluntary-aided and foundation schools.

Pro rata principle

The Regulations state that, where appropriate, the pro rata principle should be applied to any comparison. This means that where a benefit can be broken down into parts related to the amount of time worked, then this should be done for the purpose of comparison: e.g. a permanent employee has four weeks' holiday entitlement; an employee on a six-month fixed-term contract can be given only two weeks' holiday.

Objective justification

Where an employer does treat a fixed-term employee less favourably than a permanent employee the treatment has to be objectively justified. The Regulations state that the treatment can be justified 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.

The guide to the Regulations states that the treatment could be objectively justified if it can be shown that the less favourable treatment:

- is to achieve a legitimate objective, for example a genuine business objective;
- is necessary to achieve that objective;
- is an appropriate way to achieve that objective.

Victimisation

Under these Regulations the employee has the right not to be subjected to any detriment by any act (such as disciplining or dismissal) or deliberate failure to act of the employer because they have asserted their rights under the Regulations.

Remedies

The Regulations allow an employee to bring a claim based on a term-by-term basis, i.e. pay or hours of work. However, the employer may argue that less favourable treatment in relation to one specific term is justified if the overall package available to both employees is considered.

If an employee believes that he or she has been treated less favourably he or she should make a written complaint to the employer requesting a statement giving particulars of the reasons for the treatment. The employee is entitled to be provided with a written statement within 21 days of the request.

Fixed-term employees should ensure that they use internal grievance procedures before proceeding with a claim to an employment tribunal.

Assistance should be obtained from the Regional Centre as it will be necessary to ensure that an employment tribunal application is not prejudiced because of delays in the grievance procedure.

An application to an employment tribunal must be made within three months of the date that the right was infringed. If a tribunal upholds a complaint of unfair dismissal or detrimental treatment, it can order the employer to pay the employee compensation. In dismissal cases, if the employee wants their job back and the tribunal considers this practicable and just, it can order the employer to re-employ them.

Existing fixed-term contracts

Members should check that their terms and conditions are comparable with those of permanent employees. In particular, they should compare the following:

- pay;
- hours of work;
- entitlement to an occupational pension;
- training opportunities;
- any other benefits;
- notification of vacancies.

If the post covered by a teacher employed on a twelve-month fixed-term contract is to continue beyond the date of the fixed term, the teacher should be offered renewal of the contract without the post being advertised in order to comply with the duty of an employer to seek to avoid redundancy. If this is not happening the teacher should contact their NASUWT Regional Centre for assistance. Consideration will be given to submitting an employment tribunal application if the teacher has one year's service.

Renewal of a fixed-term contract

If an employee has a fixed-term contract renewed or extended beyond the statutory limit of four years (or beyond the limit agreed in any applicable collective or workforce agreement), the contract will be regarded as one of indefinite duration, i.e. permanent. The employee can write to the employer requesting written confirmation that the contract is now to be regarded as permanent.

Non-renewal of a fixed-term contract

Employment protection rights depend upon the length of continuous service. If an existing contract is renewed immediately upon its termination then

clearly there will be continuity. However, even though there may be a break between contracts it is sometimes possible for employment to be continuous. For instance, if a new contract has been agreed before the previous contract has expired, the employee will be continuously employed as long as the new contract starts within four weeks of the end of the old one. Alternatively, where a further contract is not agreed to before the first one expires but begins within a week of the previous one expiring, continuity of employment will again not be broken. Also, continuity of employment may be preserved despite a longer gap between contracts, for example in situations where work ceases temporarily.

If you have worked for the same employer for one year or more and the contract is not renewed but the post is continuing, you may have a claim to an employment tribunal on grounds of unfair dismissal. A dismissal on the expiry of a fixed-term contract will be fair if the principal reason for the dismissal is the expiry of the contract, i.e. there is no further work available. If, however, the contract could have been renewed but the employer declined to do so, an unfair dismissal claim may succeed. This is because the circumstances would suggest that the reason for the dismissal might be for some other reason. You should seek advice from your Regional Centre.

Prior to the expiry of a fixed-term contract an employer should:

- review whether there is any suitable alternative employment;
- discuss any available options with the teacher;
- give written notice of the dismissal;
- give the teacher the opportunity of a hearing and an appeal (this is a statutory right). However, in the case of a fixed-term contract of less than one year's duration, an employee will normally have no right to claim unfair dismissal.

Redundancy

Fixed-term employees should not be selected for redundancy purely because they are on fixed-term contracts, unless this can be objectively justified. However, where fixed-term employees have been brought in specifically to complete particular tasks, it is likely that an employer could objectively justify selecting them for redundancy at the end of their contracts.

Provided two years' continuous service has accrued and a further post has not been accepted to commence within four weeks of the termination of the current contract, a redundancy payment should be paid.

Sex discrimination

Temporary workers who become pregnant must not be treated unfavourably because of their pregnancy. Dismissal by virtue of pregnancy is automatically unfair. Where temporary contracts are being renewed, pregnant workers' contracts should also be renewed. Failure to do this will

result in claims for unfair dismissal and will amount to direct discrimination under both UK and European Case Law.

Pension issues

If you are employed on a fixed-term contract directly with the school or through the LEA you can continue to contribute to the Teachers' Pensions Scheme. If you are not retired and are engaged and paid for five full days in any one week, pension contributions should automatically be deducted from your pay. If you work for less than five full days or do different days for different employers, this is classed as part-time work and you will need to complete election form 261 to pay pension contributions on these earnings. It is important to remember that the benefits of the Teachers' Pension Scheme paid in respect of part-time teachers are based on full-time equivalent rates of pay and not their part-time gross earnings.

If you have retired, your teachers' pension may be affected if you return to work after receiving retirement benefits awarded on grounds of age or premature retirement. Information about how re-employment after retirement can affect the pension is given in Teachers' Pensions leaflet 192. The leaflet also contains details of how retired teachers can make their re-employment in teaching service count for pension benefits if they so wish.

Any re-employment after ill-health retirement risks the pension being stopped. The advice from Teachers' Pensions is as follows:

'If a teacher commenced any full or part-time teaching employment on or after 30 March 2000, which comes within the scope of the Teachers' Pensions Regulations, their ill-health pension would stop immediately. However, if the ill-health pension became payable on or before 31 March 1997, a limited amount of part-time employment is permitted. This employment is subject to monitoring.

If the ill-health pension became payable on or after 1 April 1997 a limited amount of part-time employment in the private sector or in higher education is permitted. This employment must have commenced before 30 March 2000 and is subject to monitoring until the end of the current contract. Any new contract of employment would result in the ill-health pension being stopped immediately.'

Grievance and disciplinary procedures

Grievances arising during the course of employment should be capable of being heard within the normal grievance procedure of the school. If you have a grievance and the school will not progress the case, you should contact your NASUWT Regional Centre for advice.

Where the school management have cause for concern in respect of disciplinary matters, these should also be dealt with via the school disciplinary procedure.

Maternity, paternity, adoption, parental and dependants leave

A teacher employed on a succession of fixed-term contracts or employed to cover a long-term absence, e.g. long-term sickness or maternity leave, may accrue enough service to qualify for family leave, as follows:

Maternity 26 weeks' unpaid leave with no service requirement.

26 weeks' statutory maternity pay, if 26 weeks' continuous service by the qualifying week (15th week before expected week of childbirth). It is important to note that rate of statutory maternity pay is based on your average weekly pay received during the 8 weeks (2 monthly salary payments) immediately before the qualifying week.

If you do not qualify for statutory maternity pay you may be entitled to 26 weeks' maternity allowance if you have worked for 26 weeks in the 66 weeks ending with the expected week of childbirth.

Paternity 2 weeks' paid leave if continuously employed for 26 weeks by the 15th week before the expected week of childbirth (statutory paternity pay).

Adoption 26 weeks' paid leave if 26 weeks' service by the date of matching (statutory adoption pay).

Parental Up to 13 weeks' leave after one year's service (unpaid).

Dependants Time off for emergency. No service requirement (unpaid).

Further contractual benefits enhance the statutory schemes if you have enough continuous service. Full details on the statutory and contractual schemes are available in the NASUWT booklet 'Maternity, Paternity and Adoption Leave and Pay' which can be obtained from your NASUWT Regional Centre.

Threshold

Teachers employed on fixed-term contracts can apply to cross the threshold, giving them access to the upper pay scale.

Teachers who cite evidence from more than one school should submit their application to the headteacher of the school they are contracted to work in on the date of signature and submission of their application form. That headteacher will be expected to consult with the heads of the other school in assessing the application.

Performance Management

The regulations regarding Performance Management apply to teachers employed on fixed-term contracts of more than 12 weeks.

Further advice is available in the NASUWT 'Performance Management in Non-standard Settings' guide.

The National Agreement

The Agreement signed in 2003 applies to all teachers employed under the School Teachers' Pay and Conditions Document, whether employed on permanent, fixed-term, temporary or part-time contracts.

The table below shows the deadlines set out in the Agreement for the implementation of the changes:

Contractual change	To take effect on
Clerical and administrative tasks not to be routinely carried out by teachers	1 September 2003
Allocation of time for leadership and management responsibilities	1 September 2003
Reasonable work/life balance	1 September 2003
A limit on cover	1 September 2004
Minimum 10% planning, preparation and assessment time	1 September 2005
No routine invigilation of external exams	1 September 2005
Dedicated headship time	1 September 2005

Detailed information can be found in the NASUWT booklet 'A Step-by-Step Guide to Implementation'.

Other booklets available in this series:

Flexible Working Regulations

Part-time Employment

Job-share Arrangements

Working as a Supply Teacher

NASUWT

Hillscourt Education Centre
Rose Hill
Rednal
Birmingham
B45 8RS

Telephone 0121 453 6150

Fax 0121 457 6208
0121 457 6209

E-mail nasuwt@mail.nasuwt.org.uk

Website www.teachersunion.org.uk

04/11039

National **A**ssociation of **S**choolmasters **U**nion of **W**omen **T**eachers