
FIXED TERM WORK – NEW LEGAL RIGHTS

INTRODUCTION

The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 came into force on **1 October 2002**.

Which contracts are included?

There are three types of fixed term contract which are distinguished in the Regulations by the trigger for the termination of the contract.

The first is a contract that will terminate on a specific *date*. This would include a contract where a teacher is employed for a fixed term pending an appointee filling a permanent post on a specific date.

The second type of contract is one which will terminate when a specific *event* does or does not happen, for example, a fixed term contract for a teacher to cover another teacher's sickness or maternity or parental leave absence.

The third is a contract which will terminate when a particular *task* has been completed. In practice, 'task' contracts are less common in teaching and where they are used, for example, to implement a new scheme of work, the fixed term posts are usually filled temporarily by existing permanent employees.

Who is covered?

The Regulations apply to all fixed term teachers employed by a school or an LEA.

Some supply teachers are also included. Supply teachers who have an employment contract with a school or an LEA are included, as are teachers who have been introduced to a school by an agency but then enter into an employment contract with a school or LEA.

NQTs employed on fixed term contracts during their induction year are included by the Regulations.

Who is excluded?

Agency teachers engaged directly by an employment agency are specifically excluded by the Regulations.

Similarly, students working as part of their teacher training courses will not be able to rely on the Regulations.

THE RIGHT TO EQUAL TREATMENT

The Regulations create a right to equal treatment with a comparable permanent employee unless the discrimination can be justified.

The Regulations do not prevent employers from placing employees on fixed term contracts in the first place but prohibit employers from discriminating against employees because of their fixed term status.

This means that fixed term employees have the right on a pro rata basis to the same pay and other contractual provisions, such as pensions, paid bank holidays and access to training as a permanent employee. Fixed term employees also have the right not to be subjected to any detriment, act or failure to act by the employer because they are on a fixed term contract.

The Regulations specify that limiting fixed term employees' opportunities to secure permanent employment within the establishment may amount to less favourable treatment.

Who is the comparator?

The fixed term employee would have to compare their contractual terms or their treatment to that of a 'permanent employee' who, at the time that the less favourable treatment is alleged, is:

- employed by the same employer; *and*
- engaged in broadly similar work; *and*
- based at the same establishment *or*, if there is no comparable permanent employee at the same establishment, at a different establishment.

The comparator should have a similar level of qualification and skills as the fixed term employee but they need not have similar experience.

In practice, a fixed term school teacher should be able to compare their terms and conditions to the teacher for whom they are covering (if maternity, sickness or secondment absence, for example) or to another permanent teacher in the same school.

Similarly, a centrally employed teacher who is not school-based could select a comparable permanent teacher in the service in which they work, or if there is none, a comparable permanent teacher in another service or in a school where they work.

The defence of 'objective justification'

Employers may avoid liability for discrimination against fixed term employees if they can show that any less favourable treatment can be justified on objective grounds.

There are two ways that an employer can justify discrimination:

- that the particular treatment is justified; or
- that a less favourable term is justified as the total package is equal overall.

This means that an employer might agree that a fixed term employee has been treated less favourably but may state that different treatment was justified.

Or an employer might agree that a fixed term employee has a less favourable contractual term than a permanent employee which cannot in itself be justified on objective grounds but that the total 'package' offered to the fixed term employee is not less favourable than that offered to permanent employees.

The upshot of this provision is that, unlike for example sex discrimination cases where treatment may be deemed less favourable irrespective of the existence of other more favourable terms and conditions, if a fixed term employee can show that a term in their contract is less favourable than the equivalent term in the comparable permanent employee's contract, the employer could avoid liability by showing that, overall, the fixed term employee's package of terms and conditions are not less favourable than the comparable permanent employee's package of terms and conditions.

THE RIGHT TO A PERMANENT CONTRACT AFTER FOUR YEARS

A fixed term contract will become permanent:

- after 4 years or more of continuous service;
- on two or more fixed term contracts;
- unless the use or renewal of the fixed term contract is justified.

Once an employee has accrued four years' service on a fixed term contract, the next renewal of the contract makes the employee permanent unless the use or renewal of the fixed term contract is justified on objective grounds. It is difficult to envisage any circumstances in which a teachers' employment on fixed term contracts for four years or more could be justified.

Divisions and associations should note that any period of service before 10 July 2002 is disregarded under the Regulations which means that employees will not be able to enforce this provision until 10 July 2006 at the earliest.

ADDITIONAL STATUTORY RIGHTS

Unfair dismissal and Redundancy

The Regulations explicitly extend existing statutory rights to fixed term employees.

- All employees with at least one year's continuous service on fixed term contracts have the right not to be unfairly dismissed.

- All fixed term employees have the right to claim statutory redundancy pay in line with permanent employees if they have at least 2 years' continuous service with the same employer.
- Any redundancy waiver clause in a fixed term contract which is agreed, extended or renewed on or after 1 October 2002, will be invalid.

If an employee is dismissed for asserting a statutory right under the Regulations, the dismissal will be automatically unfair.

Selection for redundancy solely on the ground of an employee's fixed term status will make the dismissal unfair unless the discrimination can be justified.

Fixed term employees will be entitled to the same level of redundancy payment as permanent employees unless the different treatment can be justified.

Training and Permanent Vacancies

The Regulations provide that fixed term employees should have the same opportunity to receive training as permanent employees. Unequal access to training on the ground that an employee is on a fixed term contract would be discrimination unless it is justified. The NUT does not envisage any circumstances where limiting a fixed term teachers' access to training could be justified.

Also, fixed term employees should have the same opportunity as permanent employees to secure permanent employment with the employer and they have the right to be informed by their employer of available vacancies in their place of work.

Other Statutory Rights

The Regulations extend the right to minimum notice periods to fixed term employees with one month's service in line with permanent employees.

Fixed term employees also have the right to receive statutory sick pay, payments on the grounds of medical suspension and guarantee payments after one month's service.

WHAT STEPS SHOULD I TAKE...

...if a member has been treated less favourably?

If a fixed term employee considers that they have been treated less favourably, they may request a written statement of the reasons for the treatment from their employer. The employer must provide a written statement within 21 days of the request.

...if a member believes that their contract is now permanent?

Employees are entitled to request a written statement from their employer that their contract is no longer fixed term or that they are now permanent. The employer must provide a written statement within 21 days.

An employee who had accrued four years' continuous service on successive fixed term contracts would be advised to wait until the next renewal of their fixed term contract and then request confirmation that they are now permanent.

...if a member's fixed term contract is not renewed?

The non-renewal of a fixed term contract is a dismissal in law.

If a fixed term contract is not renewed or is terminated by an employer, an employee with one year's continuous service may request a written statement of the reasons for the dismissal and is entitled to receive the written statement within 14 days of their request.

A fixed term employee who is pregnant or is on ordinary or additional maternity leave is entitled to a written statement irrespective of their length of service or whether they have requested a statement.

Any written statements supplied by employers under the Regulations may be produced as evidence before an employment tribunal.

WHEN CAN A MEMBER TAKE THEIR CASE TO AN EMPLOYMENT TRIBUNAL?

If a fixed term employee believes that they have been treated less favourably or subjected to a detriment, they may make an application to an employment tribunal. There is a time limit of 3 months from the date of the discriminatory act, omission or detriment.

If an employee continues to be employed by the employer and has requested a written statement that they are permanent, they may make an application to an employment tribunal for a declaration that they are permanent if the employer has either failed to provide a statement or has provided a statement that the contract continues to be fixed term and the reasons why.