

FIXED TERM CONTRACTS

1. Introduction

This reps bulletin examines the range of issues and employment protection rights that accompany a fixed term contract.

2. Flexible option for employers

Employers often like fixed term contracts, considering they provide a more flexible option than permanent employment contracts. They are often used to cover maternity leave or long term sick leave. Alternatively, they may be used for a job where funding has been provided for a specific project – for example, the installation of a computing system. They are also attractive for work that has seasonal variations in demand – such as agricultural workers or shop workers at Christmas time.

3. Employment rights

However, employers – and reps – should always recognise that fixed term employees have a range of employment protection rights enforceable by presenting a claim to an employment tribunal (ET), including protection from less favourable treatment under the Fixed Term Employee (Prevention of Less Favourable Treatments) Regulations 2002 – known as the “2002 Regulations”.

4. Recent ET case

Royal Surrey Hospital County NHS Foundation Trust v Drzymala has highlighted the importance for

employers of handling correctly the non-renewal of a fixed term contract. Dr Drzymala was a doctor employed by the Trust as a locum consultant on a series of fixed term contracts. She was unsuccessful in her application when her locum post was made permanent. Her last contract was then not renewed. She was given no right of appeal against the dismissal and no worthwhile discussion took place about alternative employment with the Trust. At the ET she claimed the reason for the Trust not renewing her contract was age discrimination and since she had more than two years’ service with the Trust, she also brought a claim for unfair dismissal.

5. EAT judgement

The employment appeal tribunal (EAT) upheld the ET’s finding that, although she had not been discriminated on the grounds of age, she had been unfairly dismissed.

The Trust had argued that it had complied with the non-discriminatory regime in the 2002 Regulations. The EAT stressed that mere compliance was not enough. The principles of the law on dismissal (as set out in s98(4) of the Employment Rights Act [ERA] 1996) applied to all dismissals that arise from the renewal of a fixed term contract - that is, reasonableness, a fair procedure and a fair reason for dismissal. This dismissal was unfair because there had been no right of appeal given and there had been no discussion with the claimant about

alternative roles within the organisation.

The EAT emphasised that while dismissals by the non-renewal of a fixed term contract may potentially be fair by reason of “some other substantial reason”, they are not a special case attracting different considerations from those ordinarily considered under s 98(4) of ERA. In its view the Trust had not followed a fair procedure nor had it provided a fair reason for the dismissal.

6. Fixed term contracts – key points

Definition – a fixed term contract is one that specifies a start date and an expiry date. It will terminate on the expiry of a specific term, on the completion of a particular task, or on the occurrence or non-occurrence of any other specific event other than retirement. It may also be known as a limited term contract.

A fixed term employee (not a worker, who is excluded from the protection of the 2002 Regulations) is employed under a fixed term contract (Regulation 1 of the 2002 Regulations).

Notice clause – while there is no legal requirement to have a notice clause in a fixed term contract, the employer in some circumstances may decide to have one as it allows for the end of the relationship before the expiry date should it be genuinely necessary to do so. A project may, for instance, come to an early end. In such circumstances, if there is no notice period stipulated in the contract, the employee may be able to claim damages to cover the loss of wages suffered for the outstanding period of the contract.

Less favourable treatment – employees on fixed term contracts have the right under the 2002

Regulations not to be treated less favourably than comparable permanent employees in relation to:

- terms and conditions of employment (eg pay and bonus schemes) unless there are objective reasons for the less favourable treatment
- training, promotions and transfers
- permanent positions within the organisation – they must be informed of any permanent posts that arise.

Conversion to permanent employee status – under the 2002 Regulations if an employee completes four years’ continuous service under two or more fixed term contracts, they will be considered as permanent employees unless the fixed term status can be justified. A fixed term employee who considers themselves to be a permanent employee on this four-year basis is entitled to ask the employer to confirm in writing that their contract is no longer fixed term in nature. The employer must respond within 21 days of the request. If it does not agree, then it must justify (give reasons) why it believes the contract remains fixed term. An employee will be able to ask an ET for a declaration that they have become a permanent employee, without any parallel claim for compensation being necessary.

Termination of fixed term contracts – the law regards the expiry of a fixed term contract without its renewal as a dismissal. The employee will be able to claim unfair dismissal if there is still work available, or to a redundancy payment where the work has ended (subject to completion of two full years’ service).

The case of *Drzymala* (see above) demonstrates the need for the employer to ensure a fair procedure is

followed and that there is a fair reason for the dismissal.

One essential action the employer must take is consult the employee in good time before the expiry of the contract, so the potential effects of the non-renewal of the contract can be explained and explored, together with consideration of any other opportunities existing within the organisation.

The question of the employer's reasonableness in dismissing will be decided by the ET in accordance with equity and the substantial merits of each individual case, taking into account the size and administrative resources available to the undertaking. Waiver clauses – where employees agree to waive their rights to claim unfair dismissal or a redundancy payment – are no longer lawful and so cannot be relied upon by the employer.

be regarded as a complete or authoritative statement of the law.

7. Reps' action

Reps dealing with a member working under a fixed term contract should always examine the specific details and clauses within the contract document against the key points detailed above and if they believe there is a potential claim for unfair dismissal, a redundancy payment or less favourable treatment BECAUSE of the fixed term contract, speak to their full time official in the first instance.

Further Information

More information on this and other legal matters is available from:

- ❑ Val Stansfield, Employment Rights Adviser at stansfieldv@tssa.org.uk or 020 7529 8046
- ❑ the TSSA Helpdesk – 0800 328 2673

The information given here is for general guidance only and should not