

# Schools Beware:

## Use of Fixed Term Contracts



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# Use of Fixed Term Contracts

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## What is a fixed term contract?

A fixed term contract is a contract of employment that clearly states how and when it will end. This is generally on the expiry of a specific date, completing a specific task, or the occurrence of a specific event.

## Why use a fixed term contract?

Fixed-term contracts are often used by Schools to give them certainty and flexibility, for example in the following circumstances:

- Where someone is needed for a specific task or project, such as research;
- Where funding comes from an external source and may not be renewed after a fixed period;
- Where demand for a particular post is not clear and the employer wishes to carry out a trial period before committing themselves to offering a permanent position; and most commonly
- To provide maternity cover, or to cover for someone on sabbatical/secondment or long-term sick leave.

## Are they as helpful as they first appear?

Whilst fixed term contracts can sometimes be helpful, Schools need to be very careful when using them to avoid a number of common pitfalls which can add to your troubles rather than cure them!

## What do you need to be aware of?

### 1. The non-renewal of a fixed term contract is a dismissal for unfair dismissal purposes

If you have an employee who has been employed by the School, or if you are a maintained School, by the same local authority, or Governing Body of a School maintained by the same local authority, for more than two years in total (with no break in service), then they will have the same right as permanent members of staff not to be unfairly dismissed.

Therefore, unless you have one of the five potentially fair reasons for dismissal (conduct, capability, redundancy, illegality or some other substantial reason) and follow a fair procedure, any dismissal at the end of a fixed term contract is likely to be unfair.

It is therefore important to check the employee's previous employment history so you are aware of their length of service (and their rights) from the outset, as previous service with the same local authority could count towards continuous service. They may already have more than two years' service from the outset and therefore what you intended to be a 'fixed term' contract is not from day one.

### 2. The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the Regulations)

The Regulations provide that fixed-term employees cannot be excluded from the contractual benefits and facilities offered to permanent staff or treated less favourably.

Therefore, staff employed on fixed term contracts should be treated in the same way as permanent employees.

### **3. Successive fixed-term contracts may automatically become a permanent contract**

Under the Regulations, employees who have been continuously employed for four years or more on a series of successive fixed-term contracts are automatically deemed to be permanent employees (that is, employed on an indefinite contract) unless the continued use of a fixed-term contract can be objectively justified. However, remember the point above that after two years employees have the right not to be unfairly dismissed in any event.

This includes cases where the original contract has been renewed or extended, or where a different contract has been entered into after the expiry of the original contract. It does not include cases where there has only been one fixed-term contract (of whatever duration) that has not been renewed or extended.

### **4. School holidays do not break continuity**

A gap between two contracts does not necessarily break continuity of service. There are a number of situations where continuity of employment will not be broken even though there has been a complete week in which there is no employment contract. There are three sets of circumstances where continuity will not be broken. These are:

- The employee's illness or injury;
- A temporary cessation of work; or
- There is an arrangement or custom to regard employment as continuing.

Time during which an employee is "absent from work on account of a temporary cessation of work" will count for continuity purposes. A leading case in this area held that a teacher employed on a series of temporary assignments under several employment contracts did not have her continuity of service broken by the intervals between each assignment because these intervals were held to be due to a temporary cessation of work.

So, by way of example, imagine you have a teaching assistant on a fixed term contract which expires on the last day of the summer term. Before the end of that contract you negotiate a further fixed term contract which is to start at the beginning of the next academic year. It would therefore be both the Schools and teaching assistants intention that the teaching assistant will be returning after the summer holidays. In this situation continuity would be preserved.

For there to be a temporary cessation of work the following must be satisfied:

- i. There must be a cessation of work. For example, the School shuts for the School holidays; and
- ii. The employee must be away from work due to the cessation (because of the summer holidays); and
- iii. The cessation must be temporary. There is no statutory limit to the period of absence that can qualify, therefore depending on the circumstances the six weeks holidays is likely to be viewed as temporary.

### 5. Always dismiss giving the correct notice period

An employee who is dismissed before the end of a fixed term contract may have a claim for wrongful dismissal (breach of contract) unless the contract contains a provision for earlier termination and the employer has complied with that provision, or the employee has committed a serious breach of contract (such as an act of gross misconduct).

They may also have a claim for unfair dismissal, subject to the usual principles governing unfair dismissal claims.

### Practical tips when using fixed term contracts

1. Consider whether the use of a fixed term contract is necessary in the circumstances.
2. Check continuous service at the outset so you know the employees' rights and when the employee will qualify for protection against unfair dismissal (or if they do already).
3. When issuing a fixed term contract, include a provision which gives you the ability to terminate early. This provides the School with a "get out clause" if the employee turns out not to be very good or situations change and you want to dismiss before the expiry of the specified date or task.
4. When issuing or renewing fixed-term contracts, consider including a provision for termination by notice after the initial term. This will prevent disputes arising over the applicable notice period if the employee works beyond the end of the term or if the contract becomes permanent.
5. Before renewing a fixed-term contract, consider whether there are objective grounds for a further fixed-term rather than a permanent contract. These grounds should be recorded in writing. If the contract has been renewed and the employee has reached four years' service (or will reach four years' service before the new expiry date), consider whether there were objective grounds at the time renewal took place for the continued use of a fixed term, and record those grounds.
6. Where an employee achieves permanent employee status under the Regulations (see above) send a written statement of variation to the employee.



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- Bribery Act Compliance
- Data Protection
- IT & e-Commerce
- Intellectual Property
- Outsourcing & Supply Agreements
- Public Procurement
- Terms & Conditions

### Commercial Property:

- Conditional Sale Agreements
- Development Agreements
- Joint Ventures (*as part of a wider team construction & public procurement*)
- Land Acquisition & Disposals (*including options*)
- Leases
- Planning / Section Agreements
- Profit Sharing / Overage Agreements
- Property Acquisition & Disposals
- Property Management

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- Alternative Dispute Resolution (ADR)
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- Arbitration
- Building Contracts
- Dispute Management
- Litigation
- Security Documentation

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- Buy-outs
- Company Secretarial Services
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- Alternative Dispute Resolution
- Property Litigation
- Insolvency
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- Regulatory Advice & Prosecutions
- Reviews & Enforcement
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- Disciplinary matters
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- Unfair dismissal
- Discrimination
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- TUPE
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- Children Issues
- Cohabitation
- Civil Partnerships
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- Transfer of Equity
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