

Guide to employing fixed-term staff, including part-time hourly-paid lecturers

1. Introduction

1.1 The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (known as the Regulations) came into force on 1 October 2002. The main purpose of the regulations is to give substantial protection to fixed-term staff by:

- outlawing discrimination against staff employed on fixed-term contracts (FTCs);
- preventing the misuse of FTCs by employers.

The Regulations implement the EU Directive on Fixed-term Work¹, and form part of the Government's work-life balance campaign launched in March 2000.

1.2 FTCs have been widely used in the higher education sector, and their potential misuse was identified in the Bett Report², which commented in recommendation 36 that there was:

"...scope for HEIs to reduce their use of fixed-term and casual employment".

1.3 The concerns expressed in the Bett Report have been addressed by the Regulations, and the issuing of additional guidance by the Joint Negotiating Committee for Higher Education Staff (JNCHES)³. In response to the Regulations and the JNCHES guidance, the Personnel Department has revised its procedures for appointing and terminating the following groups of fixed-term staff:-

- (i) fixed-term staff other than part-time hourly-paid lecturers;
- (ii) part-time hourly-paid lecturers (PTHPLs).

2. Definition

2.1 The Regulations broaden the definition of a FTC to cover a contract which:

- (i) is for a stated period e.g. two years. This period can, however, be shortened by appropriate notice given by either side within the specified period;
- (ii) ends when a specific task or job has been completed (known as a "task contract");
- (iii) ends when a specified event does or does not happen.

This means that temporary contracts without a defined end date will be treated as FTCs if they terminate on completion of a specific task, for

¹ 99/70/EC

² Report of the Independent Review of Higher Education Pay and Conditions, June 1999

³ JNCHES Fixed-term and casual employment guidance for HEIs, June 2002

example when a new payroll system has been implemented, or when a specific event happens or does not happen, for example, when a woman returns from maternity leave. It also brings certain casual staff within the definition of a FTC.

- 2.2 FTCs should be used in limited situations where a permanent (or indefinite) contract cannot be objectively justified, for example due to funding restrictions, or where the viability of a new course is being tested during its first year. They cannot be used to 'test out' somebody in what is actually a permanent post, or to shortcut the recruitment process.
- 2.3 The reason for the fixed-term nature of the contract must be stated in the FTC. In cases of doubt as to whether to fill a post on a fixed-term or permanent basis, advice should be sought from the Personnel Department.
- 2.4 These notes are for guidance only and are not intended to enable managers to deal with any issue regarding fixed-term staff without seeking specific advice from the Personnel Department.

3. Summary of legislation relating to fixed-term staff

- 3.1 The Regulations, which were implemented on 1 October 2002, introduce the following:
 - The prevention of less favourable treatment of a fixed-term member of staff when compared with a comparable permanent member of staff
 - The introduction of a four year limit from 10 July 2002 on the use of successive FTCs
 - The notion of objective justification in relation to either less favourable treatment or an extension of the four year limit
 - An obligation to inform staff on FTCs of any permanent vacancies
 - The removal of the redundancy waiver clause in all FTCs issued or extended/renewed from 1 October 2002
 - The ability to modify the statutory provisions by collective agreement with the recognised trade unions (or workforce agreement with elected representatives)
- 3.2 Managers are responsible for ensuring that staff on FTCs are treated fairly, and that the non-renewal of any FTCs complies with the legislation relating to unfair dismissal and redundancy. Further guidance on the impact of the Regulations is available from the Personnel Department.

4. Extension/renewal of a FTC

NB: In law a FTC is renewed when replaced by a further FTC of the same length, whereas a FTC is extended when replaced by a further FTC of a different length.

- 4.1 A FTC must be extended/renewed before the end date of the contract, and be effective within four weeks of the expiry of the contract in order to avoid

a dismissal occurring. In cases where there is a temporary cessation of work (e.g. during vacation periods), this gap is excluded, and continuity is maintained provided the FTC is extended/renewed to take effect from within 4 weeks of the end of the period of temporary cessation of work.

For example: a PTHPL with a contract from 1 September to 31 August may teach his/her last session on 20 June. If the contract is renewed for the next academic year and before 31 August, there will be no dismissal and continuity will be maintained.

4.2 In order to minimise staff anxiety, managers are encouraged to give as much notice as possible of the extension/renewal of a FTC.

5. Termination of a FTC

5.1 The end of a FTC is a **dismissal** in relation to unfair dismissal and redundancy law⁴. This means that if a FTC expires and is not renewed, the individual may be able to claim unfair dismissal and/or a redundancy payment, provided s/he has the requisite qualifying period of continuous service (one year for unfair dismissal, two years for redundancy).

5.2 In situations where the FTC related to the happening or non-happening of a specific event, for example, the return of a woman from a period of maternity leave, the reason for the dismissal arising on the expiry of the contract would be for 'some other substantial reason'.

5.3 In the majority of cases, however, the reason for the dismissal will be **redundancy**. A redundancy situation arises in cases where:-

- (i) the volume of work diminishes either permanently or temporarily e.g. due to the withdrawal of external funding; or
- (ii) the volume of work remains the same but the university requires fewer staff to carry out the work e.g. due to a reorganisation and reallocation of duties; or
- (ii) there is a change in the nature of the work but the overall volume of work and number of staff required remains the same e.g. following significant changes in a course resulting in a requirement for different kinds of skills.

In such situations, it is essential that a fair basis for selection for redundancy is adopted, and that reasonable steps are taken to avoid or minimise redundancies, for example by redeployment to a suitable alternative post. Selection on the basis of being employed on a FTC will not be fair unless this can be objectively justified, for example where fixed-term staff have been brought in to cover a particular task.

⁴ Employment Rights Act 1996

5.2 Where an employer is proposing 20 or more redundancies (regardless of whether an individual has waived his/her right to claim a redundancy payment), the employer is required to consult

- (i) the individual
- (ii) its recognised trade unions

"in good time" about the proposed redundancies. The following **minimum** consultation periods are laid down by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) Amendment Regulations 1995

- at least 90 days before the first dismissal where the employer is proposing to dismiss 100 or more employees;
- at least 30 days before the first dismissal where at least 20 but fewer than 100 dismissals are planned.

NB: It is the university's practice to consult its recognised trade unions on all proposed redundancies, even though it is not legally obliged to do so when fewer than 20 staff are involved.

5.3 As most universities employ well in excess of 100 PTHPLs, the UCEA recommends that institutions who employ such staff should decide four months before the end of the summer term, i.e. at the end of February, which contracts will be renewed in the following academic year, and begin the consultation process for any individuals who are unlikely to have their contracts renewed. In most cases this timescale will be unrealistic, but heads should ensure that decisions about extending/renewing PTHPL contracts are made as early as possible.

5.4 In situations where the **performance** of an individual appointed on a FTC has been unsatisfactory, but the work will be continuing, the reason for any termination will probably be incapability or misconduct, rather than redundancy. In such cases, the dismissal is likely to be fair if the university can demonstrate that it has followed its procedure for dealing with poor performance, or its disciplinary procedure respectively.

5.5 Consultation with the individual is required regardless of the number of proposed redundancies. The university's agreed procedures for consultation on the termination of

- (i) a FTC other than a PTHPL contract (flowchart 1)
- (ii) a PTHPL contract (flowchart 2)

are outlined in the attached flowcharts. Responsibility for consultation with the individual rests with the head of school/department. The Personnel Department is responsible only for consulting the trade unions.

5.6 The consultation process for a **FTC other than a PTHPL contract** is initiated four months before the FTC is due to expire by the Personnel Department sending a reminder (ML29) to the head of school/department asking for confirmation of

(i) extension/renewal or

(ii) termination

of the FTC.

5.7 In situations where it is highly probable that a FTC will not be extended or renewed (e.g. due to lack of funding), the head of school/department should seek advice from the Personnel Department, and send written notification to the individual giving the reasons for the proposed dismissal, and, where this is on grounds of redundancy, the method of selection for redundancy e.g. length of service. The letter should also include an opportunity for the individual to discuss the situation with an appropriate manager.

Standard letters are attached for

(i) the end of a FTC other than a PTHPL contract (FTC1);

(ii) the end of a PTHPL contract (PTH1).

Where the opportunity to meet is taken up, the head of school/department should hold a meeting with the individual to inform him/her of the situation, and keep a written record. The head should consider any proposals the individual may have to avoid a redundancy situation, or to lessen the impact. The head should find out whether the individual would be interested in suitable alternative employment with the university and, if so, in what areas. Copies of all appropriate documentation, including an up-to-date CV, should be sent to the Director of Personnel with a request to seek alternative employment.

NB: If the university does not take reasonable steps to seek alternative employment, a dismissal on termination of a FTC is likely to be unfair.

5.8 If, 6 weeks before the expiry date, a head of school/department has been unable to confirm whether or not to renew or terminate an FTC, the Personnel Department will, after checking with the head of school/department, initiate the termination of the contract by:-

(a) **6 weeks before the expiry date**

(i) consulting with the recognised trade unions;

- (ii) sending confirmation to the head that the FTC will be terminated and requiring the head to consult the individual immediately if s/he has not already done so;

(b) **4 weeks before the expiry date**

- (iii) sending written notification of the termination of the FTC to the individual (FTC2). The reason for the dismissal should be stated, and if redundancy, details of any redundancy payment due will be given. The individual will have a right of appeal against the dismissal as detailed in Section 5.1 of the university's dismissal procedure.

N.B. (b) will not be followed for the expiry of PTHPL contracts, unless exceptional circumstances prevail.

5.9 An appropriately timed meeting could be used as part of the consultation process, including giving the individual notice of the proposed renewal or termination of the contract. Where termination is proposed, the discussion could be followed up with the written notification referred to in 4.7 above.

5.10 The consultation process for a **PTHPL contract** should be initiated as early as possible during the last term of the contract by the head of school/department taking the appropriate action either to

- (i) extend/renew or
- (ii) terminate

the contract. This is outlined in flowchart 2.

5.11 Failure to undertake adequate consultation with the individual or the recognised trade unions could place the university in a weak position in any subsequent employment tribunal.

5.12 In situations where a FTC expires and is not renewed due to a redundancy situation, and the member of staff has at least two years' continuous service, s/he will be entitled to receive a statutory redundancy payment on the expiry of the contract. In such cases, the individual will receive written notification from the Personnel Department as detailed in 5.8 (b) above.

5.13 Any redundancy payment due is based on the member of staff's age and length of service. Further advice is available from the Personnel Department.

6. Continuity of employment

- 6.1 Any week in which an individual's relations with the employer are governed by a contract of employment counts when computing continuous employment. A week is defined as a week ending on a Saturday.
- 6.2 Employment is deemed to be continuous over a series of consecutive FTC's, provided the FTC is renewed before the end date of the contract and the renewal takes effect within 4 weeks of the previous contract expiring, or, where there has been no renewal/extension prior to the expiry of the previous contract, the new contract begins within a week of the previous one expiring.
- 6.3 Where there is a break in service between two FTC's, the employment will still be continuous if the reason for the break is that there is no work for the individual (known as a temporary cessation of work). This is important for PTHPL's as it means that vacation periods and assessment periods, when there is no requirement for teaching, do not break continuity of employment.
- 6.4 Employment is unlikely to be deemed as continuous, however, in cases
- (i) where the break is longer than the combined lengths of the contracts before and after the break; or
 - (ii) where there is a break between contracts and the work is significantly different under each contract; or
 - (iii) where suitable work was available for the individual during the break, but was not accepted.
- 6.5 As a rule of thumb, a break of one whole term or semester for a PTHPL would normally break continuity of employment.

7. Exclusions

- 7.1 The processes described in these notes do not apply to **"one-off" appointments** which should be used for individuals who are not required to work for more than three sessions in a three month period, where a session is not more than one day.

8. Changing a post from fixed-term to permanent

- 8.1 In situations where the reason for the fixed-term nature of a post is no longer valid, and there is justification for filling the post on a permanent basis, a request should be made to the Director of Personnel to make the post permanent. In such circumstances, the postholder would normally be transferred to a permanent contract, unless a different course of action can be objectively justified.