

Are Fixed-term employees becoming permanent?

In this article, Sarah Youatt, a solicitor from the employment group of Field Fisher Waterhouse LLP, considers the additional impact the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 have from 10 July 2006 given that employees who have been worked under successive fixed term contracts for four years or more with the same employer will be entitled to permanent employment unless their employer can objectively justify a renewal or extension of their fixed term status.

Whilst employers are generally aware that the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (“the Regulations”) require them to treat employees on fixed term contracts of employment no less favourably than comparable permanent members of staff, they may have forgotten that an additional provision of these Regulations concerning the automatic conversion of fixed term employment to permanent employment kicks in from 10 July 2006.

Regulation 8 provides that from 10 July 2006 employees who have been employed for 4 years or more on successive fixed term contracts will be entitled to regard themselves as working under a permanent contract (i.e. a contract of indefinite duration).

Although the Regulations came into force on 1 October 2002, the right to permanent employment after four years of successive fixed term contracts is calculated from 10 July 2002 as this was the date the government should have implemented the provisions of the European Council Directive (1999/70/EC).

Which employees do the Regulations cover?

The Regulations only cover employees who are engaged under a fixed term contract. A fixed term contract usually has a specific end date but also includes contracts which will terminate on completion of a particular task or project, or on the occurrence (or non-occurrence) of a specific event.

Individuals who are not employees, such as agency workers, employees seconded from another employer or the genuinely self-employed are not covered by the Regulations. Additionally apprentices, employees on publicly funded training, reintegration and work schemes, students on work placements of one year or less as part of a higher education course and members of the armed forces are expressly excluded from protection under these Regulations.

How do fixed term staff become permanent employees?

As from 10 July 2006 employees who are on their second or later fixed term contract, and who have reached four years of continuous service, will automatically have their fixed term contracts converted to permanent contracts as the Regulations state that the fixed term provisions of their contracts will be of no effect (unless the employer can demonstrate that continuing fixed term status is justified on objective grounds).

The position is different for employees who are still employed under their first contract even if this contract is for a fixed term of four years or more as they will not automatically become permanent employees by virtue of acquiring four years' service. However when their fixed term contract expires, any attempt to renew their contract with a further fixed term will be ineffective and they will then become permanent employees (again, unless the employer can demonstrate that continuing fixed term status is justified on objective grounds).

The Regulations do allow employees to vary the four year limit in some situations if they have reached or are able to reach a collective agreement (made between the employer and a trade union) or a workforce agreement (made between the employer and its employees or their representatives) specifying a period greater than four years over which fixed term contracts can continue to be used, or an alternative limit of a maximum number of successive fixed term contracts. In these circumstances the Regulations will apply as modified by these agreements.

Do employers have to issue new contracts?

Employers are not required to issue new contracts to fixed-term employees as their existing terms and conditions will continue to apply, save that the fixed term provisions of their contract will have no effect. However, employers may wish to ensure that there is no confusion and therefore may prefer to issue a new contract confirming the employee's permanent status.

It is advisable however for employers to write to any employee converting from fixed-term to permanent employment within a month of this change so that the employer continues to comply with section 4 of the Employment Rights Act 1996 (the requirement to inform employees in writing of the changes to their written statement of particulars of employment within a month of the change in question). The employer should notify the employee in writing of the permanent status of the employment and the relevant notice period which the employee is entitled to receive but also which the employee is required to give the employer. Failure to provide notification in writing could result in an award of two or four weeks' pay if the employee subsequently brought an employment tribunal claim.

In any event employees who believe they have acquired permanent status are entitled to request a written statement from their employer confirming this. The employer must provide a statement within 21 days of receiving a written request, either confirming the permanent status or setting out the reasons which the employer considers justify the employee remaining on a fixed term contract.

What might be “justification on objective grounds” allowing a further offer of a fixed term contract to an employee with four years service?

Objective justification requires an employer to show particular business reasons or requirements which establish that a fixed term contract is more appropriate than a permanent position. An example of where appropriate justification might exist would be a role on a short term project which depends on its funding from an external client. However it may be very difficult to prove justification if the individual in question has been employed on a succession of fixed term contracts as this would imply that there is in fact an ongoing role.

Employers cannot avoid their fixed term employees obtaining permanent status by not renewing their contracts or by dismissing them before they obtain four years’ service after 10 July 2002. Any dismissal of a fixed term employee carried out to prevent that employee acquiring permanent status is likely to be unfair and in breach of the Regulations. A decision not to renew a fixed term contract is expressly regarded in law as a “dismissal” in the same way as a positive decision to terminate an employee’s contract.

Fixed term employees with more than a year’s service are entitled not to be unfairly dismissed in the same way as permanent employees. Furthermore, whatever their length of service, fixed term employees can bring claims in relation to any treatment of them which is less favourable than that offered to comparable permanent employees (unless that treatment can be objectively justified).

Even if there is a gap between one fixed term contract and the next fixed term contract so as to ensure the employee does not have four years of fixed term employment, the gap in itself may not legally be enough to break the employee’s continuity of employment as “temporary cessations of work” can be disregarded for the purposes of calculating the employee’s continuity of service. Although there is some legal uncertainty in this area, in general it may be safest to assume that any planned gaps in employment will not break continuity, especially if they are for a short period when compared to the overall length of employment, or indeed, are designed solely to avoid the impact of the Regulations.

Conclusion

Employers may want to consider whether they wish to make the conversion of fixed term employment to permanent employment a positive event for the employee and be proactive in informing that employee that he or she is a permanent member of staff.

More generally, given that fixed term employees have exactly the same rights as permanent employees and generally are entitled to insist that they receive treatment no less favourable than that offered to permanent staff, in most cases there is little or no benefit to be gained from the use of fixed term contracts.

However on a practical note, the use of fixed term contracts can set or encourage mutual expectations as to how long the employment is likely to last and that it is viewed as temporary in nature. Fixed term contracts are also useful where the employer is covering short-term absence of up to year such as maternity leave or sickness absence. Otherwise, it is only in those special and limited circumstances where there are objective grounds justifying the different treatment of fixed term employees that such contracts may offer concrete advantages.

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