
REPORT TO:	FINANCE & MANAGEMENT COMMITTEE	AGENDA ITEM: 11
DATE OF MEETING:	22 nd JUNE 2006	CATEGORY: DELEGATED
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SUBJECT:	FIXED-TERM REGULATIONS (PREVENTION OF LESS FAVOURABLE TREATMENT) REGULATIONS 2002	REF:
WARD(S) AFFECTED:	ALL	TERMS OF REFERENCE: FM05

1.0 Recommendations

1.1 That the Finance & Management Committee approve Annexe A for adoption by the Council.

2.0 Purpose of report

2.1 To:

- Provide an overview of the above regulations and the impact on employment contracts used by the Council.
- Propose guidance (Annexe A) for use by managers when considering the use of fixed-term contracts.

3.0 Detail

Coverage

3.1 The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 were introduced to ensure that employees on fixed-term contracts are not treated less favourably than comparable permanent employees. The Regulations cover:

- The terms and conditions included in a fixed-term contract.
- The use of successive fixed-term contracts.
- Redundancy payments to fixed-term employees.

Employee rights

3.2 Under the Regulations fixed-term employees have the right:

- Not to be treated less favourably than a comparable permanent employee with regards to terms and conditions of employment.
- To be informed of suitable permanent vacancies in the organisation.
- To have their fixed-term contracts considered as permanent if they are renewed or extended (or if reengagement occurs on a successive contract) and four years' continuous service has been completed (starting from 10th July 2002). This is unless the continued use of a fixed-term contract can be objectively justified.
- The right not to be selected for redundancy or be unfairly dismissed if the principal reason for the selection or dismissal was because they were a fixed-term employee.
- To make a complaint to a tribunal seeking a written statement, which sets out the reason(s) for the less favourable treatment, complained of.

Redundancy payments

3.3 The regulations also repeal the provisions in the Employment Rights Act 1996 that enable a fixed-term employee to waive their right to a redundancy payment. However, waiver clauses agreed before 1st October 2002 still have effect on the expiry of the contract.

Consultation

3.4 The Joint Negotiating Group has considered the proposed guidance in Annexe A and agreed that it be recommended to this Committee for adoption by the Council. If adopted the guidance may then be reviewed at any time in consultation with the Trade Unions.

Review of current situation

3.5 A review of fixed-term contracts has been undertaken and managers have been appropriately advised on the practical effects of the Regulations, particularly from the 10th July 2006.

4.0 Financial Implications

4.1 There are no financial implications arising from this report.

5.0 Corporate Implications

5.1 The proposed guidance will help managers to understand the practicalities of using fixed-term contracts. It also advises on other employment conditions such as probationary and notice periods. The Statutory Dismissal and Disciplinary Procedure relating to the termination of fixed-term contracts is also included in the guidance.

6.0 Conclusions

6.1 The Council commonly uses fixed-term contracts in partnership arrangements and to enable continuity of service provision (e.g. cover for long-term absence). The purpose of the proposed guidance in Annexe A is to highlight for managers the practical employment issues relating to fixed-term contracts. It:

- Gives examples of less favourable treatment.
- Covers issues relating to redundancy situations.
- Provides advice (which incorporates the Statutory Dismissal and Disciplinary Procedures) on terminating a fixed-term contract.
- Provides advice on the use of successive fixed-term contracts and the right of employees to claim that they are employed on an indefinite contract.
- Advises on employment issues such as probationary periods, notice periods, induction etc. This should help ensure a consistent approach to these matters.

7.0 Background Papers

7.1 Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 available from Human Resources.

7.2 Minutes of the Joint Negotiating Group available from Human Resources.

Annexe A

SOUTH DERBYSHIRE DISTRICT COUNCIL

GUIDANCE ON FIXED TERM CONTRACTS

Human Resources
Presented to Finance & Management Committee on 22nd June 2006

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1.0 INTRODUCTION

1.1 The employment of people on fixed-term contracts is becoming more prevalent in the Authority. A fixed-term contract is very often used where the employment is part of a partnership arrangement or where there is a specific need to maintain service delivery (e.g. to cover a vacant post). This guidance is intended to highlight the practical issues and employment legislation relating to this type of employment contract.

2.0 LEGISLATION

2.1 The Fixed-Term (Prevention of Less Favourable Treatment) Regulations 2002 ensure that fixed-term employees are not treated less favourably than comparable permanent employees are. The objective of the Regulations is to prevent the abuse of fixed-term contracts and cover:

- The terms and conditions included in a fixed-term contract.
- The use of successive fixed-term contracts.
- Redundancy payments to fixed-term employees.

2.2 The termination and non-renewal of a fixed-term contract is considered to be a dismissal. The Statutory Dismissal and Disciplinary Procedures (effective 1st October 2004) now affect the way that such contracts are terminated.

2.3 Other important employment legislation e.g. the right not to be unfairly dismissed and the right not to be discriminated against also applies to fixed-term employees.

2.4 Relevant employment legislation will be referred to throughout this guidance. If a manager is in any doubt she/he should ask Human Resources for advice.

3.0 WHO IS A FIXED-TERM EMPLOYEE?

3.1 A fixed-term employee is a person with a contract of employment which is due to end when a specified:

- Date is reached.
- Event happens.
- Task has been completed.

3.2 Examples include:

- Employees that have temporary contracts for a short period of time (e.g. play-scheme leaders).
- Employees on temporary contracts to cover for maternity leave or sick leave.
- Contracts that will expire when a specific task is complete (e.g. setting up a new data base, developing and implementing a policy, managing a project till its conclusion).
- Contracts that are linked to the expiry of funding.

4.0 WHAT IS LESS FAVOURABLE TREATMENT?

4.1 Fixed-term employees have the right not to be treated less favourably than comparable permanent employees because they are fixed-term, unless the different treatment can be **objectively justified**.

- 4.2 Examples of less favourable treatment would be:
- Excluding a contractual allowance in a contract for a fixed-term employee that would be in the contract for a comparable permanent employee e.g. a car allowance.
 - Giving a different contractual allowance in a contract for a fixed-term employee than in the contract for a comparable permanent employee e.g. a casual user allowance compared to an essential user allowance.
 - Offering training opportunities to permanent employees that are not made available to fixed-term employees.
 - Not being given the opportunity to apply for suitable permanent vacancies.
- 4.3 Sometimes the cost of offering a particular benefit to an employee on a fixed-term contract may be disproportionate to when compared to the benefit the employee would receive. This may objectively justify different treatment.

Objective justification

- 4.4 There may be a reason why it is objectively justifiable to treat a fixed-term employee differently from a comparable permanent employee. A manager should give due regard to the rights of the individual and try to balance those against business objectives.
- 4.5 Less favourable treatment will be justified on objective grounds if the manager can show that it is:
- To achieve a legitimate objective.
 - Necessary to achieve that objective.
 - An appropriate way to achieve that objective.
- 4.6 Managers should be aware that the Regulations purposely make objective justification a hard test to satisfy.

Pro-rata principle

- 4.7 Where appropriate terms and conditions of employment can be applied on a pro-rata basis.

Right to written reasons

- 4.8 A fixed-term employee who believes that they are receiving less favourable treatment has the right to ask for a written statement that explains the reason for such treatment. The manager must reply in writing within 21 days of the request.
- 4.9 If the employee does not agree with the reasons given, the Grievance Procedure should be used to try and resolve the matter. A grievance can continue after the end of employment in accordance with the Statutory Grievance Procedure.

5.0 REDUNDANCY

- 5.1 An employee can no longer waive their right to a redundancy payment under the Regulations. However, there are "lead-in" arrangements, which are set out below:
- If a waiver clause was put into a contract before **1st October 2002 the employee will not be entitled to a redundancy payment.**
 - If a fixed-term contract is extended/renewed **after 1st October 2002 any waiver clause included would not be valid.** When such a contract expires and if the employee has at

least two years continuous service by that point, they would be entitled to a statutory redundancy payment if the reason for non-renewal was redundancy

Selection for redundancy

- 5.2 Employees should not be selected for redundancy purely because they are employed on a fixed-term contract.

6.0 TERMINATION OF A FIXED TERM CONTRACT

- 6.1 The termination or non-renewal of a fixed-term contract is a dismissal. The reason for the dismissal will not always be redundancy. This will depend upon the individual circumstances. Other reasons for terminating/not renewing a fixed-term contract include:
- Where the employee has been providing cover (during maternity leave or a period of sickness absence) for a permanent post and the post holder returns to work.
 - Where the dismissal is on the grounds of capability (i.e. it is performance-related), misconduct or poor attendance.
 - Where the employee's probationary period is unsatisfactory.

Unfair dismissal

- 6.2 Fixed-term employees have the right not to be unfairly dismissed after one years' continuous service. The Council's policies promote best practice when considering the termination/non-renewal of employees (including those with **less than** one years' continuous service).

Statutory Dismissal & Disciplinary Procedures

- 6.3 On 1st October 2004 statutory Dismissal and Disciplinary Procedures were introduced which cover dismissals such as the termination/non-renewal of a fixed-term contract. Failure to follow these procedures will make a dismissal automatically unfair. **This applies to the situation where the fixed-term contract merely expires.**

Procedure – expiry of a fixed-term contract

- 6.4 Managers should follow the procedure in Annexe A when a fixed-term contract expires.

Termination of a fixed-term contract for other reasons

- 6.5 Managers should ask Human Resources for advice when it is proposed to terminate a fixed-term contract for another reason other than its expiry (e.g. capability, discipline or poor attendance).

7.0 LIMITING THE USE OF SUCCESSIVE FIXED TERM CONTRACTS

- 7.1 The Regulations prevent abuse arising from the use of successive fixed-term contracts. Providing a statutory scheme has done this. The Council has adopted this scheme in an amended form (see Annexe B).

7.2 Managers are advised against using successive fixed-term contracts as a means to increase their permanent establishment. The Vacancy Management procedure, which requires managers to justify filling posts, should be used for this purpose.

7.3 It is advised that fixed-term contracts be of no more than three years in length wherever possible.

8.0 FIXED-TERM EMPLOYEES AND VACANCIES FOR PERMANENT POSTS

8.1 An employer must give its fixed-term employees the same opportunity to apply for suitable vacancies as permanent employees. Any difference between the availability of internal vacancies to fixed-term and permanent employees must be objectively justified.

8.2 The current practice of displaying details of vacancies on notice boards and e-mailing the details to all employees will ensure that the Council meets this requirement.

8.3 A recruiting managers should not discriminate against any fixed-term employee applying for a vacancy i.e. their applications must be treated on its own merits and compared against the Person Specification/Job Description to decide whether the employee(s) should be short-listed.

9.0 EMPLOYMENT WITH THE COUNCIL

9.1 Below are a number of general terms and conditions of employment for fixed-term employees:

- **Notice periods (see table below)**

The notice period **the Council** should give to a fixed-term employee (in the event that the contract is to be terminated before its expiry and notice is due) is now the same as for permanent employees.

Period of Continuous Service	Minimum Notice
One month or more, but less than 4 years	1 month
Four years or more, but less than 12 years	1 week for each year of continuous service
Twelve years or more	12 weeks

Reasonable notice periods have been established for fixed-term employees which are linked to the length of contract. They are set out in the table below.

Length of Contract	Notice Period
Up to and including 6 months	1 week
More than 6 months and up to and including 12months	2 weeks
More than 12 months	4 weeks

- **Probation**

It is best practice for a probationary period to be included in a fixed-term contract. The probationary periods, which are linked to the length of contract, are in the table below. Managers should agree a schedule of meetings to discuss the employee's performance taking into account the length of the probationary period.

Length of Contract	Probationary Period
Up to and including 6 months	1 month
More than 6 months and up to and including 9 months	2 months
More than 9 months and up to and including 12 months	3 months
More than 12 months	6 months

- **Induction**

All fixed-term employees should be properly inducted into their post.

- **Training and Development**

All fixed-term employees should have equal access to internal training courses unless there is an objective justification for not doing so.

- **Leave entitlement**

Leave entitlement will be calculated on a pro-rata basis for part-time and/or part-year contracts.

EXPIRY OF A FIXED-TERM CONTRACT

1. The following procedure should be followed when a fixed-term contract is to expire.
2. The Head of Service should notify the employee in writing that their fixed-term contract is to expire and that it is not to be renewed/extended. The written notification should be given at least 20 Working days before the expiry date. The employee should also be invited to a meeting with the Head of Service to discuss their dismissal. The employee should be given at least 3 working days notice of the meeting.
3. Following any meeting, the Head of Service should confirm in writing whether or not the fixed-term contract is still to be terminated. The reason(s) for the termination of employment should also be confirmed in the letter together with the employee's right of appeal. The Head of Service should write to the employee by no later than 3 working days of the meeting.
4. If the employee wishes to appeal against their dismissal they should write to the Head of Human Resources by no later than 3 working days of receipt of the Head of Service's letter.
5. A Director who has had no previous involvement in the case will consider the employee's appeal. The appeal will take place by no later than 5 working days of receipt of the employee's letter unless an extension of this time is mutually agreed. Any written evidence will be exchanged by no later than 2 working days of the Appeal Hearing.
6. The Director who will be supported by a representative from Human Resources will chair the Appeal Hearing. The employee will have the right to be accompanied by a recognised trade union representative or another employee of the Council. The Appeal Hearing will be conducted on the same basis as that described in Annexe A of the Grievance Procedure.
7. The Director will inform the employee of their decision at the Appeal Hearing. Confirmation will be given in writing by no later than 3 working days of the Appeal Hearing.
8. The decision of the Director will be final and there will be no further right of appeal.

USING SUCCESSIVE FIXED-TERM CONTRACTS

1.0 INTRODUCTION

- 1.1 The Council has adopted the following scheme to limit the use of **successive** fixed-term contracts and to ensure the fair treatment of employees on such a contract. It is based on the statutory scheme incorporated in the Fixed Term (Prevention of Less Favourable Treatment) Regulations 2002.
- 1.2 The scheme has been agreed with the recognised trade unions.

2.0 WHAT IS A SUCCESSIVE FIXED-TERM CONTRACT

- 2.1 Successive fixed-term contracts are defined as a series of two or more contracts that do not break continuity of employment as defined by the Employment Rights Act 1996.
- 2.2 A typical example of successive fixed-term contracts is:

“A employee has a five-year contract from 1st October 2002 to 1st October 2007. This is renewed immediately for another three years.”
- 2.3 An employee may be continuously employed even where there is a gap between successive contracts. For instance, if a new contract has been agreed before the previous contract has expired, the employee will be continuously employed so long as the new contract starts within four weeks of the end of the old one.

3.0 THE SCHEME

- 3.1 If a fixed-term employee has their contract renewed or if they are re-engaged on a new fixed-term contract (**see note 1**), when they already have a period of four or more years of continuous employment (**see note 2**), the renewal or new contract will be a permanent contract unless a fixed-term contract can be objectively justified.
- 3.2 Once the four years continuous service has been completed under two or more successive contracts, the employee can write to their Head of Service and request written confirmation that the contract is to be regarded as permanent. The Head of Service must reply in writing within 21 days of receipt of the employee’s request to confirm whether or not the contract is to be regarded as permanent. If the Head of Service considers that the contract is not permanent (i.e. the employee is still employed on a fixed-term basis), then the reasons for this must be explained to the employee.
- 3.3 If the issue remains unresolved following this the employee can choose to register a grievance.
- 3.4 This scheme can be reviewed in consultation with the recognised trade unions.

Note 1: There is no limit on the length of the first fixed-term contract. However once a fixed-term contract of over four years expires and is renewed (or the employee is re-engaged) then the contract will be deemed to be permanent unless the renewal can be objectively justified.

In the example in paragraph 2.2, the contract would become permanent on 1st October 2007 unless the use of a fixed-term contract could be objectively justified.

Note 2: The Regulations say that continuous service prior to 10th July 2002 does not count towards the period of four years. For the purpose of accumulating continuity of service towards the four-year period, all fixed-term employees' service begins at zero on 10th July 2002.

Continuous service on a permanent contract prior to employment on a fixed-term contract will not count for the purpose of this scheme.

