

CIRCULAR NIJC 01 - Issued July 2003

GUIDANCE FOR COUNCILS ON THE EMPLOYMENT OF NON-PERMANENT EMPLOYEES

BACKGROUND

In December 1996 Guidelines for the Employment of Non-Permanent Staff were issued by the NIJC for APT&C staff. In recent years the Trade Union Side of NIJC have expressed concern that permanent posts in councils have been allowed to remain vacant while non-permanent staff have been recruited and, in addition, that the non-permanent staff recruited have, in some cases, been treated less favourably than permanent staff in relation to the terms and conditions of employment that they have enjoyed.

The NIJC agreed to update the advice given to councils on this matter and specifically the circular issued in December 1996, taking into account the main points of the new Fixed-term Employee (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 and giving pointers for good practice. This advice should not be taken to replace any legal advice necessary for specific cases or circumstances.

FIXED-TERM EMPLOYEES

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations (Northern Ireland) 2002 (the Regulations) came into force on 1 October 2002 and they in turn implement the provisions of the European Directive on Fixed-term Work. The aim of the Regulations is to give Fixed-term employees the right not to be treated less favourably than comparable permanent employees unless the less favourable treatment can be objectively justified.

There are two ways in which less favourable treatment can be objectively justified:

- Where it can be shown that the less favourable treatment is to achieve a legitimate objective and that it is both necessary and appropriate to achieve that objective; or
- Where it can be shown that the overall value of the employment package is no less favourable than that of a comparable permanent employee.

Definition of a Fixed-term employee

A 'Fixed-term employee' is defined as a person with a contract of employment that comes to an end:

- upon reaching a specified date;
- when a specified task has been completed; or
- when a specified event does or does not happen.

This is a wide definition which also includes employees who are usually referred to as 'temporary', 'seasonal' or 'casual'. However in the case of 'casuals' it may be, depending on the terms of their engagement, that they have a Fixed-term employment contract of a very short period every time they are engaged e.g. one day. (See THE USE OF CASUAL WORKERS on page 4.)

The definition excludes agency workers, i.e. those who are supplied to an organisation by an agency but whose contract of employment remains with the agency. These workers will be subject to a different European Directive relating to the working conditions of temporary agency workers (See THE USE OF AGENCY WORKERS on page 5).

The Regulations do not apply to students on work experience placements of one year or less that they must do as part of a higher education course. It should be noted however that university students doing holiday jobs on fixed-term contracts and gap year students with fixed-term contracts that are not part of their course are not excluded from the Regulations. The Regulations also apply to those employed on the New Deal subsidised employment option.

The Decision to use Fixed-term Contracts.

When a vacancy occurs a managerial assessment should be undertaken of the need for the work to be undertaken and the type of contract that is required.

It is recommended that fixed-term contracts or casual work arrangements are used only in emergency or unpredictable situations. It is further recommended that where it is deemed necessary to cover a vacancy on a short term basis (or during the recruitment process for the permanent post) that development opportunities for existing staff by way of secondment arrangements, or acting up, should be considered before opting for the fixed-term contract approach.

Fixed-term employees should not have their contracts terminated in order to prevent them from acquiring employment protection rights.

Examples of where a fixed-term contract may be appropriate include:

- contracts for a short period or a specific task that end when the period expires or the task is completed. Examples include employees at children's summer schemes; seasonal grounds maintenance staff; and shop assistants working specifically for Christmas or another busy period.
- contracts specifically to cover for maternity, parental, paternity leave or sick leave.
- contracts to cover for peaks in demand and which expire when demand returns to normal levels. For example finance clerks taken on to help at the end of the financial year.
- contracts which expire when a specific task is complete. For example implementing a new IT system.

General Points to Consider when using Fixed-term Contracts

If a decision is taken to use a fixed-term contract the following points should be noted.

1. The Principle of Equal Treatment

Employees engaged on a fixed-term contract should enjoy the same terms and conditions of employment to comparable permanent employees with regard to terms and conditions or suffering any other detriment, unless the less favourable treatment can be justified on objective grounds. The Regulations make clear that less favourable treatment includes the following:

- requiring fixed-term employees to have longer service qualifications for conditions of service and/or benefits
- affording fixed-term employees less favourable access to training
- fixed-term employees not being given the same opportunity to secure a permanent position.

2. Information and Transparency

The following information should be made clear to applicants and appointees:

- The reason for the contract being offered on a fixed-term basis and the likelihood, or not, of it being made permanent.
- The duration or anticipated duration of the period of employment and/or information on the date, event, conditions or completion of a specific task that will bring about the termination of the contract.

Employees engaged on fixed-term contracts should be kept fully informed of any developments that may affect the duration of their employment.

3. Successive Fixed-Term Contracts

The Regulations include provisions to prevent abuse arising from the use of successive fixed-term contracts. This works by providing a statutory fallback scheme which applies unless it is varied by a collective or workforce agreement.

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 (NI) Order 1996 (ERO).

Statutory Fallback Scheme

In brief the provisions of the scheme are as follows:

- A fixed-term contract that has been renewed or extended (or where the employee is re-engaged on a successive contract) will become a permanent contract once the employee has completed four years' continuous service (starting from 10 July 2002) unless the continued use of a fixed-term contract can be objectively justified

- Once four years' continuous service has been completed under two or more successive contracts, the employee can write to their employer and request written confirmation that the contract is to be regarded as permanent
- 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), the contract will be deemed to be permanent unless the renewal can be objectively justified
- Continuous service on a permanent contract prior to service in a fixed-term contract will not count for the purposes of the Regulations.

4. Fixed-term Contracts and Dismissal

The Regulations amend the ERO so that the expiry and non-renewal of all fixed-term contracts as defined by the Regulations constitutes a dismissal. Previously, this was only the case for contracts with a specified end date.

5. Waiving of Statutory Redundancy Rights

The Regulations repeal the provisions of the ERO that enable a Fixed-term employee to waive their right to redundancy payment but only for contracts agreed, renewed or extended after 01 October 2002.

THE USE OF CASUAL WORKERS

As previously stated the definition of a fixed-term employee includes those workers normally referred to as casuals, however in the case of casuals it may be, depending on the terms of their engagement, that they have a Fixed-term employment contract of a very short period every time they are engaged e.g. one day.

The following advice is given to assist councils in the use of casual workers.

Key Features Of Casual Employment

- Individuals are retained on a list to be available at short notice.
- Intended to cover work which occurs only once (e.g. one shift) or occurs more often but on an irregular or unpredictable basis.
- The employer is not obliged to offer work – the manager determines if work is available.
- The individual is not obliged to accept the offer of work – the individual decides if he/she is available.
- Individuals are paid an hourly rate for the hours worked.

Examples of circumstances in which casual staff may be used

- (i) Specific special events e.g. civic festival, Christmas events, major sporting events, etc.
- (ii) Work which occurs only once (e.g. one shift) or occurs more often but on an irregular or unpredictable basis

THE USE OF AGENCY WORKERS

The use of agency workers is generally costly to an organisation and can be disruptive in a workplace. Whilst it may not be possible to completely eliminate the use of agency workers the NIJC recommends that agency workers are used only in emergency situations.

It is recognised that as with casual workers emergency cover provided by agency workers can, in certain circumstances meet the needs of employers. However the NIJC recommends that the usage and number of agency workers should be minimised, and where they are used, they should be used appropriately and not to cover vacancies that otherwise would be publicly advertised in the normal way.

SOURCES OF FURTHER INFORMATION/REFERENCES

Legislation

All UK Acts of Parliament and Statutory Instruments can be downloaded free from www.hmso.gov.uk

The Fixed-term Work Directive can be downloaded free from <http://europa.eu.int/infonet/library/i/199970ce/en.htm>

The draft Directive on Working Conditions for Temporary (Agency) Workers can be downloaded free from
TXTG – 52002PC0149 – bas-cen

Guidance

The Labour Relations Agency website can be accessed at www.lra.org.uk

The Employers' Organisations' **Fixed-term Contracts - A Guide for Employers** (ISBN 0 7488 9230 3) available from The Employers' Organisation (Employment Relations Unit), Layden House, 76-86 Turnmill Street, London EC1M 5LG website www.lg-employers.gov.uk

Guidance and information on fixed-term employees can be downloaded from www.dti.gov.uk/er/fixed/index.htm