

ARCHDIOCESE OF BIRMINGHAM DIOCESAN EDUCATION SERVICE

PERMANENT, TEMPORARY, AND FIXED TERM CONTRACTS

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1. INTRODUCTION

1.1 There is a contract of employment between every employee and their employer. The contract exists even if it is not written down in any formal way. However, it is much better for all concerned if its terms are in written form than there is less likelihood of misunderstanding and subsequent difficulties. As school governors have taken on greater responsibility for organising and arranging employment matters, the use of fixed term and temporary contracts seems to have increased and a growing number of industrial tribunal cases suggest that some schools are misusing these types of contract. The whole area of contract law in relation to fixed term and temporary employment is complex and difficult. There are regulations in relation to fixed term workers. The courts have not yet said the last word on every aspect of them. This paper seeks to offer you some guidance and caution on the subject but cannot be exhaustively authoritative.

2. WHAT IS A FIXED TERM CONTRACT?

2.1 Briefly, it is a contract in which the end date is specifically stated at the outset. The date will be put in the advertisement and in the letter of appointment. In contrast, a temporary contract does not stipulate the end date. Very often, as in the case of sickness absence cover, the end date cannot be known in advance; it is unpredictable. A temporary contract may have to run until a job or a defined task is complete. Completion may not be determinable in advance.

2.2 By its very nature a fixed term contract relates to a job which will come to an end and for which the job or post will cease to exist. If the job/post does not end on the date specified, then either circumstances have drastically changed, or someone got it wrong in the first place.

3. 'INITIAL/INITIALLY'

3.1 You will see advertisements for fixed term contracts in the press which use wording such as "initially for one year" or for "an initial period of terms". Such wording is entirely inappropriate, since it amounts to saying that the contract could run beyond the specified end date. The words 'initial/initially' seem to say that the fixed term contract is not really a fixed term contract. These words can also be interpreted by people who read the advertisement as an implicit promise of extension. Such words should be avoided. Headteachers and governors must

make up their minds, at the outset, whether the job is really fixed term or not. If in doubt, treat it as a permanent job.

4. THE 'ACID TEST'

4.1 Is your fixed term contract really a fixed term contract? The simple way of testing this is to state the reason for the job being fixed term. If you can spell out the reason, if you can put it in the advertisement, if you have no difficulty about telling it to the person to whom you are offering the appointment, if you can have it set down in the contract letter, then you can be pretty sure the proposed fixed term contract is okay.

4.2 However, if the reason for advertising a fixed term contract really amounts to: "*We want to test drive the teacher to see if he/she can perform*", governors are likely to be embarrassed about telling it to anyone they interview. Such a reason does not legitimate a contract being issued as fixed term.

5. MISUSE OF FIXED TERM CONTRACTS

5.1 "*Our budget may be cut next year*" "*Numbers may drop*" "*The person may be no good*" "*Let it run for another year and see how we go*" ..., and so forth Reasons such as those given above are unlikely to be accepted by an Industrial Tribunal as being appropriate reasons for setting up or renewing a fixed term contract. The following reaction by an Industrial Tribunal to such action by a school is worth quoting:

"After all, any employer anywhere, would always employ an employee on a 'temporary' contract on the basis that he does not know the exact requirements of the demands of his business in the years ahead We think it would create the situation where every single employer could organise his employment contracts by dressing up ordinary contracts with the protection of the employment protection statutes in the form of temporary/fixed term contracts".

5.2 The County of Avon Authority, for example, along with one of its schools, had a similar ruling from an Employment Tribunal. The dismissal was ruled unfair. The person had to be reinstated. The original intention of using a fixed term contract clearly backfired. Such actions can be expensive.

5.3 Fair Funding arrangements do not give governing bodies exemption from the requirements of the law. In addition, the courts do not regard any such delegation of funding as an excuse for governing bodies to act improperly and infringe contract law. If schools ignore advice from the LA in these matters they can expect to meet any Tribunal costs out of the school budget. The LA is unlikely to help defray the cost.

6. A FIXED TERM CONTRACT ENDS IN DISMISSAL

6.1 Employment protection legislation has provided that **when a fixed term contract expires a dismissal occurs**. Consequently, on the face of it, an employee whose fixed term contract expires has the same rights as any other, including a hearing and the right of appeal (on request). In addition there may be a claim for unfair dismissal and/or redundancy compensation, subject to the length of the contract and his/her length of continuous service.

7. UNFAIR DISMISSAL

7.1 The qualifying period necessary for an employee to bring a claim for unfair dismissal is one year. As a result very few employees fall outside the qualifying period. However, if the contract is for a shorter period, then the person possibly cannot claim unfair dismissal. On the other hand, if you dismissed the person when the contract expired and then kept the job going and put someone else into it, you can expect to be faced with a charge of unfair dismissal. Keep the job going and you give the person the right to say, *"That's my job; it should not have been taken away from me"*. The fact that the original bargain in the fixed term contract should have ended on such and such a date makes no difference. What the legislation stipulates is what matters.

7.2 In addition, a person builds unfair dismissal rights from one year's continuous service, however short in duration the contracts that make up that year. This right applies whether the employee is contracted full time or part time on a regular casual basis. As a result of European legislation part time can be as few hours a week as you like.

8. REDUNDANCY COMPENSATION

8.1 An employee's entitlement to redundancy payment arises after two years of continuous service, with associated employers as set out in the Burgundy Book, whether that is full time, or part time, or a mixture of both. It can be achieved by a series of contracts, however short each contract may be.

9. THE USE OF FIXED TERM CONTRACTS/TEMPORARY CONTRACTS

9.1 You should ensure that there is a good reason to appoint on a non-permanent basis. You should state the reason in the advertisement and any further details for candidates. When the contract ends the reason for its ending should be the same, unless you have operated notice procedures built into the contract or have taken appropriate and proper action under health, competency or discipline procedures.

9.2 If at the time of appointment you make commitments or take actions which are contrary to the LAs policy, or its advice, or legislative provisions you should not expect the LA to defend you or to underwrite your costs before the courts. If you have doubts about the use of

temporary or fixed term contracts, the Diocesan Education Service or LA should be contacted.

10. TEMPORARY APPOINTMENTS

10.1 These are appropriate when either the need for a person is temporary, e.g. maternity cover, or when the need to undertake the work is temporary. The following are examples of proper use of temporary contracts:

- to cover for sickness absence
- to cover for paid/unpaid leave when the end date is not known
- to cover maternity absence
- to cover a vacancy, pending the appointment to the substantive post by normal procedure
- to cover a temporary reduction in hours by a member of staff
- to cover temporary workload, or a one-off task for which the end date has not been defined.

11. FIXED TERM APPOINTMENTS

11.1 These are likely to be appropriate in schools on only a few occasions. Remember, the idea of an initial period with possible extension negates the concept of a fixed term. Examples of proper use are as follows:

- to cover for the secondment of a member of staff
- to perform a specific task for which an end date can be set
- to cover a vacancy until the permanent appointee (already decided) is able to take up office
- to maintain classes through to the end of the school year, until restructuring is introduced in September as a result of a known budget reduction
- to fill a post dependent on time-limited funding from an external agency.

12. INSTRUCTORS/NON QUALIFIED TEACHERS

12.1 Instructors, that is people who do not hold qualified teacher status but are employed as teachers, need a special mention. Unqualified teachers should only be employed to deliver a subject specialism for which the school has been unable to recruit a qualified teacher. Even when an instructor has been recruited, the governing body remains

under an obligation to continue to seek to secure a qualified teacher. For this reason fixed term contracts of not more than three terms/a year should be issued. If the efforts to recruit a qualified teacher fail then the fixed term contract may have to be re-issued.

- 12.2 Those on the GTP Scheme and the RTP Scheme, as paid employees , would accrue employment rights.

13. KEEPING CONTRACTS UNDER REVIEW

- 13.1 Governors should regularly review the position of all staff. If you have any people who have been on a series of renewed fixed term contracts, then it should be recognised that they are to all intents and purposes serving the school on the same basis as permanent staff. You should give them a permanent contract.
- 13.2 Some governing bodies have hoped to find in fixed term contracts a means of avoiding the distress and disturbance for their staff - who are permanent and the core of the school's provision - which budget reductions and redundancy procedures bring. This is understandable. Reductions in staff, however, must be addressed through redundancy procedures; specious fixed term contracts must be avoided.
- 13.3 All newly appointed staff, or existing staff taking up a new post within a school, should be issued with the appropriate contract at the time of their employment. This should be the Catholic Education Service contract not one provided by the LA. The employee and the chairman of governors (or the clerk to the governors) will be required to sign it. One copy will be kept by the school, one by the teacher.
- 13.4 Over a period of time employment conditions may change because of new legislation, a re-negotiation of national agreements or as new customs and practices become accepted. Governors should, as a matter of course, regularly review their employees contracts to see if they are up to date or if there have been any significant changes which might need to be noted in some formal way.
- 13.5 Should there be any significant change it will probably be appropriate to issue existing staff with a new 'Statement of Written Particulars of Employment'. The Catholic Education Service contract should be used for this purpose (instructions are given in the notes for guidance attached to the contract). All staff concerned should be given a dated copy of the appropriate document (but no-one is required to sign it) and a duplicate kept by the school in the teacher's personal file. However, if a serving employee and the governors both agree, it can be regarded as an updated contract and signed by both parties.

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