Employees in the UK working under fixed-term contracts may be covered by certain protections set out in the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the “Regulations”).

The Regulations are designed to prevent employers treating fixed-term employees less favourably than permanent employees. This means that fixed-term employees cannot be excluded from the contractual benefits and facilities offered to permanent staff unless this can be objectively justified.

Definition of a fixed term employee

A “fixed-term contract” means a contract of employment that will terminate:

- on the expiry of a fixed term;
- on the completion of a particular task; or
- on the occurrence or non-occurrence of any other specific event.

The terminology in the Employment Rights Act 1996 refers to ‘limited-term contracts’, which is similar, and which requires that the employment under the contract is not intended to be permanent.

Examples of fixed-term contracts are:

- contracts ending on a specific date;
- contracts linked to a specific funding stream used to pay the employee’s salary and which expires on the end-date for funding;
- short-term seasonal contracts catering for additional demand or workload;
- contracts covering a permanent employee’s sickness or maternity leave which end when the permanent employee returns to work; and
- contracts due to expire on the completion of a particular project.

Who is covered by the Regulations?

The Regulations only apply to employees, and not workers. Case law suggests that the protections also apply to permanent employees who have previously been on fixed-term contracts - in other words, they should not be treated less favourably on grounds of their former status as a fixed-term employee.

Certain categories of employment-relationship are specifically excluded from protection under the Regulations, namely, apprentices, agency workers contracted to perform work for an end-user company through a temporary work agency, employees on government or EC institution-funded or sponsored training, those on work experience or temporary work schemes, and the armed forces.
Discrimination against fixed-term employees

The Regulations aim to achieve parity of treatment between fixed-term employees and comparable permanent employees. The right not to be treated less favourably than a comparable permanent employee covers less favourable treatment:

- in respect of the terms of their contract; or
- by being subjected to any other detriment by any act, or deliberate failure to act, of their employer.

Under the Regulations, a fixed-term employee can compare their working conditions with those of a comparable permanent employee, in most cases this will be an employee who is not on a fixed-term contract and who is working for the same employer in the same establishment doing ‘the same or broadly similar work’.

Employers can objectively justify giving fixed-term employees different terms of employment in two main ways:

- **Term-by-term approach** - by objectively justifying not giving a particular term (or benefit) or giving a term (or benefit) on less favourable terms to a fixed-term employee. The employer will need to demonstrate a good business reason for the less favourable treatment and show that it has acted proportionately.

- **Package approach** - by showing that the value of the fixed-term employee’s total package of terms is at least equal to the value of the permanent comparator’s total package of terms.

**Pro-rata Principle**

Under the pro rata principle, a fixed-term employee is entitled to receive such proportion of pay or benefit that a permanent employee is entitled to as is reasonable in the circumstances, having regard to the length of the contract and the terms on which the pay or benefit is offered.

Therefore, where a particular benefit is offered over a specific period of time (usually on an annual basis), for example, a season ticket loan or gym membership, employers should consider whether it is possible or appropriate to offer the benefit to a fixed-term employee on a pro-rata basis in proportion to the duration of their contract. Where the benefit in question cannot be pro-rated, employers may be able to objectively justify not giving it to fixed-term employees but they must be able to demonstrate that the cost of doing so will be disproportionate to the benefit to the employee concerned.

The Regulations create a presumption that less favourable treatment has occurred if the pro rata principle has not been applied. However, it is open to the employer to show that offering the benefit on a pro-rata basis was not appropriate.

**Unfair dismissal / Statutory redundancy**

The expiry of a fixed term contract in circumstances in which the same contract is not renewed will count as a dismissal for unfair dismissal and redundancy purposes. It is not possible to contract out of a right to claim unfair dismissal or the right to a statutory redundancy payment on the non-renewal of a fixed-term contract.

In order to make a claim for unfair dismissal or for a statutory redundancy payment, the employee will require to have the requisite qualifying service (which has increased from 1 to 2 years for employment commencing after 6 April 2012) in the same way as a permanent employee, unless the reason for non-renewal is one of the automatically unfair reasons that do not require a qualification period (see ‘Protection from dismissal’ below).

Generally speaking, it is likely to be unlawful to select a fixed-term employee for redundancy simply by reason of their fixed-term status. However, it may be possible to objectively justify selecting fixed-term employees for redundancy; for example, where they were employed for six months to complete a particular task and that task has been completed. It could also be lawful to select fixed-term employees for redundancy on the basis of length of service, for example taking a ‘last in first out’ approach, provided that the same criteria is applied to any permanent staff. Fixed-term employees should not be excluded from enhanced contractual redundancy payment schemes without a legitimate reason.

From 6 April 2013, employees on expired fixed term contracts are no longer required to be included for collective consultation purposes in redundancy situations affecting 20 or more employees.
Protection from dismissal

The dismissal of a fixed-term employee will be automatically unfair if the reason or principal reason for the dismissal is that they have brought (or the employer believes or suspects that they have done or intend to bring) proceedings against the employer under the Regulations (or give evidence or information in connection with any proceedings) or have alleged that the employer has infringed the Regulations. Where a dismissal of an employee is automatically unfair, there is no minimum period of qualifying service for bringing a claim. A claim must be brought within three months of the effective date of termination.

When fixed-term becomes permanent

Employees who have been continuously employed for 4 years or more on a series of successive fixed-term contracts are automatically deemed to be permanent employees, unless the continued use of a fixed-term contract can be objectively justified.

This can include cases where the original contract has been reviewed or extended or where a different contract has been entered into after the expiry of the original contract. However, it does not include cases where there has been only one fixed-term contract that has not been renewed or extended. Employers should be aware that a time-gap between two contracts will not always break continuity where it is clear the employment relationship has continued.

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