



# FIXED-TERM AND VARIABLE HOURS CONTRACTS IN SCHOOLS

(including essential procedure for the non-renewal of fixed-term contracts)

## Management Guidance Agreed with All Recognised Trade Unions

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Vale of Evesham School

a specialist school for cognition and learning - enabling solutions in the community

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**FIXED-TERM AND VARIABLE HOURS CONTRACTS**

## 1. Preface

Schools have in the past employed significant numbers of employees on fixed-term contracts. However, when and how these contracts are used is increasingly open to challenge and must be objectively justified. Governing Bodies remain responsible for determining the type of contract of employment for all employees at the school.

**These principles are detailed in this guidance document.**

Headteachers and Governors are urged to seek advice from our HR Providers, if they have any questions regarding the reasons for issuing, use or ending of fixed-term contracts.

## 2. Introduction

This document provides guidance for Headteachers, School Managers and Governors on the use of different types of contracts of employment. This guidance highlights the law arising as a result of the implementation of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (and amended 2007).

The regulations apply to any employee on a fixed-term contract. Fixed-term contracts are defined in the Regulations as meaning those which will terminate:

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

This definition encompasses staff employed in schools on contracts which may have previously been described as 'temporary'. For this reason, and to avoid confusion, this guidance refers to all staff employed on temporary contracts in schools as 'fixed-term' employees.

Key points from the 2002 and 2007 legislation are:

1. Employees on fixed-term contracts have the right to be treated on an equal level with employees on 'open ended contracts' (permanent) doing similar work (usually defined by grade), unless the employer can provide objective justification for the treatment. If they are treated differently by virtue of being on a fixed-term contract then the treatment is a form of discrimination.

Any treatment which disadvantages fixed-term staff in respect of, for example:

- working hours
- holiday entitlement
- flexible working
- opportunities to attend training/conferences

is therefore unlawful. This applies regardless of the employee's length of service.

2. Employers are obliged to inform fixed-term employees of any 'open ended' (permanent) vacancies in the same way that employees on 'open ended' (permanent) contracts are informed of them.
3. After four years' employment on two or more successive contracts, the law regards the employee as a 'permanent' employee. The employee can exercise this right to be considered

'permanent' by writing to the employer to request clarification of their status. The employer has to respond within 21 days and either agree that they may be considered as a 'permanent' employee or provide 'objective justification' as to why they will not consider them a 'permanent' member of staff.

4. The termination of a fixed-term contract is recognised in law as a dismissal. This includes the non-renewal of a fixed-term contract. For example, those which expire on the completion of a specific task or when a specific event does/does not occur. (In most cases this is a redundancy – the exception being when it is to cover another employee's absence, e.g. maternity leave or sickness.)
5. Employees on fixed-term contracts are entitled to the same redundancy arrangements as employees on 'open ended' (permanent) contracts. These include:
  - formal minimum notice of the pending redundancy
  - an entitlement to redundancy pay for employees with more than two years' service.
  - rights to be considered for redeployment
  - formal meetings to review the situation
  - a written statement of the reasons for the dismissal (after one year's service)
  - a right of appeal.Failure to offer this provision to employees on fixed-term contracts as well could make the termination of a contract an unfair dismissal.
6. Redundancy waiver clauses cannot be used.

### **Right to claim unfair dismissal**

It is essential the ending of any fixed-term contract follows the appropriate procedure in order to prevent a claim from an employee for unfair dismissal.

An employee (including those on fixed-term contracts) will qualify for the right to claim unfair dismissal before an employment tribunal after two years' continuous service.

**Note:** There is no minimum service requirement to bring a claim based on discrimination on the grounds of race, gender, disability, sexual orientation, religion, gender re-assignment or age, marriage or civil partnership, pregnancy or maternity.

### **3. When to use a fixed-term contract**

Employers need to demonstrate that they have clear and objective reasons for using a fixed-term contract rather than an open-ended (permanent) contract.

Circumstances where fixed-term contracts **may** be appropriate include:

- the funding is of short-term duration and longer-term funding is unlikely or uncertain
- where specific or specialist expertise or experience is a necessary element of the job and will only be required for a specified period
- a project is shortly to come to an end
- to cover a period up to the closure of a school, or school/area re-organisation
- to cover a vacancy while recruitment to the permanent post takes place
- where the need is of limited duration, e.g. support to SEN pupil.

## **Using a fixed-term contract to cover absence of a member of staff, e.g. long term sick, maternity or adoption leave, or medical suspension.**

If existing staff cannot cover the work performed by an absent employee, an individual may be recruited on a fixed-term contract to replace the employee. Under Section 106 of the Employment Rights Act 1996 when the replacement is dismissed this will be regarded as 'some other substantial reason' (SOSR) for dismissal, as long as:

- the replacement employee was informed in writing that employment would end when the absent employee returned to work: and
- the employer dismisses the replacement in order to make it possible for the absent employee to return to work.

An employee dismissed for this reason may still claim unfair dismissal so employers are obliged to act reasonably including bringing alternative positions to the employee's attention.

If the absent colleague gives notice that they will not be returning to their post, then the absence cover contract will no longer be applicable. If you wish to continue to employ the replacement employee (perhaps to the end of term or year), then a new contract needs to be issued citing the new reason for the fixed-term contract, e.g. pending a permanent appointment.

An employee on a fixed-term contract does not have an automatic right to a post if it is decided that a 'permanent' appointment will be made, for example, where a member of staff decides not to return following maternity leave. The employee will however be able to apply for the post and should be treated on an equal footing with other candidates.

However, if the role is unchanged and continuing *and* the proper recruitment process was followed when they were appointed, the individual may be confirmed as permanent. However, be aware that the advertising of the post as temporary initially may have limited the number of quality applicants.

**Headteachers are advised to plan carefully and when issuing successive fixed-term contracts advice should be sought from our HR Provider.**

### **4. How to use a fixed-term contract**

Contracts for a fixed-term should always include:

- the reason for the appointment being temporary
- the duration of the period of employment
- and/or the event that will bring about the termination of the contract.

Headteachers should ensure that these details are passed to School Employee Services (SES) for inclusion in the contract.

**Please note that School Employee Services will not issue a fixed-term contract without this information.**

Fixed-term contracts should not be used to create a 'trial period' or because of general anxiety over the *possibility* of budget problems at an unspecified point in the future: all schools face a degree of uncertainty in terms of pupil numbers and budgets from year to year. Additionally, if the need for the

post continues beyond the end of the original contract, then the fixed-term contract should be renewed (see section 6).

Schools advertising a fixed-term post should make it clear at each stage of the recruitment process (in job advertisements, recruitment documentation and at interview) that the post is for a fixed-term and explain why this is so.

## **5. Renewal of fixed-term contracts**

If a post covered by an individual employed on a fixed-term contract is to continue unchanged beyond the end date, the fixed-term contract should be renewed. Any extension is by mutual agreement and the employee is not obliged to accept, so schools should ensure that sufficient time is given to discuss the proposed extension. Only if the duties or hours of the post have changed significantly can it be advertised.

## **6. Successive fixed-term contracts**

The use of these is restricted in law:

- successive fixed-term contracts will not be allowed to last longer than a combined period of four years (unless a further fixed-term contract can be objectively justified)
- a fixed-term employee who has been employed on successive fixed-term contracts for four years will be entitled to become a permanent member of staff.

## **7. Non-renewal of a fixed-term contract – additional points**

Non-renewal of fixed-term contracts due to pregnancy or reasons connected with pregnancy is unlawful. If the contract necessarily ends for a reason not connected with the pregnancy or maternity leave (for example where the requirement has ended or funding is no longer available) then the normal procedure for ending such a contract should be followed (see section 11 below). However, the consultation process may need to be extended to account for the impact of the timing of the maternity leave and the birth.

As soon as possible after the Headteacher/Manager becomes aware of the pregnancy, they should ensure that the employee is aware of the implications of reaching the end date of their current contract, and in what circumstances the contract might end or be extended. Schools should ensure that members of staff on Maternity leave are made aware of any permanent or other vacancies in school when they arise.

Non-renewal of fixed-term contracts for reasons of poor/unacceptable performance may amount to unfair dismissal. Poor performance should be managed as it would be normally for staff on permanent contracts, in accordance with the Probationary Procedure or other relevant procedures, although it may be appropriate to shorten timescales (please contact our HR provider for advice if required).

## **8. Variable Hours Contracts**

There may be instances where it is reasonable to expect that there will be an ongoing requirement for a particular post, but the number of hours required, or the hours the school can afford will vary from year to year (or even from term to term). In such cases it is appropriate to issue a variable hours contract, which will include the following wording:

“Due to the changing needs of the school, the hours which you are required to work may vary from time to time. Where the hours are varied, your salary and other benefits will be varied accordingly. Changes will only commence at the beginning of a school term/year and you will be notified of any changes not less than three weeks before the last working day of the previous term. The maximum proportion you will be expected to work will be..... and the minimum will be .....

#### **Points to Note:**

1. Schools should ensure the width of the range is reasonable. As a guide +/- 25% would be a reasonable range.
2. Variable hours contracts are usually permanent, but may be issued on a fixed-term basis in certain very limited circumstances, e.g. to cover the long-term sickness absence of someone who is him/herself employed on a variable hours contract.

#### **9. Agency Workers**

Since October 2010 agency workers (including supply teachers) also have the legal right to equal treatment, in terms of basic working and employment conditions, as if they had been hired direct by the employer.

Some entitlements start immediately, whilst some only apply once the agency worker has been in the relevant post for 12 weeks.

#### **Day one Rights:**

- to be informed of any vacancies within the organisation (via the same methods as for other employees).
- access to facilities such as childcare, car parking, canteens, etc.  
(However, if there is a waiting list they only have the right to join that waiting list.)

#### **12 week Qualifying Period Rights:**

- the same basic employment and working conditions, i.e. pay, holiday, working time and rest periods.

Liability for this equal treatment, after 12 weeks, is primarily with the temporary work agency, but the hirer must provide correct information.

The Agency Workers Regulations DO NOT provide an entitlement to:

- an Occupational Pension
- Occupational Sick, Maternity, Paternity or Adoption Pay
- Redundancy Pay.

#### **10. Redundancy Selection**

If the school finds itself in a position of having to reduce staff via a redundancy procedure, fixed-term employees cannot be selected for redundancy simply because of their employment status.

Furthermore, case law and the Regulations have made it clear that attempts to select employees on fixed-term contracts for redundancy, in preference to those on 'permanent' open-ended contracts, is likely to be treated as discriminatory under the Fixed-Term Workers regulations. The process for

ending fixed-term contracts described below should be followed and kept separate from any actions taken under the redundancy procedure.

Since 6th April 2013 the statutory law on consultation about multiple redundancies changed with relation to how it applies to the non-renewal of fixed-term contracts. Where the number of posts to be made redundant exceeds 20 at one establishment specific law exists about consultation. Since 6th April 2013, there is no need to include in the calculation of the 20 posts, those staff on fixed-term contracts whose contracts will not be renewed, unless there is a need to end those fixed-term contracts earlier than originally anticipated on the grounds of redundancy. In any redundancy situation it is highly recommended that advice is sought from our HR provider to ensure the agreed procedures and guidance are followed.

## **11. Non-renewal of a fixed-term contract – essential procedure**

It is crucial that Governing Bodies and Headteachers recognise that the non-renewal of a fixed-term contract is a dismissal in law. Fixed-term employees have the same rights to claim unfair dismissal and redundancy payments as those on open-ended (permanent) contracts (see Section 2).

It is vital that Governing Bodies and Headteachers follow the procedure detailed below in the event of every non-renewal of a fixed-term contract.

It is recommended you give employees at least a half term's notice of the ending of this contract.

### **Step 1 – Invitation to meeting 1**

Headteachers formally invite employees on fixed-term contracts, in writing, to a meeting to discuss the non-renewal of their fixed-term contract further (see model letter 1). 5 working days' notice of the meeting should be given. The employee has the right to be accompanied by a colleague or Trade Union representative at such a meeting but may choose not to do so. In some cases, the Headteacher may wish to be accompanied at this meeting by an appropriate colleague (member of Senior Leadership Team).

As this is a dismissal in law, the Headteacher cannot delegate responsibility for this meeting.

The employee should take all reasonable steps to attend.

Where the situation is not certain (for example, where the Headteacher is awaiting confirmation of continued funding), the letter inviting to a meeting should still be sent but reference should be made to the possibilities.

### **Step 2 – The Meeting (Meeting 1)**

At the meeting the Headteacher should outline the reason(s) for the non-renewal of the fixed-term contract and confirm the end date. Any opportunity for alternative suitable employment and re-training should be discussed. If necessary, another meeting could be arranged to discuss the matter further (see draft agenda – Appendix 1a).

The employee must be given the opportunity to make any representations against the ending of their fixed-term contract. If the meeting involves alternative suggestions to the ending of the contract, the Headteacher is advised to adjourn to consider all the facts and representations before confirming any decision. The employee must be advised of the outcome of the meeting and, if necessary, of their right to appeal against the ending of their fixed-term contract. The outcome of the meeting must be confirmed in writing within 5 working days of the meeting (see Appendices 2 and 3). School Employee Services will need to be informed of any changes to the original decision.

### **Step 3 - Right to appeal**

If an employee wishes to appeal they must inform their employer by writing to the Headteacher within 5 working days of the receipt of the letter confirming the ending of their contract. This letter must state his/her reasons for appeal. On receipt of a letter confirming a wish to appeal, the Governing Body will organise a date for an appeal hearing and communicate the date to the employee within 10 working days (see model letter Appendix 4). The employee will be given a minimum of 10 working days' notice of the date of the appeal hearing.

The appeal hearing will follow the procedure detailed in Appendix 5 and the outcome will be confirmed using model letter Appendix 6.

School Employee Services will need to be informed of any changes to the original decision.

### **Important Note – Delegation of Authority**

In adopting this procedure and in relation specifically to the non-renewal of fixed-term contracts, the Governing Body hereby delegates the power to determine that anyone employed to work in the school should be dismissed, to the Headteacher.

For the purposes of Appeal rights, the Governing Body must appoint a Dismissal Appeal Panel. This should be a panel of three Governors, other than in exceptional circumstances.

## **MODEL LETTERS / DOCUMENTS - NON-RENEWAL OF FIXED-TERM CONTRACTS PROCEDURE**

**Appendix 1** - Model letter for invitation to meeting 1 to discuss the non-renewal of temporary contract and the hearing of representations

**Appendix 1a** - Agenda for meeting 1 above

**Appendix 2** - Model letter for ending of fixed-term contract (when the reason is redundancy)

**Appendix 3** - Model letter for ending of fixed-term contract (when the reason is SOSR, e.g. absence cover)

**Appendix 4** - Model letter informing a member of staff of arrangements for an appeal against the non-renewal of a fixed-term contract

**Appendix 5** - Model procedure for the hearing of an appeal against dismissal by reason of redundancy or SOSR due to the non-renewal of a fixed-term contract

**Appendix 6** - Model letter confirming outcome of appeal against dismissal

## Appendix 1 - Model letter for invitation to meeting 1 to discuss the non-renewal of temporary contract and the hearing of representations



(Insert date)

Dear

You will recall that your letter of appointment indicated that your contract of employment is temporary due to **[insert reason for fixed-term contract]** and is due to end on **[date]**. As it stands, I do not believe that we will be able to continue your employment beyond this date as **[insert circumstances]**.

However, I would like to meet to discuss this with you and to consider whether there are any alternatives.

This meeting will take place at **[location]** on **[date]** at **[time]**. As we will be discussing the ending of your contract, you may choose to be accompanied at the meeting by a colleague or trade union representative if you wish.

**Optional:** I will be accompanied by **[insert name]**.

If you do not wish to attend the meeting please either advise me as soon as possible, or you may provide me with your written representations within 5 working days of receipt of this letter (i.e. by **[insert date]**).

Yours sincerely,

Headteacher.

**Appendix 1a - Agenda for meeting 1 above (to discuss the non-renewal of temporary contract)**

1. Remind employee of the reason for the fixed-term contract and reason coming to an end.
2. Advise employee post is not subject to renewal and why.
3. Advise employee of end date of the fixed-term contract.
4. Employee makes representations as appropriate.
5. Discuss any suitable alternative employment (and training) and arrange any further meetings as required.
6. Adjourn if necessary to consider employee representations.
7. Advise employee of decision - confirmation of ending of contract and effective date  
*or*  
extension of contract details.
8. Advise employee of right of appeal (if necessary), timescale and that the outcome of meeting will be confirmed in writing.

**Appendix 2 - Model letter for ending of fixed-term contract (when the reason is redundancy)**



(Insert Date)

Dear

Following our meeting on ***[insert date]*** when we discussed your temporary contract of employment, I write to confirm the outcome of that meeting. ***[Delete paragraph if the meeting was declined.]***

As explained, ***[may be more relevant if meeting was declined]*** your contract is temporary for the following reason ***[state reason as per the contract and explain further if necessary]***.

As, to date, no suitable alternative employment is available I have determined that your contract will not be renewed and that your contract will therefore cease on ***[insert contract end date]***. The technical reason for this dismissal is redundancy; if you have more than two years' continuous service, you may be entitled to a redundancy payment.

Please note that you have the right to appeal against this decision to a panel of Governors. If you wish to appeal you will need to inform me in writing within 5 working days of the receipt of this letter.

**OR**

I have decided to extend your contract to ***[add new end date of contract and give reasons for continuing with the contract]***.

Yours sincerely,

Headteacher.

Copy to: School Employee Services

**Appendix 3 - Model letter for ending of fixed-term contract (when the reason is SOSR, e.g. absence cover)**



(Insert Date)

Dear

Following our meeting on ***[insert date]*** when we discussed your temporary contract of employment, I write to confirm the outcome of that meeting. ***[Delete paragraph if the meeting was declined.]***

As explained, your contract is temporary to cover the maternity leave/sickness absence of ***[insert name]***.

As ***[insert name]*** is due to return to work and also, to date, no suitable alternative employment is available, I have determined that your contract will not be renewed and that your contract will therefore cease on ***[insert contract end date]***. The technical reason for this dismissal is 'some other substantial reason'.

Please note that you have the right to appeal against this decision to a panel of Governors. If you wish to appeal you will need to inform me in writing within 5 working days of the receipt of this letter.

**OR**

I have decided to extend your contract to ***[add new end date of contract and give reasons for continuing with the contract]***.

Yours sincerely,

Headteacher.

Copy to: School Employee Services

**Appendix 4 - Model letter informing a member of staff of arrangements for an appeal against the non-renewal of a fixed-term contract**



(Insert Date)

Dear

**Appeal Against Non-Renewal of Fixed-Term Contract**

Following your letter of ***[insert date]*** lodging your appeal against the non-renewal of your fixed-term contract. I have arranged for your appeal to be heard by the Appeal Panel at ***[location]*** on ***[date]*** at ***[time]***.

You have the right to be represented by a colleague or trade union representative at this hearing and I enclose a copy of the procedure which will be followed at the meeting. ***[attach Appendix 5]***

The Appeal Panel will be provided with the documentation which was available at the initial hearing. If you have any supplementary documentation which you wish to be submitted to the Appeal Panel it must be provided to the Headteacher, along with details of witnesses, not less than 5 working days before the hearing.

I understand that you will be represented by ***[insert name]*** at the hearing.

Yours sincerely,

Headteacher.

## **Appendix 5 - Model procedure for the hearing of an appeal against dismissal by reason of redundancy or SOSR due to the non-renewal of a fixed-term contract**

Where an employee wishes to appeal against the decision to dismiss he/she must:

- (a) lodge the appeal in writing;
- (b) state his/her reasons for wanting to appeal;
- (c) send this letter to the Headteacher within 5 working days\*\* of receipt of the decision to dismiss.

If the employee appeals against the decision of the dismissal hearing the matter shall be dealt with by the Appeal Panel of the Governing Body. A Human Resources Adviser will normally attend as adviser to the panel.

The Headteacher/Line Manager ('Management') may be accompanied by a Human Resources Adviser, who may speak in support of the Headteacher/Line Manager.

Although Governors will take notes of the proceedings, there is no obligation on the panel to make these available to the employee. Employees and/or their representative are at liberty to make their own notes during the proceedings. The use of tape recorders, cameras, etc. to record proceedings of the hearing is not allowed.

Adjournments may take place before a decision is given. An adjournment allows for proper consideration of all matters raised.

The employee and his/her representative shall be given not less than 10 working days\*\* notice of the date, time and place of the meeting of the Appeal Panel at which the appeal is to be heard. The panel shall hear the case in accordance with the following procedure:

- (a) Chair of the panel to introduce those present, explain the purpose of the meeting, including the confidential nature of proceedings, and outline the order of business.
- (b) Chair of Panel to clarify that it is not intended to make available notes of the meeting. No unreasonable restrictions will be placed on the employee or their representative if they wish to make notes for their own use.
- (c) The Appellant shall give a short simple statement of their reasons for appeal and the remedy being sought (if this is not already included in written submission).
- (d) The Management shall put the case in the presence of the Appellant and his/her representative, calling witnesses as appropriate.
- (e) The Appellant (or his/her representative) shall have the opportunity to ask questions of the Headteacher and witnesses on the information given by them.
- (f) The panel and officer adviser shall have the opportunity to ask questions of the Headteacher and witnesses.
- (g) The Appellant (or his/her representative) shall put his case in the presence of the Management, calling witnesses as appropriate.
- (h) The Management shall have the opportunity to ask questions of the Appellant (or representative) and witnesses.

- (i) The panel and officer adviser shall have the opportunity to ask questions of the Appellant (or representative) and witnesses.
- (j) The Management and the Appellant (or his/her representative) shall have the opportunity to sum up their cases in turn if they so wish, but must not introduce any new factors.
- (k) The Headteacher, his/her adviser and the Appellant and his/her representative shall all withdraw.
- (l) The panel and the HR provider shall deliberate in private only recalling the Management and the Appellant (and his/her representative) to clear points of uncertainty on information already given. If recall is necessary, both parties shall return even if only one is concerned with the point giving rise to doubt.
- (m) The panel shall announce the decision to the Headteacher and the Appellant (and his/her representative) in person.

The decision of the Appeal Panel shall be notified in writing to the Appellant within 5 working days\*\*. There shall be no further right of appeal under this procedure. However, nothing in this procedure shall be construed to limit an employee's rights under the Employment Rights Act 1996 or any other enactment.

Where the appeal is upheld, a copy of the letter shall at the same time be sent to the Schools' Employee Services with a covering letter requesting that the employee be reinstated.

\*\* Working days = days during which the school is open, including training days.

## Appendix 6 - Model letter confirming outcome of appeal against dismissal



(Insert Date)

Dear

Following your appeal against dismissal (non-renewal of fixed-term contract) held on **[insert date]** I have to inform you that having regard to all the circumstances the Appeals Panel has decided to **(delete those sections which do not apply)**

allow your appeal. This means that the dismissal will not take effect as previously advised and your contract of employment will be renewed until **[insert new relevant date]**

**OR**

***allow your appeal. This means that the dismissal will not take effect as previously advised and your contract of employment will be made permanent.***

**OR**

dismiss your appeal. This means that the dismissal will take effect from **[insert date]** as previously advised.

Yours sincerely,

Headteacher.

Copy to: School Employee Services