

Legal Q&A: Terminating fixed-term contracts

By Akshay Choudhry on 28 Apr 2014 in Dismissal, Fixed-term contracts, Redundancy



The use of fixed-term contracts is widespread across many industries and business sectors. However, while simple on the face of it, dealing with the expiry of a fixed-term contract is not always straightforward. Akshay Choudhry looks at the issues.

Q. Do I need a reason not to renew a fixed-term contract?

Perhaps surprisingly, the expiry of a fixed-term contract constitutes a dismissal of the employee. You should therefore be mindful to dismiss the employee fairly where they have sufficient continuity of service to bring an unfair dismissal claim, just as with a permanent employee.

Fixed-term contract employees also have the right not be treated less favourably than a permanent employee because of their fixed-term contract status. You should, therefore, identify a potentially fair reason for the dismissal, and follow a fair procedure.

Often the reason for non-renewal is redundancy – and the usual test for redundancy applies. As a rule of thumb, if you do not intend to replace the fixed-term contract employee and the non-renewal means you will have fewer employees overall, it is probably a redundancy.

Other potentially fair reasons include capability, conduct or some other substantial reason (SOSR). In practice, SOSR is often relied on by employers. Where, for example, a fixed-term contract was used to provide maternity or sickness cover – and the permanent employee returns – the expiry of the contract will usually be for SOSR.

Q. What procedure should I follow?

If the reason for non-renewal is redundancy, you should follow a fair redundancy process. Even if the employee lacks sufficient service for unfair dismissal protection, following a fair process will

help to avoid claims of less favourable treatment (as well as warding off any potential discrimination claims).

The redundancy process should be essentially the same as for a permanent employee, so should include the following:

- Pooling: you should consider pooling employees – whether fixed term or permanent – who are carrying out the same or similar work, and go through a selection process.
- Redeployment: you should conduct a reasonable search for alternative employment.
- Individual consultation: you should hold meetings to discuss the proposed redundancy, and should offer a right of appeal.

The expiry of fixed-term contracts will not, on their own, trigger collective redundancy consultation. However, if your proposals may lead to the redundancy of 20 or more permanent employees within a 90-day period, collective consultation may be required.

If the reason for non-renewal is SOSR, you should still follow a fair process. This will normally mean holding meetings with the individual to discuss the expiry of the contract, alternative job opportunities and considering a right of appeal.

Q. Can I avoid pooling permanent employees with fixed-term contract employees in a redundancy process?

If the fixed-term employee was engaged to perform a specific task or project, and that particular task or project has been completed, there may be no need to pool the fixed-term employee (unless there were permanent staff also engaged in that same project).

It will be more difficult to avoid pooling if the fixed-term employee was engaged to undertake a more general role (eg as additional general resource to assist during a busy period) unless, for example, it is clear in the contract that he or she has been engaged to cover a busy period and that the contract would expire when the excess demand reduced.

As an alternative, you could label the dismissal as for SOSR, even where the test for redundancy is likely to be met. This would avoid the need to pool employees, but there is a risk that the employee may challenge the real reason for, and the fairness of, their dismissal. Although this risk only applies where the employee has qualifying service for unfair dismissal protection, there is also a chance of a less favourable treatment claim.

Q. Is the fixed-term contract employee entitled to a redundancy payment?

If the reason for non-renewal is redundancy and the employee has 2 years' continuous service, they will qualify for a statutory redundancy payment. If, under your policies, a permanent employee in the same circumstances would qualify for an enhanced redundancy payment, the fixed-term employee should also receive one.

Q. Do I need to give the fixed-term contract employee notice?

This will depend on the wording of the contract. Some fixed-term contracts include express notice provisions which should be complied with. If the contract does not mention notice, you may be able to terminate on the expiry date without giving it. However, check for notice provisions in any relevant collective agreement. As a matter of good practice, you should consider giving some notice in any event and you should also confirm the termination in writing.

Q. Can I end a fixed-term contract early?

Yes, though you should still identify a fair reason, follow a fair process and avoid treating the employee less favourably than permanent employees.

However, be warned. If the contract itself does not allow for early termination, unless the employee has committed an act of gross misconduct, the employee may be entitled to be paid what they would have earned during the remainder of the contract term.



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