

Guidance on negotiating a fixed-term contract policy in HE

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It is UCU policy to seek, and campaign for, a significant reduction in the use of fixed-term contracts in higher education. For hourly-paid staff there is also a commitment to seek conversion to fractional (pro-rata) or full-time posts as appropriate. In the post-92 sector conversion should be to the national contract and in the pre-92 sector conversion should be to contracts with the same terms and conditions as salaried academic and related staff.

One method to help achieve this objective is to negotiate on the introduction of a Fixed-Term Contract Policy. It will not always be appropriate to seek to negotiate a policy and advice should be sought from your regional office before doing so. In particular, where the dominant use of fixed-term contracts is for hourly-paid staff, it may be more appropriate to use the framework implementation to seek conversion to fractional contracts and permanency. However, there will also be situations where the agreement of a model policy will lead to 100s of staff being transferred to permanent contracts and such policies may contribute to a change in culture away from the use of fixed-term contracts in higher education.

Background and summary

The Fixed Term Employee (Prevention of Less Favourable Treatment) Regulations 2002 (the Regulations) came into force in October 2002. The Regulations:

- Prevent less favourable treatment of fixed-term staff and
- Restrict the successive use of fixed-term contracts

unless less favourable treatment or the successive use of fixed-term contracts can be justified on objective grounds.

The Regulations can be viewed at <http://www.opsi.gov.uk/si/si2002/20022034.htm>



Developing a Policy

The starting point in developing a local policy should be to get as many fixed-term staff transferred to permanent contracts as possible and to secure a reduction of their use in the future. Local priorities can also be fed into the process.

The development of a policy is a first step in tackling the issue of the use of fixed-term contracts in higher education but a massive culture shift will be required to tackle the issue effectively. It is therefore important that any policy is endorsed by the appropriate university bodies and has buy-in at all levels. It is also important that the policy is binding on all departments; guidance alone has been found to be ineffective in tackling the issue.

Equally important is that any agreed policy is communicated to all staff and that managers are well briefed in its content.

It is important that any policy that has been agreed by the UCU is supported by its members, especially those on fixed-term contracts themselves. In relation to the successive use of fixed-term contracts, the Regulations provide for collective or workplace agreements to override the statutory provisions so it is very important that any agreements made do not offer less protection to members than they are afforded by the Regulations.

Advice from our legal department in the light of the Ball v Aberdeen case is that including specific examples of potentially objectively justified use, of or continuation, of fixed term contracts – in either national or local agreements - is unhelpful and potentially misleading. In every case the employer should be required to show that it has a real need to employ the employee on a fixed term contract, and that the benefits to the employer in doing so outweigh the detriment to the employee caused by remaining employed on a fixed term.

We will therefore be approaching the employers nationally to seek amendments to the JNCHES guidance – in particular to amend or remove part 9 of the guidance which sets out examples of circumstances when the use of a fixed-term contract may be objectively justified.

We are seeking national and local agreements that make it clear that fixed-term contracts should only be used in the circumstances described above. In addition, we are seeking a commitment that fixed-term contracts will not be used for a period beyond four years.



In light of these developments, branches / LAS are encouraged to negotiate for the introduction of a policy that:

- includes commitments from the university to reduce the use of fixed-term contracts and to effectively manage any remaining fixed-term contracts;
- specifies that fixed-term contracts will only be used for transparent and objective reasons where the employer can demonstrate there is a genuine fixed-term need;
- provides for transfer to permanent contracts after (at most) 4 years' service;
- does NOT give specific examples of when a fixed-term contract can be used;
- identifies any particular issues and commitments relating to specific groups of staff;
- sets down procedures for the management of fixed-term contracts;
- includes a commitment to joint monitoring and review.

The UCU Model Policy – Commentary

1. Introduction

It is important to get commitment to continuity of employment within the policy itself.

The requirement to treat fixed-term staff no less favourably (unless such treatment is objectively justified) and to inform fixed-term staff of permanent vacancies are both legal requirements under the Regulations.

The requirement to all transfer staff to permanent contracts after 4 years or before if appropriate goes beyond the legal requirements in the Regulations but UCU believe that the majority of staff would be entitled to a permanent contract under the Regulations after 4 years and that it would be very difficult to objectively justify the continued use of fixed-term contracts after 4 years. Our aim should be to get all such staff onto permanent contracts.

It is important that any agreed policy applies to all staff.

It is important to build a review date into any agreed policy

2. Purpose

It is useful that the purpose of the policy is agreed up front. It should not be merely about complying with the legislation – there needs to be a commitment to really start to tackle the problem of the endemic use of fixed-term contracts.

An annual audit, including equalities data ensures that the policy remains a working document.



3. Reduction in the use of fixed-term contracts

Again, commitment to the reduction in the use of fixed-term contracts is stated and a commitment to using permanent contracts as the normal form of employment. This will represent a significant shift in employment practices in most universities.

It is also useful to make clear, within the policy, that the university, as the employer, takes responsibility for implementation of the policy.

4. Transfer of staff to permanent contracts

The Regulations state that those members of staff on at least their second contract, or who have had their contract renewed, and who have at least 4 years' service, can regard their posts as permanent – unless the employer can objectively justify the use of a fixed-term contract.

The UCU model policy builds on the spirit of the Regulations and requires that:

- All staff with more than 4 years' service be placed on a permanent contract
- All staff with less than 4 years' service be placed on a permanent contract unless the use of a fixed-term contract can be linked to a genuine fixed-term need
- Hourly-paid staff be transferred to pro-rata / full-time permanent contracts other than in exceptional circumstances

The model policy also includes commitments in relation to staff acquiring 4 years' service and compulsory redundancies. These are both areas around which members have raised concerns and it is therefore important to secure commitments of this nature to allay any fears that fixed-term staff may have about the effect of any agreed policy.

5. The circumstances in which fixed-term contracts may be considered

Following legal advice, we have moved away from advising branches / LAs to agree to specified circumstances in which fixed-term contracts may be considered. We are also seeking to have the JNCHES guidance amended.

Any policy should include a statement to the effect of:

*Fixed-term contracts should only be used on those occasions where the employer can demonstrate a real need, i.e. that the employer can identify facts evidencing an objective which can **only** be met by the use of a fixed term. Where an objective is identified but can be achieved by alternative means which do not involve the use of a fixed term, the employer will not have established a real need.*



Even where a real need is established the use of a fixed term contract may not be justified if, after consideration of all the facts, it is apparent that the detriment caused to the employee by remaining on a fixed term contract outweighs the expected benefits accruing to the employer by the use of a fixed term contract. It follows that on every occasion the employer must adopt an individual approach to the issue rather than apply a blanket rule.

Whilst it may be appropriate to offer fixed-term contracts for short periods of time with an aggregate period of less than 4 years in the circumstances outline above, fixed-term contracts should not be used for a period beyond 4 years of continuous employment.

6. Management of fixed-term contracts

In recognising that there will be situations in which the use of a fixed-term contract will be objectively justified (for service of less than 4 years) it is important to get commitments on the management and treatment of staff on fixed-term contracts.

Key to this is a commitment to not treat fixed-term staff less favourably than permanent employees. It is useful to give example of this within the policy to make it clear that the less favourable treatment provisions apply to all terms and conditions of employment – contractual and otherwise. E.g. pay, access to library facilities.

Under the Regulations fixed-term staff have the right to request a written statement of reasons for less favourable treatment which must be supplied within 21 days of the request. They also have the right, if they consider they are entitled to regard their post as permanent, to request a written statement confirming that the contract is no longer fixed-term. Within 21 days of that request the employer must either provide such a statement or provide a statement giving the reasons why the contract remains fixed-term.

7. Particular groups of Staff

Any policy agreed should apply to all staff but is worth noting some of the particular issues that are likely to arise for particular groups of staff. The JNCHES guidance identifies contract research staff and hourly-paid staff as groups for which the Regulations will have a significant impact.

7.1 Contract research staff

It is important to get some level of commitment to breaking the link between a particular funding stream (e.g. a research project grant) and the employment of an individual researcher. Commitment to investing in the research infrastructure and looking at research funding as a whole, rather than on a project by project basis, can go some way to changing the culture of short term-ism within HE research.



7.2 Fixed-term hourly-paid staff

In addition to seeking permanence for hourly-paid staff in the same way as other staff, we should be negotiating for the transfer of hourly-paid staff to pro-rata / full-time contracts as appropriate. There may be limited circumstances in which an hourly-paid contract is appropriate but for most staff a part-time or full time contract (depending on hours worked) is most appropriate and is more easily demonstrable in meeting equal pay considerations.

8. Ending a fixed-term contract

It is important, if we recognise that some fixed-term contracts will remain in use, that procedures are built into the policy that deal with the ending of a fixed-term contract. The aim of these provisions is to move away from the current expectation that the expiration of a fixed-term contract will result in an automatic dismissal – in most cases a compulsory redundancy.

The provisions build on the JNCHES guidance and are aimed at avoiding compulsory redundancies.

The example of a redeployment policy requires active intervention from the employer to identify suitable alternative employment – it is not sufficient to leave it to the affected member of staff to seek suitable vacancies and competitively apply for them.

If a fixed-term member of staff is made redundant this should be on the same basis as comparable permanent members of staff – including levels of redundancy pay, and the procedure should be no less favourable.

Redundancy waiver clauses signed after October 2002 are void but we should seek a commitment from the employer that they will not seek to enforce waiver clauses signed before that date.



Model fixed-term contact policy

This policy has been agreed between X University and XUCU and will commence on (insert date)

1. Introduction

The University is committed to ensuring continuity of employment for its staff and to use fixed-term contracts only for transparent and objective reasons where there is a genuine fixed-term need.

The University will avoid the successive use of fixed-term contracts and will transfer staff to permanent contracts once they have completed four years' service, or earlier if appropriate.

Where fixed-term contracts are used the University will ensure that staff are treated no less favourably than permanent staff and are informed of permanent vacancies.

The University will not take any action that it is contrary to the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

This policy will apply to the use and management of fixed-term contracts for academic (including research) and academic related staff across all departments.

This policy will be effective from (insert date) and will be jointly reviewed every two years or whenever there is a change in relevant legislation.

2. Purpose

The aim of this policy is to

- reduce the use of fixed-term contracts within the University
- provide for the transfer of fixed-term staff to permanent contracts
- specify how fixed-term contracts will be managed
- identify specific issues in relation to contract research staff and hourly-paid staff
- specify the action required at the termination of a fixed-term contract.

As part of this policy, the University will carry out an annual audit of the use of fixed-term contracts across the University which will include equality data and will share the results with the UCU. If the use of fixed-term contracts does not significantly reduce or there are equality implications the university will take action, agreed with the UCU, to address the situation.

3. Reduction in the use of fixed-term contracts

The University is committed to a significant reduction in the existing numbers of fixed-term contracts and to limiting their future use.

In future, permanent contracts will be the normal form of employment for all staff and fixed-term contracts will only be used when there are transparent and objective reasons where there is a genuine fixed-term need. This test for whether there is a genuine fixed-term need should be applied in each and every case. The University is the employer and therefore overall responsibility for the management of fixed-term contracts is held centrally. Decisions on the use of fixed-term contracts should not be made solely by Heads of Departments or line managers but must be referred to personnel / human resources to ensure that they are in line with University policy and in accordance with the fixed-term employee regulations.

The University recognises that this will represent a significant shift from current practices and will ensure that this policy is brought to the attention of all managers and staff and is well publicised.

The University will also take steps to monitor the implementation of the policy centrally and will take appropriate action where it appears that the policy is not being followed within departments.

4. Transfer of staff to permanent contracts

All staff on fixed-term contracts will be transferred to permanent contracts immediately if they have at least four years' service or when they have completed 4 years' service.

All fixed-term staff with less than 4 years' service will be transferred to permanent contracts by (insert date) unless the continued use of the fixed-term contract can be demonstrated to be linked to a genuine fixed-term need.

Hourly-paid staff should also be transferred to pro-rata or full-time contracts as appropriate other than in exceptional circumstances (see 7.2).

In pursuing this policy, the University gives its commitment that the acquiring of 4 years' service will not be regarded as a legitimate reason for the expiry of a fixed-term contract.

The University gives a commitment to no compulsory redundancies as a direct result of this policy.

5. The circumstances in which fixed-term contracts may be considered

Fixed-term contracts should only be used on those occasions where the employer can demonstrate a real business need, i.e. that the employer can identify facts evidencing a business objective which can only be met by the use of a fixed term. Where a business objective is identified but can be achieved by alternative means which do not involve the use of a fixed term, the employer will not have established a real business need.

Even where a real business need is established the use of a fixed term contract may not be justified if, after consideration of all the facts, it is apparent that the detriment caused to the employee by remaining on a fixed term contract outweighs the expected benefits accruing to the employer by the use of a fixed term contract. It follows that on every occasion the employer must adopt an individual approach to the issue rather than apply a blanket rule.

Whilst it may be appropriate to offer fixed-term contracts for short periods of time with an aggregate period of less than 4 years, fixed-term contracts should not be used for a period beyond 4 years of continuous employment.

6. Management of fixed-term contracts

Where staff are placed on a fixed-term contract in accordance with paragraph 5 they shall be treated no less favourably than comparable staff on permanent contracts.

In particular, fixed-term staff will:

- Have equivalent terms and conditions of employment to colleagues on comparable permanent contracts including pay, absence provisions, pensions;
- Be provided with a suitable working environment;
- Have the same opportunity as other staff to access services to develop their career such as staff development, training, appraisal and careers advice;
- Be provided with information on, and the opportunity to apply for, permanent positions in the university;
- Be able to access university facilities such as libraries and intranet services;
- Have the right to participate in university governance and committees;
- Have their contracts regularly reviewed to consider whether the continued use of their fixed-term contract remains justifiable on objective grounds as set out in paragraph 5;
- On request, be provided with a written statement within 21 days explaining any differences in their employment arrangements from those of comparable permanent employees on a 'term by term' basis;
- After 4 years service be provided with confirmation that the post is now permanent;
- On request, at any time, be provided with the objective justification for the post to be on a fixed-term basis.

7. Particular Groups of Staff

7.1 Contract Research Staff (CRS)

The University recognises that the use of fixed-term contracts within research for the employment of CRS is widespread. This policy applies to CRS as it applies to other staff groups and the commitment to the use of permanent contracts as the normal form of employment extends to research staff.

Research staff will only be placed on a fixed-term contract if the use of such a contract is in accordance with paragraph 5.

The University acknowledges that this represents a major overhaul of the way in which research staff are employed with a significant transfer to, and future use of, permanent contracts. CRS will no longer be appropriate terminology for groups of research staff who should be referred to by reference to their job title (e.g. level 2 researchers).

The University recognises that additional funding provided for research through full economic costing will allow for investment in the research staffing infrastructure including investment that will allow continuity of employment between externally funded research projects.

Examples could include the use of bridging funds, retraining budgets, the establishment of pools of researchers or a redeployment database.

In this way the University will retain high quality, experienced staff and employees will maintain their continuity of employment.

The University also re-iterates its commitment to the active management of research careers and the concordat for the career management of contract research staff.

7.2 Fixed-term hourly-paid staff

The University also recognises that hourly-paid staff also form a large and distinctive group particularly affected by the use of fixed-term contracts.

The University will transfer hourly-paid staff to permanent contracts in accordance with paragraph 4 of this policy.

The University will also undertake to transfer hourly-paid staff to pro-rata or full time contracts as appropriate other than in exceptional circumstances that have been agreed with the UCU.

The transfer to pro-rata contracts will meet equal pay considerations with staff being transferred to a salary point on the appropriate grade.

The method of calculation of pro-rata contracts will be by reference to the national contract (or to an agreed lower workload agreement) in post-92 institutions and subject to agreement with the UCU in pre-92 institutions.

8. Ending of a fixed-term contract

The University recognises that the ending of a fixed-term contract is a dismissal in law. In most cases, the dismissal will constitute a redundancy.

The University recognises its legal duty in relation to collective consultation on redundancy and the steps set out below do not in any way detract from those legal obligations.

The University will take all necessary and appropriate steps to avoid compulsory redundancies of both permanent and fixed-term staff.

Up to four months before the expiry of a fixed-term contract, all alternative options should be considered e.g. alternative funding arrangements, renewal, use of bridging funds, retraining and redeployment.

Up to three months before the expiry date, consultation should take place with the postholder on the prospects of alternative options. The postholder may be accompanied by a trade union representative at any discussions about his/her post.

At the same time, the University will consult with the recognised trade unions about any potential redundancies.

In the first instance consideration should be given to transferring the employee to a permanent contract if the work is on-going, extending the fixed-term contract (in accordance with paragraph 5), providing alternative work or funds for a temporary period (for example between grants) or slotting the employee into a suitable vacancy (either on a permanent or a fixed-term contract in accordance with paragraph 5).

If these options are not available, or at the employee's request, formal redeployment will be considered.

As part of that process the University will actively seek suitable alternative employment for the member of staff. This will include any posts for which training may be required. The redeployment process is about matching transferable skills not necessarily seeking an exact job match. The University will also ensure that that departments / schools / centres are willing to take on staff who have been redeployed, including staff that may need significant retraining.

Where the employee does not want to be considered for redeployment or the redeployment process has been unsuccessful, the university's redundancy procedure should be applied. However, the fact that a member of staff is in a particular fixed-term post the funding for which has ceased, will not be the sole criteria for selection for redundancy.

The redundancy procedure will be applied to fixed-term staff in the same way as it is applied to comparable permanent members of staff including any redundancy payments.

The University will not seek to enforce any redundancy waiver clauses.

The UCU reserves the right to oppose any compulsory redundancies.

Conclusion

The University recognises that this policy represents a significant cultural shift in the use of fixed-term contracts. However, the University believes that to meet both its legal and moral obligations, and to strengthen its sustainable research capacity, such a policy is both necessary and welcome.

This policy is endorsed by the University at the highest level and all managers and members of staff are obliged to comply with its content.