

Draft Regulations laid before Parliament under section 2(2) of the European Communities Act 1972 for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2001 No.

TERMS AND CONDITIONS OF EMPLOYMENT

The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2001

Made 2001

Coming into force xxx 2001

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SCHEDULE: Amendments to primary legislation.

The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972^(a) in relation to measures relating to employment rights and duties^(b), in exercise of the powers conferred on him by that provision hereby makes the following regulations—

PART I
GENERAL AND INTERPRETATION

Citation, commencement and interpretation

1. —(1) These Regulations may be cited as the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2001 and shall come into force on xxx.

(2) In these Regulations—

“the 1996 Act” means the Employment Rights Act 1996^(c);

“contract of employment” means a contract of service or of apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;

“employee” means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under a contract of employment;

^(a) 1972 c. 68.

^(b) See the European Communities (Designation) Order 2000 (S.I. 2000/738).

^(c) 1996 c. 18.

“employer”, in relation to any employee, means the person by whom the employee is or (except where a provision of these Regulations otherwise requires) where the employment has ceased, was employed;

“fixed-term contract” means a contract of employment—

- (a) which is made for a specific term which is fixed in advance, or
- (b) which terminates automatically on the completion of a particular task or upon the occurrence or non-occurrence of any other specified event other than—
 - (i) the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him, or
 - (ii) a breach of the terms of the contract of employment arising from conduct of the employee that, in the absence of the provision for automatic termination upon the breach and any provision in the contract to the contrary, would entitle the employer to dismiss him summarily;

and any reference to “fixed-term” shall be construed accordingly.

PART II

RIGHTS AND REMEDIES

Less favourable treatment of fixed-term employees

2. —(1) An employee employed under a fixed-term contract has the right not to be treated by his employer less favourably than the employer treats a comparable employee who is not employed under a fixed-term contract —

- (a) as regards the terms of his contract; or
- (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

- (a) the treatment is on the ground that the employee is a fixed-term employee, and
- (b) the treatment is not justified on objective grounds.

(3) The right conferred by paragraph (1) does not apply to any term of a fixed term contract to the extent that the term relates to—

- (a) the amount of pay due under the contract; or

- (b) membership of, or rights under, an occupational pension scheme within the meaning of the Pension Schemes Act 1993^(a).

(4) An employee is a comparable employee in relation to a fixed-term employee if, at the time when the treatment that is alleged to be less favourable to the fixed-term employee takes place—

- (a) both employees are—
 - (i) employed by the same employer, and
 - (ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and
- (b) the comparable employee works or is based at the same establishment as the fixed-term employee or, where there is no comparable employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

Right to receive a written statement of reasons for less favourable treatment

3. —(1) If an employee who considers that his employer may have treated him in a manner which infringes a right conferred on him by regulation 2 requests in writing from his employer a written statement giving particulars of the reasons for the treatment, the employee is entitled to be provided with such a statement within twenty-one days of his request.

(2) A written statement under this regulation is admissible as evidence in any proceedings under these Regulations.

(3) If it appears to the tribunal in any proceedings under these Regulations—

- (a) that the employer deliberately, and without reasonable excuse, omitted to provide a written statement, or
- (b) that the written statement is evasive or equivocal,

it may draw any inference which it considers it just and equitable to draw, including an inference that the employer has infringed the right in question.

(4) This regulation does not apply where the treatment in question consists of the dismissal of an employee, and the employee is entitled to a written statement of reasons for his dismissal under section 92 of the 1996 Act^(b).

^(a) 1993 c. 48.

^(b) Section 92(3) was amended by the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999 (S.I. 1999/1436), Article 3. Section 92(4)(b) was amended by the Employment Relations Act 1999 (c. 26), section 9 and paragraphs 1 and 5 of Part III of Schedule 4.

Right to receive information

4.—(1) An employee employed under a fixed-term contract has the right to be informed by his employer of any suitable available vacancy in the establishment.

(2) For the purposes of this regulation an employee is “informed by his employer” only if the vacancy is contained in an advertisement which the employee has a reasonable opportunity of reading in the course of his employment or the employee is given reasonable notification of the vacancy in some other way.

Unfair dismissal and the right not to be subjected to detriment

5. —(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part X of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (4).

(2) For the purposes of this regulation an employee is dismissed not only in the circumstances mentioned in section 95 of the 1996 Act but also where –

- (a) his contract of employment terminates automatically on the completion of a particular task or upon the occurrence or non-occurrence of a specified event;
- (b) his employment is not renewed (whether under the same contract or otherwise); and
- (c) the reason (or, if more than one, the principal reason) for the non-renewal is a reason specified in paragraph (4);

and for the purposes of the application of Part X of the 1996 Act to this regulation, section 95 shall be construed accordingly

(3) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, of his employer done on a ground specified in paragraph (4).

(4) The reasons or, as the case may be, grounds are—

- (a) that the employee has—
 - (i) brought proceedings against the employer under these Regulations;
 - (ii) requested from his employer a written statement of reasons under regulation 3;
 - (iii) given evidence or information in connection with such proceedings brought by any employee;
 - (iv) otherwise done anything under these Regulations in relation to the employer or any other person;
 - (v) alleged that the employer had infringed these Regulations; or
 - (vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations, or

- (b) that the employer believes or suspects that the employee has done or intends to do any of the things mentioned in sub-paragraph (a).

(5) Where the reason or principal reason for dismissal or, as the case may be, ground for subsection to any act or deliberate failure to act, is that mentioned in paragraph (4)(a)(v), or (b) so far as it relates thereto, neither paragraph (1) nor paragraph (3) applies if the allegation made by the employee is false and not made in good faith.

(6) Paragraph (3) does not apply where the detriment in question amounts to the dismissal of an employee within the meaning of Part X of the 1996 Act as it is required to be construed by this regulation.

Complaints to employment tribunals etc.

6. —(1) An employee may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 2, 4(1) or (subject to regulation 5(6)) 5(3).

(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—

- (a) in the case of an alleged infringement of a right conferred by regulation 2 or 5(3), with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them;
- (b) in the case of an alleged infringement of the right conferred by regulation 4(1), with the date, or if more than one the last date, on which other individuals, whether or not employees of the employer, were informed of the vacancy.

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(4) For the purposes of calculating the date of the less favourable treatment or detriment under paragraph (2)(a)—

- (a) where a term in a contract is less favourable, that treatment shall be treated, subject to paragraph (b), as taking place on each day of the period during which the term is less favourable;
- (b) a deliberate failure to act contrary to regulation 2 or 5(3) shall be treated as done when it was decided on.

(5) In the absence of evidence establishing the contrary, a person shall be taken for the purposes of paragraph (4)(b) to decide not to act—

- (a) when he does an act inconsistent with doing the failed act; or
- (b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to have done the failed act if it was to be done.

(6) Where an employee presents a complaint under this regulation in relation to a right conferred on him by regulation 2 or 5(3) it is for the employer to identify the ground for the less favourable treatment or detriment.

(7) Where an employment tribunal finds that a complaint presented to it under this regulation is well founded, it shall take such of the following steps as it considers just and equitable—

- (a) making a declaration as to the rights of the complainant and the employer in relation to the matters to which the complaint relates;
- (b) ordering the employer to pay compensation to the complainant;
- (c) recommending that the employer take, within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates.

(8) Where a tribunal orders compensation under paragraph (7)(b), the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

- (a) the infringement to which the complaint relates, and
- (b) any loss which is attributable to the infringement.

(9) The loss shall be taken to include—

- (a) any expenses reasonably incurred by the complainant in consequence of the infringement, and
- (b) loss of any benefit which he might reasonably be expected to have had but for the infringement.

(10) Compensation in respect of treating an employee in a manner which infringes the right conferred on him by regulation 2 shall not include compensation for injury to feelings.

(11) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(12) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(13) If the employer fails, without reasonable justification, to comply with a recommendation made by an employment tribunal under paragraph (7)(c) the tribunal may, if it thinks it just and equitable to do so—

- (a) increase the amount of compensation required to be paid to the complainant in respect of the complaint, where an order was made under paragraph (7)(b); or

- (b) make an order under paragraph (7)(b).

PART III

MISCELLANEOUS

Renewals

7. —(1) Where –

- (a) an employer engages an employee under a contract purporting to be a fixed-term contract (whether by renewal or otherwise);
- (b) that employee was previously continuously employed for a period of four years or more on a fixed-term contract or on a series of successive fixed-term contracts, and
- (c) there is no break in the employee's continuity of employment between the period of four years or more and his employment under the contract mentioned in sub-paragraph (a),

the provision of the contract mentioned in sub-paragraph (a) that restricts the duration of the contract shall be of no effect, and the contract shall accordingly be regarded for all purposes as being a contract of indefinite duration, unless the employer can show the engagement of the employee under a fixed-term contract to have been justifiable on objective grounds.

(2) In applying paragraph (1) in relation to an employee employed under a fixed-term contract (or one of a series of fixed-term contracts) on the day on which these Regulations come into force, any period of continuous employment falling before that day shall be disregarded for the purposes of paragraph (1)(b).

(3) For the purposes of paragraph (1) Chapter I of Part XIV of the 1996 Act shall apply in determining whether an employee has been continuously employed and whether there is a break in his continuity of employment.

Restrictions on contracting out

8. Section 203 of the 1996 Act^(a) (restrictions on contracting out) shall apply in relation to these Regulations as if they were contained in that Act.

Amendments to primary legislation

9. The amendments in the Schedule to these Regulations shall have effect.

^(a) Section 203 was amended by the Employment Rights (Dispute Resolution) Act 1998 (c. 8); section 203(2)(d) was amended by the Employment Relations Act 1999, section 44 and Schedule 9.3.

Liability of employers and principals

10.—(1) Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as also done by his employer, whether or not it was done with the employer's knowledge or approval.

(2) Anything done by a person as agent for the employer with the authority of the employer shall be treated for the purposes of these Regulations as also done by the employer.

(3) In proceedings under these Regulations against any person in respect of an act alleged to have been done by a worker of his, it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the worker from—

- (a) doing that act; or
- (b) doing, in the course of his employment, acts of that description.

PART IV

SPECIAL CLASSES OF PERSON

Crown employment

11.—(1) Subject to regulation 12, these Regulations have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees.

(2) In paragraph (1) “Crown employment” means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(3) For the purposes of the application of the provisions of these Regulations in relation to Crown employment in accordance with paragraph (1)—

- (a) references to an employee shall be construed as references to a person in Crown employment;
- (b) references to a contract of employment shall be construed as references to the terms of employment of a person in Crown employment;
- (c) references to dismissal shall be construed as references to the termination of Crown Employment; and
- (d) the reference to an occupational pension scheme in regulation 2(3)(b) shall be construed as a reference to a public service pension scheme within the meaning of the Pension Schemes Act 1993.

Armed forces

12. -(1) These Regulations-

- (a) do not apply to service as a member of the naval, military or air forces of the Crown, but
- (b) do apply to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996^(a).

House of Lords staff

13.—(1) These Regulations have effect in relation to employment as a relevant member of the House of Lords staff as they have effect in relation to other employment.

(2) In this regulation “relevant member of the House of Lords staff” means any person who is employed under a contract with the Corporate Officer of the House of Lords by virtue of which he is a employee.

House of Commons staff

14.—(1) These Regulations have effect in relation to employment as a relevant member of the House of Commons staff as they have effect in relation to other employment.

(2) In this regulation “relevant member of the House of Commons staff” means any person—

- (a) who was appointed by the House of Commons Commission; or
- (b) who is a member of the Speaker’s personal staff.

Police service

15.—(1) For the purposes of these Regulations, the holding, otherwise than under a contract of employment, of the office of constable or an appointment as a police cadet shall be treated as employment, under a contract of employment, by the relevant officer.

(2) In this regulation “the relevant officer” means—

- (a) in relation to a member of a police force or a special constable or police cadet appointed for a police area, the chief officer of police (or, in Scotland, the chief constable);
- (b) in relation to a person holding office under section 9(1)(b) or 55(1)(b) of the Police Act 1997^(a) (police members of the National Criminal Intelligence Service and the National Crime Squad), the Director General of the National Criminal Intelligence Service or, as the case may be, the Director General of the National Crime Squad; and

^(a) 1996 c. 14.

^(a) 1997 c. 50.

- (c) in relation to any other person holding the office of constable or an appointment as a police cadet, the person who has the direction and control of the body of constables or cadets in question.

PART V

EXCLUSIONS

Apprenticeship

16. These Regulations shall not have effect in relation to a fixed-term employee who is employed under a contract of apprenticeship.

Government training schemes etc.

17.—(1) These Regulations shall not have effect in relation to a fixed-term employee who is participating in a scheme, designed to provide him with training, work experience or temporary work, or to assist him in seeking or obtaining work, which is either—

- (a) a scheme provided to him under arrangements made by the Government, or
- (b) funded in whole or part under the European Social Fund.

(2) These Regulations shall not have effect in relation to a fixed-term employee whose employment consists in attending a period of work experience not exceeding one year that he is required to attend as part of a higher education course.

(3) For the purpose of paragraph (2) “a higher education course” means—

- (a) in England and Wales, a course of a description referred to in Schedule 6 to the Education Reform Act 1988^(a);
- (b) in Scotland, a course of a description falling within section 38 of the Further and Higher Education (Scotland) Act 1992^(b); and
- (c) in Northern Ireland, a course of a description referred to in Schedule 1 to the Further Education (Northern Ireland) Order 1997^(c).

Agency workers

18.—(1) These Regulations shall not have effect in relation to employment under a fixed-term contract where the employee is an agency worker.

^(a) 1998 c. 40.

^(b) 1992 c. 37; section 38 was amended by the Education (Scotland) Act 1996 (c. 43), Schedule 5, paragraph 9.

^(c) S.I. 1997/1772 (N.I. 15).

(2) In this regulation “agency worker” means any person who is supplied by an employment business to do work for another person under a contract or other arrangements made between the employment business and the other person.

(3) In this regulation “employment business” means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity.

Amendments to primary legislation

1. The Employment Tribunals Act 1996^(a) is amended as follows—

(a) in section 18(1)^(b) (cases where conciliation provisions apply)—

(i) at the end of paragraph (g), omit “or”, and

(ii) after paragraph (h), insert—

“or

(i) arising out of a contravention, or alleged contravention of regulation 2, 4(1) or 5(3) of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2001.”.

(b) in section 21 (jurisdiction of the Employment Appeal Tribunal) in subsection (1)^(c) (which specifies the proceedings and claims to which the section applies)—

(i) at the end of paragraph (i), omit “or”,

(ii) after paragraph (j) insert—

“or

(j) the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2001.”.

2. -(1) In section 105 of the 1996 Act (redundancy as unfair dismissal) in subsection (1)(c)^(d) (which requires one of a specified group of subsections to apply for a person to be treated as unfairly dismissed) for “(7E)” substitute “(7F)” and after subsection (7E) insert—

“(7F) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was one specified in paragraph (4) of regulation 5 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2001 (unless the case is one to which paragraph (4) of that regulation applies).”.

^(a) 1996 c. 17. Under section 1(2) of the Employment Rights (Dispute Resolution) Act 1998, the Act, formerly the Industrial Tribunals Act 1996, may now be cited as the Employment Tribunals Act 1996.

^(b) Section 18(1) has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

^(c) Section 21 has been amended on a number of occasions to specify additional proceedings and claims to which the section applies.

^(d) Section 105 has been amended on a number of occasions to specify additional circumstances in which an employee dismissed by reason of redundancy is to be regarded as unfairly dismissed.

(2) In section 108 of the 1996 Act (exclusion of right: qualifying period of employment) in subsection (3)^(a) (cases where no qualifying period of employment is required) omit “or” at the end of paragraph (hh) and after paragraph (i) insert—

“or

- (i) paragraph (1) of regulation 5 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2001 applies.”.

(3) In section 109 of the 1996 Act (exclusion of right: upper age limit) in subsection (2)^(b) (cases where upper age limit does not apply) omit “or” at the end of paragraph (hh) and after paragraph (i) insert—

“or

- (i) paragraph (1) of regulation 5 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2001 applies.”.

(4) Section 197 of the 1996 Act^(c) is repealed.

^(a) Section 108(3) was amended by S.I. 1999/1436, Article 3.

^(b) Section 109(2) has been amended on a number of occasions to specify additional cases where the upper age limit does not apply.

^(c) Subsections (1) and (2) of the 1996 Act were repealed by the Employment Relations Act 1999, sections 18(1) and 44 and Schedule 9.3.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations come into force on 10 July 2001 and implement Directive 99/70/EC (normally referred to as the Fixed-Term Work Directive) in Great Britain.

The Regulations give fixed-term employees the right in principle not to be treated less favourably than permanent employees of the same employer doing similar work in respect of terms and conditions other than pay. The right applies where the less favourable treatment is on the ground that the employee is fixed-term and is not justified on objective grounds. In addition the Regulations give fixed-term employees the right to be informed of suitable vacancies at the establishment where they work. These rights are exercisable by complaint to an employment tribunal.

The Regulations also provide that where a fixed-term employee who has been continuously employed on fixed-term contracts for four years or more is re-engaged on a fixed term contract without his continuity being broken, the new contract has effect under the law as a permanent contract.

A Regulatory Impact Assessment of the costs and benefits that these Regulations would have is available to the public from Employment Relations 5A, Department of Trade and Industry, 1 Victoria Street, London SW1H 0ET.