Recommendation to the Employment and Social Security Committee on the issue of Fixed Term Contracts and Unfair Dismissal

SECTION 1 - Introduction

The States approved the Employment (Jersey) Law 2003 on 8th July 2003 and it has been approved by Privy Council and registered in the Royal Court. The Law currently awaits an appointed day.

It is envisaged that the basic employment legislation will come into force early in 2005. This is due to the following factors;

- the subordinate legislation must be drafted,
- a political promise was made that the Employment Relations Law would be enacted on the same day as the Employment Law,
- a political promise was made to industry that a year's notice of the Minimum Wage rates would be given.

The Committee asked the Employment Forum to consult on two of the remaining areas on which subordinate legislation is required. This recommendation is based on the Forum's consideration of the responses to one of those issues; the effect of the unfair dismissal provisions on fixed term contracts, and the possibility that legislation or guidance might be required to deal with this.

Three issues of concern have specifically been considered:

- Protection from unfair dismissal at the end of a J category contract

- Protection from unfair dismissal at the end of any fixed term contract

- The unfair dismissal qualifying period for fixed term contracts of 26 weeks or less.

SECTION 2 - Other jurisdictions

The concept of unfair dismissal is generally adopted around the world, although different jurisdictions emphasise and interpret its application in their own way. Some of the different approaches are summarised below.

Europe

The European Council Directive on fixed term work (1999/70/EC of 28 June 1999) relates to the employment conditions of fixed term workers, with the exception of those placed by a temporary work agency at the disposition of a user enterprise. It is intended to consider the need for a similar agreement relating to temporary agency work.

The growth of fixed term contracts in several European countries has led to concerns that workers on fixed term contracts may be less favourably treated than workers on open-ended contracts. The aims of the European Framework Agreement on fixed term work are to: (a) improve the quality of fixed term work by ensuring the application of the principle of non-discrimination; and (b) establish a framework to prevent abuse arising from the use of successive fixed term contracts.

UK

Unfair dismissal provisions were amongst the first pieces of legislation to be introduced in the UK granting employees additional statutory protection. Protection from unfair dismissal is key to the workability of other protections that were subsequently introduced, including; working time, maternity rights and transfer of undertakings.

The right to complain of unfair dismissal in the UK has always been dependent on the employee establishing a qualifying period of service, except in specified cases. That period has often been amended and has ranged from 26 weeks to two years. It currently stands at one year.

The UK unfair dismissal legislation is based on the concepts of a “fair reason” for the dismissal and on “fairness” in the way the employer decides upon, and implements, a dismissal. In UK law, in cases other than automatically unfair dismissal, the employer must show the reason for the dismissal. That reason must fall within one or more of the following categories:

- it related to the **capability or qualifications** of the employee for performing work of the kind which he or she was employed to do. (“Capability” means capability assessed by reference to “skill, aptitude, health or any other physical or mental quality”; “qualifications” means “any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee held”)
- it related to the **conduct** of the employee;
- the employee was **redundant**;
- the employee could not continue to work in the position he or she held without either the employer or the employee **contravening a duty or restriction** imposed by or under statute;

• it was **some other substantial reason** of a kind such as to justify the dismissal of an employee holding the position which the employee held. (An employee's "position" is defined as meaning "the following matters taken as a whole – (a) his status as an employee, (b) the nature of his work and (c) his terms and conditions of employment".)

The employer has the right to show that the non-renewal of the fixed-term contract was fair (e.g. for valid business reasons.) However, if the employer cannot show a reason for the dismissal, or if that reason does not fall within the above list, then the tribunal must find the dismissal unfair.

The non-renewal of a fixed-term contract concluded for a specified period of time is a dismissal in law. Employees on task contracts of one year or more will have a right to a written statement of reasons for their dismissal and the right not to be unfairly dismissed. The end of a task contract that expires when a specific task has been completed, or a specific event does or does not happen, is also a dismissal in law. Examples include employees covering for maternity leave, peaks in demand, or setting up a database.

The Regulations do not apply to agency workers, i.e. those who have an employment contract or relationship with a temporary work agency, but are placed with and do their work for a third party.

Guernsey

The Guernsey unfair dismissal legislation provides that employees may waive their unfair dismissal rights in the event of non-renewal of a fixed term contract of two years or more. This means that an employee entering into a fixed term contract of two years or more can agree that the unfair dismissal protection does not apply to their contract.

The Employment Protection (Guernsey) Law, 1998, provides that a dismissal may be considered fair if it falls within one of five categories (that are basically the same as the UK categories):

a) related to the capability or qualifications of the employee to perform the work;
b) related to the employee's conduct
c) the employee was redundant
d) the employee could not continue to work in the position without a contravening a duty or restriction imposed by Guernsey law
e) some other substantial reason.

The guidelines to the law suggest the housing regulations and health regulations as examples of local laws that could be contravened, that is, the dismissal could relate to housing laws and be a fair dismissal under d) above.

SECTION 3 – Employment Forum's Consultation, 2001

In 2001, the Employment and Social Security Committee asked the Employment Forum to research the issue of unfair dismissal. The Forum produced a consultation paper providing information on the relevant issues, including details of how unfair dismissal and fixed term contracts are treated in other jurisdictions. The document was distributed to all those on the Forum's consultation database.

This section details the outcomes of that research and the Forum's previous "Recommendation on Unfair Dismissal", published in December 2001.

Qualifying Period

The Forum was aware that many organisations and members of the community were anxious that there should be a qualifying period for the right to claim unfair dismissal. Taking this into account, the Forum recommended that only those employees who have been employed for a period of 26 weeks or more, should be entitled to lodge a claim for unfair dismissal and have their case determined by a Tribunal.

The Forum recognised that a large proportion of the Island's workforce work under fixed term contracts and therefore recommended that the legislation should provide that consecutive fixed term contracts are to be aggregated. It was recognised that many employers may employ staff under fixed term contracts for valid business reasons. However, it is also believed that less scrupulous employers could utilise several fixed term contracts of less than six months with short gaps between them, so as to ensure that the qualifying period would never be satisfied and an employee, with perhaps a number of years service, may never be in a position to benefit from the unfair dismissal provisions. The Forum therefore recommended that the legislation should provide that fixed term contracts with gaps between them up to a maximum period of 26 weeks should be aggregated.

The Forum's recommendations have been incorporated into the Employment Law.

Two Thirds Rule

Concerns had been expressed that if a qualifying period for unfair dismissal were to be introduced, a number of employees who work either as seasonal workers or on short fixed term contracts would gain no protection. It was considered that protection would be needed for employees against employers offering only short fixed term contracts to avoid the accrual of service by employees and therefore prevent eligibility for statutory rights, including the right to claim unfair dismissal and possibly other benefits, such as bonuses. It was suggested that to overcome this problem, there should be a shorter qualifying period for short term contracts, whether seasonal or otherwise.

There was also a concern that employers should be allowed to enter into such contracts with their employees without the fear of being subjected to an unfair dismissal claim if the contact is not renewed, and that contracts must be allowed to expire naturally without the employee being entitled to make a claim to a Tribunal. The concept of time limited contracts is that both parties enter the agreement with the understanding that there is a

natural life to the employment relationship and that non-renewal of the contract should be seen as fair.

Jersey has a high proportion of seasonal and short term workers who are employed throughout the Island's industries and the Forum was of the view that, in order for the system to be equitable, such employees should be afforded unfair dismissal protection. It was therefore recommended that employees who enter into contracts of 26 weeks or less with a particular employer be an exception to the six month qualifying rule, and qualify to lodge a claim for unfair dismissal if they have completed a period of two thirds or more of their contract.

SECTION 4 - Unfair dismissal and fixed term contracts

The unfair dismissal provisions in the Employment (Jersey) Law 2003 protect employees against arbitrary termination of employment, but make it clear that employees also have responsibilities. In the same way as the UK and Guernsey legislation provides categories of reason that can justify dismissal, the Employment Law gives five specific types of reason:

- the capability or qualifications of the employee to perform work of the kind which he or she was employed to do;
- the conduct of the employee;
- redundancy;
- the employee could not continue to work without contravention of a Statute (e.g. when a delivery driver loses his licence);
- other substantial reasons which can be justified.

The test of unfair dismissal is one of "reasonableness". That is to say, having regard to all the circumstances of the case, whether it was reasonable to dismiss the employee or not. In certain circumstances the Law states that dismissal of an employee will be classed as "automatically" unfair, if it relates to reasons such as, the assertion of a statutory right and union membership or non-membership.

Fixed term contracts are utilised in both the public and private sector. The report at the beginning of the Employment Law states that, *"in order to avoid the artificial use of fixed term contracts by employers, the non-renewal of fixed term contracts will amount to dismissal, except where the job has come to an end (which will be construed as redundancy) and any of the other valid reasons described in the law."*

With regard to what constitutes a dismissal, article 62 of the Law provides circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to paragraph (2), only if) –

(a) the contract under which he is employed is terminated by the employer (whether with or without notice);

(b) he has been employed under a fixed term contract of employment, or a series of fixed term contracts, for less than such continuous period of time as may be prescribed, and the term of the subsisting fixed term contract expires without being renewed under the same contract; or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Paragraph 62(1)(b) is quite a wide provision, in that it allows for a maximum period to be set by regulation, above which any fixed term contract, or specified types of fixed term contract, may end after a prescribed period and **not be considered a dismissal**. It also allows for different periods to be prescribed for different types of fixed term contract.

Regulations do not have to be drawn up under this article, however if they were to be made, the right to claim unfair dismissal for specified fixed term contract workers may be subject to a maximum period, depending on the type or length of employment contract.

The provision at 62(1)(b) was specifically included by the Committee at a late stage of drafting due to concerns about protecting the States' housing and immigration policies. The intention was to allow the drafting of subordinate legislation, if required, enabling a J category contract to end and not be considered a dismissal. It had been suggested that a period should be prescribed, such as 3, 5 or 7 years, above which a fixed term contract would not be considered to be a dismissal for the purpose of the unfair dismissal provisions. Some have considered the resulting effect to be illogical - that the longer you work on a fixed term contract, the less protection you would be afforded by the Law.

This provision was included due to concerns that a dismissal may be found to be unfair if a contract is not renewed but the job itself continues. One type of contract that has been suggested could be specified under this provision is temporary agency work contracts, so that the end of a contract should not be considered a dismissal, as usually the job continues even thought the contract does not. This is often also the case with fixed term contracts in nursing and teaching, where the job must continue, but with a new J category employee. There is therefore a concern that the dismissal would be considered unfair, despite housing regulations limiting the renewal of the contract.

The J category (1 (1) (j)) regulations give the Housing Committee discretion to grant consent to essential employees to purchase or rent property, or to require such employees to be housed in accommodation owned or leased by their employers.

As part of the immigration policy, since 1987 the Housing Committee has been asked to make time restricted, rather than open ended contracts, wherever possible and use that time to train residentially qualified people to take over when J category contracts expire. Where a J category employee completes 10 years essential employment in Jersey, they have residential status in their own right under regulation 1 (1) (e) of the Housing Law.

A 3 year contract is usually given if there is someone ‘in the wings’ who is expected to be ready to take on the job at the end of that period, although this is not usually made explicit in the contract because it cannot be guaranteed that person will be ready or qualified by the end of that time. 3, 5 or 7 year contracts are the standard length of J category contract used, for example in health and teaching. However, the Forum has been advised that the issue may be complicated further given the recent decision to permit Health and Social Services J category contracts for 10 years.

Nurses are often given a maximum contract of 5 years and a formal application must be made to extend the contract by a further two years. After 7 years, the contract must end, unless the employee can be made permanent as part of the organisation’s annual quota, or the employee becomes residentially qualified during that time by some other means, such as getting married, or if they find alternative unqualified accommodation.

If alternative unqualified accommodation cannot be found, then the dismissal could be found fair for ‘some other substantial reason’, although it has been suggested that a

substantial reason should not include a reason such as housing status, which is extraneous to the individual's qualifications to do the job. However, the UK definition appears to be wide, including status as an employee, the nature of the work and terms and conditions of employment, and, as mentioned earlier, the Guernsey guide to the law specifically refers to the housing regulations as an example of a duty or restriction that might be contravened.

Both parties agreeing the intention at the outset of employment is very important. The Law Draftsman had advised that if the fixed term contract is properly drafted, such that it ends by mutual agreement at the expiry of a fixed term contract or J category licence, then the concept of unfair dismissal is unlikely to be raised.

The Two Thirds Rule

The Employment Law states that employees who enter into contracts for less than 26 weeks with a particular employer are an exception to the six month qualifying rule, and qualify to lodge a claim for unfair dismissal if they have completed a period of two thirds or more of their contract.

Paragraph 3 of article 73 provides the two thirds rule for the unfair dismissal qualifying period;

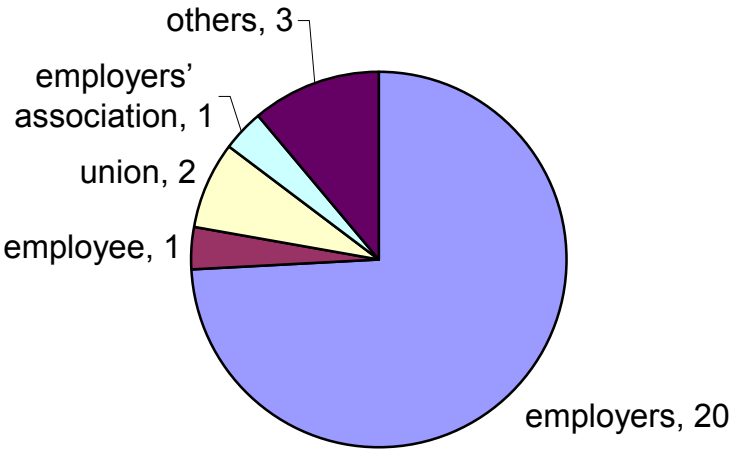
> (3) If an employee is employed under a contract of employment for a fixed term of 26 weeks, or such other period as may be prescribed, or less, Article 61 shall not apply to the dismissal of that employee unless at least two-thirds of the fixed term have expired on the effective date of dismissal, and for this purpose parts of a day that have expired shall be rounded up to a whole day.

This means that an employee on a 30 day fixed term contract would qualify for unfair dismissal protection after 20 days. Some have expressed concern regarding this effect in that it appears unfair, as a permanent employee would have to wait 26 weeks for such protection, which undermines the purpose of having a qualifying period.

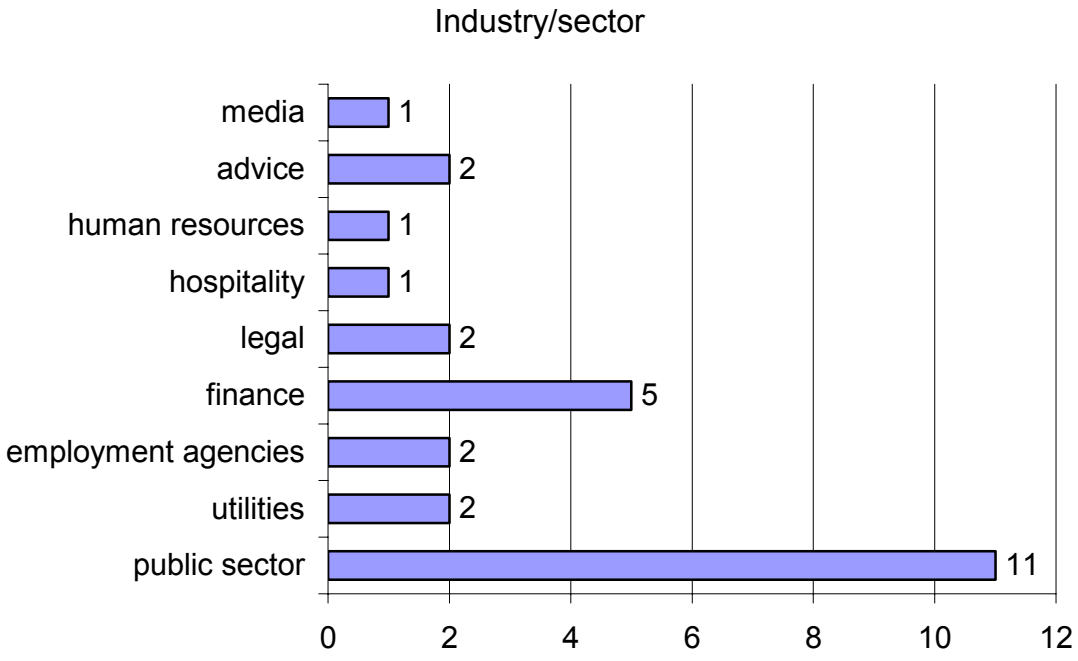
The two thirds rule was created to protect seasonal workers, but there is a need to balance this with the interests of businesses generally, where there is a need to employ people on a short term contract, without the danger of falling into unfair dismissal concerns. It has therefore been suggested that Regulations under the Employment Law should require an employee to have completed a minimum period of service in order to qualify for the two thirds rule for protection against unfair dismissal.

SECTION 5 – Consultation responses

27 responses were received from the following;



The industry type, or sector of respondents was;



A summary of the responses is provided below;

- 18 respondents said that a provision should be included in the law to allow a fixed term contract over a certain length to end without being considered a dismissal (and therefore neither fair nor unfair). 5 respondents said that there should not be such a provision.

Of those who said that there should **not** be such a provision in the law, reasons given included that fixed term contract employees should not be treated differently from permanent employees and should be offered some protection against dismissal. It was also argued that the results of such a provision would be illogical - the longer the fixed term contract the less protection such employees would be afforded.

- 4 respondents said that, if such a provision was included in the law, it should apply only to J category contracts and not other fixed term contracts. 19 respondents said that any such provision should **not** be limited to J category contracts.

Of those who said that such a provision should only relate to J category contracts, it was stated that, if there has to be a provision for fixed term contracts to end without being considered a dismissal, it should only relate to J category contracts, and only if it forms part of the contract and the fixed term contract matches the length of the J category (i.e. the maximum term should be the end of the J cat permit, rather than a specific period in years), and that there would still be protection against unfair dismissal during the contract, subject to the qualifying period.

Those who said that such a provision should **not** only relate to J category contracts, but also to other fixed term contracts, were generally of the view that J category status relates to housing and not to employment. Consents are granted for housing purposes, based on business needs and the availability of housing and are not a requirement of employment. If the J category licence expires and the job continues, the employee may chose to live in unqualified accommodation.

- 19 respondents said that provisions or specific regulations should be included in the law to allow other types of fixed term contracts to end without being considered a dismissal. 4 said that there should not be provision for other types of fixed term contract.

Of those who were in favour of such a provision for other types of fixed term contract, areas of concern appeared to be agency work, secondments, and contracts used specifically for training.

Two-thirds rule

- 22 respondents stated that there should there be a minimum period of service before which an employee on a fixed term contract of 26 weeks or less would not be entitled to claim unfair dismissal. 2 respondents said that there should not be a minimum period of service before the two thirds rule applies.

14 of those who were in favour of a minimum period of service expressed the additional view that it would be unfair for employees on contracts of 26 weeks or less to have more protection than permanent employees. It was also pointed out that there may be an excessive number of claims referred to the Tribunal if a claim may be made after working 2 days of a 3 day contract.

Some of those who were not in favour of a minimum period of service being incorporated into the law stated that a minimum period of service would undermine the two thirds provision for those on short term contracts and would leave employees vulnerable.

- When asked what the minimum period of service should be, the following periods were suggested;

4 weeks	2
12 or 13weeks	8
26 weeks to one year	14

A selection of other general comments

Fixed term contracts are necessary for cover during vacancies/recruitment, annual leave, suspensions, filing, etc. The possibility of unfair dismissal is a burden to the employer.

The law allows the end of a fixed term contract to cover maternity etc, to be an automatically fair dismissal, but all other contracts where the job potentially continues could be found unfair. There is no reason why a job covering a development / training post, or annual leave should not also be an 'auto fair' dismissal.

The intention seems to be to protect seasonal workers who are transient. Permanent employees have made a longer term commitment and have more to lose.

The law does not qualify how two thirds of the contract is to be calculated, but it will be difficult to establish the two thirds point of some contracts. Suggest using the following calculation - number of working days / 3 * 2.

Employers should identify the reason and terms and conditions of the fixed term contract when it is offered, and only if the contract deviates from the agreement would an unfair dismissal claim arise. If housing consent is issued for a specific purpose/project and the project or reason ends, provided the contract states these terms then it would meet with one of the current fair reasons for dismissal.

A practical way forward is, if the fixed term contract is properly drafted, such that it ends by mutual agreement at the expiry of a fixed term contract or J category licence, the concept of unfair dismissal is unlikely to be raised.

Proposals on Housing Regulations and the Regulation of Undertaking to go to the States in late 2004, the outcome of which is likely to have profound effect on the administration and management of immigration/population control.

SECTION 6 – Forum's recommendations

The Forum has consulted JACS and it appears that there are still a considerable number of cases of employees being dismissed just before the end of a fixed term contract before a bonus becomes due, particularly in hospitality and agriculture, but also in the finance sector. It also appears that States departments continue to make significant use of fixed term contracts, which may be due to concerns regarding headcount.

Fixed term contracts and unfair dismissal

The Forum recognises that the majority of respondents indicated that the Employment Law should include a provision allowing fixed term contracts to end without being considered a dismissal. However, this would give no protection to fixed term contract employees from unfair dismissal. It appears that some employers who responded want fixed term contact employees to have no protection against unfair dismissal, which goes against the original principles of the legislation and the provisions that were incorporated specifically to provide protection for fixed term contract workers.

The Forum considers that the majority of responses in favour of a provision allowing fixed term contracts to end without being a dismissal stem from a reluctance to change business methods and reluctance to give protection to fixed term employees. Evidence has been received which suggests that fixed term contracts are used to excess in some industries and are not being used for their intended purpose, i.e. employment for a genuinely limited period of time.

The Forum recommends that there should **not** be a provision allowing fixed term contracts (including J category contracts) to end without being considered a dismissal, and that they should therefore be subject to the current provisions to determine whether that dismissal was fair or unfair.

The Forum believes that there are other ways of dealing with fixed term contacts (and J category contracts). For example, a contract for an employee with a J category licence could state that the duration of the contract is linked to the training of a residentially qualified employee, or that the contract is linked to the length of the housing licence itself. The dismissal at the end of that contract might then be fair for 'some other substantial reason'. However a contract does not necessarily have to end on the expiry of the J category licence, as alternative unqualified accommodation may be found.

The Employment Forum recommends that no action should be taken to remove any protection currently afforded to agency workers, including protection against unfair dismissal, as with any other employees under the law.

Two thirds rule

The consensus from the responses is that there should be a 26 week qualifying period for employees on fixed term contracts of 26 weeks or less to become entitled to protection against unfair dismissal. This is contrary to the Forum's original recommendation providing protection via the two thirds rule for employees on short term contracts of 26 weeks or less, which has been incorporated into the Employment Law and agreed by the States.

Some respondents appear to have misunderstood the question, or have used it as a means of indicating that they do not agree with the two thirds rule, and that employees on contracts of 26 weeks or less should not be entitled to protection before a permanent employee (or an employee with a fixed term contract longer than 26 weeks).

Many respondents also suggested 12 weeks or 13 weeks as the minimum qualifying period for the two thirds rule on a contract of 26 weeks (or less). The Forum considered that either of these periods would give protection to those in hospitality and agriculture, and other industries who are typically given short contracts with a bonus at the end of the contract. The Forum is concerned that employers should not be able to circumvent the legislation.

The Forum recommends a 13 week minimum qualifying period for the two thirds rule, as is half of the standard unfair dismissal qualifying period (26 weeks) and the same period is used elsewhere in the law in relation to termination of employment.

The Law Draftsman's advice has been obtained regarding the insertion of a 13 week minimum qualifying period for the two thirds rule, which may be appropriately inserted into the primary law by amendment.

Calculation of 'two thirds'

To calculate when the two thirds point of a contract is may not always be easy, for example, a 17 week contract. The Forum recommends that a code of practice should outline the method of calculation – number of working days / 3 * 2.

Divide the total number of working days by two thirds. Working days are days on which the employee normally works, including public holidays if the person would normally work those days, i.e. if the employee is **contracted** to work on that day.

If a short term contract is not defined by a specific number of weeks, but is dependent on the completion of a specific task, e.g. an IT project, then determining the two thirds point of the contract becomes problematic. Both parties obviously need clarity in this situation and the Forum recommends that guidance is provided in a code of practice.

The Forum recommends that the code of practice states that the employer and employee should agree at the start of the contract what point should be considered to be two thirds of the way through the project or task. This may be an event or task, for example. It would be recommended that where possible, it would be better to give fixed term contracts for a specific time period.