

Principals Kit – Fixed Term Appointments

The fundamental principle upon which employment is based in New Zealand is that employees should be permanently employed unless there are *genuine reasons based on reasonable grounds* for a fixed term appointment. The relevant legislation governing this issue is s66 of the Employment Relations Act 2000.

Permanent employment of staff enhances a feeling of stability for staff and students, increases staff morale and shows a commitment to staff development. In a school setting, where some funding streams for the support of students with additional needs can be needs based or tagged to students, and staffing entitlements are governed by rolls which fluctuate, there are often concerns about how to ensure compliance with legislation and not expose your school to financial risk. Therefore it is essential to seek advice before entering into any fixed term employment arrangement.

Case law

The starting point when making an appointment should be that employment is permanent unless there is a genuine reason based on reasonable grounds for it not to be. Two pieces of case law are of particular relevance to schools when considering this, although advice should be always sought before offering a fixed term position.

In November 2005, *in New Zealand Educational Institute (Inc) v Board of Trustees of Red Beach School (ERA Auckland AA437/05, 7 November 2005)*, teacher aides were employed on fixed term agreements because funding was tied to the number of children enrolled. The Employment Relations Authority said that while this was a genuine reason, the roll was stable, there were always waiting lists for places, and roll fluctuations could be managed under the agreement's provisions for variations of hours. As such, while there was a genuine reason to have fixed term agreements, it was not based on reasonable grounds. The teacher aides were, therefore, deemed to be permanent employees.

The more recent [Employment Court decision in Morgan vs Transit Coachlines Wairarapa Ltd](#) [2019] NZEmpC 66 is also of particular relevance because it addresses the issue of uncertain funding. In this case, the plaintiff was a school bus driver who had been employed by Transit Coachlines on a series of fixed term contracts. Transit Coachlines argued that Mr Morgan's fixed term employment was necessary and justified as Mr Morgan's position as school bus driver was dependent on MOE funding under a series of contracts between Transit Coachlines, for which there was no guarantee of renewal. The Court did not accept this argument and held that the mere fact that financial uncertainty exists for an employer cannot in itself override the statutory requirements under section 66 of the Employment Relations Act. The Court accepted that there was a risk that the contracts between the MOE and Transit Coachlines might not be renewed and the Court also accepted that it was very likely that non-renewal would have a financial impact on Transit Coachlines. However, this financial uncertainty was nevertheless insufficient to justify employing Mr Morgan on a fixed term basis.

Genuine reasons for fixed term appointments

There are a number of school scenarios where fixed term appointments may be necessary for genuine, operational reasons. These include:

- Cover for approved leave of a permanent employee, such as parental leave, long term sick leave and study leave
- Employing an employee for a specific project that runs for a limited time
- Filling a temporary vacancy that has arisen on short notice and it is not practically possible to run a full recruitment process until later in the year.
- Making teaching appointments in schools with steadily and consistently dropping roll numbers where the Ministry of Education has provided the school with instructions not to make a permanent appointment to avoid a surplus staffing situation.

Reasons that will not be accepted as genuine justifications for term appointments

The following would not be accepted as being a *genuine reasons* for a fixed term appointment

- Employing someone on a fixed term basis as a trial to see how they measure up.
- Employing someone on a fixed term basis to limit the employee's statutory rights i.e. in terms of the employee's leave entitlements
- Employing a someone on a fixed term basis because the school's roll has increased for years but there is an imagined risk that next year may be different, because you never know with absolute certainty what the coming year will look like. (In this case, there are unlikely to be reasonable grounds for fixed term employment.)
- Employing support staff on rolling fixed terms despite there being an established pattern of ongoing work

The support staff "grey areas"

The uncertainty of the current mechanisms for funding support staff does not automatically constitute a valid reason for those support staff to be employed on fixed terms. The decision around whether each employee is permanent or fixed term comes down to a case-by case-determination.

As a general rule of thumb, where there is an ongoing established pattern of work from year to year, the support staff employee should be employed on a permanent basis. Recall that the Support Staff in Schools' Collective Agreement gives employers the ability to vary employees' hours annually. In most circumstances, this will be the appropriate tool to address fluctuations in funding. This notwithstanding, there may be some scenarios where it is clear at the outset that a position will need to end. Factual circumstances are crucially important in determining whether there are reasonable grounds for making the decision to employ someone on a fixed term basis. A consideration of the circumstances must be made for each specific offer of fixed term employment and advice sought before making that offer.

The NZEI Te Riu Roa advice is:

- When making an appointment start from the position of asking, “Is there a reason that this position could not be permanent?”
- Seek advice from the NZEI Te Riu Roa Principals Helpline (0508 774 624)
- If you are considering the appointment of an employee on a fixed term, seek NZSTA sign off (written) that the reason for the fixed term is genuine. If you make a fixed term appointment that is subsequently found to be non-compliant with section 66 of the Employment Relations Act and this results in costs to the school, your insurer will not cover these unless you have that NZSTA approval.
- When offering fixed term employment the prospective employee should be advised of the reason why fixed term employment is offered and their entitlement to seek advice on this. Appropriate time should be offered for this to occur.
- Where possible, avoid employing teacher aides on the basis of being attached to a specific child.
- The regular pattern of a support staff employee’s hours from year to year should be the basis for permanent hours of work. Clause 2.5 of the Support Staff Collective Agreement gives you the ability to vary a support staff employee’s permanent hours on a once per annum basis if you have a shortfall in funding. Any such variation in hours must be notified in writing and provide one month’s notice of the variation. *Note: Hours may not be reduced by more than 25%*
- NZEI Te Riu Roa and NZSTA have worked together to develop consistent advice to schools on this subject. Further material about fixed term appointments can be found at www.nzsta.org.nz

Letters of appointment

[NZSTA has templates for fixed term employment letters on their website.](#)

While these letters are agreed as valid by NZEI Te Riu Roa, many schools have chosen to add a paragraph along the following lines to the letters:

*It is your decision as to whether you opt to become a member of NZEI Te Riu Roa. If you do, you will be covered by the applicable collective agreement. **xxxx** School is a NZEI Te Riu Roa friendly school. If you seek further advice about the union you can speak to our onsite NZEI Te Riu Roa worksite representative (**insert name**), contact the union at 0800 693 443 or you can join online at www.nzei.org.nz/join*

Any letter of appointment for a fixed term employee must clearly state the *genuine reasons based on reasonable grounds* for the fixed term appointment. It must also state when the fixed term will end (i.e. a specific date) or the event that would bring the fixed term to an end (e.g. the return of the permanent employee from leave or the cessation of funding such as ACC).