

The Renewal of Fixed-Term Contracts: The Law

Nick Wood, November 2015

This paper, based mainly on documents in English, attempts to clarify for university teachers in Japan the main legal issues regarding the renewal of fixed-term contracts.

The information relates to the renewal and non-renewal of fixed-term labour contracts, statutory rights and responsibilities, ministry directives and standards, and relevant case law and custom. It is for guidance only. If there are any errors, please let me know.

Nick Wood, University Teachers Union, secretary.utu@nugw.org

Contents

1. Value judgement criteria
 2. Standards for the renewal of fixed-term contracts
 3. Completion of contract
 4. Concept of abusive dismissal or refusal to renew
 5. Amended Labour Contract Law (2012)
 6. Labour Contract Law (2012) and university teachers
 7. MHLW directives regarding fixed-term contracts
 8. Case Law
 9. Workplace custom
 10. General Union's response
 11. Summary
- Glossary
- Appendix
- References

1. Value judgement criteria

Deciding whether a teacher has a case to challenge a non-renewal of a fixed-term contract depends on not only on the soundness of the evidence but also on how this evidence may be judged in terms of rational expectations.

1.1 Subject: “objectively reasonable grounds”

Source: Employment Guidelines, MHLW (2013, p.2)

“In individual judgments on employment rules in Japan, value judgment criteria including “objectively reasonable grounds” and “based on social acceptability” (normative requirements) are used in cases such as dismissal, under the principle of good faith and a general rule prohibiting the abuse of rights.”

2. Standards for the renewal of fixed-term contracts

It has been mandatory since 2013 for a university, when hiring an employee (and renewing a contract), to clearly declare matters concerning the standards in the case of renewal of a fixed term employment. A teacher on a fixed-term contract should therefore know what standards will be applied at the time a contract is up for renewal.

2.1 Subject: Declaration of Terms and Conditions of Employment

Source: The Model Rules of Employment, MHLW (2013, p.10)

“Article 7 Clear Declaration of Terms and Conditions of Employment

1. An employer is required to clearly declare the terms and conditions of employment, such as wages, working hours and other conditions when hiring an employee. In such event, issuing a document especially for the following items from (1) to (6) (exception of the item with regard to wage increase) is mandatory (Article 15 of the Labour Standards Act, Article 5 of the Ordinance for Enforcement of the Labour Standards Act)

- (1) matters concerning the period of the labour contract;
- (2) matters concerning the standards in the case of renewal of a fixed term employment contract (apply only to the case of renewal of a fixed term employment contract) (came into effect on April 1, 2013).”

3. Completion of contract

The non-renewal of a fixed-term contract is conditional. If circumstances do not exist for a reasonable expectation of its renewal (see below), in principle, the contract is terminated on completion.

3.1. Subject: Completion of contract

Source: Employment Guidelines, MHLW (2013, p.47)

“In Japan, when there are no provisions on the purpose of use of a fixed-term labour contract, and when the term of a labour contract that specifies a contract term is complete, that labour contract is normally terminated.”

4. Concept of abusive dismissal or refusal to renew

The Supreme Court established the concept (or doctrine) of abusive dismissal by analogy, “abuse of the right to dismiss” (Okunuki, 2012) or “refusal to renew” (Baker & McKenzie, 2012). This occurs if the non-renewal of a fixed-term contract negates either one of two conditions: that the fixed-term contract is virtually indistinguishable from a permanent contract or that there is a reasonable expectation on the part of the employee that the contract would be renewed.

4.1 Subject: Doctrine of abusive dismissal

Source: Takeuchi-Okuno (2010, p.78)

“Thus, the Supreme Court established a rule regarding the refusal to renew a fixed-term employment contract that: (1) although in principle the contract would automatically expire at the end of the term, (2) the doctrine of abusive dismissal would be applied by analogy where (a) the contract is virtually indistinguishable from indefinite-term employment contracts, or (b) there is an expectation on the part of the employee that the employment relationship would continue, even if the contract were not virtually indistinguishable from indefinite-term employment contracts.”

5. Amended Labour Contract Law (2012)

The amended Labour Contract Law, passed in August 2012, enshrines into law the

concept of abusive dismissal. [Note: An English translation of the amended law is not available at the time of writing.]

5.1 Subject: Abusive dismissal and Labour Contract Law (2012)

Source: Baker & McKenzie (2012)

The amendment clarifies that, notwithstanding the expiration of a fixed period of employment, the employer may not refuse to renew a fixed period of employment agreement without a justifiable cause in either of the following circumstances:

- the fixed period of the employment contract has been repeatedly renewed and the refusal to renew is deemed as equivalent to dismissal of a permanent employee based upon social convention, or
- there is a reasonable cause for the employee to expect, at the time of expiration of the period, that the employment contract would be renewed.”

5. Amended Labour Contract Law (2012): Article 18

Article 18 of the Labour Contract Law (2012) entitles an employee whose contract has been renewed for a continuous period of five years or more to apply for permanent employment, effective from 1 April, 2013. Under this proviso, the earliest date that an employee can apply for open-ended employment is April, 2018.

5.2 Subject: Article 18 - Permanent contract after five years

Source: Employment Guidelines, MHLW (2013, p.48)

“When a fixed-term labour contract is repeatedly renewed for a total period of more than five years, it may be converted to a labour contract with no fixed term upon request by the worker. (Article 18 Labour Contract Act)”

5.3 Subject: Article 18 - Permanent contract after five years

Source: Revised Labor Contract Law –Important changes (Nakajima, 2013)

“The law only applies to the limited-term contract that began on April 1, 2013.

5.4 Subject: Switching to Indefinite Term Employment Contract

Source: The Model Rules of Employment, MHLW (2013, p.64)

“An employer should append the following clauses in the rules of employment, in the case where the separate set of rules of employment are drawn up for employees under a fixed term employment contract.” (See Appendix)

5. Amended Labour Contract Law (2012): Article 19

Article 19 of the Labour Contract Law (2012) states that when a fixed-term labour contract has been repeatedly renewed

(i) to make the contract effectively identical to a contract with no specified term due to their being repeatedly renewed, or

(ii) to make the worker conceive a reasonable expectation of continued employment in view of the repeated renewal,

if there are no objectively reasonable grounds and it is judged socially unacceptable for the employer to refuse the application, the employer shall be deemed to have accepted the application under the same working conditions as before.

5.5 Subject: Article 19 – Expectation of continued employment and renewal of contract

Source: Employment Guidelines, MHLW (2013, p.47)

“Article 19 of the Labour Contract Act states that, in cases such as (i) and (ii) above, when a worker applies for renewal of a fixed-term contract before the end of the contract term, if there are no objectively reasonable grounds and it is not deemed socially acceptable for the employer to refuse said application, the employer shall be deemed to have accepted the application under the same working conditions as before.”

In the absence of these two conditions (i) and (ii), if an employer refuses to renew a limited-term contract (*yatoidome*), employment ends with the termination of the contract (Nakajima, 2013).

5.6 Subject: Necessary procedure for renewal of fixed-term contract

Source: Revised Labor Contract Law –Important changes (Nakajima, 2013)

“For the text of the law to apply, the worker must apply for a renewal of a limited-term contract. (Even after the contract ends, it is subject to the law if a worker applies for it without delay.) A worker simply saying, “I refuse,” to the employer wishing to terminate

contract or convey his/her disagreement in any other way is considered effective.”

6. Labour Contract Law (2012) and university teachers

In 2013, following responses by universities to Article 18 of the Labour Contract Law, the MHLW and Ministry of Education, Culture Sports, Science and Technology (MEXT) made it mandatory that the period of continuous renewals of fixed-term contracts leading to permanent employment for university teachers and researchers should be raised from five to ten years.

6.1 Subject: 大学等及び研究開発法人の研究者、教員等に対する労働契約法の特例について

[Trans. On the special provisions of the Labour Contract Law for teachers and researchers in universities and research and development corporations, etc.]

Source: MHLW & MST (2014)

労働契約法の改正により、有期労働契約の濫用的な利を抑制し労働者の雇の安定を図ることを目的とした「無期転換ルール」が平成25年4月から導入されていますが、研究開発能力の強化及び教育研究の活性化等の観点から「研究開発システムの改革の推進等による研究開発能力の強化及び研究開発等の効率的推進等に関する法律及び大学の教員等の任期に関する法律の一部を改正する法律」（平成25年法律第99号）が平成25年12月13日に公布され、大学等及び研究開発法人の研究者、教員等については、無期転換申込権発生までの期間（原則）5年を10年とする特例が設けられました（平成26年4月1日施行）

Preliminary translation: A conversion rule has been introduced from April 2013 in order to reduce abusive use of fixed-term labour contracts due to the revision of the Labour Contract Law and to achieve stability in the employment of workers. From the perspective of education research and to strengthen research and development capabilities, to promote reform of the system of research and development and the efficient promotion and tenure of university teachers only the part of the law on the term of office of teachers, researchers, etc. has been amended (2013 Act No. 99), promulgated on December 13, 2013, establishing for researchers at universities and research and development corporation, for teachers, etc., the right to convert to indefinite employment after a period of ten years. (April 1, 2014 enforcement)

7. MHLW directives regarding fixed-term contracts

In 2003, the Labour Standards Law was amended to give authorization to the Ministry of Health, Labour and Welfare (MHLW) to issue directives regarding the renewal of limited-term contracts. These directives require the employer:

- to establish at the start of a fixed-term employment contract whether the contract will be renewed and, if there is the possibility of renewal, the criteria for renewal
- to give advance notice of refusal to renew contract
- to issue a certificate, if requested, stating the reason for refusing to renew a contract

7.1 Subject: MHLW directives regarding fixed-term contracts

Source: Employment Guidelines, MHLW (2013, p.48)

“When terminating employment under a fixed-term labour contract, an employer must give at least 30 days’ notice, and when the worker requests written certification of the reason for termination of employment, the employer must provide this without delay.

* Standards on the Conclusion and Renewal of Fixed-Term Labour Contracts and Termination of Employment (Ministry of Labour Notice No. 357, 2003), Article 1.”

7.2 Subject: MHLW directives regarding fixed-term contracts

Source: Takeuchi-Okuno (2010, pp.78 &79)

“The standards set in accordance with this amendment require an employer: (1) to notify employees clearly upon the initiation of a fixed-term employment contract, as to whether the contract will be renewed at the time of expiration and, if there is the possibility of renewal, the criteria for renewal; (2) to give at least 30 days advance notice if it is going to refuse a renewal of contract that had been previously renewed at least three times, or under which an employee had been employed for at least one year since his or her initial hiring; (3) upon request and without delay, to issue a certificate stating the reason for refusing to renew a contract in cases referred to in (2); and (4) to make the effort to extend as long as possible the term of a contract that had been renewed at least once and under which an employee had been employed for more than one year since his or her initial hiring, taking into consideration the actual

circumstances concerning the contract and the desires of the employee.”

Although it can be argued that these directives (or administrative standards) establish a reasonable expectation of how an employer will act (and they are certainly a basis for collective bargaining), directives do not have the force of statutory law, and there are no penalties if directives are flouted.

7.3 Subject: MHLW directives regarding fixed-term contracts

Source: Takeuchi-Okuno (2010, p.80)

“Rather, the amendment provides grounds only for procedural requirements, and compliance is pursued only through administrative advice and guidance i.e., no other sanctions, such as criminal penalties or modifications of contents of an employment contract, are provided.”

8. Case Law

If non-renewal of a fixed-term contract is legally challenged, courts take several factors into consideration, including the number of contract renewals, whether appropriate procedures have been followed, and the expectation of continuing employment.

8.1 Subject: Factors considered by courts

Source: Takeuchi-Okuno (2010, p.78)

“The courts decide whether the doctrine of abusive dismissal is applied by analogy, while thoroughly considering such factors as: (1) whether the work is of a permanent or temporary variety, (2) the number of contract renewals or the total duration of the employment relationship, (3) whether or not the procedure taken at renewal is appropriate, (4) how other employees in similar circumstances are treated at the time of renewal, and (5) whether an employer, by its words or deeds, provides an expectation that the employment relationship will be continued for a longer period.”

In addition, reference can be made to previous cases that have established precedents.

8.2 Subject: Toshiba Yanagi-cho Factory Case

Source: MHLW Employment Guidelines (2013, pp. 47-48)

“Toshiba Yanagi-cho Factory Case (Decision by the Supreme Court, First Petty Bench, July 22, 1974)

In this case, temporary workers who had joined a company based on labour contracts with a term of two months had their employment terminated after having their contracts renewed between 5 and 23 times. The court deemed the termination of their employment invalid.

When there is some indication or action from a company leading workers to expect long-term continuous employment, when no new contract conclusion procedures are undertaken at the end of each contract term, and when there are other circumstances such as that no examples of termination of employment on completion of a 2-month term for temporary workers can be found within the period in question, the legal principle on abuse of dismissal rights should be applied analogously when judging the validity of termination of employment.”

8.3 Subject: Hitachi Medico Case

Source: MHLW Employment Guidelines (2013, p.48)

“Hitachi Medico Case (Decision by the Supreme Court, First Petty Bench, December 4, 1986)

In this case, temporary workers who had been hired for an initially stipulated period of 20 days, and whose labour contracts with a term of two months had subsequently been renewed five times, had their employment terminated by the employer at the end of the contract term. The court deemed the termination of their employment valid.

Under certain circumstances, such as when personnel cuts are necessary in a factory where a self-supporting system is adopted, and it is not unreasonable to judge that the employment of all temporary employees needs to be terminated since there is no room for excess personnel for transfer, termination of employment of such workers cannot be deemed invalid, even when it was executed without attempting to reduce personnel by offering voluntary retirement to the workers with indefinite term of employment.”

9. Workplace custom

Workplace customs (*rōshi kankō*) are practices established over time with the tacit

understanding of management and employees and not laid down in law, rules of employment or contracts. These practices override law, rules of employment and contracts if they are beneficial to employees. (Okunuki, 2013)

Legally, three conditions apply for determining whether a customary workplace practice has been established (Okunuki, 2013):

1. The workplace custom has been repeated over a long period of time
2. Neither management nor employees have clearly rejected the practice
3. The custom is supported by the normative consciousness (*kihan ishiki*) of both parties, that is, both management and employees are aware that the custom must be followed

However, according to Okunuki (2013) “One rare example of a court accepting the validity of established workplace practice is the Nihon University case” (p.10). A department at Nihon University voted to deny the deferment of retirement of a professor. Law professors had previously never been refused deferred retirement, and this had been established at customary practice over a long period of time.

9.1 Subject: Establishment of workplace custom

Source: Tokyo District Court, 25 Dec 2002 (Okunuki, 2013, p.10)

“if a custom takes on the nature of being part of the labor contract between employer and employed, then it holds legal binding force regardless of whether it violates work rules”

10. General Union’s response

Q: Can my employer not renew my contract without offering me any reasons?

A: There is a new ordinance attached to Article 14 of the Labour Standards Law in regards to contract non-renewals. The Labour Bureau has explained it to the General Union like this:

In cases of contract non-renewals after the second contract has been signed, the employer must give a reason for the non-renewal if asked. Also, employers should now

give 30 days' notice for non-renewal prior to the end of such a contract. Unfortunately, these are only ordinances and when asked whether they were enforceable by the Labour Standards Office, officials answered that they didn't know.

Civil Law does deal with this issue but the only way to use this law for an individual is to sue the employer. Past civil rulings have said that a one year contract worker who has been renewed several times should be treated like a worker on an unlimited term contract and therefore an employer must have proper reasons for dismissal (non-renewal). In the past the General Union has been able to deal with this issue inside and outside of courts.

(General Union, Labour Standards Law Q&A)

11. Summary

- In a dispute with management, evidence may be judged not only in terms of the law but also in terms of rational expectations and social acceptability.
- From the outset, a university must clearly declare matters related to the renewal of a fixed-term employment contract.
- If circumstances do not exist for a reasonable expectation of its renewal, in principle, a fixed-term employment contract is terminated on completion.
- Abusive dismissal occurs if the non-renewal of a contract negates either one of two conditions: a) the fixed-term contract is virtually indistinguishable from a permanent contract or b) there is a reasonable expectation on the part of the employee that the contract would be renewed.
- These two conditions are enshrined in Article 19 of the amended Labour Contract Law (2012).
- Article 18 of Labour Contract Law (2012) gives employees the right to apply for open-ended employment after five years of continuously-renewed contracts, but in the case of university teachers, in 2013, this period was raised to ten years.
- MHLW directives state that a university must give advance notice of a refusal to renew a contract, and if requested, state the reason/s for refusing to renew the contract.
- Issues that courts will consider include the number of contract renewals,

whether appropriate procedures were followed, how other employees were treated, and whether there was a rational expectation that employment would continue.

- Established workplace custom may be considered a factor in determining rational expectations.
- If a university teacher's fixed-term contract is not renewed as expected, there may be a basis for a successful challenge.
- The union can offer support and representation, but it is the responsibility of an aggrieved teacher to know their contract, rules of employment, and to collate relevant evidence.

Glossary

<i>dankō kyōhi</i>	good-faith collective bargaining
<i>jōtai-setsu</i>	legal principle of abusive dismissal
<i>kaiko</i>	dismissal
<i>keiyaku shūryō-setsu</i>	principle that employment is terminated when the contract ends
<i>keiyaku</i>	contract, agreement
<i>nikan no sadame no nai koyō</i>	open-ended employment
<i>kihan ishiki</i>	normative consciousness – sense that one must follow a rule or custom
<i>rōdō iinkai</i>	Labour Commission
<i>rōdō keiyaku-hō</i>	Labour Contract Act
<i>rōdōsha</i>	worker/employee
<i>rōshi kankō</i>	a workplace practice established by custom rather than rules, contract or law
<i>shūgyō kisoku</i>	rules of employment
<i>tenka-setsu</i>	principle that employment becomes permanent after several renewals
<i>yatoidome</i>	refusal to renew fixed-term employment contract
<i>yūki koyō</i>	fixed-term employment

(Okunuki, 2012, 2013a, 2013b, 2015, et al.)

Appendix

Switching to Indefinite Term Employment Contract

An employer should append the following clauses in the rules of employment, in the case where the separate set of rules of employment are drawn up for employees under a fixed term employment contract. (The Model Rules of Employment, MHLW, 2013, p.64)

(Switching to Indefinite Term Employment Contract) Article 62 An employee who is employed under a fixed term employment contract where the total duration of term contracts is more than 5 years, is entitled to switch his/her contract term to an indefinite term contract by applying using a separately specified form. In such event, such switch shall take effect from the day following the last day of the current fixed term contract. 2. The total duration of term contracts described in the preceding paragraph means the total duration of fixed term employment contracts of an employee which starts after April 1, 2013. If the contract starts prior to the date, it means the period from the date until the last day of the contract. However, in the case where an employee goes without a contract for 6 consecutive months or longer, the term with contract prior to such interval shall not be included in the total duration of term contracts. 3. The terms and conditions of employment stipulated in these rules of employment remain in effect after such switch to an indefinite term employment contract pursuant to the provision in paragraph 1. However, the fixed age for retirement that applies to an employee who switches his/her employment contract to an indefinite term employment contract is established at age ____, and his/her retirement shall begin the last day of the month in which he/she reaches such fixed age for retirement (Article 45).

Note: The total duration of term contracts for university teachers is 10 years.

References

- [1] Baker & McKenzie (2012). *Japan: Amendment to the Labour Contract Act (Protection of Contract Employees)*. GlobalAutoIndustry.com. Retrieved from: <http://www.globalautoindustry.com/article.php?id=8889&jaar=2012&maand=10&target=Global>
- [2] General Union, Labour Standards Law Q&A. Retrieved from: <http://www.generalunion.org/law/lsl#16>
- [3] MHLW *Employment Guidelines* (2013). Retrieved from: http://www.kantei.go.jp/jp/singi/tiiki/kokusentoc/pdf/employment_guidelines.pdf
- [4] MHLW 大学等及び研究開発法人の研究者、教員等に対する労働契約法の特例について

- [Trans: *On the special provisions of the labour contract law for teachers and researchers in universities and research and development corporations, etc.*] (2014) Retrieved from: <http://www.mhlw.go.jp/file/06-Seisakujouhou-11200000-Roudoukijunkyouku/0000043387.pdf>
- [5] MHLW *The Model Rules of Employment* (2013). Retrieved from: <http://www.mhlw.go.jp/file/06-Seisakujouhou-11200000-Roudoukijunkyouku/0000102523.pdf>
- [6] Nakajima, Y. (2013). *Japan's Revised Labour Law*. JALT Tokyo chapter event, 3 July 2013. Translated and interpreted by Chie Matsumoto. Retrieved from: <http://www.tokyojalt.org/uploads/9/3/6/9/9369653/20130703laborcontractlaw.pdf>
- [7] Okunuki, H. (24 April, 2012). *No legal cure-all for fixed-term job insecurity*. Japan Times. Retrieved from: <http://www.japantimes.co.jp/community/2012/04/24/issues/no-legal-cure-all-for-fixed-term-job-insecurity/#.VIWgHJKhfIU>
- [8] Okunuki, H. (19 March, 2013a). *Labor law reform raises rather than relieves workers' worries*. Japan Times, p.13.
- [9] Okunuki, H. (16 July, 2013b). *Unwritten perks can trump laws, rules, contracts*. Japan Times, p.10.
- [10] Okunuki, H. (27 July 2015). *Three amigos on a mission to protect your rights*. Japan Times, p.9.
- [11] Takeuchi-Okuno, H. (2010). *The Regulation of Fixed-term Employment in Japan, Labour Policy on Fixed-term Employment Contracts*, 2010 JILPT Comparative Labour Law Seminar, The Japan Institute for Labour Policy and Training, pp. 69-84
Retrieved from: <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no.9.pdf>

Creative Commons license

Attribution-NonCommercial 4.0 International (CC BY-NC 4.0)

You are free to copy and redistribute the material in any medium or format; remix, transform, and build upon the material. You must give appropriate credit and provide a link to the license. You may not use the material for commercial purposes

<http://creativecommons.org/licenses/by-nc/4.0/>