

# Temporary Engagements under sections 112 and 113 of the *Public Service Act 1996*

## ISSUES AND GUIDELINES prepared by the Department of Employment and Industrial Relations

### INTRODUCTION

Public sector employers should be best practice employers. Engaging people on a temporary basis in accordance with sections 112 and 113 of the *Public Service Act 1996* (PS Act) allows an agency staffing flexibility to meet fluctuating service needs or temporary unforeseen reductions in the permanent workforce. However agencies should not misuse temporary engagements.

It is appropriate to engage employees on a temporary basis under sections 112 and 113 of the PS Act if the work to be undertaken is genuinely of a temporary nature, e.g. a special project or backfilling an employee on leave.

Section 113(1) of the PS Act provides “To meet temporary circumstances, a chief executive may employ a person as a temporary employee to perform work of a type ordinarily performed by an officer other than a senior executive”.

The principle that there should be limited use of temporary employment is enshrined in the Public Service Commissioner Directive 19/97, *The Employment of Temporary Employees Engaged on a Full Time or Part Time Basis* which states in clause 5 (emphasis added):

(a) *To ensure that temporary employees are employed only to meet temporary circumstances, chief executives shall ensure that all temporary employees are provided with an appointment letter. The appointment letter could include, but is not limited to, the following:*

(i) *The anticipated duration of the engagement.*

(ii) *Specified task.*

(iii) *Brief details of the range of duties to be undertaken during the course of the engagement (e.g. copy of the job description).*

(v) *Circumstances in which the engagement can be terminated by either party.*

(vi) *A clause indicating that the temporary employee is not eligible for Voluntary Early Retirement or Retrenchment provisions under a Directive of the Public Service Commissioner.*

(b) *Temporary engagements shall not be extended for any reason other than where there is a continued need to meet the temporary circumstances specified in the original appointment letter and, where extended, the temporary employee shall be advised in writing.*

It is not appropriate to use temporary engagements under sections 112 and 113 of the PS Act as an alternative to managing probationary periods. It is not appropriate to use temporary engagements as a means to trial employees instead of conducting merit selection and properly managed probation. Nor is it appropriate to use temporary employment as an alternative to managing performance.

## **FIXED TERM CONTRACTS**

There is a common misunderstanding that temporary engagements under sections 112 and 113 of the PS Act are fixed term contracts. This is not the case.

A fixed term contract is a contract of employment that is for a specified period of time. The two key consequences of a genuine fixed term contract is that there is no remedy for unfair dismissal under the relevant industrial relations legislation and no entitlement to severance benefits under award provisions for Termination, Change and Redundancy.

While an employment contract might purport to be a fixed term contract, there is considerable case law which establishes principles for properly characterising the nature of the employment contract.

Some broad indicia of fixed term contracts are outlined in *Ogilvie v Warlukurlangu Artists Aboriginal Association Incorporated* and these principles have been referred to in many other cases:

- *A specified period of time is a period of employment that has certainty as to its commencement and time of completion.*
- *A contract, which provides that after a specified period of time it may be reviewed and extended by consent, may still be a contract for a fixed period.*
- *Where a contract provides for termination during its life on grounds that are analogous to the common law right to terminate an agreement for misconduct or other breach, such may still be a contract for a fixed period.*
- *Where a contract provides a broad or unconditional right of termination during its term, the period of the contract is indeterminate and thus not for a specific period of time.*
- *The terms of the contract are to be objectively construed and in the absence of ambiguity their plain meaning is to be applied unless such would result in absurdity or clear injustice.*
- *A series of fixed term contracts may give rise to an understanding that the employment is in fact ongoing and not genuinely fixed term in nature.*
- *The whole of the contract is to be taken into account and provisions that are inconsistent with an intention to provide a fixed term (such as references of long service or entitlements beyond the stated period) may create ambiguity and need to be taken into account.”*

The two weeks' notice provision common in temporary appointments under sections 112 and 113 of the PS Act would be deemed to be “...a broad or unconditional right of termination” and such engagements would not be characterised by a tribunal as contracts for a specified period.

In *Otto Senagroun Banchit and St Mina's Global Restaurants Pty Ltd (U2003/5696)* the AIRC outlined provisions of employment contracts which are inconsistent with an intention to provide for a fixed term of employment:

- *the fact it may be reviewed on an annual basis;*

- *annual leave accruing once a minimum continuous period of employment has been completed;*
- *sick leave accrual;*
- *long service leave being available upon the completion of a certain number of years' continuous service; and or*
- *a probationary period applying in the first year of employment.*

Employees engaged under sections 112 and 113 of the PS Act are entitled to annual leave, long service leave and sick leave. Service as a temporary employee is recognised for the purpose of sick leave and long service leave upon appointment as an employee with tenure. Temporary employees engaged under sections 112 and 113 of the PS Act are clearly not engaged on fixed term contracts.

When industrial tribunals characterise the nature of an employment contract they also look behind the appearance of the contract and take into account whether the role, skills and responsibilities of the employee are appropriate to a contract for a specified period. As a general rule it is not appropriate to engage lower level employees on fixed terms contracts. Fixed terms contracts are more appropriate for professionals, technicians or other people possessing specialised skills sets which are required for a specific time or a specific project.

One reason for this is the remedies for termination of a fixed term contract. Breaches of fixed term contracts (including premature termination) are not litigated under industrial legislation which provides for remedies for unfair dismissal. Indeed section 72(1)(d) of the *Industrial Relations Act 1999* states such termination cannot be litigated in the industrial relations commission. Such matters are litigated in the civil courts where the losing party is liable for the legal costs of the successful party.

Employers who prematurely terminate fixed term contracts may be sued for breach of contract. The employer will not be liable for damages for breach of contract if the employer can establish that the employee was in fundamental breach of the contract. Courts have set the bar high for parties trying to establish fundamental breach of contract.

If the dismissed employee establishes breach of contract by the employer, the damages obtained by the employee are usually the employee's projected earnings under the contract. For example if an employee on a fixed term contract is terminated six months into a two year contract, the damages will be the amount the employee would have earned in the remaining 18 months of the contract. This is in stark contrast to the limit of six months wages on compensation for unfair dismissal under the statutory regime for unfair dismissal.

## **FIXED TERM CONTRACTS IN THE PUBLIC SERVICE**

Sections 69 and 70 are the provisions of the PS Act which should be used for fixed term contracts in the public service, not sections 112 and 113. Fixed term contracts under sections 69 and 70 require the approval of the Director-General of the Department of Employment and Industrial Relations or the Public Service Commissioner.

There are two Directives governing fixed term contracts under sections 69 and 70 – Directive 11/04 *Contracts for a Fixed Term* (which applies to employees remunerated at the senior officer level or above) and Directive 04/04 *Contracts for a Fixed Term – Officers*

*whose Remuneration is Less than that of a Senior Officer.* Directive 04/04 outlines the principles for use of fixed terms contracts. They can be used:

- to recruit or attract a person or persons with specialist skills for a major project;
- to recruit or attract a person or persons with specialist skills for a specified period;
- for incentive options to recruit or attract a person or persons in specialised roles;
- in commercialised operations which are competing with the private sector for business; or
- to offer incentives or benefits to recruit or attract staff to specialised roles in remote areas.

Each proposal for approval of an appointment to be made on a fixed term contract is to take the form of a business case.

### **TEMPORARY APPOINTMENTS UNDER SECTIONS 112 AND 113**

As most temporary appointments under sections 112 and 113 are for a period of up to 2 years, the appointment includes a provision for two weeks' notice by either party. While there is no fixed term contract, the end date of the temporary appointment marks the outer boundary of the employment.

Notice periods must be determined in accordance with section 84 of the *Industrial Relations Act 1999*. It should be noted that, while the IR Act outlines notice periods for periods of employment of greater than 3 years, the Queensland Government does not support temporary appointments for periods greater than 3 years.

#### **Unfair Dismissal**

If an employee works until the end date of the engagement there is no termination at the initiative of the employer, that is, there is no dismissal. The engagement has finished through the effluxion of time. However, if the temporary employment is terminated at the initiative of the employer within the period of time set by the appointment it may be an unfair dismissal.

If the Queensland Industrial Relations Commission (QIRC) finds the dismissal was unfair, the maximum compensation allowable under the *Industrial Relations Act 1999* is six months' wages. The QIRC rarely awards the maximum compensation and it is highly unlikely that an employee engaged under sections 112 or 113 who is dismissed unfairly before the end of the contract would be awarded the maximum compensation.

### **SERIES OF TEMPORARY ENGAGEMENTS**

Many public service agencies extend or "roll-over" temporary appointments or engage an employee on a series of temporary appointments under sections 112 and 113.

## Unfair Dismissal

In the private sector, if an employee has been engaged on a temporary basis and where the employment has extended past the initial period, a tribunal might characterise the employee as being engaged on an ongoing basis and award a remedy for unfair dismissal if the contract is not extended again.

However, with respect to employees who have been appointed under section 113(1) to “meet temporary circumstances” to perform the work of an officer, there is no remedy for unfair dismissal if the temporary engagement is not extended, rolled over or renewed.

In the *Carey* case, the Industrial Court of Queensland applied the High Court decision in *Sutling* which held that no agent of the Crown can engage someone contrary to the terms of the statute. The Industrial Court said that the *Industrial Relations Act* provides that reinstatement is the primary remedy for unfair dismissal but if the temporary engagement had not been renewed because the temporary circumstances no longer exist, then the employee cannot be reinstated because it would be contrary to section 113(1) of the PS Act .

The decision in *Carey* leaves open the possibility of a remedy for unfair dismissal if an agency has failed to manage poor performance or misconduct over a series of temporary engagements and then decides not to renew the temporary appointment when the “temporary circumstances” still exist.

For example, an accounts payable unit in a Shared Services Provider (SSP) usually has eight AO2 positions, two AO3 and one AO5 to effectively deliver services. The SSP employs five of the AO2 officers on a permanent basis and three temporary AO2 employees. One of the temporary AO2 employees has served three 12 month appointments and then her contract is not renewed. The real reason is poor performance but the SSP has no record of attempting to manage the poor performance of that employee. A new temporary AO2 is engaged to carry out the duties previously undertaken by the one whose contract was not extended.

Strictly speaking the employee is not entitled to severance benefits because they are not surplus. In such circumstances they might win an unfair dismissal case because objectively, the “temporary circumstances” still exist.

## Severance benefits

If the temporary circumstances no longer exist the person has become surplus and might be entitled to severance benefits under Directive 22/05 *The Retrenchment of Temporary Employees Engaged on a Full Time or Part Time Basis*.

The provisions regarding eligibility outlined in clause 4 of the Schedule of the Directive must be interpreted in the light of the application clause. The application clause states:

*This directive applies to employees engaged on a temporary basis under section 112(2)(a) and 113(2)(a) of the Public Service Act 1996 who can **reasonably be regarded as being employed on an ongoing basis.***

The key factor is whether the employee can reasonably be regarded as being an ongoing employee. This is an objective test (not what the employee believes or would like to be the case). It is not the case that a person who has more than one engagement over more than 12 months is entitled to severance benefits. Each case turns on its own facts.

For example an A03 who has become surplus after undertaking four consecutive nine month temporary engagements doing similar but different work (eg different functions within accounts payable) would be reasonably regarded as have being employed on an on-going basis. The fact that the employee might have held positions with different position numbers will not remove the entitlement to severance benefits.

By way of contrast, an A07 Project officer engaged on merit to back fill an officer on maternity leave for one defined period and then engaged, again on merit, for a second temporary contract to develop a specific policy unrelated to the role of the first position is less likely to be eligible for severance benefits. The surrounding circumstances including an appointment letter clearly specifying the temporary circumstances to be met, the fact of appointment on merit (even if by an EOI rather than full open merit), and the distinctly different roles, would work against reasonably regarding the person as having on-going employment.

## **RISK MANAGEMENT**

Agencies should manage their risk on the one hand but not create artificial arrangements to deny employees their just entitlements. To minimise risk, it is recommended that agencies:

- Clearly indicate why the person is being engaged on a temporary basis, i.e. specify the temporary circumstances which are being met;
- Make effective use of merit selection for temporary appointments (including EOI);
- Properly manage poor performance;
- Do not re-employ anyone who has failed to improve with performance management;
- If it is clear that an employee's performance is inadequate early in the initial temporary engagement, you may terminate their employment within the first three months of the initial engagement without having to manage their poor performance (a 3 month probationary period under the *Industrial Relations Act* excludes the employee for remedy for unfair dismissal). If the employee has been continuously engaged for more than 3 months, no matter how many temporary appointments, the exemption from unfair dismissal claims does not apply.