Memorandum

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EXECUTIVE DEANS
HEADS OF DEPARTMENT
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URGENT - ACTION REQUIRED

INTERIM AWARD IN NON-CONTINUING EMPLOYMENT CASE

The Full Bench of the Australian Industrial Relations Commission (AIRC) dealing with the non-continuing employment case in respect of academic staff brought down an interim award on 9 December 1996 introducing severance pay for many categories of fixed-term contract academic employees, and requiring written advice of non-renewal of contract.

This decision is going to have significant implications for departments and faculties and will almost certainly result in costs being incurred which have not been budgeted for.

Nature of Renewal or Non-Renewal of Contract

The most pressing part of the decision is that the University is required to give notice to non-continuing contract employees stating the reasons why the current contract is not being renewed. For staff whose contracts expire on or before 31 December 1996 notice is to be given by 17 December 1996. For staff whose contracts expire after 31 December 1996 the interim award requires a minimum period of notice of renewal or non-renewal of a contract to be based on the period of continuous service as follows:

<table>
<thead>
<tr>
<th>Period of continuous service</th>
<th>Period of notice required</th>
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<tr>
<td>More than one year but less than 3 years</td>
<td>3 weeks' notice</td>
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<tr>
<td>3 years and up to the completion of 5 years</td>
<td>3 weeks' notice</td>
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<tr>
<td>5 years and over</td>
<td>4 weeks' notice</td>
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Employees over the age of 45 years and who have two years' continuous service at the time of being given notice are entitled to one additional week's notice.

Severance Pay

The interim award provides that where the contract of a fixed term employee is not renewed because:

a) the same or substantially similar duties are no longer required by the employer; or

b) the duties continue to be required but another person has been appointed, or is to be appointed, to the same or substantially similar duties;

the employee shall be entitled to severance pay in accordance with the following scale:

A.C.2
Period of continuous service | Severance pay
---|---
More than one year but less than 2 years | 4 weeks' pay
More than 2 but less than 3 years | 6 weeks' pay
More than 3 but less than 4 years | 7 weeks' pay
More than 4 years | 8 weeks' pay

The scale of severance pay specified is based on the 1984 Termination, Change and Redundancy Test Case decision. It would appear that the clause is designed to cover all circumstances where the contract expires, though some circumstances could be imagined that do not fit neatly into either of the categories (a) or (b).

Exemptions

The decision indicates that the interim award has been designed not to create an obligation in relation to "shorter term employees who are engaged for a particular purpose, and who could not be seen as more 'regular' employees of universities". Accordingly, the following classes of fixed-term contract employees are exempt from the requirements in relation to notice and severance pay:

- casual hourly paid employees;
- "guest" lecturers who are not primarily employed in universities;
- "replacement employees" who are replacing, either directly or indirectly, an employee on leave or secondment;
- employees on a "first fixed-term contract" where that contract is for two years or less and contains an express provision that the contract is not renewable;
- employees engaged under a contract expressly related to and expiring upon the completion of a specified task or project to be undertaken by the employee;
- undergraduate or postgraduate students employed on work generally related to a degree course they are undertaking within the same academic year or an associated research unit.

It seems unlikely that many "first fixed-term contracts" currently in operation would satisfy the requirement that they contain an express provision saying that the contract is not renewable. Statements in relation to there being no expectation of renewal would not be sufficient.

Similarly, it is unlikely that provisions in existing contracts relating to research funding would exempt employees from these requirements. The exemption relates to employment in relation to a specified task or project to be undertaken by the employee. This would need to be said specifically in the contract (rather than implied by the nature of the funding) and reference to a general research project rather than the specific project for which the employee was engaged would not satisfy this requirement.

AIRC Reasons for Decision

The Full Bench, in its "reasons for decision", stated that:

"...we have decided that a case has been made out for some interim relief for those on rolled-over fixed-term contracts, whose work has been of an on-going nature. The award we make will deal only with some members of the class of employees who are on second or subsequent fixed-term contracts, although we make one exception for employees who are on a fixed-term contract that has a term in excess of two years."

The Full Bench took regard of the notion of fixed-term contract employees as an excluded category in the Termination, Change and Redundancy (TCR) provisions, and especially the fact that "the nature of employment patterns that have developed in universities are of a different character".

The Full Bench also noted that "decisions of the Industrial Relations Court of Australia have, in our view, reinforced the need to examine the use of rolled-over fixed-term contracts, and whether or not this type of employment method should attract some further award.
entitlements. The interim award ... has been designed as a cautious step, and does not create
an obligation for employees who are engaged for a particular purpose, and who could not be
seen as more 'regular' employees of universities'.

The Full-Bench also stated in its decision that "the contentions raised by the NTEU were
strongly denied by AHEIA ... (which) argued that the policies of universities were not
excessive, unfair or exploitative, and that the demands of the higher education sector required
flexibility in employment practices".

The interim award will operate until 1 July 1997 or until further orders are made by the AIRC.

What to do now

To comply with the interim award the University is required to give non-exempt employees
notice and reasons by 17 December 1996 in the first instance.

Using the Human Resource System the attached list of academic staff affected has been
prepared for your area. As Human Resources does not have information to identify exempted
employees and to meet the tight deadlines set by the AIRC, you are requested to identify those
employees who are required to be given notice and to provide the notice and reasons for non-
renewal of contract. To assist in this a pro-forma letter is attached. This letter, together with
the list of staff, is also available on email to assist in preparing letters using mail-merge
should you so desire.

Please forward a copy of any letters sent to the Payroll Section, Human Resources to be
placed on the staff member's file and to allow the preparation of severance pay in accordance
with the award. It would also be appreciated if you would forward a list of those staff who
you believe to be exempt, indicating the reasons.

Your urgent assistance in complying with these requirements of the Interim Award is
appreciated.

ALAN ROBSON
Deputy Vice-Chancellor