Use of Casual Employment

Contents

Authority and Application

Clause 19 of the *Victorian Public Service Enterprise Agreement 2024* (the Agreement) applies to Victorian Public Service (VPS) Departments and Agencies (Employers) and their Employees covered by the Agreement.

Overview

Clause 19 of the Agreement sets out the general reasons and limitations on the use of casual employment by Employers, as well as the rights of Employees employed on a casual basis, to be converted to ongoing employment in certain circumstances.

Clause 19 of the Agreement should be read in conjunction with clause 17 of the Agreement, which acknowledges the positive impact of secure employment on Employees and the obligations on Employers to preference ongoing forms of employment over insecure forms of employment wherever possible. In assessing their obligations under clause 19 of the Agreement, Employers must be mindful of the commitment in clause 17.2 of the Agreement to give preference to ongoing forms of employment wherever possible. For the purpose of this Policy, a Casual Employee means an Employee employed on a casual basis.

Relevant provisions of the Agreement

Clause 19 – Use of Casual Employment

Supplementary Guidance Information

1. Guiding principles for the Use of Casual Employment

1.1. Clause 19.1 of the Agreement sets out the overarching principles underpinning the use of casual employment in the VPS. Clause 19.1 of the Agreement states that the Employer must not use casual labour;

1.1.1. for the purpose of undermining the job security of ongoing Employees; or

1.1.2. for the purposes of 'turning over a series of casual workers' to fill an ongoing employment vacancy; or

1.1.3. as an overall means of avoiding obligations under the Agreement.

1.2. Clause 19.2 of the Agreement expands on clause 19.1 of the Agreement by providing that the employment of casuals is limited to meeting short-term work demands or specialist skill requirements that are not continuing and cannot be met by existing Employees.

1.3. Employers need to apply these fundamental principles in conjunction with clause 17.2 of the Agreement – Secure Employment, which provides that the Employer will give preference to ongoing forms of employment over casual and fixed term arrangements wherever possible.

1.4. Further (and more generally), Employers should be mindful of the Government's intention to facilitate more secure forms work and position the VPS as a model Employer.

1.5. Employers must keep these principles in mind when considering:

1.5.1. the engagement of a Casual Employee, to ensure that the engagement is for one of the reasons in clause 19.2 of the Agreement, and/or

1.5.2. whether reasonable business grounds apply when determining whether there is an entitlement to casual conversion.

1.6. Employers should interpret and apply these obligations broadly and not in a manner that could be seen to circumvent or limit the implementation of the fundamental guiding principles outlined above.

2. Permissible reasons for engaging Casual Employees

2.1. Employers may only engage an Employee on a casual basis for the purpose of meeting short-term work demands or specialist skill requirements that are not continuing and would not be anticipated to be met by existing Employee levels.

2.2. Employers should interpret these permissible reasons narrowly.

2.3. Whether employment on a casual basis is permissible under the terms of the Agreement should not be the only consideration when determining whether to engage an Employee on a casual basis. Employers should also consider the appropriateness of the engagement as a casual engagement, in the context of the underlying secure employment commitments in clauses 17 and 19 of the Agreement.

3. Application of Agreement entitlements to Casual Employees

3.1. Clause 19.4 of the Agreement provides that all provisions in the Agreement are to apply to Casual Employees, unless expressly stated otherwise.

3.2. Employers must ensure that Casual Employees receive the applicable entitlements in the Agreement and must not assume that the casual loading offsets those entitlements unless they are expressly excluded and/or where the term is listed in clause 35 of the Agreement as a term for which the casual loading is paid in lieu of.

3.3. For instance, Casual Employees are entitled to Long Service Leave in accordance with clause 69 of the Agreement, family violence leave in accordance with clause 59.6 of the Agreement, shift penalties when engaged in Shift work in accordance with clause 43.1(b) of the Agreement, and to Overtime payments in accordance with clause 46 of the Agreement.

3.4. Where unsure, Employers should seek advice from their local Human Resources or People and Culture Unit (or equivalent).

4. Interaction between the *Fair Work Act 2009* and Clause 19 of the VPS Agreement 2024

4.1. The provisions of the *Fair Work Act 2009* (Cth) (FW Act) as they relate to casual conversion do not automatically apply to Victorian Public Service Employers and their Employees. This is because of the operation of the *Fair Work (Commonwealth Powers) Act 2009* (Vic) (Referral Act), which excludes from the Victorian Government's referral of its industrial relations powers to the Commonwealth, matters pertaining to the number, identity or appointment (other than terms and conditions of appointment) of Employees in the public sector who are not law enforcement officers.

4.2. However, while these provisions of the FW Act do not legally apply, the Victorian Government has taken a policy position, that public service Employers and Employees should be subjected to the same secure employment regime as all other Employers in Australia and has asked its Employers to apply the FW Act provisions as if they did legally apply.

4.3. Given this, Employers must have regard to both the provisions of the FW Act and the casual conversion arrangements outlined in the Agreement when giving effect to the Government's secure employment commitments. The FW Act provisions and their interaction with the Agreement entitlements are explained in further detail below.

5. *Pathway* 1 Casual Conversion Arrangements in the Enterprise Agreement – Where an Employer is required to make an ongoing offer of Employment

5.1. Clause 19.5(a) of the Agreement provides that Employers must make an offer of ongoing employment to a Casual Employee, where the following criteria are concurrently met:

5.1.1. The Casual Employee has 12 months of continuous service; and

5.1.2. The Casual Employee has been employed on a regular and systematic basis over the last six months; and

5.1.3. The Casual Employee could continue to work as a full or part-time Employee without significant adjustment.

5.2. Where all three of the criteria are met, an Employer is required to make an offer of ongoing employment unless clause 19.5(b) of the Agreement applies. (See section 7 below)

5.3. Where all three criteria are met and clause 19.5(b) of the Agreement does not apply, clause 19.5(a) of the Agreement provides that an Employer is required to make an offer of ongoing employment. The offer must be:

5.3.1. in writing; and

5.3.2. at the same VPS Classification or equivalent as the Employee's casual role; and

5.3.3. consistent with the Employee's existing pattern of hours over the previous six months; and

5.3.4. given to the Employee within 21 days after the Employee has reached 12 months continuous service (subject to transitional arrangements at clause 19.6 of the Agreement - see paragraph 7 of this Common Policy).

5.4. The Employee has the right to request to be made ongoing where they believe that the Employer has failed to make an offer of ongoing employment consistent with clause 19.5(f) of the Agreement.

6. *Pathway 2* - Casual Conversion Arrangements in the *Fair Work Act 2009,* which are applied to VPS Employees by policy

6.1. The FW Act provides that, from 26 August 2024, Casual Employees, who have been employed for six months, may provide their Employer with written notification that they intend to change to permanent employment. Casual Employees can provide their Employer with a notification if they believe their current employment relationship no longer meets the FW Act's definition of casual employment and has not received a written notification from the Employer within the previous six months.

6.2. The Employer must provide a written response to the Employee's notification within 21 days after the notice was received and may only refuse a written notification on the grounds that:

6.2.1. the Employee's current employment relationship with the Employer still meets the FW Act's definition of Casual Employee;

6.2.2. there are fair and reasonable operational grounds for not accepting the notification such as:

- substantial changes would be required to the way work in the Employer's business is organised, or
- there would be significant impacts on the operation of the Employer's enterprise, or
- substantial changes to the Employee's employment terms and conditions would be reasonably necessary to ensure the Employer does not contravene either an

award or agreement that would apply to the Employee as a full-time or part-time Employee.

6.2.3. accepting the notification would result in the Employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

6.3. The general rule under the FW Act is that an Employee is only a Casual Employee if:

6.3.1. the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and

6.3.2. the Employee would be entitled to casual loading or a specific rate of pay for Casual Employees under the terms of a fair work instrument, or the Employee is entitled to such a loading or rate of pay under the contract of employment.

6.4. For further guidance on the application of the casual notification requirements under the FW Act please refer to the Fair Work Commission and Fair Work Ombudsman materials available online. Please see this link on the Fair Work Ombudsman's site. This link may be subject to change.

Transitional Arrangements under the FW Act:

6.5. The FW Act provided that Casual Employees who were employed prior to 26 August 2024 would continue to have access to the superseded FW Act provisions, which required Employers to notify and to convert eligible Casual Employees. These transitional arrangements applied until 26 February 2025.

7. Employment on a regular and systematic basis

7.1. In order to become eligible for casual conversion under clause 19.5(a) of the Agreement, the Employee, amongst other criteria, must have been employed on a regular and systematic basis. The FW Act does not define employment on a 'regular and systematic basis'.

7.2. Given this, case law is likely to be an important reference if a Casual Employee's eligibility for conversion is disputed.

7.3. In considering whether a Casual Employee has been employed on a regular and systematic basis, the Employer must keep in mind that:

7.3.1. it is the employment that must be on a regular and systematic basis, not the hours worked, and

7.3.2. the term 'regular' implies a repetitive pattern and does not necessarily mean frequent, often, uniform or constant.

7.4. Whether a casual is employed on a regular and systematic basis so that they are eligible for conversion will turn on the specifics of each individual case. Noting the FW Act does not define what regular and systematic is, things which may determine if a casual is employed on a regular and systematic basis for the purpose of casual conversion could include:

7.4.1. a clear pattern or roster of hours,

7.4.2. a repetitive pattern of work but which does not necessarily mean frequent, often, uniform or constant.

7.4.3. engagements which have a system, method or plan over the period

7.4.4. the Employer offering suitable work when it was available at times that the Employee had generally made themselves available, and work was offered and accepted regularly enough that it could no longer be regarded as occasional or irregular.

8. Effect of an Employee rejecting or not responding to an offer of conversion

8.1. Where an Employer makes an offer of ongoing employment under clause 19.5(a) of the Agreement and the Casual Employee declines or fails to respond to the Employer's conversion offer in writing within 21 days, either accepting or declining the offer, the offer is taken to be rejected. Employers should take reasonable steps to ensure the Employee has received the notification.

8.2. An Employer must not reduce or vary an Employee's hours of work or terminate an Employee's employment in response to the Employee rejecting an offer of casual conversion.

8.3. No further offers of casual conversion with respect to the role are required to be made by the Employer, noting that the FW Act provisions allow an Employee to make a new request for conversion after a period of six months.

8.4. Notwithstanding paragraph 8.2, a subsequent request for conversion by an Employee, who would have otherwise been eligible, should be treated in the same manner as required under clause 19.5(f) of the Agreement, which provides that conversion to ongoing employment will not be withheld unless one of the exceptions in clause 19.5(b) of the Agreement applies.

8.5. Employers should ensure they maintain proper records of the casual conversion offers made to ensure they have evidence to support that they took the appropriate actions as required by clause 19 of the Agreement. The records should include:

8.5.1. the written offer of conversion from casual to ongoing employment,

8.5.2. if accepted, the written acceptance by the Employee,

8.5.3. if rejected, the Employee's written rejection of a casual conversion offer,

8.5.4. evidence of the steps taken to make the offer and any failure of the Employee to respond to a casual conversion offer made by the Employer, and

8.5.5. any other correspondence or notes of relevant conversations regarding the casual conversion offer to ensure they have evidence to support that they took the appropriate actions as required by clause 19 of the Agreement.

9. Casual Conversion – Where an Employer is not required to make an ongoing offer of Employment:

9.1. Clause 19.5(b) of the Agreement states that an Employer is not required to make an offer of ongoing employment if:

9.1.1. There are reasonable business grounds not to do so; or

9.1.2. If the Employee has been continuously employed for 12 months but has not been employed on a regular and systematic basis for at least the last six months.

9.2. That is, clause 19.5(b) of the Agreement modifies the operation of clause 19.5(a) of the Agreement, by nullifying the requirement to make an offer of ongoing employment in the specific circumstances referred to in section 9.1 above.

9.3. Where an Employer is not required to make an ongoing offer of employment on the basis there are reasonable business grounds not to do so or because, whilst employed continuously

for 12 months, the Employee has not been employed on a regular and systematic basis for at least the last six months clause 19.5(c) of the Agreement states that Employers must provide written notice to an Employee of this consideration. This notice must:

9.3.1. Advise the Employee that the Employer is not making an offer of ongoing employment; and

9.3.2. Provide details of the reasons for not making the offer, including any reasonable business grounds; and

9.3.3. Be given to the Employee within 21 days after their continuous service has reached 12 months duration.

9.4. In effect, when clauses 19.5(a), 19.5(b) and 19.5(c) of the Agreement are read in conjunction, the requirement for Employers to provide a written notification of a 'non-offer' arises only where the criteria in clause 19.5(a) of the Agreement are concurrently met, but there are reasonable grounds which mean that the Employer is not required to make an offer of ongoing employment.

9.5. This notice must:

9.5.1. Advise the Employee that the Employer is not making an offer of ongoing employment; and

9.5.2. Provide details of the reasons for making the offer, including any reasonable business grounds; and

9.5.3. Be given to the Employee within 21 days after their continuous service has reached 12 months duration.

10. Application of Reasonable Business Grounds in the context of casual conversion

10.1. Clause 19.5(d) of the Agreement sets out examples of what may constitute reasonable business grounds, including that:

10.1.1. the Employee's position will cease to exist in the coming 12 month period; or

10.1.2. the hours which the Employee is required to perform will be significantly reduced in the coming 12 month period; or

10.1.3. there will be a significant change in either the days or times at which the Employee's hours of work are required to be performed in the coming 12 month period, which cannot be accommodated within the Employees' availability; or

10.1.4. making the offer would be inconsistent with Section 8 of the *Public Administration Act 2004* (Vic) (PA Act) (Public Sector Employment Principles). See section 12 below.

10.2. In considering whether reasonable business grounds apply, the onus will be on the Employer to ensure they can provide evidence and justification that the application of one of the listed exceptions applies to the particular circumstances.

10.3. Where reasonable business grounds apply and the Employer is not required to make an offer of ongoing employment, this does not mean an Employer should continue to offer casual employment in perpetuity. Reasonable business grounds may change or evolve over time, employers should ensure the engagements are consistent with the Government's secure employment commitments under clause 17 of the Agreement.

11. Case Studies – Casual Conversion

11.1. The following scenarios in relation to casual conversion have been provided to illustrate, in a general sense, the operation of the conversion to ongoing employment requirement. These scenarios are not intended to be comprehensive. Employers are encouraged to seek their own advice where they are unsure of their conversion obligations in any casual conversion scenario.

Scenario	Rationale
Jordan commenced employment with a VPS Employer as a casual 11 months ago, his shifts have been assessed as not being on a regular and systematic basis over the last six months.	Jordan is not eligible to be considered for conversion to ongoing employment as his employment does not meet the criteria outlined in clause 19.5(a) of the Agreement because he has not been employed as a casual for 12 months. Further he has not been employed on a regular and systematic basis over the past six months of his employment. The Employer is not required to provide Jordan with written notice under clause 19.5(c) of the Agreement because the 12 months criteria at clause 19.5(a) of the Agreement has not been met and also because he has not been employed on a regular and systematic basis for the past six months.
Meaghan commenced with a VPS Employer as a casual 19 months ago and has worked on a regular and systematic basis for the last 12 months to cover ongoing Employees who have been on leave. On the facts, it is highly arguable that she could continue working in that role on a part-time basis without significant adjustment. However, several of the ongoing Employees who have been taking leave are all due to return within the next three months.	While Meaghan's employment meets the three criteria outlined in clause 19.5(a) of the Agreement requiring the Employer to make an offer of ongoing employment, the fact that the incumbents return from leave in three months' time means the casual hours will not be offered after that time and the position will no longer exist. This is a reasonable business ground for not making an offer of ongoing employment (see clause 19.5(d)(i) of the Agreement), meaning clause 19.5(b) of the Agreement is enlivened). Under 19.5(b) of the Agreement where reasonable business grounds apply the Employer is not required to make an offer and the Employer must give written notice to the Employee in accordance with clause 19.5(c) of the Agreement.
Nolan is employed by a VPS Employer on a casual basis. Nolan commenced work with their Employer as a casual 22 months before 1 June 2025. For these 22 months they worked on a regular and systematic basis. Based on the circumstances they could continue in a full-time capacity without any adjustment.	Nolan's employment meets the three criteria of clause 19.5(a) of the Agreement that require the Employer to make an offer of ongoing employment. Unless a reasonable business ground applies, the Employer is required to make an offer of ongoing employment in writing in accordance with clause 19.5(a) of the Agreement. If the Employer fails to make an offer of ongoing employment, Nolan can request consideration of conversion to ongoing in accordance with clause 19.5(f) of the Agreement.
Rosa is employed by a VPS Employer on a casual basis. Rosa commenced work with DGS as a casual 15 months ago and for the last six months, has worked on a regular and systematic basis. Based on the circumstances, Rosa could continue working on a part-	As Rosa's employment meets the three criteria outlined in clause 19.5(a) of the Agreement, the Employer is required to write to her with an offer of ongoing employment. Rosa has not responded in writing to the offer of

Scenario	Rationale
time basis without significant adjustment. After the commencement of the Agreement, Rosa was offered ongoing employment, however, she has not responded in writing to the offer within 21 days.	ongoing employment within 21 days. It is taken that Rosa has declined the offer and Rosa can continue to work as a casual in accordance with clause 19.5(e) of the Agreement. Notwithstanding the above, Rosa may approach her Employer in the future to request conversion from casual to ongoing employment. In considering Rosa's request, the Employer will have regard to clauses 17.2 and 19.5(c) of the Agreement.

12. Transitioning from casual employment to ongoing Employment

12.1. Merit in employment processes and decisions is a fundamental concept in the Victorian Public Sector/Service. The PA Act provides that employment decisions in the public sector must be made based on merit and that employment processes need to reflect this. (see sections 3,7 and 8 of the PA Act).

12.2. Given the application of the PA Act, VPS Employers should not use the casual employment provisions of the Agreement to bypass the requirement for merit-based recruitment. Employers must proactively manage their merit-based recruitment processes to support the transition from casual to ongoing employment in circumstances where it is identified that there is an ongoing need for work to be performed or where conversion must be offered.

12.3. The general principle is that an offer of ongoing employment can only be made where a candidate is found suitable either through a merit-based process for the role or a merit-based process for a similar role. Employers are expected to ensure that any employment decisions have merit processes or justifications properly documented (see Part 8 of PA Act, Public Sector Employment Principles).

12.4. Where an Employee has been appointed to a casual position following a merit-based selection process and the role becomes eligible for conversion because of the operation of clause 19 of the Agreement, Employers may apply for an exemption to advertising and convert the incumbent Employee to an ongoing form of employment without the need for a further merit selection process.

12.5. Where a Casual Employee has not gone through a merit selection process but otherwise becomes eligible for conversion under clause 19 of the Agreement, then the Employer must balance the requirement for merit-based recruitment with the fact the Employee has been working in the role for a substantial period of time such that they have become eligible for conversion. That is, merit selection considerations should not be used as a basis to circumvent the intent of these provisions.

12.6. Where the Employee has otherwise demonstrated that they have the ability to fulfil the role over a substantial period of casual employment to allow them to become eligible for conversion, it may be appropriate for the Employer to apply for an exemption to advertising and convert the incumbent Employee to ongoing employment.

13. Effect of conversion from casual to ongoing employment on entitlements

13.1. Continuous paid service under casual employment engagements will be taken into account when an Employee is subsequently engaged on an ongoing basis (including in determining any probation period required).

14. Anti-Avoidance Provisions

14.1. An Employer must not reduce or vary an Employee's hours of work or terminate an Employee's employment, in order to avoid any right or obligation under clause 19 of the Agreement.

14.2. Some examples of anti-avoidance actions could include the following if they are taken in order to avoid any right or obligation under clause 19 of the Agreement:

14.2.1. reducing or varying hours of work,

14.2.2. changing pattern of work, or

14.2.3. terminating employment.

14.3. Despite the operation of the anti-avoidance provisions, it may be possible that an Employer takes actions listed in the anti-avoidance provisions for reasons that do not include an intent to avoid a right or obligation under clause 19 of the Agreement. In such cases it will be important for the Employer to demonstrate a clear rationale for why particular decisions were made.

15. Casual Employment Information Statement

15.1. Employers must give Casual Employees a copy of the Casual Employment Information Statement (CEIS) on commencement of employment. This requirement applies in addition to the requirement to provide the Fair Work Information Statement (FWIS).

15.2. The CEIS provides new Casual Employees with information about their conditions of employment and the circumstances in which it may be possible for their employment to be converted to ongoing employment.

15.3. A CEIS must be provided to new Casual Employees before, or as soon as possible after, they have started employment and then again:

15.3.1. after six months of employment, and

15.3.2. after 12 months of employment, and

15.3.3. then after every 12 months of employment.

15.4. In addition to the CEIS being provided to the Casual Employee, the Employer must provide access to this Policy to explain the differences between the CEIS and the casual provisions permitted by the Agreement and how they apply to the Employee.

16. Implications for Employers

16.1. Consistent with the Victorian Government’s commitments, these legislative and industrial reforms aim to reduce the prevalence of casual employment and promote secure employment. These arrangements should be implemented with this objective in mind.

16.2. The intent of the Parties in drafting clause 19 of the Agreement is to provide an avenue for casual conversion in circumstances where the work pattern is similar to more secure forms of employment where work is being performed on a regular and systematic basis over a reasonable period of time. Employers should interpret and implement clause 19 of the Agreement with this intent in mind.

16.3. The arrangement in the Agreement will eliminate or significantly reduce risk and complexity. However, casual arrangements entered into for a reason other than meeting short-term work demands or specialist skill requirements, which are not continuing and would not be anticipated to be met by existing Employee levels, will continue to expose Employers to being in breach of the Agreement.

Making decisions under this policy

Under s.20(1) of the *Public Administration Act 2004*, the public service body head has all the rights, powers, authorities and duties of an Employer, which will usually be delegated to staff within their Department or Agency. Employers should ensure that any actions under this policy are only taken by an Employee with the delegation to do so. Each Department and Agency should give effect to this policy in accordance with its own delegations.

Dispute resolution

An Employee who is directly affected by a decision made or action taken pursuant to clause 19 of the Agreement may apply for a review of actions under the Employer's review of actions policy or seek to resolve a dispute through the Resolution of Disputes procedure at clause 13 of the Agreement.

Further Information

Employees should refer to their Department or Agency's intranet for information on procedural requirements, systems and approval delegations.

For further information and advice please contact your local Human Resources or People and Culture Unit (or equivalent).

Related policies or documents

Common Policies

- Employment Categories and Secure Employment
- Review of Actions

All policies can be found at https://www.vic.gov.au/common-policies-victorian-public-service-enterprise-agreement.

Best Practice Employment Commitment

The Best Practice Employment Commitment can be found at: https://www.vic.gov.au/vps-best-practice-employment-commitment.

Authorised by Industrial Relations Victoria:

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