

**DISPUTE RE FIXED TERM CONTRACTS OF EMPLOYMENT
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00216

CORAM : PUBLIC SERVICE ARBITRATOR
SENIOR COMMISSIONER S J KENNER

HEARD : MONDAY, 3 FEBRUARY 2020
WRITTEN CLOSING SUBMISSIONS 8 &
18 FEBRUARY 2020

DELIVERED : FRIDAY, 17 APRIL 2020

FILE NO. : PSACR 19 OF 2019

BETWEEN : CIVIL SERVICE ASSOCIATION (INC.)
Applicant

AND

DEPARTMENT OF WATER AND ENVIRONMENTAL
REGULATION

Respondent

Catchwords : Public Service Commissioner's Instruction 23 – Conversion of fixed term contract and casual employees in WA public sector to permanent status – Employee employed on series of fixed term contracts over several years – Principles of interpretation applied – Employee did not meet requirements to be eligible for conversion to permanency – Application dismissed

Legislation : *Industrial Relations Act 1979* ss 44(9), 80C(1)(a);
Public Sector Management Act 1994 ss 22A(7), 64(1)(b);
Interpretation Act 1984 (WA)

Result : Application dismissed

Representation:

Counsel:

Applicant : Mr M Amati
Respondent : Mr J Carroll of counsel

Solicitors:

Applicant :
Respondent : State Solicitor's Office of Western Australia

Case(s) referred to in reasons:

Civil Service Association Inc v Department of Water and Environmental Regulation [2019] WAIRC 00794; 100 WAIG 138

Patman v Fletchers' Fotografics Pty Ltd (1984) 6 IR 471

Case(s) also cited:

Ancor Limited v Construction, Forestry, Mining and Energy Union (2005) 222 CLR 241

Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union [2018] FCAFC 223; (2018) 363 ALR 343

City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union [2006] FCA 813

Director General, Department of Education v SSTU (2019) 99 WAIG 1609

Norwest Beef Industries Limited and Anor v AMIEUW (WA Branch) (1985) 12 IR 314

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 347 ALR 405; 91 ALJR 936

Tulloh v CEO, Department of Corrective Services [2020] WASCA 10

Reasons for Decision

1 The present matter is referred for determination under s 44(9) of the *Industrial Relations Act 1979* (WA). The background to the application is set out in my earlier reasons for decision of 7 November 2019 in relation to an application for interim orders made by the applicant on behalf of its member, Mr Byrnes: *Civil Service Association Inc v Department of Water and Environmental Regulation* [2019] WAIRC 00794; 100 WAIG 138. The dispute referred for determination is set out in the schedule to the s 44(9) memorandum which is in the following terms:

1. The parties are in dispute in relation to the conversion to permanency of the applicant's member Mr Byrnes, who was employed by the respondent as a Manager, Process Industries Regulatory Services. The applicant refers to and relies upon cl 2 of the Commissioner's Instruction No. 23, which sets out criteria for the conversion of fixed term contracts and casual employees engaged in the public sector, to permanency.
2. Mr Byrnes was engaged by the respondent on a series of fixed term contracts since in or about August 2015, it is alleged. On 10 June 2019, the respondent informed the applicant by letter, that the respondent did not consider Mr Byrnes was eligible for conversion to permanency. Subsequent discussions between the parties were not successful in resolving the dispute.
3. The applicant maintains that Mr Byrnes is eligible to be converted to permanent, on-going employment on the basis that the criteria in cl 2.1 of the CI are met. These criteria are that:
 - (a) the reason for engagement on a fixed term contract is not a circumstance mentioned in the relevant industrial instruments; and
 - (b) the employee has completed two or more years of continuous service in the same or similar role; and
 - (c) the employee is not subject to formal disciplinary or substandard performance action at the time of assessment.
4. Specifically, the issue is whether, in accordance with cl 2.1(a) of the CI, Mr Byrnes' "reason for engagement on a fixed term contract" is, or is not, due to "a circumstance mentioned in the relevant industrial instruments". The respondent maintains that Mr Byrnes was engaged on a fixed term contract from October 2018 to cover a period of leave whilst the substantive occupant of the position was in another position, in an acting capacity. This is disputed by the applicant.
5. The applicant seeks an order that Mr Byrnes be eligible for conversion to permanency and that he be made a permanent employee under CI 23.
6. The respondent's position is that cl 2.1(a) of the CI is not met and it objects to and opposes the applicant's claim.

- 2 The matter in dispute largely turns upon the proper interpretation of CI 23, which sets out a procedure for the conversion of fixed term contract and casual employees engaged in the public sector in this State, to permanency. Specifically, as reflected in the referral set out above, the principal issue in this case is whether Mr Byrnes satisfies the criterion in cl 2.1(a) of the CI.

The facts

- 3 The essential facts in this matter are not really in dispute and they are as follows. Mr Byrnes has Bachelor of Science and Master of Business Administration degrees. He has held a number of positions prior to his employment by the respondent in 2015. These included with the Department of Environmental Protection from 1997 for several years before working in the private sector from 2011. Mr Byrnes commenced his employment with the respondent in August 2015 on a fixed term contract as a Principal Strategy and Reform Officer. Copies of Mr Byrnes' various fixed term contracts were contained in a bundle of documents tendered by the parties as exhibit A1. The 18 contracts identified by Mr Byrnes were generally for periods of about one year and some were for a few months only. The contracts involved Mr Byrnes mainly working in the position of Manager Licensing (Process Industries) from November 2016 through to October 2019.
- 4 A summary of Mr Byrnes' employment history under these various fixed term contracts was helpfully set out in an aide memoire to the respondent's written submissions. This document refers to the dates of the various fixed term contracts; their length; the title of the position occupied by Mr Byrnes and what the respondent contended was the reason for the appointment under the contract. This document also is cross-referenced to the relevant fixed term contract documents contained in exhibit A1. In relation to some of these positions, Mr Byrnes testified that he took part in an expression of interest type of process, which he said involved some degree of merit selection. As to how the contract renewal process took place, Mr Byrnes testified that in most cases, the fixed term contract just "rolled over". The exception to this was the few where the appointment was based on an expression of interest and he was required to apply for the particular position.
- 5 Mr Byrnes further testified that he has had no adverse performance assessments and this was not in dispute. He also maintained that from his history of appointments in the same or similar positions, he has had at least two years' continuous service in a similar role for the respondent.
- 6 There was some contention about the basis of Mr Byrnes' appointment to some of the fixed term contract positions, as to whether this was to provide one-off

periods of relief or for some other reason, contemplated in the relevant industrial agreements. I will consider this issue in more detail later in these reasons. This issue relates to the contract between July and December 2018, where the substantive occupant of the position, Mr Bailes, was appointed to an acting higher position of Senior Manager - Industry Regulation (Process Industries). In essence Mr Byrnes, in the fixed term contract position concerned, reported to Mr Bailes. Mr Bailes had in turn been appointed to his acting position, because its substantive occupant, Mr Schuller, was appointed to a higher position of Acting Director Regulatory Services (Environment). It was common ground that Mr Bailes resigned from his employment with the respondent in late 2018. Thus, in effect, over these periods, both Mr Bailes and Mr Schuller were “acting up” in higher positions, leading to Mr Byrnes filling Mr Bailes’ substantive position over this time period. Mr Byrnes in his evidence said he was aware of this.

- 7 In relation to the few positions that Mr Byrnes occupied resulting from an expression of interest process, he said that the process was internal. Both Mr Schuller and Mr Bailes assessed Mr Byrnes’ suitability for the positions. No interview was conducted and no selection criteria or any assessment report was prepared. This was largely confirmed on the evidence of Mr Schuller, who was called on behalf of the respondent.
- 8 After Mr Bailes left the respondent’s employment, Mr Byrnes had two further fixed term contracts, in January and April 2019 respectively. Evidence was given by the respondent’s Manager People Services, Mr Murphy. He testified that both short-term contracts were offered to Mr Byrnes to enable the CI 23 conversion review process, which had started in late 2018, to see its course. This was also set out in the bundle of documents at pp 121 and 127, in the respondent’s “Human Resources Request Form”. It was also common ground that Mr Byrnes applied for substantive appointment to management positions at the respondent in early 2019, but he was assessed by the respondent as not being suitable for the roles.

Relevant provisions of CI 23

- 9 CI 23 has as its stated intent to “provide a framework for the conversion and permanent appointment of *current* fixed term contract and casual employees, subject to applicable criteria being met” (my emphasis). By its scope and application, it “is limited to persons employed at the time of the commencement of this Instruction”. The CI commenced on 10 August 2018. For present purposes, clauses 1.1, 1.2, 2, 3.1 and 4.2 are particularly relevant. Given the discussion to follow, it is convenient to set those provisions out now. Clause 1

deals with a review of the status of fixed term contract employees and cls 1.1, 1.2 and 1.3 are in the following terms:

- 1.1 Employing authorities shall conduct a review of current fixed term contract employee arrangements to:
 - (a) identify the reason for the engagement of each fixed term contract employee; and
 - (b) determine whether a fixed term contract employee has met the criteria in clause 2 and if so, shall offer to convert or appoint the fixed term employee to permanency in accordance with clause 4.
- 1.2 The employing authority shall commence the review as soon as possible after the commencement of this Instruction, taking into consideration the requirements at 1.3.
- 1.3 The employing authority shall provide the names, business email addresses and work locations of fixed term contract employees who will be subject to the processes in this Instruction to the relevant union/s no less than 30 working days prior to the commencement of the review, or as otherwise agreed to by the employing authority and the relevant union.

10 Additionally, cl 2 deals with criteria for converting or appointing a fixed term contract employee to a permanent role. The most contentious part for present purposes is cl 2.1(a). Clause 2.1 is as follows:

- 2.1 The criteria for conversion or appointment to permanency of a fixed term contract employee are as follows:
 - (a) the reason for engagement on a fixed term contract is not a circumstance mentioned in the relevant industrial instruments; and
 - (b) the employee has completed two or more years of continuous service in the same or similar role; and
 - (c) the employee is not subject to formal disciplinary or substandard performance action at the time of assessment.

11 A proper assessment of merit is dealt with in cl 3.1 of the CI and it states:

- 3.1 Where all the provisions in clause 2 are met, and the employing authority forms the opinion that the employee has not been subject to a proper assessment of merit for their role, a proper assessment of merit shall be undertaken in accordance with clause 10.

12 Finally, cl 4 of CI 23 concerns the outcome of a review for fixed term contract employees and cl 4.2 relevantly provides:

- 4.2 Subject to clauses 11 and 12 of this Instruction, and if all of the criteria in clause 2.1 and the requirements in clauses 3 and 5 are met, then:
- (a) where the employee is to remain in their current role, the employing authority shall offer to convert or appoint the employee to permanent, at the employee's substantive level of classification; or
 - (b) where the current role is not required on an ongoing basis, but a similar role will be, the employing authority shall offer to appoint or employ the employee permanently to that role at the employee's substantive level of classification.

Interpretation of CI 23

13 CI 23 is not an industrial instrument such as an award or an industrial agreement. It is an administrative instrument made under s 22A of the *Public Sector Management Act 1994* (WA), although it is not considered to be subsidiary legislation for the purposes of the *Interpretation Act 1984* (WA). Despite this however, I agree with the written submissions of the respondent that it is appropriate to interpret CI 23 in accordance with the usual canons of statutory interpretation, making due allowance for the fact that it may not have been drafted with the skill, attention and felicity of expression of parliamentary counsel.

14 This being so, the starting point in the interpretation of CI 23 must be the text. In this respect, in Pearce D, *Statutory Interpretation in Australia* (8th Ed), 2019, the learned author, when dealing with the contemporary approach to statutory interpretation observes at par 2.1:

2.1 In a statement that has come to be quoted as the present basis for interpreting legislation, the plurality (Kiefel CJ, Nettle and Gordon JJ) in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 347 ALR 405; 91 ALJR 936 at [14] said:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

The courts recognise that the application of this approach will in most cases lead a court to having to make what is commonly referred to as a 'constructional choice'. The following observations of Gageler J in *SZTAL* at [37]-[39] are important to the making of this choice:

...The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text'.

The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.

Integral to making such a choice is discernment of statutory purpose

This chapter is concerned with how the courts arrived at this approach to statutory interpretation and the application of the approach in practice. As was noted in *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCAFC 223; (2018) 363 ALR 343 at [79] 'the task of statutory construction can be assisted by a wide range of more specific principles of statutory construction, many of which have been developed by the courts, while others are now expressed in legislation'. The court observed that:

Some caution is required in selecting and applying the non-statutory or common law principles. They are not inflexible rules and their application in particular circumstances can be nuanced. Moreover, there can be tension between some of the principles. They are not masters, but should be viewed as servants and tools of analysis in the task of statutory construction.

The various Australian legislatures have also intervened in the process for making the constructional choice that a court must determine. This intervention is discussed after the common law approaches are outlined.

- 15 Consistent with longstanding authority too, the terms of CI 23 are to be construed as a whole.
- 16 As set out above, the stated purpose of CI 23 is to provide a framework for conversion for certain categories of public sector employees to permanent employment status. CI 23 had a commencement date of 10 August 2018 and by its scope and application, it is limited to persons employed at the time of its commencement. It thus was not intended to apply to future employees.
- 17 By cl 1.1, in its introductory part, employing authorities "shall conduct a review of *current* fixed term arrangements". The first step is for an employer to identify the reason for an employee's engagement on a fixed term contract. As to cl 1.1(b), the reference to meeting the criteria in cl 2 is not unqualified. In my view, and consistent with the need to read CI 23 as a whole, the satisfaction of the criteria in cl 2 is not absolute. Whilst cl 1.1(b) refers to the employer "shall

offer to convert or appoint the fixed term contract employee to permanency”, the subclause goes on to say, “in accordance with clause 4”.

18 Thus, in my opinion, the terms of cls 2, 3, 4, 5, 11 and 12 operate together as part of the scheme intended by CI 23. It is not enough for conversion or appointment to permanency of a fixed term contract employee to occur, for only the criteria in cl 2.1 to be met. In the case of the proposed conversion or appointment of a fixed term contract employee to permanent appointment, the following requirements, where relevant, must be met:

- (a) the employee must be in employment on a fixed term contract at the time of the commencement of CI 23 i.e. as at 10 August 2018;
- (b) the employee’s reason for engagement must not be for a reason set out in an applicable industrial instrument;
- (c) the employee must have completed at least two years’ “continuous service” (as defined in the CI 23 Definitions clause);
- (d) the employee must not be subject to any formal disciplinary action or substandard performance action at the time of the assessment;
- (e) in the case of an employee who has not had a proper assessment of merit one is to be undertaken under cl 10;
- (f) relevant advertising and recruitment obligations must be satisfied;
- (g) funding for a permanent appointment must be confirmed as required by cl 12; and
- (h) if a suitable permanent registrable or registered employee under the Public Sector Management (Redeployment and Redundancy) Regulations 2014 is able to undertake a role, then no offer of conversion to permanency can be made.

19 I therefore do not accept the applicant’s submissions to the effect that the criteria for conversion of a fixed term contract employee is limited to only those matters referred to in cl 2.1. To adopt this narrow approach is, with respect, to fail to read and interpret CI 23 as a whole which, in my view, is required.

20 The next issue to consider as to the approach to the interpretation of CI 23, is the point in time at which the terms of cl 2.1(a) is to be considered. The answer to this question is to be obtained from the language used in relevant provisions of CI 23, having regard to and in the context of its stated intention. The first matter to observe is that the reference in the “Scope and Application” provision of CI 23 refers to it being “limited” to those employees who are employed in a relevant manner at the time CI 23 commenced. This is a clear indication that the framework and mechanisms set out in CI 23 were not intended to have ongoing

effect, and to apply to all fixed term and casual employees, irrespective of when their employment commenced with the employer.

- 21 By cl 1.1, the introductory words of this clause refer to the review of the status of fixed term contract employees, the language used by the draftsman of cl 1.1 is that an employer “shall conduct *a* review ...”. There is nothing in the language of cl 1.1 to suggest that the obligation on an employer is to engage in a series of reviews, on an ongoing basis. On the contrary, the language that follows cl 1.1 indicates a contrary intention. This is in accordance with the broad interpretative principle that CI 23, as with a statute or regulation, should be read and interpreted from the beginning to its end: *Patman v Fletchers’ Photographics Pty Ltd* (1984) 6 IR 471 at 474 - 475 per Priestly JA. The use of the word “current” in cl 1.1 also suggests a temporal connection, in that the review is not to be based on past or future full-time fixed term contract employee arrangements.
- 22 Following this approach, after cl 1.1, in cl 1.2 it is said that the employer “shall commence *the* review as soon as possible after the commencement of this Instruction ...”. By cl 1.3, also set out above, it is provided that the employer is to provide certain information to relevant unions “no less than 30 days prior to the commencement of *the review* ...”. Similarly, in cls 1.4, 1.5 and 4.1, reference is also variously made to “*the review*”, in terms of the processes to apply and the outcome. I note also that a similar scheme operates in the case of casual employees, commencing at cl 6 of CI 23.
- 23 Accordingly, having regard to these provisions of CI 23, I consider that the respondent’s submission, that a review of a fixed term contract employee in accordance with its terms, was intended to be a one-off process and not some form of continuous or periodical assessment, to be the correct approach.
- 24 A further and related question, that arises in the present case, is the relevant contract or contracts of a fixed term contract employee that are to be the subject of assessment and review by the employer. This also involves a matter of construction of provisions of CI 23. This was a matter in dispute between the parties. In my view, for the following reasons, there is a temporal connection between the currency of a fixed term contract employee’s contract and the commencement of the review process. This involves no inconsistency with the terms of cl 2.1(b), which deals with the requirement for a fixed term contract employee to have had at least two years’ continuous service, as that term is defined, as I will now endeavour to explain.
- 25 The temporal connection between the relevant contracts to be considered and the timing of the review, is supported by the language used in the relevant provisions of the CI. As noted by the respondent in its written submissions, in my view correctly, the language of cl 1.1 speaks of “current” fixed term contract

arrangements and not prior fixed term contract arrangements. The ordinary meaning of the word “current” is “belonging to the current time; ...at the present time” (Concise Oxford Dictionary). Furthermore, in cl 1.1(a) as part of the review, the employer is required to “identify *the reason*” for each employee’s engagement on a fixed term contract. The language of this provision, with the use of the word “the” reason, in conjunction with the use of “current” in the preamble in cl 1.1, strongly suggests that it is the fixed term contract in effect at the time of the employer’s review, that is to be taken into account by the employer, to ascertain whether the requirements of the CI are met. Even if, as postulated by the respondent, the relevant fixed term contract for present purposes was that to which Mr Brynes was a party at the time of the commencement of CI 23, for the reasons that I set out below, this would make no difference to the outcome of the present matter.

- 26 As mentioned above, this approach to construction of CI 23 involves no inconsistency or absurdity when read with cl 2.1(b), which was the import of the applicant’s submissions on this issue. The applicant submitted that this approach would involve an absurd construction because if a hypothetical employee had been employed on a series of fixed term contracts for say 10 years, the last for 15 months, the person would be ousted from the conversion process. I do not consider this to be the case.
- 27 The number of contracts and the period over which they have been in effect is a separate issue to the issue of the reason for the engagement of a fixed term contract employee and whether the reason is for a circumstance mentioned in an industrial instrument, as at the material time of the review and assessment. The former matters are relevant to the satisfaction of criterion cl 2.1(b). This deals only with “continuous service” as defined in the CI. It does not concern itself with the reason for the engagements under fixed term contracts in the past, as long as the employee has been employed continuously for at least two years in the same or similar job. Nor does it require the performance of the same or similar role under a single fixed term contract for two or more years, which also seemed to be the import of the applicant’s submissions. As the definition makes clear, the focus is on “service (employment)” and not fixed term contracts per se. Clause 2.1(b) is an independent criterion to cl 2.1(a). This means, on the hypothetical example cited by the applicant in its written submissions, if the hypothetical employee performed the same or similar job for at least two or more years of the period cited, this criterion would be met. In my view in this case, there can be no doubt that Mr Brynes satisfies cl 2.1(b) of the CI.
- 28 Finally, in relation to the issue of interpretation of CI 23, it is important to note that it does not prohibit fixed term contracts of employment. It is recognised that fixed term contract employment may be appropriate, as long as it is for a purpose

permitted by the relevant industrial instrument. In this case, it was not in dispute that this meant cl 15.2 of the Public Service and Government Officers General Agreement 2014 and cl 16.5 of the Public Service and Government Officers General Agreement 2017. Accordingly, in my view, it would be, as contended by the respondent, contrary to the scheme of operation of CI 23 and the terms of the relevant industrial instruments, and their intended primacy, for an employee to be able to rely on prior fixed term contracts, as opposed to a current fixed term contract, to support a claim for conversion to permanency, in circumstances where the current fixed term contract is for a purpose mentioned in the relevant industrial instrument but the prior fixed term contracts were not for such purposes. Moreover, such an approach would be at odds with the express obligation on an employer under cl 1.1 of CI 23 to conduct a review of current and not past fixed term arrangements.

Consideration

- 29 As I have indicated above, I have no doubt Mr Byrnes had, on the evidence and the material contained in exhibit A1, been continuously employed for two or more years in the same or similar role for the respondent, in satisfaction of cl 2.1(b) of CI 23. The issue is whether, having regard to the proper construction of relevant provisions of CI 23, Mr Byrnes satisfied the requirements of cl 2.1(a) of CI 23. For the following reasons, I do not think that he did.
- 30 A circumstance mentioned in the 2014 and 2017 Agreements, in effect at the material time of Mr Byrnes' employment, was for employment on a fixed term contract to cover one-off periods of relief. Other circumstances included work on a project with a finite life, seasonal work, where an employee has specific skills not readily available, and any other situation agreed by the parties. There are additional circumstances set out in cl's 16.2, 16.3 and 16.8 of the 2017 Agreement, that I will come to later in these reasons.
- 31 In this case, the relevant fixed term contract in force at the time CI 23 came into effect, was for the position of Manager Licensing - Process Industries, with a term of appointment from 1 July to 31 December 2018. A copy of this fixed term contract was at pp 115 - 116 of exhibit A1. The fixed term contract was dated 29 May 2018 and while the copy in exhibit A1 was not signed by Mr Byrnes, there was no dispute that this was the position occupied by him at this time. As I have already mentioned, and it was not in dispute, this fixed term contract came about because the substantive occupant of the position, Mr Bailes, was acting in a higher role. On the first page of the contract, in the area dealing with the details of the employment, is marked the words "Reason for contract - covering one-off period of relief". Mr Byrnes' evidence was, as I have already observed, that he

was aware Mr Bailes was the substantive occupant of the job and that he (Mr Bailes) was acting in a higher position. As also noted earlier in these reasons, this was the subject of evidence from Mr Schuller who confirmed the nature of Mr Byrnes' appointment at the time and that Mr Bailes was occupying a higher position with the respondent. Exhibit R9, a spreadsheet setting out the various positions occupied by Messrs Schuller, Bailes and Byrnes, illustrated the number and type of appointments of these three employees at the time. This showed Mr Byrnes' acting/contract positions at the same times Messrs Schuller and Bailes were also in their respective acting positions.

- 32 It is clear from the evidence taken as a whole, that in relation to Mr Byrnes' fixed term contract from July to December 2018, that in that time both Mr Schuller and Mr Bailes, as the substantive holders of their respective positions, were entitled to return to them. None of these positions were vacant.
- 33 As at the time of the offer and acceptance of the July to December 2018 fixed term contract, Mr Byrnes was appointed to his position to cover the position for Mr Bailes, who was in turn acting in a higher position. On any view, this was a "one-off period of relief" as stated in the fixed term contract itself and was a circumstance specified in cl 15.2 of the 2017 Agreement. Whilst the applicant made much of the fact that Mr Bailes resigned from his position with the respondent in late 2018, in my opinion this cannot alter the conclusion that the "reason" for the engagement of Mr Byrnes on the fixed term contract in July 2018 was for one-off relief, as was referred to in the 2017 Agreement at that time.
- 34 In relation to Mr Byrnes' final two short fixed term contracts for the periods 1 January to 31 March 2019 and 1 April to 30 June 2019, both of these contracts were for the purpose of enabling the respondent's then fixed term contract review process, which commenced in late 2018, to proceed to completion. This was the uncontested evidence of Mr Murphy and was consistent with the chain of correspondence at the time, as set out in exhibit R7. To extend a fixed term contract for the reason of ensuring employees may continue to participate in an employer's fixed term contract review process under CI 23 is not only consistent with the spirit of CI 23 and equity and good conscience, but is also plainly a circumstance mentioned in a relevant industrial agreement for the purposes of cl 2.1(a) of CI 23. In particular, as mentioned earlier, I refer to cl's 16.2, 16.3 and 16.8 of the 2017 Agreement and note that cl 16.3 specifically refers to a renewal of an existing fixed term contract in relation to a review for a possible conversion under processes referred to in cl 16.8, which ultimately became CI 23. This was a circumstance specifically contemplated by the 2017 Agreement and was specified in the various human resources documents in evidence at exhibit A1.

Conclusions

- ³⁵ In the circumstances of this case, irrespective of which fixed term contract Mr Byrnes was a party to, either as at the commencement of CI 23 or in early 2019 when the respondent commenced its review of fixed term contract arrangements, I am not persuaded that Mr Byrnes met the requirements of cl 2.1 of CI 23 for him to be eligible for conversion to permanency. Accordingly, I do not need to finally determine the respondent's alternative contention that even if Mr Byrnes had met the cl 2.1 requirements, he would not have satisfied the cl 3 requirement for a "proper assessment of merit" in accordance with cl 10 of CI 23. However, in light of the evidence led in these proceedings on this issue, I have considerable doubt as to whether these requirements could have been satisfied, especially where Mr Byrnes had applied for and had not been assessed as suitable by the respondent for two management positions, one of which he occupied on a fixed term contract basis from 2016 to 2019.
- ³⁶ For the foregoing reasons, the application must be dismissed.