Temporary employment directive 08/17

Frequently asked questions

Relationship with other directives

1. Can a temporary employee be converted to permanent employment if the employee was not initially employed through an open merit process?

Yes. The temporary employment directive does not prevent an employee from being converted to permanent employment because the employee's temporary engagement did not involve a competitive merit process.

The rationale behind the *Public Service Act 2008* (the PS Act) creating a conversion process is that it gives the ability to provide long-term temporary employees with an avenue to secure permanent employment.

An employee has no ability to influence the manner in which the employee was originally engaged. It would not be fair to an employee to prevent their conversion because of a recruitment process decision, made by another person, two or more years earlier.

Clause 9.6 of the temporary employment directive requires that, when reviewing the status of a temporary employee's employment, an assessment is undertaken of the temporary employee's merit for the permanent role.

2. Do I have to advertise a position before permanently appointing a temporary employee to it following a conversion process?

No, provided that the temporary employee has performed at least two years of continuous service in the same or a substantially similar role.

The advertising requirements under the recruitment and selection directive do not apply to the conversion of temporary employees under the temporary employment directive (refer to clause 5.4 of the temporary employment directive). The assessment of merit under the temporary employment directive is only of the employee's merit for the role and does not involve a comparative assessment against other potential candidates for a role.

3. Why don't you need to consider employees registered under the support for employees affected by workplace change (SEAWC) directive before a review of the status of a temporary employee is undertaken?

Section 149 of the PS Act provides a legislative basis for the conversion of a temporary employee's employment to permanent employment after two years of continuous service.

It was included in the PS Act to provide an avenue through which temporary employees can advance their claims for conversion to permanent status. If SEAWC employees are prioritised over temporary employees, this could result in temporary employees losing their job when they became eligible for review. This is considered inconsistent with the intent of the legislation that seeks to provide long-term temporary employees with an avenue to secure permanent employment.

4. Can I convert a temporary employee to a permanent role if they have been in the same or a substantially similar role for less than two years?

No. Conversion of an employee prior to the completion of at least two years of continuous service cannot occur because it does not meet the timeframe required by section 149 of the PS Act.

Where an agency wishes to permanently appoint a temporary employee to a position prior to this timeframe having elapsed:

- the recruitment and selection directive must be complied with, namely that the role must be advertised unless an exemption from advertising applies; and
- the directive on supporting employees affected by workplace change applies.

Conducting the review of a status of a temporary employee

5. A temporary employee can now notify their agency of the requirement to commence a review of their temporary employment status. What role does a temporary employee, or their representative, have during a status review?

Clause 10 of the temporary employment directive allows a temporary employee, or their representative, to notify their agency of the requirement to commence the status review after two years of continuous service in the same or substantially the same role. The temporary employee, or their representative, can provide this notification any time up to three months before the date the temporary employee is eligible to have their status reviewed. However, the agency will still commence the review on the date the temporary employee becomes eligible for review, not the date the employee notifies the agency of their upcoming eligibility for review.

Prior to or during the review process, the temporary employee or their representative can make a written submission to provide details of relevant facts that they would like the agency to consider during the review.

A temporary employee has the right to appeal against a decision not to convert the employee's employment to permanent employment (see section 194(1)(e) of the PS Act).

6. Does an agency need to assess merit before deciding whether to convert a temporary employee's employment to permanent employment?

Yes. Clause 9.6(b) requires an agency to consider the merit of a temporary employee for a role by applying the merit criteria in section 28 of the PS Act. This should include consideration of the temporary employee's abilities, aptitude, skills, qualifications, knowledge, experience and personal qualities relevant to carrying out the duties in question. The agency can also consider the way in which the person has carried out their occupational duties and their potential for development.

In a situation where an employee has been in the same or a substantially similar role for two years, the employee should have participated in the agency's ongoing performance management system. Assessments undertaken during this process can assist in applying the merit principle.

When applying this clause, there is no comparative assessment of merit against other employees – the merit of the temporary employee for the role is the required assessment.

7. If a temporary employee has been employed on a casual contract, does this count towards their continuous employment as a temporary employee?

No. Section 149 of the PS Act provides a legislative basis for the conversion of a temporary employee's employment to permanent after two years of continuous service as a temporary employee. Section 149(5) of the PS Act clarifies that for the conversion process under section 149, a temporary employee does not include a person employed on a casual basis. This means that any time the employee was engaged on a casual basis could not be counted towards the two years' service as a temporary employee.

Employees who are employed on a casual basis at the time of their status review must have their review undertaken in accordance with the directive relating to the conversion of casual employees to permanent employment.

8. What considerations may fall under 'genuine operational reasons' in clause 9.7?

A review of the industrial relations framework in Queensland report (completed in December 2015) provided at recommendation 13 that temporary staff be converted where the qualifying conditions were met, 'unless there are operational reasons not to do so'. It did not provide any further detail about the meaning of the term 'operational reasons'.

Consistent with this approach, there is no definition of 'genuine operational reasons' in the directive. It should be interpreted in accordance with ordinary understanding, taking into account the specific context in which an agency operates.

If an agency makes a decision not to convert a temporary employee to permanent employment based on genuine operational reasons, an agency must clearly document these in the written notification to the temporary employee, as required under clause 11.2.

9. A temporary employee has performed in the same or similar roles at different classification levels. Does an agency need to consider conversion at both classifications?

Clause 9.8 addresses the potential unintended outcome under the previous directive where a temporary employee who performed higher duties for a short period became ineligible for conversion to permanent employment as they had not performed continuous service in the same role. This directive provides a fairer approach by allowing an agency to consider conversion where a person has performed substantially similar roles, albeit at two different classifications.

The conversion process should start with a consideration of what roles, if any, are required to be ongoing, to meet the service delivery and operational needs of an agency (clause 9.6(a)) The agency should then consider the following:

- is there a continuing need for the temporary employee to be employed in the ongoing role or roles (clause 9.6 (a));
- the employee's merit for the ongoing role/s (clause 9.6(b)); and
- whether any other genuine operational reasons not to convert the employee to that role exist.

If there is a need to fill roles at both classification levels on an ongoing basis, the employee should be considered for both roles and an assessment made which is the most suitable, taking into account the criteria above.

10. When is it appropriate to conduct a review earlier than the temporary employee's work anniversary, and what are the implications of conducting a review early?

Under the PS Act, an agency has an obligation to conduct an initial review after two years of continuous service. An agency cannot conduct a review under the directive before the temporary employee has completed two years of continuous service in the same or a substantially similar role.

The PS Act also requires a review after every additional year of service. An agency can review earlier than this date, however, if the employee was not converted, a second review must also be undertaken (i.e. at the anniversary of commencing in the role) as the PS Act still requires that an agency conduct a review after every additional year of service.

Where two reviews were undertaken within a one-year period and the circumstances of the temporary employee's employment remained the same, it is likely the decision not to convert the temporary employee would remain the same. Notwithstanding, the employee must be advised of the outcome of the review and that the reasons remain the same as the first review. In this case, when notifying the employee of the outcome of the second review, it should be clear the agency has undertaken a further review (as required by the PS Act). The agency should reiterate the reasons provided in the previous review (as opposed to simply referring to the correspondence or reasons previously provided).

It is recommended that an agency only conducts a status review earlier than the one-year anniversary date where:

- the agency is in a position to convert the temporary employee's employment to permanent employment. For example, if an employee had previously not been converted due to funding reasons, but funding certainty was confirmed prior to their next work anniversary, the agency could conduct an early review to convert the employment to permanent employment; or
- the agency has a process of reviewing all of its eligible temporary employees together when service delivery and operational needs are known, e.g. due to the confirmation of forward funding or that a project will be ongoing. Employees who do not have their employment converted at this review remain entitled to a subsequent status review at their one-year anniversary date under section 149 of the PS Act.

11. Should a part-time temporary employee only be converted when a part-time permanent position becomes available?

No. If a part-time temporary employee meets the criteria for conversion, the agency's starting position should be a decision to convert on terms that reflect the number of hours the employee has traditionally worked, unless there are genuine operational reasons why the agency cannot support performance of the role on a part-time basis.

If the employee had already been performing the role on a part-time basis, the review should specifically consider any reasons for not being able to continue to support performance of the role on a part-time basis. If the agency decides the role cannot continue to be performed on a part-time basis, the specific reasons for this must be clearly stated.

If the agency decides that the role must be undertaken on a full-time basis, an alternative option is for the agency to consider implementing a job share arrangement to support the conversion of the part-time employee.

As far as practicable, the agency should support part-time employees through flexible work arrangements. If the circumstances were such that it suited both the agency and the employee for the conversion to occur to a full-time position, that could occur as well.

12. If a temporary employee was initially contracted on a full-time basis, but resumed work in the role on a part-time basis, for example after returning from maternity leave, should they be considered for conversion to a full-time or part-time role?

If the employee is considered eligible for conversion, they should be considered for conversion to an ongoing full-time role as per their initial contract. The agency should then consider any request by the employee for leave and/or part-time arrangements in accordance with the employee's entitlements under the relevant industrial instruments.

Consideration of multiple employees for a vacancy

13. If there are multiple employees who might be considered for a permanent vacancy, which employee should be appointed?

Situations may arise where there is a vacant ongoing role and employees with competing claims to the role. Examples of when this may occur are when two or more of the following exist:

- a temporary employee or employees who are eligible for conversion to that role;
- an employee who is eligible to be transferred or appointed to that role, for example, an employee of the agency displaced by organisational change;
- a long term permanent employee or employees who have been acting in higher duties in the same or a similar role for a significant period; or
- a permanent employee that the agency is seeking to transfer for compassionate reasons or to make reasonable adjustment for illness or injury.

The advice below:

- applies only where a two year or annual review process for conversion of a temporary employee is not involved; and
- assumes that the agency has determined that there is a need for one or more ongoing roles and have therefore created new permanent position/s at a particular level or there are vacancies in an existing position/s.

More temporary employees than positions – permanent employees not being considered

Note: Queensland Industrial Relations Commission (QIRC) decisions have expressed different views on the use of a closed merit process in this scenario with a number of them saying that a closed merit process should not be used. Given the uncertainty, the PSC is considering these decisions and options for dealing with this scenario before providing further advice.

Temporary vs transfer of permanent employees

This scenario assumes, for an ongoing role, there is at least one temporary employee who would be eligible to be converted and permanent employee who may, due to business or compassionate reasons, be suitable for transfer to the role.

There cannot be any hard and fast rules for this scenario as the outcome will vary depending on the circumstances.

For example, in a situation where an employee needs to be transferred for their safety due to medical or domestic and family violence reasons, it would be open for the agency to decide that this transfer should be given preference to converting a temporary employee. Alternatively, in a situation where an employee requests to be transferred for non-compassionate reasons, the agency may wish to give preference to converting eligible temporary employees in recognition of their continuous service to the agency in a role which has an ongoing requirement.

A situation may occur where a position becomes available and there are one or more temporary employees (outside their review period) who are eligible for conversion, and one or more permanent employees who have been acting in higher duties in the role for an extended period of time. In this instance, we suggest the agency conduct a closed merit process to ensure fairness for both long-term temporary employees and any permanent employee who may have been acting in the role. Because the closed merit process will include employees who are not long-term temporaries eligible for conversion under the PS Act, the directives relating recruitment and selection and supporting employees affected by workplace change will apply.

Section194(1)(e) of the PS Act permits a temporary employee to appeal their agency's decision to not convert them to permanent employment following a review of their status (but not for decisions made outside of the review period – unless as a result of an early review). The employee seeking a transfer could also appeal the agency's decision not to transfer as a fair treatment appeal under the Public Service Act.

Probation

14. When a temporary employee has their employment converted to permanent employment under s149 of the PS Act, why is probation only for use in exceptional circumstances?

Clause 11.4 states that it is expected that probation would only be used in exceptional circumstances. The clause does not prohibit placing a converted employee on probation.

The PSC considers that probation is unlikely to be of value if the employee has already performed in the role or in a substantially similar role for at least the two years prior to their conversion and were assessed as meritorious during the review process.

Agencies are encouraged to consider what benefit would be gained from having a probation process. If genuine reasons exist, an agency can use probation where it is considered appropriate to do so.