IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 - Four Yearly Review of Modern Awards
AM 2014/229 - Higher Education Industry - Academic Staff Award 2010
AM 2014/230 - Higher Education Industry - General Staff Award 2010

SUBMISSIONS IN RESPONSE TO NTEU REPLY SUBMISSIONS

Filed on Behalf of the Group of Eight Universities

A. Introduction

1. These submissions are made on behalf of the Group of Eight in response to the NTEU's Submissions in Reply dated 3 June 2016 (**NTEU Reply Submissions**) opposing proposed variations sought by the Group of 8 (and AHEIA) to delete the fixed-term severance provisions in the Higher Education Industry - Academic Staff Award 2010 (**Academic Staff Award**) and the Higher Education Industry - General Staff Award 2010 (**General Staff Award**) and to remove a discriminatory provision in clause 17.6 of the Academic Staff Award.

B. Fixed-Term Severance

2. The arguments raised by the NTEU in reply, particularly at paragraphs 5 to 8 and 11 of Part A of the NTEU Reply Submissions, centre around broad criticisms of fixed term contracts generally and their use in the higher education sector as being a "manifest injustice" and asserting "unfairness" of the "widespread" use of fixed-term contracts. They extend to unsubstantiated assertions that the use of fixed-term contracts are a "contrivance" by employers.

3. First, these matters are not responsive to the issue in question - whether in a modern award provision of severance payments at the expiration of a fixed term contract is an appropriate safety net and whether this is consistent with the legislative scheme now set out in the NES for redundancy payments and its exclusions.

4. Secondly, the assertions are gratuitous and no evidentiary material is identified or exists for many of the NTEU assertions. The provisions of the Higher Education Awards themselves obviously recognise the use of fixed-term contracts and both the common law and commission decisions recognise the fact that such contracts expire due to the effluxion of time and not as a consequence of termination at the employer's initiative, a "dismissal" or "non-renewal" of the contract or retrenchment by the employer (see *Victoria v Commonwealth (1996)* 138 ALR 129 *Anderson v Edith Cowan University* [1999] FCA 1802; *Leddington v University of Sunshine Coast* (2003) 127 IR 152, *Department of Justice v Lunn*, (AIRC FB 27 November 2006, Print PR974185) and *Drummond v Canberra Institute of Technology [2010]* FWAFB 5455).

5. Further, while the NTEU identify that the fixed term severance provisions were included in the pre-reform Higher Education Contract of Employment Award in the late 1990s, acknowledging that no Federal legislative redundancy provisions existed at the time, the NTEU assert that this (and the consequent legislative introduction of a scheme of redundancy payments) is irrelevant. We disagree. The significant legislative developments that have occurred in respect of entitlements to termination and redundancy pay since that time are relevant to whether a fixed term severance provision is inconsistent with that legislative scheme (as set out in the previous Go8 Submissions). The inclusion of the NES provisions and exclusions mean that the existing severance pay provisions in the Higher Education Awards are inconsistent with what is the clear legislative intent as to what types of employees and circumstances severance/redundancy payments should apply to, and that such provisions are otherwise not necessary provisions to provide a fair and relevant safety net.

C. Clause 17.6 of the Academic Staff Award

6. The NTEU concedes at paragraph 9 of Part C of the NTEU Reply Submissions that clause 17.6 of the Academic Staff Award is, prima facie, discriminatory on the basis of age.

7. The NTEU then says the appropriate "solution" is to increase the entitlement for all employees to 12 months, such that an employee in circumstances of redundancy under their amended award would receive 12 months' notice, plus NES notice and NES redundancy payments.

8. The Go8's proposed variation is "appropriate" because one of the objectives of the award is to provide a minimum safety net of terms and conditions. The legislative standard in relation to notice and redundancy payments is provided for in the NES. On one view the most appropriate provisions would be to simply reflect the legislative entitlements to notice and redundancy pay. The Go8 proposal retains a more generous provision, retaining entitlements that are well in excess of the NES but are also in keeping with providing a minimum safety net of terms and conditions for employees; which it does by removing the discriminatory parts of the clause that exceed the entitlement in the award of 6 months, which is in addition to notice and redundancy under the NES.

9. On the other hand, the NTEU's proposed variation will result in an additional entitlement being provided to employees that did not previously apply and take the award provisions even further away from the community standards reflected in the NES. It is very difficult to see how an entitlement of 12 months (plus NES redundancy and NES notice) for every retrenched employee reflects a fair and relevant safety net.

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8 July 2016