QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Rackley v State of Queensland (Queensland Police Service)* [2024] QIRC 080
PARTIES:	**Rackley, Grahame Edwin** Appellant v **State of Queensland (Queensland Police Service)** Respondent
CASE NO:	PSA/2024/11
PROCEEDING:	Public Service Appeal – Conversion Decision
DELIVERED ON:	11 April 2024
MEMBER:	Pratt IC
HEARD AT:	On the papers
ORDER:	**The appeal is dismissed**
CATCHWORDS:	INDUSTRIAL LAW – PUBLIC SECTOR APPEAL – appeal against respondent's deemed decision to refuse the appellant's conversion request - where appellant performing higher duties position – where appellant requested conversion from substantive role to higher duties role – where request made in accordance with *Public Sector Act 2022* (Qld) s 120 – where respondent made deemed decision to refuse conversion request – where appeal made under *Public Sector Act 2022* (Qld) s 130 – consideration of nature of appeals under the *Public Sector Act 2022* (Qld) – consideration

of meaning of "fair and reasonable" under *Industrial Relations Act 2016* (Qld) s 562B – consideration of phrase "genuine operational requirements" under *Public Sector Act 2022* (Qld) s 120 – where the respondent had a genuine operational requirement to refuse the appellant's conversion request – appeal dismissed

LEGISLATION:

Industrial Relations Act 2016 (Qld) s 451, s 562B, s 564

Public Sector Act 2022 (Qld) s 119, s 120, s 130, s 134

CASES:

Colebourne v State of Queensland (Queensland Police Service) (No. 2) [2022] QIRC 016

Goodall v State of Queensland (Unreported decision of the Supreme Court of Queensland Dalton J, 10 October 2018)

Hunt v State of Queensland (Department of Agriculture and Fisheries) [2022] QIRC 162

Johnston & Ors v Carroll (Commissioner of the Queensland Police Service) & Anor; Witthahn & Ors v Wakefield (Chief Executive of Hospital and Health Services and Director General of Queensland Health); Sutton & Ors v Carroll (Commissioner of the Queensland Police Service) [2024] QSC 2

Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326

Morison v State of Queensland (Department of Child Safety, Youth and Women) [2020] QIRC 203

Pope v Lawler [1996] FCA 1446.

Readman v State of Queensland (Queensland Police Service) [2020] QIRC 222

Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam (2003) 214 CLR 1

Wirth v Mackay HHS & Anor [2016] QSC 39

Reasons for Decision

Introduction

[1] Mr Rackley ('the Appellant') has been employed by Queensland Police Service ('the Respondent') since 1992. The Appellant is currently a substantive AO4 Service Desk Analyst (ICT) in the Queensland Police Service's Frontline and Digital Division ('FDD') ('AO4 Role'). However, the Appellant has been performing the higher duties position of AO7 Principal Service Architect ('AO7 Role') since 4 April 2022. The Appellant formally requested to be converted to this AO7 Role on 6 December 2023.

[2] It is uncontroversial that the Appellant's request was made in accordance with s 120 of the *Public Sector Act 2022* (Qld) ('PS Act'). However, the Respondent did not issue a written decision in response to that request. Where a relevant chief executive does not issue a written decision in response to a request within 28 days of that request, s 120 of the PS Act operates such that the chief executive is deemed to have decided to refuse that request. Such a decision is termed a "deemed decision" by the *Queensland Government directive - Directive 03/23 "Review of acting or secondment at higher classification level"*. Accordingly, the date that the decision to refuse the Appellant's conversion request was deemed to be made was 3 January 2024.

[3] A Queensland public service employee may appeal a relevant decision made under the PS Act under s 130 of the PS Act. Section 134 of the PS Act requires an appeal under s 130 to be heard and decided under chapter 11 of the *Industrial Relations Act 2016* (Qld) ('IR Act'). Section 564 of the IR Act, which is contained within chapter 11 of the IR Act, requires that appeals against a decision made to an industrial tribunal must be made with 21 days of the decision being made. The Appellant's appeal, being filed on 24 January 2024, is within time.

[4] The Appellant appeals the Respondent's deemed decision to refuse his request to be converted to the AO7 Role. The Respondent opposes the appeal on the basis that there were genuine operational requirements behind why it refused the conversion request.

Relevant law

[5] Section 119 of the PS Act says:

(1) This division applies to a public sector employee who is acting at, or seconded to, a higher classification level in the public sector entity in which the employee is employed.

(2) However, this division does not apply to—

(a) a public sector employee employed on a casual basis; or

Note—

For a public service employee, see *sections 149 (2) (c)* and *151*.

(b) a non-industrial instrument employee; or

(c) an employee who is acting in, or seconded to, a position that is ordinarily held by a non-industrial instrument employee.

[6] Section 120 of the PS Acts says:

(1) If the public sector employee has been acting at, or seconded to, a higher classification level for a continuous period of at least 1 year, the employee may ask the employee's chief executive to employ the employee in the position at the higher classification level on a permanent basis, after—

(a) the end of 1 year of acting at, or being seconded to, the higher classification level; and

(b) the end of each subsequent 1-year period.

(2) The employee's chief executive must decide the request within the required period.

(3) The employee's chief executive may decide to employ the employee in the position at the higher classification level on a permanent basis only if the chief executive considers the employee is suitable to perform the role.

(4) In making the decision, the employee's chief executive must have regard to—

(a) the genuine operational requirements of the public sector entity; and

(b) the reasons for each decision previously made, or taken to have been made, under this section in relation to the person during the person's continuous period of acting at, or secondment to, the higher classification level.

(5) If the employee's chief executive decides to refuse the request, the chief executive must give the employee a notice stating—

(a) the reasons for the decision; and

(b) the total continuous period for which the employee has been acting at, or seconded to, the higher classification level in the public sector entity; and

(c) how many times the employee's acting arrangement or secondment has been extended; and

(d) each decision previously made, or taken to have been made, under this section in relation to the employee during the employee's continuous period of acting at, or secondment to, the higher classification level.

(6) If the employee's chief executive does not make the decision within the required period, the chief executive is taken to have refused the request.

(7) The commissioner must make a directive about employing an employee at a higher classification level under this section.

(8) In this section—

"continuous period", in relation to an employee acting at, or seconded to, a higher classification level, has the meaning given under a directive.

"required period", for making a decision under subsection (2), means—

(a) the period stated in an industrial instrument within which the decision must be made; or

(b) if paragraph (a) does not apply—28 days after the request is made.

"suitable", in relation to an employee performing a role, has the meaning given under a directive.

[7] Section 562B of the IR Act says:

(1) This section applies to a public service appeal made to the commission.

(2) The commission must decide the appeal by reviewing the decision appealed against.

(3) The purpose of the appeal is to decide whether the decision appealed against was fair and reasonable.

(4) For an appeal against a promotion decision or a disciplinary decision under the *Public Sector Act 2022*, the commission—

(a) must decide the appeal having regard to the evidence available to the decision maker when the decision was made; but

(b) may allow other evidence to be taken into account if the commission considers it appropriate.

[8] In summary, appeals of this nature are by way of a review of the relevant decision, not a re-hearing. In other words, the role of the reviewing jurisdiction is supervisory, not substitutionary.[1] Presently, the Commission must decide whether the relevant decision

[1] As put by his Honour Martin SJA in *Johnston & Ors v Carroll (Commissioner of the Queensland Police Service) & Anor; Witthahn & Ors v Wakefield (Chief Executive of Hospital and Health Services and Director*

was fair and reasonable. That task is to be carried out with regard to the information and evidence available to the decision maker at the relevant time, although regard can be had to other material if appropriate.

[9] In *Colebourne v State of Queensland (Queensland Police Service) (No 2)* ('*Colebourne*'),[2] his Honour, Merrell DP, concluded that the term "fair and reasonable" should be construed within the ordinary meaning of the phrase as used in the context of section 562B of the IR Act.[3] His Honour noted that assessing whether a decision was "fair and reasonable" is not an assessment of whether the decision was unreasonable only by reference to the legal standard and not by reference to the factual merits of the decision.[4] His Honour observed that assessing whether a decision was "fair and reasonable" instead permits a review of both the factual merits and legal reasonableness of both the decision itself and the process of making that decision.[5]

[10] In *Hunt v State of Queensland (Department of Agriculture and Fisheries)* ('*Hunt*'),[6] his Honour, O'Connor VP, observed that a decision is unfair where the decision has caused a practical injustice.[7] His Honour cited Kiefel, Bell and Keane JJ's favourable view of Gleeson CJ's observations in *Lam* that "[t]he ultimate question remains whether there has been unfairness; not whether an expectation has been disappointed."[8]

[11] In *Morison v State of Queensland (Department of Child Safety, Youth and Women)* ('*Morison*'),[9] his Honour, Merrell DP, considered the phrase "genuine operational requirements of the Department" under a predecessor of s 120(4) of the PS Act.[10] His Honour held that there would be a "genuine operational requirement" if there was an authentic need to appoint an employee who has been assuming the duties and responsibilities of a higher classification level in the department for the requisite period of time, having regard to the effective, efficient and appropriate management of the public resources of the relevant department.[11]

General of Queensland Health); Sutton & Ors v Carroll (Commissioner of the Queensland Police Service) [2024] QSC 2, [8], albeit in a different statutory context.

[2] [2022] QIRC 16 ('*Colebourne*').

[3] Ibid [25], citing *Pope v Lawler* [1996] FCA 1446.

[4] *Colebourne* (n 2) [21]-[22].

[5] Ibid [23], citing *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland Dalton J, 10 October 2018) regarding the former equivalent provisions in s 201 of the *Public Service Act 2008* (Qld).

[6] [2022] QIRC 162 ('*Hunt*').

[7] Ibid [79], citing *Wirth v Mackay HHS & Anor* [2016] QSC 39.

[8] *Hunt* (n 6) [82]-[83], [85], citing *Minister for Immigration and Border Protection v WZARH* [2015] (2015) 256 CLR 326, [35]-[36], [57], [61]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Lam* (2003) 214 CLR 1.

[9] [2020] QIRC 203 ('*Morison*').

[10] Ibid [29]-[44].

[11] Ibid [40].

[12] In *Readman v State of Queensland (Queensland Police Service)* ('*Readman*'),[12] Power IC followed his Honour's reasoning in *Morrison*,[13] again in the context of the predecessor of s 120(4). Power IC held that the resourcing for the department that the appellant was part of was a relevant consideration when having regard to the "effective, efficient and appropriate management of the public resources of the [relevant] department".[14] Power IC also held that it was for a respondent, and not the Commission, to determine how particular roles are filled.[15] Power IC subsequently held that a respondent's considerations of how particular roles are filled was "reasonably part of any consideration of genuine operational requirements".[16] By contrast, Power IC observed that the Commission's role is only to decide whether the respondent's considerations of genuine operational requirements was fair and reasonable.[17]

Submissions

[13] The Commission directed the parties to file written submissions and that the matter would be dealt with on the papers pursuant to s 451(1) of the IR Act unless any party requested leave to make oral submissions or further written submissions by 6 March 2024. Neither party sought an oral hearing, so the matter has been decided on the papers.

Appellant's appeal notice

[14] In the Form 89 Appeal Notice, the Appellant submits that he has not worked in his substantive AO4 Role since 2015, but rather has acted in higher duty AO5, AO6 and AO7 roles. The Appellant submits that his latest higher duty role is the AO7 Role that he started acting in on 6 December 2021. The Appellant submits that he first applied for conversion from the AO4 Role to the AO7 Role on 26 June 2023 but that this application was unsuccessful.

Respondent's submissions

[15] The gist of the Respondent's submissions is that the Appellant's second conversion application was refused because the Respondent does not require the AO7 Role permanently. The Respondent submits that there are two reasons why it does not require the AO7 Role permanently.

[16] The first reason is that the Respondent is restructuring its operations such that it will not require the AO7 Role as part of its restructured operations. In support of this submission, the Respondent submits that its current operations require it to utilise the Public Safety Business Agency ('PSBA'). The PSBA is an entity that provides corporate

[12] [2020] QIRC 222 ('*Readman*').
[13] Ibid [20], citing *Morison* (n 9) [40].
[14] *Readman* (n 12) [21].
[15] Ibid [23].
[16] Ibid [24].
[17] Ibid [26].

services to the Respondent and other government entities. These corporate services include the provision of Information and Communications Technology ('ICT') services through the Frontline and Digital Division ('FDD').

[17] The Respondent submits that the Treasurer announced on 7 September 2020 that the PSBA would be discontinued and would have its functions reallocated to other entities. The FDD, being part of the PSBA, would also be discontinued and would have its functions reallocated. However, given the complexity of reallocating these functions, a project called the 'ICT Service Transition' was created to ensure the smooth reallocation of functions away from the FDD. Until that project is completed, the Respondent and other government entities will continue to use the FDD. That is the case presently. But the Respondent submits that the continued use of the FDD is only a temporary measure that would no longer be required after 28 June 2024.

[18] The second reason the Respondent submits as to why it does not require the AO7 Role permanently is that further restructuring will soon occur when it expands its operations into new areas. The Respondent submits that the Honourable Mark Ryan, Minister for Police and Community Safety, announced that the Queensland Government would expand the disaster capability for the Respondent. As part of this expanded disaster capability, the Respondent would take on State Emergency Services, disaster management functions, and the new Marine Rescue Queensland. As a consequence of this restructure, the Respondent received correspondence from Queensland Fire and Emergency Services ('QFES') on 13 October 2023 recommending that all conversions be paused. QFES recommended that the Respondent do this in order to ease the Respondent's transition towards increased disaster capabilities. The Respondent submits that it honoured this recommendation. The Respondent submits that there was thus a genuine operational requirement for pausing conversions from 13 October 2023 and notes that the Appellant's request for conversion was made after 13 October 2023.

[19] Altogether, the Respondent contends that the simultaneous restructuring and expansion of its operations have made the AO7 Role operationally unnecessary moving forward. The Respondent therefore submits that it refused the conversion application because of a genuine operational requirement.

The Appellant's submissions in reply

[20] The Appellant accepts that the PSBA will be disbanded but contends that, to the best of his knowledge, the submission about disestablishing the FDD is untrue. That submission is based on work the Appellant has done recently and an assumption that IT support services will still be needed in the future. As to recent work, the Appellant submits that 94% of his working hours in the past four months has been spent delivering QPS Service Architecture services to the FDD at an AO7 level.

Consideration

[21] I accept that the Appellant is still performing the duties of the AO7 Role at present. However, I see no inconsistency between the fact that the Appellant is still carrying out the duties of the role and the fact that the Respondent will soon have no genuine operational requirement for that role. Based on my consideration of all of the material before me, I conclude that the Respondent is taking a 'business as usual' approach to its restructuring process. I find that that the purpose of this approach is to ensure that there are no major disruptions in the Respondent's day-to-day operations while the Respondent restructures. I therefore conclude that the Appellant might easily, from his perspective, intuit that there is an ongoing demand for the work he does. I appreciate why the Appellant might not be aware of the fact that the Respondent is in the process of phasing out the role.

[22] However, a longer-term perspective, arrived at after review of the Respondent's submissions, reveals that the Respondent will soon have no genuine operational requirement for the AO7 Role that the Appellant wants to convert to. I accept that the Respondent refused the Appellant's application to convert to the AO7 Role because the Respondent was substantially restructuring. I find that the Respondent's refusal was made while having regard to its obligations to ensure effective, efficient and appropriate management of the public resources. In fact, it would be at odds with that obligation if the Respondent allowed the conversion when it knew that the role would soon no longer be needed. In addition, the Respondent was specifically advised by QFES to pause such conversions. In my view, those are compelling and genuine operational reasons for the deemed decision refusing the conversion application.

[23] As to the ongoing AO7 level work that the Appellant refers to, there are two difficulties I have in accepting those submissions. First, the Appellant is not fully aware of the changes occurring that I have referred to above. The Appellant, understandably, sees things from a different perspective than the Respondent does. The Respondent's business as usual approach has a doubtless had some influence over the Appellant's perspective on this point. But I accept the Respondent's submissions on this point. For obvious operational reasons, the AO7 Role will soon be done away with. Second, one should not confuse the tasks that make up a role with the role itself. The two are very different. Even if some of the tasks that make up the AO7 Role might need to be carried out in the future, that does not mean that the AO7 Role remains. I accept the Respondent's submissions that the AO7 Role will not remain.

[24] On my assessment of the material that was before the decision maker at the time of the deemed decision, it is clear to me that it was open to the decision maker to find that the Respondent had a genuine operational requirement to discontinue the AO7 Role after 28 June 2024. It follows that I find that it was open to the decision maker to conclude that there was a genuine operational requirement supporting the decision to refuse the Appellant's second conversion application. I therefore see nothing in the reasons for refusing the conversion request that would make that decision unfair or unreasonable. Accordingly, I dismiss the appeal.

Order

The appeal is dismissed.