

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Ward v State of Queensland (Department of Housing and Public Works)* [2021] QIRC 111

PARTIES: **Ward, Tobi**
(Appellant)

v

State of Queensland (Department of Housing and Public Works)
(Respondent)

CASE NO: PSA/2020/352

PROCEEDING: Public Service Appeal – Appointment to position at higher classification

DELIVERED ON: 1 April 2021

MEMBER: Industrial Commissioner Dwyer

HEARD AT: On the papers

ORDER: **1. The decision appealed against is confirmed.**

CATCHWORDS: INDUSTRIAL LAW – Public Service Appeal – application for permanent employment at higher classification – genuine operational requirements – position has nominated end date

LEGISLATION: *Directive 13/20 Appointing a public service employee to a higher classification level* cls 4.2, 6.2

Industrial Relations Act 2016 (Qld) ss 562B, 562C

Public Service Act 2008 (Qld) ss 148, 149B,

- CASES:
- 149C
Brandy v Human Rights and Equal Opportunity Commission [1995] HCA 10
- Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018)
- Holcombe v State of Queensland (Department of Housing and Public Works)* [2020] QIRC 195
- Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203
- Page v John Thompson and Lesley Dwyer, As Chief Executive Officer, West Moreton Hospital and Health Service* [2014] QSC 252

Reasons for Decision

Background

- [1] Mr Tobi Ward is substantively employed as a Project Contract Administration Officer (BAO4) within QBuild, by the Department of Housing and Public Works ('the Department').
- [2] From 3 April 2017 to 30 August 2019, Mr Ward acted as a Senior Project Contract Administration Officer (BAO5) (position number 707329) within QBuild on the Borallon Correctional Centre Recommission project. Since 2 September 2019, Mr Ward has been acting a Senior Project Contract Administration Officer (BAO5) (position number 707611) on the Queensland Corrective Services New Youth Detention Centre project ('NYDC'). Mr Ward was acting in this latter position at the time of his request to be appointed to the higher classification level BAO5.
- [3] Relevantly, at the time of the decision the subject of this appeal, this project's end date was nominated as 30 June 2021, and Mr ward's higher duties placement was due to expire on 30 August 2021.
- [4] On 13 October 2020, Mr Ward wrote to the Department requesting that he be permanently appointed to the higher classification position Senior Project Contract

Administration Officer BAO5 within QBuild, as he had been acting in the position since 3 April 2017.

[5] On 6 November 2020, Mr Ward received correspondence from Ms Simone Pirie, Human Resources Consultant of the Department. The correspondence advised him that the Deputy Director-General had conducted a review of his employment status in accordance with the requirements of *Directive 13/20 Appointing a public service employee to a higher classification level* ('the Directive').

[6] The correspondence advised Mr Ward that because his temporary BAO5 placement is due to expire on 30 August 2021, the engagement will continue in accordance with its current terms ('the decision'). The decision noted that he could request another review on 3 April 2021 if his engagement in the position continued, or earlier if the position became a substantive vacancy.

[7] The reasons for the decision were set out as follows:

- The purpose of your current placement in the position of BAO5, Senior Project/Contract Administrator, BPAM, is to perform work for a particular project specifically, the Queensland Corrective Service project, which has an expected end date of 29 January 2021.
- On the completion of this project on 30 August 2021, there will no longer be a continuing need for you to be engaged in the position of BAO5, Senior Project/Contract Administrator within QBuild, BPAM.

[8] Mr Ward filed an Appeal Notice on 25 November 2020. In his appeal, he contended that:

- Based on the QBuild construction model accepting major projects for the past six years and the possibility of future projects, there is a genuine operational requirement for an additional BAO5 within the Department;
- His position description does not specify which project he has been allocated to or the end date of that project;
- Citing s 148(2)(c) of the *Public Service Act 2008* (Qld) ('the PS Act'), the decision's conclusion that he works on a single project is incorrect, and as such the decision does not comply with s 149B of the PS Act;
- Mr Ward carries out project supervision tasks and administrative support roles across multiple projects within QBuild and does not work on one single project. He notes it is inequitable that QBuild will appoint employees on a fixed-term basis for major projects, but will appoint permanent BAO5 staff for smaller projects of a lesser value who carry out the same tasks as Mr Ward;

- Mr Ward's nine extensions across three years within the BAO5 position is a "HR strategy" that requires reviewing as it is "not correct" per s 149B and 149C of the PS Act;¹ and
- Mr Ward has not been appropriately offered a permanent role considering he has been working with QBuild since 2012, has provided support to the delivery of many projects and has been praised as a significant role and success on several projects.

What decisions can the Industrial Commissioner make?

[9] In deciding this appeal, s 562C(1) of the *Industrial Relations Act 2016* (Qld) ('the IR Act') provides that the Commission may:

- (a) confirm the decision appealed against; or
- (b) set the decision aside and return the matter to the decision maker with a copy of the decision on appeal and any directions permitted; or
- (c) set the decision aside and substitute another decision or return the matter to the decision maker with a copy of the decision on appeal and any directions considered appropriate.

Nature of appeal

[10] Under Chapter 11 of the IR Act, the role of the Commission is to review the decision appealed against.² The IR Act does not define the term 'review'. The term 'review' will take its meaning from the context in which it appears.³

[11] An appeal under Chapter 11 of the IR Act is not a rehearing of the matter,⁴ but rather, it is a review of the decision and the decision-making process.⁵ The purpose of such an appeal is to have the Commission decide whether the decision appealed against was fair and reasonable.⁶

[12] The issue for my determination in the matter before me is whether the decision to refuse to permanently appoint Mr Ward to the higher position was fair and reasonable.⁷

[13] For the reasons set out below I have determined that the decision was fair and reasonable.

¹ Appeal Notice filed 25 November 2020, page 4.

² *Industrial Relations Act 2016* (Qld) s 562B.

³ *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10.

⁴ *Goodall v State of Queensland* (unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018), 5.

⁵ *Ibid.*

⁶ *Industrial Relations Act 2016* (Qld) s 562B(3).

⁷ *Page v John Thompson and Lesley Dwyer, As Chief Executive Officer, West Moreton Hospital and Health Service* [2014] QSC 252, 60-61.

Relevant sections of the PS Act and Directive

[14] The relevant provisions of the PS Act and the Directive for consideration in this appeal are set out below.

[15] Section 149C of the PS Act relevantly provides:

149C Appointing public service employee acting in position at higher classification level

- (1) This section applies in relation to a public service employee if the employee –
 - (a) is seconded to, under section 120(1)(a), or is acting at, a higher classification level in the department in which the employee holds an appointment or is employed; and
 - (b) has been seconded to or acting at the higher classification level for a continuous period of at least 1 year; and
 - (c) is eligible for appointment to the position at the higher classification level having regard to the merit principle.

...
- (3) The employee may ask the department's chief executive to appoint the employee to the position at the higher classification level as a general employee on tenure or a public service officer, after –
 - (a) the end of 1 year of being seconded to or acting at the higher classification level; and
 - (b) each 1-year period after the end of the period mentioned in paragraph (a).
- (4) The department's chief executive must decide the request within the required period.
- (4A) In making the decision, the department's chief executive must have regard to –
 - (a) the genuine operational requirements of the department; 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 employment at the higher classification level.

[16] Clause 4 of the Directive provides as follows:

4. Principles

- 4.1 An employee seconded to or assuming the duties and responsibilities of a higher classification level in the agency in which the employee is substantively employed can be appointed to the position at the higher classification level as a general employee on tenure or a public service officer following a written request to the chief executive.
- 4.2 Secondment to or assuming the duties and responsibilities of a higher classification level should only be used when permanent appointment to the role is not viable or appropriate. Circumstances that would support the temporary engagement of an employee at a higher classification level include:
 - ...
 - (c) to perform work for a particular project or purpose that has a known end date
 - (d) to perform work necessary to meet an unexpected short-term increase in workload
 - ...

[17] Clause 6 of the Directive provides as follows:

6. Decision making

- 6.1 When deciding whether to permanently appoint the employee to the higher classification level as a general employee on tenure or a public service officer, the chief executive may consider whether the employee has any performance concerns that have been put to the employee and documented and remain unresolved, that would mean that the employee is no longer eligible for appointment to the position at the higher classification level having regard to the merit principle.
- 6.2 In accordance with section 149C(4A) of the PS Act, when deciding the request, the chief executive must have regard to:
- (a) the genuine operational requirements of the department, and
 - (b) the reasons for each decision previously made, or deemed to have been made, under section 149C of the PS Act in relation to the employee during their continuous period of employment at the higher classification level.

Submissions of the parties

[18] The parties filed written submissions in accordance with a Directions Order dated 25 November 2020. The parties' submissions primarily concern the genuine operational requirements of the Department.

Submissions of Mr Ward

[19] Mr Ward contends, for reasons set out in his submissions dated 3 December 2020, that he should be appointed to the BAO5 position. In summary, he submits that:

- The decision not to permanently appoint him in the BAO5 position is in conflict with the PS Act and the principles in the Directive;
- There are inconsistent end dates for the position in the decision and, in any case, Mr Ward does not work solely on the Queensland Corrective Services project and administration of the project will extend past 30 August 2021;
- There is a high demand for contract/ project administration support for current and upcoming projects at QBuild and Mr Ward is a qualified, capable and experienced "senior administrator manager" having been extended nine times;
- There is a genuine operational need for a Senior Project Contract Administration Officer BAO5 role and even a BAO6 role as QBuild has "intent to expand construction management, and realignment of Delivery and administration support, along with other disciplines, such as safety and procurement". Listing projects on which he has been the lead administrator, Mr Ward highlights there are additional tasks on the projects which require completing and that in the long term, there is a significant and genuine need for an additional experienced senior administrator to support major projects within QBuild;

- There is inequity regarding recent appointments of permanent staff, as Mr Ward has worked longer on projects that other staff were part of and has been working at higher duties for a longer period than they had;
- On the temporary change of duties forms provided by the Department, positions 707224 and 707611 are noted as being a 'vacant position' and accordingly, Mr Ward contends he is eligible for permanent appointment to the position under s 149B of the PS Act;⁸
- That positions 707224 and 707611 are "identical in respect of the duties and responsibilities",⁹ with the only distinction being that they are in support of different projects; and
- According to a timeline in his submissions, he has been acting as a BAO5 for over four years and should be appointed permanently per the Directive.

Submissions of the Department

[20] The Department contends, for reasons set out in their submissions dated 26 November 2020, that genuine operational requirements preclude Mr Ward's permanent appointment at the higher level and the decision was fair and reasonable. In summary, it submits that:

- There are no performance issues regarding Mr Ward's request to be appointed to the higher classification level;
- Although there were inconsistent dates in the decision letter, it confirms the purpose of Mr Ward's higher duties placement is to perform work on the NYDC project which has a known end date of 30 June 2021;
- Although Mr Ward references the need for a BAO6 in his work unit, s 149C(3) of the PS Act and clause 4.1 of the Directive require that the employee can only request to be appointed to the position in which they were acting in at the time. Citing the case of *Holcombe v State of Queensland (Department of Housing and Public Works)*,¹⁰ ('*Holcombe*') they submit Mr Ward's relevant position is BAO5 Senior Project Contract Administration Officer (position number 707611);
- While Mr Ward is occasionally required to provide support on other QBuild projects, the primary purpose of his temporary placement is to perform work on the NYDC project which has a known end date of 30 June 2021. Mr Ward's

⁸ Submissions of the Appellant dated 3 December 2020, attachment A.

⁹ Submissions of the Appellant dated 3 December 2020, page 3.

¹⁰ [2020] QIRC 195.

higher duties placement ends on 30 August 2021 to complete post NYDC project tasks;

- Citing clause 4.2 of the Directive, the Department notes it provides circumstances that support the temporary engagement of an employee at a higher classification level. Relevantly to Mr Ward's circumstances, per the Directive, his skills are only temporarily required to perform work for a particular project that has a known end date of 30 June 2021, and after this date there will no longer be a continuing need for Mr Ward to be in the temporary BAO5 position; and
- Per clause 6.2 of the Directive and s 149C(4A) of the PS Act, the Department submits it does not have a genuine operational need to employ Mr Ward in the BAO5 position permanently once the NYDC project and associated tasks are completed, and it is not appropriate or viable to do so.

Reply submissions of Mr Ward

[21] In correspondence received by the Registry on 18 December 2020, Mr Ward chose not to provide reply submissions.

Consideration

The decision of Holcombe

[22] The Department relied on *Holcombe* in their submissions in pointing out that there is a narrow scope for consideration of an application for appointment to a higher classification under s 149C of the PS Act.

[23] In *Holcombe* the Commission found that:

The PS Act, at s 149C(1)(c), provides that s 149 applies to a public service employee if they are eligible for appointment to the position. Further, s 149C(3) provides that the employee may ask to be appointed to the position at the higher classification level. The power afforded to the department to permanently appoint Mrs Holcombe is confined to the position into which he has been seconded at the time of the review. That can be contrasted with the entitlement to request a review, which merely requires that, amongst other things, a person be engaged in a higher classification level for a period. The term 'the position' is inherently more specific than 'higher classification level'; many positions could be described as being of a higher classification level.

In that way, it can be said that an employee may be entitled to a review after engaging in a number of positions, but the review must be conducted against a precise position.

...

The PS Act at s 149C, in concert with the Directive, creates a framework where if a person has been acting at a higher classification for a particular period, they may be permanently appointed to the position they occupy. There is no contemplation in those materials that the meaning of the

position would be so broad as to encapsulate any position with the same title and classification anywhere in the workplace, or the city, or indeed the State.

By way of contrast, a broader ambit of the type proposed by Mrs Holcombe is expressly imparted in other conversion reviews which immediately precede s 149C. In conducting a temporary employment review under ss 149A and 149B, the department's chief executive may convert an employee to permanency if there is a continuing need for someone to be employed in the person's role, or a role that is substantially the same. Following the review, the department chief executive may "offer to convert the person's employment basis to employment as a general employee on tenure or a public service officer". Therefore, the review is conducted against not only the present role, but a role which is substantially the same, and any appointment is not inherently tied to a particular position identified by a number.

The language of s 149C is narrower: the employee may ask the department's chief executive to appoint the employee to the position at the higher classification level as a general employee on tenure or a public service officer. That does not empower the department chief executive to review the employee against positions which are substantially the same or appoint them to another comparable position. The power is expressly confined to the position occupied by the employee at that time.

(Emphasis added)

- [24] This presents a significant problem for Mr Ward given the position he was in at the time of his application has a nominated end date. The Department relies on this fact in citing genuine operational requirements as the reason to refuse Mr Ward's application.

Genuine operational requirements

- [25] In *Morison v State of Queensland (Department of Child Safety, Youth and Women)* the Deputy President observed:¹¹

Ms Morison submits that neither the PS Act or Directive include a role being substantively vacant as a prerequisite for appointment to the higher classification level. However, s 149C(4A)(a) of the PS Act and cl 6.2(a) of the Directive provide that the department's chief executive, in making a decision about a relevant request for an employee to be appointed to the position at the higher classification level, must have regard to the 'genuine operational requirements of the department'.

The phrase 'genuine operational requirements of the department' is not defined in the PS Act or in the Directive. As a consequence, that phrase must take its meaning from the words used in it and the context in which it appears in the PS Act; and consideration of the context includes surrounding provisions, what may be drawn from other aspects of the instrument, the instrument as a whole and it extends to what the instrument seeks to remedy. The same considerations apply to the construction of the same phrase in cl 6.2(a) of the Directive.

The adjective 'genuine' relevantly means '... being truly such; real; authentic.' The phrase 'operational requirements of the department' is obviously a broad term that permits a consideration of many matters depending upon the particular circumstances of the department at a particular time. In considering the context of s 149C(4A)(a) of the PS Act, the chief executive of a department, under the PS Act, is responsible for, amongst other things:

¹¹ [2020] QIRC 203 at [36]-[44].

- managing the department in a way that promotes the effective, efficient and appropriate management of public resources; and
- planning human resources, including ensuring the employment in the department of persons on a fixed term temporary or casual basis occurs only if there is a reason for the basis of employment under the PS Act.

In respect of the Directive, cl 4.2 provides that secondment to or assuming the duties and responsibilities of a higher classification level should only be used when permanent appointment to the role is not viable or appropriate. That clause goes on to provide that circumstances that would support the temporary engagement of an employee at a higher classification level include:

- when an existing employee takes a period of leave such as parental, long service, recreation or long-term sick leave and needs to be replaced until the date of their expected return; or
- when an existing employee is absent to perform another role within their agency, or is on secondment, and the agency does not use permanent relief pools for those types of roles.

The phrase '... genuine operational requirements of the department' in s 149C(4A)(a) and in cl 6.2(a) of the Directive, construed in context, would at least include whether or not there was an authentic need, having regard to the effective, efficient and appropriate management of the public resources of the department, 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, to '...the position at the higher classification level.'

There can be no dispute that the reason Ms Morison is presently acting in the higher classification level in position number 7021866 is that the incumbent of that position is on special leave. However, the incumbent may return from such leave. That was a relevant matter for Ms Matebau to have considered in deciding the request made by Ms Morison. Put another way, in having regard to genuine operational requirements of the Department, it was relevant for Ms Matebau to consider whether, in terms of managing the Department in a way that promoted the effective, efficient and appropriate management of public resources, Ms Morison should be appointed to position number 7021866 when it was possible the incumbent was likely to return to that position.

Ms Morison does contend that requirement was not genuine.

For the reasons given above, in my view, this aspect of Ms Matebau's decision was fair and reasonable.

(Emphasis added)

[26] Similarly, in Mr Ward's case while there is no incumbent employee to speak of, there is no clear indication that the position he is working in will exist beyond the nominated end date.

[27] Mr Ward relies on historic patterns of appointment to higher duties. It is understandable that these would give rise to an expectation that he is entitled to be permanently appointed at the higher classification. Clearly, he is capable of performing duties at that level.

- [28] However, while historic patterns of appointments might give rise to such expectations in this matter, it is an irrefutable fact that the position in question will cease to exist on a fixed date.
- [29] While I sympathise with Mr Ward, it does not alter the fact that at the time of making the decision, the limits of the decision maker's knowledge about the position did not extend beyond its expiration on the date fixed.
- [30] Speculation by Mr Ward (or the Department) about the ongoing need for the type of work performed by Mr Ward, regardless of consistent historic patterns, could never be a sound basis for decision making of this type. For the decision maker to accede to Mr Ward's request on the basis of such speculation would ignore the potentially dire consequences of appointing Mr Ward permanently to a role that was liable to shortly disappear.
- [31] I consider that the Department have legitimately identified genuine operational requirements that warrant refusal of the application by Mr Ward.
- [32] In all of these circumstances, I consider the decision to be fair and reasonable.

Order

- [33] In the circumstances I make the following order:

1. The decision appealed against is confirmed.