QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Abbott v State of Queensland (Department of Education)* [2021] QIRC 113
PARTIES:	**Abbott, Vanessa** (Appellant) **v** **State of Queensland (Department of Education)** (Respondent)
CASE NO:	PSA/2020/410
PROCEEDING:	Public Service Appeal – Appointment to Higher Classification Level
DELIVERED ON:	1 April 2021
MEMBER:	McLennan IC
HEARD AT:	On the papers
ORDER:	**That the appeal is dismissed.**
CATCHWORDS:	INDUSTRIAL LAW – PUBLIC SERVICE APPEAL – where the appellant was reviewed under s 149C of the *Public Service Act 2008* – where the outcome of the review was that the appellant was not permanently appointed – where the incumbent of the position was returning – consideration of 'the position' – consideration of the scope of a review under s 149C – consideration of 'genuine operational requirement'
LEGISLATION AND DIRECTIVES:	*Acts Interpretation Act 1954* (Qld) s 14A *Directive 13/20 Appointing a public service employee to a higher classification level* cl 1, cl 3, cl 4, cl 5, cl 6, cl 7, cl 9, cl 10, cl 11

	Industrial Relations Act 2016 (Qld) s 564, s 562B, s 562C
	Public Service Act 2008 (Qld) s 120, s 149, s 149A, s 149B, s 149C, s 194, s 196, s 197
	Statutory Instruments Act 1992 (Qld) s 7, s 14
CASES:	*Goodall v State of Queensland* (Supreme Court of Queensland, Dalton J, 10 October 2018)
	Holcombe v State of Queensland (Department of Housing and Public Works) [2020] QIRC 195
	Katae v State of Queensland & Anor [2018] QSC 225
	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

Introduction

[1] Ms Vanessa Abbott (the Appellant) has filed an appeal against a conversion decision (the decision) made by Ms Lisa Newbold (the decision maker), Director, Employment Review, Human Resources, Education Queensland (the Respondent, the Department).

[2] Ms Abbott is currently substantively employed in the role of AO2 Administrative Officer, Mango Hill State School, by the Respondent.

[3] However, she has been continuously acting as an AO4 Support Officer, Education Systems Management, Information and Technologies (the AO4 position) with the Respondent since 26 March 2018.

The Decision

[4] The terms of the decision were contained in correspondence from the decision maker dated 18 November 2020.

[5] The decision subject of this appeal is the Department's determination not to permanently convert Ms Abbott's employment to the higher classification level – that is, to the AO4 position.

Jurisdiction

Decision against which an appeal may be made

[6] Section 194 of the *Public Service Act 2008* (Qld) (the PS Act) identifies the categories of decisions against which an appeal may be made. Section 194(1)(e)(iii) of the PS Act provides that an appeal may be made against a decision:

> …under section 149C not to appoint an employee to a position at a higher classification level, if the employee has been seconded to or acting at the higher classification level for a continuous period of at least 2 years.

[7] Section 197 of the PS Act allows for an appeal to be heard and decided by the IRC. An appeal is initiated by providing the Industrial Registrar with an appeal notice stating the details of the decision being appealed against and the reasons for the appeal.

[8] Section 196(e) of the PS Act prescribes that the employee the subject of the conversion decision may appeal. Ms Abbott meets that requirement.

[9] I am satisfied that the conversion decision made by the Department is able to be appealed.

Timeframe for appeal

[10] Section 564(3) of the *Industrial Relations Act 2016* (Qld) (the IR Act) requires that an appeal be lodged within 21 days after the day the decision appealed against is given. That is the relevant inquiry with respect to timeframes. I note that despite the question posed in the Form 89 – Appeal Notice regarding when the decision was received.

[11] Ms Abbott provides that she was given the decision on 19 November 2020.

[12] The Notice of Appeal was filed with the Industrial Registry on 10 December 2020.

[13] I am satisfied that the appeal was filed by the Appellant within the required timeframe.

Appeal principles

[14] Section 562B(2)(3) of the IR Act provides that the appeal is decided by reviewing the decision appealed against "to decide whether the decision appealed against was fair and reasonable."

[15] The appeal is not conducted by way of re-hearing,[1] but rather involves a review of the decision arrived at by the Respondent and the associated decision-making process.[2]

---

[1] *Goodall v State of Queensland (Supreme Court of Queensland, Dalton J, 10 October 2018)* 5; *Industrial Relations Act 2016* (Qld) s 567(1).
[2] Ibid s 562B(2).

[16] Findings made by the Department, which are reasonably open to it, should not be disturbed on appeal. Even so, in reviewing the decision appealed against, the IRC member may allow other evidence to be taken into account.[3]

[17] The issue for my determination is whether the decision not to convert Ms Abbott's employment status to the higher classification level was fair and reasonable in the circumstances.[4]

What decisions can the IRC Member make?

[18] Section 562C of the IR Act prescribes that the Commission may determine to either:

- Confirm the decision appealed against; or
- Set the decision aside and return the matter to the decision maker with a copy of the decision on appeal and any directions considered appropriate; or
- Set the decision aside and substitute another decision.

Submissions

[19] In accordance with the Directions Order issued on 10 December 2020, the parties filed written submissions.

[20] Pursuant to s 451(1) of the IR Act, no hearing was conducted in deciding this Appeal. The matter was decided on the papers.

The decision of 18 November 2020 (subject to this appeal)

[21] The decision maker conveyed the following reasons for not permanently converting Ms Abbott to the higher classification level:

> The temporary nature of your higher classification level role is the result of the temporary vacancy arising from an existing employee being absent from the role for a known period. The existing employee is absent on a period of approved leave, requiring replacement until the date of their expected return.
>
> The substantive employee is currently accessing an approved form leave. Currently the department's leave system shows an expected return date of 15 December 2020, this is also the understanding of the business unit.
>
> As an existing employee is substantively engaged in the higher classification role, with an expected return date of 15 December 2020, a genuine operational requirement exists to refuse your request for appointment to the higher classification role.[5]

---

[3] *Industrial Relations Act 2016* (Qld) s 567(2).
[4] *Page v John Thompson and Lesley Dwyer, As Chief Executive Officer, West Moreton Hospital and Health Service* [2014] QSC 252, [60] - [61]; *Industrial Relations Act 2016* (Qld) s 562B.
[5] Correspondence from Ms Lisa Newbold to Ms Vanessa Abbott, dated 18 November 2020, page 3, 'Reasons for Decision' (the Decision Letter).

Appeal Notice

[22] Ms Abbott set out why she believes the decision was unfair and unreasonable in the Appeal Notice filed on 10 December 2020.

[23] Those reasons are summarised as follows:

- The role does not need to be vacant as a pre-requisite for conversion.

  Where a role is not substantively vacant or a backfilling arrangement exists, that may be one of a number of considerations in assessing the genuine operational requirements of the Department. However, it is a not a "blanket reason to decline an appointment."[6]

- It is not clear cut that Ms Abbott is backfilling another employee who is imminently returning to perform the work that she is currently doing.

- This case turns on questions of fact that remain unresolved, unevidenced or made in error, including: which position Ms Abbott is performing higher duties in; whether she is backfilling another employee; and whether her current work will be performed by another employee upon their return or not.

- The decision maker should have had regard to and explained other considerations to evidence the adequate assessment of the genuine operational requirements of the Department.

- There is no dispute between the parties as to merit.

Appellant's submissions

[24] Ms Abbott filed further submissions on 24 December 2020.

[25] Ms Abbott has based her appeal on three key arguments:

- The decision does not contain findings of facts, evidence and conclusions relating to substantial issues upon which the decision turned, or which are in dispute.

- The decision relies on errors of fact and incorrect assumptions.

- The decision fails to take into account relevant facts and considerations.

[26] Firstly, Ms Abbot elaborated that:

- The decision maker's assertion that the AO4 position incumbent is absent for a known period (expected return of 15 December 2020) "fails to provide

[6] Appeal Notice, filed 10 December 2020, Schedule A, page 1, [5].

facts or evidence to support these conclusions or sufficient detail for me to adequately challenge these findings in the appeal."[7]

- The decision maker's assertion that Ms Abbott's temporary engagement in the AO4 position is due to the absence of the incumbent has not been evidenced.

- She noted Deputy President Merrell's comments in *Morison v State of Queensland (Department of Child Safety, Youth and Women)*[8] that decision makers must provide adequate reasons. In this case, the decision maker offered only minimal reasoning to explain, or evidence to support findings in, the "substantial issues upon which the decision turned"[9] including:

    - What is the higher classification position?
    - What is the reason for engagement on a temporary basis?
    - Is there a substantive incumbent? If so, who?
    - Did the incumbent usually (or ever) perform the work that Ms Abbott is currently doing?
    - Will the work that Ms Abbott is currently doing be performed by the incumbent when they return from leave?
    - What connection is evidenced between the incumbent's leave or absence and Ms Abbott's temporary engagement in the AO4 position?

[27] Secondly, Ms Abbott disputed that she was temporarily engaged in the AO4 position to backfill the absent incumbent for a known period. Ms Abbott stated that:

- She was not advised that the temporary placement in the AO4 position was to backfill an absent incumbent at interview in February 2018, when advised she was the successful candidate in March 2018 nor upon commencing in the position later that month.

- There were two temporary AO4 positions filled at the time she was appointed in March 2018.

- She was informed the AO4 position was a vacant temporary position for each extension granted until at least January 2020.

- Letters from the Department regarding her contract do not indicate that she was backfilling for an absent incumbent.

- She understood that function of the work team was previously 'project' but now was instead ongoing 'support'.

- She has only recently been advised that she is backfilling an absent incumbent but has not received any further details to support this contention.

---

[7] Appellant's submissions, filed 24 December 2020, page 2.
[8] [2020] QIRC 203, [48]-[50].
[9] Ibid [49].

- The Department's claim that Ms Abbott is backfilling an absent incumbent due to return on 15 December 2020 is odd in circumstances where her current temporary engagement has been extended until 4 April 2021. It is noteworthy that the other temporary employee was also engaged until April 2021. The two temporary employees' contracts seem aligned with each other, rather than with the return of the AO4 position incumbent.

- The Directive prescribes that employment on tenure is the default basis of employment. That should only be departed from where the genuine operational requirements of the department indicate that is not viable or appropriate.

- While the Directive sets out circumstances that would support an employee's temporary engagement (including backfilling an absent incumbent), the decision maker has not included any evidence to support the finding that was the case.

- QParent App support function does not have a known or fixed end date and Ms Abbott has been renewed several times.

[28] Finally, Ms Abbott claimed that:

> The decision maker appears to have only considered a very narrow range of matters, namely whether or not I am notionally engaged, to backfill another employee" and not the other relevant "genuine operational matters that should have been considered.[10]

Respondent's submissions

[29] The Department's submissions, filed 14 January 2021, can be briefly summarised as follows:

- The decision not to permanently convert Ms Abbott to the AO4 position was due to genuine operational requirements, as conveyed to Ms Abbott in the decision letter.

- There is no dispute between the parties as to merit.

- Ms Abbott's Service History shows that she was in the higher classification role of "Consultant, Education Systems Management" (Position Number: 95000381) until accessing a period of maternity leave from 21 January 2020. The Department recognised that should have been extended until the conclusion of Ms Abbott's maternity leave on 22 April 2020 and has since made the appropriate back payment.

- Upon returning from maternity leave on 23 April 2020, Ms Abbott was placed in the *different* position of "Support Officer, Education Systems

[10] Appellant's submissions, filed 24 December 2020, page 4, [29].

Management" with a *different* position number (that is, Position Number: 95000633).

- While this position is the same classification level and within the same team, the Department contended they are "separate and distinct positions."[11]

- The Service History showed that the reason for placement of Ms Abbott in the latest AO4 Support Officer position was for the purpose of backfilling the incumbent employee absent on long term sick leave since 24 September 2018.

- At the time the Department's conversion decision was made, the incumbent employee had a medical certificate for their absence until 15 December 2020. Following the filing of this Appeal, the incumbent employee has provided a further medical certificate covering their absence until at least 15 March 2021. In order to provide continued support to schools, Ms Abbott's engagement was extended to 4 April 2021 (the end of Term 1). This was consistent with other contracts within the Education Systems Management team.

- It is agreed that Ms Abbott had been acting at the higher classification level for a period of 2 years and 8 months; notwithstanding she had not been in the current position for that entire period.

- It was reasonably open to the decision maker to decline Ms Abbott's conversion request due to these genuine operational requirements. It would not be appropriate for the decision maker "to speculate beyond known facts when conducting a review…pursuant to section 149C of the PS Act."[12]

- The Department referred to a checklist released by the Public Service Commission (PSC) that states that a delegate may have regard to whether the role being performed is substantively vacant in the assessment of whether or not there are genuine operational requirements that may prevent conversion.

- The decision maker had regard to the incumbent's absence on approved sick leave and their planned return date in concluding Ms Abbott would not be converted into a role that was not substantively vacant.

- In *Morison v State of Queensland (Department of Child Safety, Youth and Women)*, Deputy President Merrell observed that the consideration of genuine operational requirements 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.[13]

---

[11] Respondent's submission, filed 14 January 2021, page 3, [16].
[12] Respondent's submission, filed 14 January 2021, page 4, [25].
[13] [2020] QIRC 203, [40].

- With respect to Ms Abbott's assertion that the decision letter contains no evidence of the incumbent's leave, nature of duties (both previously performed and intended to be performed) and return to work arrangements, the Department confirmed that Ms Abbott's current AO4 position (and position number) corresponds to that owned by the incumbent employee on approved sick leave.

- The Decision should be confirmed.

Appellant's submissions in reply

[30] Insofar as they differ from her previous submissions, Ms Abbott's reply submissions filed on 21 January 2021 can be briefly summarised as follows:

- She refutes the Department's submission that her temporary engagement in the AO4 position was extended due to the incumbent's extended absence on sick leave. Ms Abbott stated:

> This is apparent from the timing alone. The decision was made to extend me in the Support Officer role until April 2021 before any decision was made in regard to my s 149C request and well before the Respondent received medical information indicating the incumbent employee would be taking a further period of sick leave beyond 15 December 2020. At the time my engagement was extended until April 2021 it must have been contemplated and accepted by the Respondent that if the incumbent employee returned in December 2020 at the end of their sick leave we would be concurrently employed. I maintain my submission that this is evidence that I was not engaged solely to backfill another employee.[14]

- This appeal is against the decision contained in the decision letter dated 18 November 2020. Ms Abbott noted that:

> …the provision of additional reasons in the Respondent's submissions now does not address the shortcomings of the decision I raised in my appeal notice and submissions and I maintain those submissions.[15]

- The decision maker has not provided the material findings of fact and evidence relied upon in arriving at the decision, as is required by the Directive.

The review of a decision as to whether or not to permanently appoint a public service employee acting in a position at a higher classification level

[31] The legislative scheme for the review of a decision to convert an employee to a higher classification level, in the above circumstances, is contained in the IR Act, PS Act and in the *Directive 13/20 Appointing a public service employee to a higher classification level* (the Directive).

[32] Section 149C of the PS Act provides (emphasis added):

---

[14] Appellant's Reply Submissions, filed 21 January 2021, page 1, [3]-[4].
[15] Appellant's Reply Submissions, filed 21 January 2021, page 2, [8].

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***.

(2) However, this section does not apply to the following public services employees—

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

(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.

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

(a) ***reasons for the decision***; and
(b) the ***total continuous period*** for which the person has been acting at the higher classification level in the department; and
(c) ***how many times the person's engagement at the higher classification level has been extended***; and
(d) ***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.

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

(7) The commission chief executive ***must make a directive*** about appointing an employee to a position at a higher classification level under this section.

(8) In this section—

continuous period, in relation to an employee acting at a higher classification level, has the meaning given for the employee under a directive made under subsection (7).

required period, for making a decision under subsection (4), 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.

[33] Further, s 194(1)(e)(iii) of the PS Act Act provides (emphasis added):

> **194 Decisions against which appeals may be made**
>
> (1) An appeal may be made against the following decisions—
>
> (e) a decision (each a conversion decision)—
>
> (iii) under section 149C not to appoint an employee to a position at a higher classification level, ***if the employee has been seconded to or acting at the higher classification level for a continuous period of at least 2 years***;

[34] It is noted that the Directive came into effect on 25 September 2020.

[35] The Directive relevantly provides:

> **3. Application**
>
> 3.4 The requirement to advertise roles in the directive relating to recruitment and selection does not apply to the appointment of an employee to a higher classification level under this directive. However, if an agency is seeking to permanently appoint an employee to a higher classification level prior to the employee becoming eligible to request an appointment under section 149C of the PS Act, the appointment must comply with the recruitment and selection directive.
>
> **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:
>
> (a) 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***
> (b) 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
> (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
>
> 4.3 Under the Human Rights Act 2019 decision makers have an obligation to act and make decisions in a way that is compatible with human rights, and when making a decision under this directive, to give proper consideration to human rights.

5. Employee may request to be appointed at the higher classification level

5.1 Section 149C of the PS Act provides that an employee seconded or engaged in higher duties ***may submit a written request*** to the chief executive ***to permanently appoint the employee to the higher classification level*** as a general employee on tenure or a public service officer.

5.2 ***To be eligible to request*** consideration for appointment at the higher classification level under clause 5.1 the employee must:

(a) have been seconded to or assuming the duties and responsibilities of the ***higher classification level***
(b) for a ***continuous period of at least one year***
(c) be eligible for appointment to the higher classification level having regard to the ***merit*** principle.

5.3 Under section 149C(3) of the PS Act, ***an eligible employee may request*** the chief executive to permanently appoint the employee to the higher classification level:

(a) ***one year after*** being seconded to or assuming the duties and responsibilities of the higher classification level, and
(b) ***each subsequent year*** where the employee continues their engagement at the higher classification level in the same role.

5.4 An employee may make one request for appointment in each one year period commencing on the employee becoming eligible to request under clause 5.3(a) or 5.3(b), and ***may make an additional request if the role becomes a substantive vacancy.***

5.5 The chief executive ***must consider*** permanently appointing the employee to the higher classification level ***where a written request has been made*** under this clause.

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.

6.3 In accordance with section 149C(6) of the PS Act, if the chief executive does not make the decision within 28 days, the chief executive is taken to have decided that the person's engagement in the agency is to continue according to the terms of the existing secondment or higher duties arrangement.

6.4 Each agency must, upon request, give the Commission Chief Executive a report about the number of known deemed decisions occurring by operation of section 149C(6) of the PS Act.

7. Statement of reasons

7.1 A chief executive who decides to refuse a request made under clause 5 ***is required to provide a written notice that meets the requirements*** of section 149C(5) of the PS Act (Appendix A). The notice provided to the employee must, in accordance with section 27B of the *Acts Interpretation Act 1954*:

(a) set out the ***findings on material questions of fact***, and
(b) refer to the evidence or other ***material on which those findings were based***.

7.2 A written notice is ***not required to be prepared 'after the fact'*** to support a deemed decision made under clause 6.3.

8. Appeals

8.1 An employee eligible for review under clause 149C(3)(b), that is ***after two years of continuous engagement at the higher classification level, has a right of appeal*** provided for in section 194(1)(e)(iii) of the PS Act in relation to a decision not to permanently appoint the employee to the higher classification level.

8.2 In accordance with section 195(1)(j) of the PS Act, ***an employee does not have a right of appeal*** in relation to a decision not to permanently appoint the employee to the higher classification level in response to an application made under clause 149C(3)(a), that is if the employee has been ***seconded to or acting at the higher classification level for less than two years.***

9. Exemption from advertising

9.1 Any requirement to advertise a role in a directive dealing with recruitment and selection does not apply when permanently appointing an employee under this directive.

10. Transitional provisions

10.1 Section 295 of the PS Act sets out the transitional arrangements for employees seconded to or assuming the duties and responsibilities of a higher classification level who may now be eligible to request appointment at the higher classification level as a general employee on tenure or a public service officer.

11. Definitions

Agency has the meaning provided in clause 3.3 of this directive.

Chief executive, in the context of exercising a decision making power, includes a person to whom the chief executive has delegated the decision making power.

Continuous period for the purposes of this directive, means a period of unbroken engagement, including periods of authorised leave or absence, at the higher classification level in the same role, in the same agency.

Higher classification level means a classification level which has a higher maximum salary than the maximum salary of the classification level actually held by the employee. An employee who has assumed less than the full duties and responsibilities of the higher classification level and as a result receives remuneration at a relevant percentage of less than 100 per cent is not considered to be performing at the higher classification level.

Non-industrial instrument employee has the meaning given under the Industrial Relations Act 2016.

Public service agency means a department or public service office as provided for in section 49A of the PS Act.

Secondment has the meaning given under section 120(1)(a) of the PS Act.

> **Substantive vacancy** means a recurrently funded position identified on an agency's establishment list that does not have an ongoing incumbent appointed.

[36] The Directive is a statutory instrument within the meaning of s 7 of the *Statutory Instruments Act 1992* (Qld).[16]

[37] Section 14 of the *Statutory Instruments Act 1992* (Qld) provides that certain provisions of the *Acts Interpretation Act 1954* (Qld) apply to statutory instruments. One of those is s 14A which provides that in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation. Schedule 1 to the *Acts Interpretation Act 1954* (Qld) provides that 'purpose', for an act, includes policy objective.

[38] The stated purpose of the Directive is (emphasis added):[17]

> **1. Purpose**
>
> 1.1 The Public Service Act 2008 (PS Act) establishes employment on ***tenure is the default basis of employment*** in the public service, excluding non-industrial instrument employees, and ***sets out the circumstances where employment on tenure is not viable or appropriate***.
>
> 1.2 This directive:
>
> (a) highlights key sections in the PS Act dealing with appointing a public service employee assuming the duties and responsibilities of a position at a higher classification level
> (b) ***supports the opportunity to appoint an employee to a higher classification level where that employee has performed the role for one year and is eligible for appointment having regard to the merit principle***
> (c) sets out procedures for requests and decisions.

Findings

[39] I am required to decide this appeal by assessing whether or not the decision appealed against was fair and reasonable.

[40] This involves a review of the decision-making process utilised and the conversion decision arrived at.

Eligibility for review of conversion

[41] Section 149C(1) and (3) of the PS Act provides that an employee is eligible to request permanent appointment at the higher classification level after the end of one year. This is restated at cl 4.1 of the Directive.

[42] It is not a point of dispute between the parties that Ms Abbott was eligible to request conversion to the higher classification level.

---

[16] *Katae v State of Queensland & Anor* [2018] QSC 225, [26].
[17] *Directive 13/20 Appointing a public service employee to a higher classification level,* cl 1.

Purpose

[43] In deciding this appeal, I note the significance of the legislative provisions identified and explained above.

[44] In summary, the Directive's status as a statutory instrument provides that the interpretation that will best achieve the purpose and / or policy objective of the Directive is to be preferred to any other interpretation.

[45] In that regard, I recognise that one of the stated purposes of the Directive is to support:

> …the opportunity to appoint an employee to a higher classification level where that employee has performed the role for one year and is eligible for appointment having regard to the merit principle.[18]

Decision criteria that must be considered

[46] The PS Act and the Directive provides that, in making the decision regarding a higher classification conversion request, the chief executive must have regard to:

- Whether the employee is eligible for appointment to the position at the higher classification level having regard to the merit principle.
- The genuine operational requirements of the department.
- 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.

[47] Further, in the event that the higher classification conversion request is refused, the chief executive must give the employee a notice stating:

- The reasons for the decision;
- The total continuous period for which the person has been acting at the higher classification level in the department;
- How many times the person's engagement at the higher classification level has been extended; and
- 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.

[48] The notice provided to the employee must:

---

[18] *Directive 13/20 Appointing a public service employee to a higher classification level*, cl 1.2(a)-(b).

- Set out the findings on material questions of fact, and
- Refer to the evidence or other material on which those findings were based.

Merit

[49] There is no dispute with respect to Ms Abbott's merit.

What is the position subject of this appeal?

[50] Before assessing whether there are any genuine operational requirements of the department that may prevent the conversion request, the question of the actual position that is subject of this appeal must be settled.

[51] The PS Act, at s 149C(1)(c), provides that s 149C 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 Ms Abbott is confined to the position into which she has been placed 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.

[52] 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.

[53] Ms Abbott's higher classification engagement was said to be for the purpose of backfilling an 'incumbent' employee. The question then becomes: what is that employee the incumbent of? They are not merely the incumbent of a generic position, but rather a particular position with a specific position name, classification and number. When they return, they are returning to that precise position.

[54] 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.

[55] By way of contrast, a broader ambit 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.

[56] 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.

[57] The difference in language employed by the legislation, particularly where the sections appear successively, informs my interpretation of s 149C. The words of the section must be afforded meaning to give effect to the section, and cannot be ignored. If it had been intended that a broad-ranging review be engaged in, the legislature could well have employed the terminology employed in the preceding two sections. They pointedly did not do so.

[58] The Directive, in setting out its purpose at cl 1.2(b), provides that it:

> …supports the opportunity to appoint an employee to a higher classification level where that employee has performed the role for one year and is eligible for appointment having regard to the merit principle.

[59] At first blush, there is some inconsistency between that clause, and the terminology used in s 149C and indeed other parts of the Directive as set out above. However, any inconsistency is resolved by having appropriate regard for where those words appear. Clause 1.2 is not the source of power to make the permanent appointment. Instead, it is part of a succinct summary of the reason for the Directive. The precise power by which the Department may permanently appoint a person to a higher classification level is contained within s 149C of the PS Act, which is supplemented by the Directive. In that sense, there is no inconsistency between the terms. If there were, then it would be resolved in favour of the precise empowering provisions within the PS Act at s 149C. That same reasoning applies to a number of similar clauses in the Directive, which use terms such as 'role', 'a position' and the like. It is relevant to note that the word 'role' does not actually appear in s 149C at all.

[60] To be eligible to be reviewed, a person needs to have been seconded or acted at a higher classification level in the department for the requisite period. They must also be eligible, having regard to the merit principle, to be appointed to the position which they occupy at the time of requesting the review.

[61] In conducting the review, the Department is required to determine whether a person should be permanently appointed to the position to which they have been seconded at the time of requesting the review.

[62] It follows that the position the subject of the review was the AO4 position occupied by Ms Abbott – that is, "Support Officer, Education Systems Management" (Position Number 95000633). I accept there may be more than one at-level position in the team, but Ms Abbott is only able to be appointed to the position she occupied when requesting the review.

[63] In reviewing the decision, that is indeed the position against which Ms Abbott was reviewed. That is most apparent in the decision maker's reasoning that the incumbent

will be returning to the position which they had previously occupied and to which Ms Abbott had been seconded, and so there was no longer a need for her to be seconded. The decision was fair and reasonable in that the review was conducted against the correct position.

[64] That reasoning was explained in *Holcombe v State of Queensland (Department of Housing and Public Works)*.[19] The words the position must be given effect, and merit is an entirely separate consideration.

Genuine operational requirements of the department

[65] The Directive, at cl 4.2, sets out the circumstances that would support the temporary engagement of an employee (emphasis added):

> 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:
>
> (a) 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***
> (b) 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
> (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

[66] Slavish concurrence to that clause is not tantamount to considering the genuine operational reasons of the Department. However, it is entirely fair and reasonable for the Department to consider those factors in arriving at a conclusion of whether to permanently appoint Ms Abbott to the position.

[67] The review is conducted with respect to the position occupied by Ms Abbott. That was the correct approach. It is not a more broad-ranging consideration of whether she should continue be employed at a higher level in her present workplace. Typically, only one person may occupy the position she presently occupies at any one time. That is reasoned in the Decision, and in the Respondent's submissions.

[68] However, Ms Abbott has argued that the reason proffered not to convert her to permanent employment at the AO4 position, namely the return of the incumbent, is not genuine. She asserts that:

> The decision was made to extend me in the Support Officer role until April 2021 before any decision was made in regard to my s 149C request and well before the Respondent received medical information indicating the incumbent employee would be taking a further period of sick leave beyond 15 December 2020. At the time my engagement was extended until April 2021 it must have been contemplated and accepted by the Respondent that if the incumbent employee returned in December 2020 at the end of their sick leave we would be concurrently employed.[20]

---

[19] [2020] QIRC 195.
[20] Appellant's Reply Submissions, filed 21 January 2021, page 1, [4].

[69] Ms Abbott's challenge relates to the *timing* of her most recent extension in the AO4 position, detailed at paragraph [68] above. This warrants an express consideration of the chronology of events:

22 June 2020	Ms Abbott's current contract commenced.
14 October 2020	Ms Abbott makes a s149C higher classification conversion request.
18 November 2020	Decision letter stated that the "…department's leave system shows an expected return date of 15 December 2020, this is also the understanding of the business unit."
4 April 2021	Ms Abbott's current contract concludes - well beyond the expected date of return of the incumbent employee (15 December 2020), as at the date of the conversion decision on 18 November 2020.

[70] In light of the above chronology, Ms Abbott contends that:

> …this is evidence that I was not engaged solely to backfill another employee.[21]

[71] The Department has submitted a document titled 'Workplace Reports – Employee Details' that described the 'Engagement Reason' for Ms Abbott's current contract as 'Backfilling'. However, the actual Position Number for the position Ms Abbott is said to be currently backfilling is identified only in the Respondent's submissions.

[72] At paragraph [65] above, I have referred to the circumstances that would support the temporary engagement of an employee at a higher classification level under cl 4.2 of the Directive. The Department has submitted that Ms Abbott's engagement was for the purpose of backfilling the incumbent employee absent on long-term sick leave, even though the Directive provision indicates that those particular circumstances would be warranted "until the date of their expected return."

[73] In Ms Abbott's case, her current contract was actually timed to conclude many months after the expected date of return of the incumbent employee at the time her conversion request was determined. That is certainly curious – and may have excited Ms Abbott's suspicions that she was "not engaged solely to backfill another employee".

[74] Despite the date of the contract cessation - and while it is true that the date for the incumbent's expected return has since changed due to their ongoing medical condition – neither circumstance undermines the reality that the incumbent is still set to return to the position on a given date.[22] That remains a legitimate basis for engaging a person on a temporary basis, and it is also a genuine operational reason preventing her permanent appointment; the Department does not require two persons to be employed within the same position.

---

[21] Appellant's Reply Submissions, filed 21 January 2021, page 1, [4].
[22] Respondent's Submissions, filed 14 January 2021, page 3, [20] state "…at least until 15 March 2021."

[75] The decision maker was correct to consider the position as at the time of undertaking the review. Ms Abbott's submissions regarding the current contract dates do not overcome the practical reality of the higher duties engagement - someone else is to return to that position. As set out above, the Department is not able to review Ms Abbott against any role at AO4 level, but rather against the precise position she occupied at the time of requesting the review.

[76] Altogether, those circumstances present a genuine operational requirement for the Department, which prevented Ms Abbott being permanently appointed to her seconded position. There is nothing within that decision which was unfair or unreasonable, when regard is had to the precise wording of s 149C. Only one person may occupy the position permanently at any one time in the usual course.

Adequate reasoning

[77] The reasoning contained within the decision was brief, but in my view sufficient. It outlined the material facts, including Ms Abbott's history of engagements and the reason for her present engagement. The decision also contained the reasoning, albeit briefly, as to why the request was rejected: the incumbent of the position is to return.

[78] Despite the brevity of the decision, in my view the reason for the decision is clearly expressed. Indeed, Ms Abbott and the Department have each addressed that reasoning in detail in this appeal.

The effect of any previous decisions

[79] The Directive came into effect on 25 September 2020, while s 149C of the PS Act became effective (subject to transitional arrangements) on 14 September 2020.

[80] S 149C(4)(b) provides that the department must consider the reasons for each decision previously made or taken to have been made under that section in relation to that person during their period of employment at the higher classification level.

[81] An employee is only entitled to make one request for review every 12 months, in accordance with s 149C(3) and cl 5.4 of the Directive.

[82] Given the timing of the legislative instruments coming into effect, the date of the decision, and the time restrictions on requesting reviews, there cannot have been any previous decisions made under that section with respect to Ms Abbott. Further, the term 'taken to have been made' relates to s 149C(6) of the PS Act, which provides that if the Department does not make a decision within the requisite review period, they are taken to have refused the request.

[83] It follows that the decision was fair and reasonable in that respect.

Conclusion

[84] Ms Abbott has been acting in a higher duties AO4 position. That present engagement was to backfill another employee, the incumbent of that position.

[85] Ms Abbott has sought, pursuant to s 149C of the PS Act, to be made permanent in that position.

[86] S 149C of the PS Act applies to an employee seconded to or acting at a higher classification level in the department, for at least 1 year, and who is eligible to be appointed to 'the position' at the higher classification level with regard to the merit principle. The employee may ask the department chief executive to appoint them to the position permanently. In determining that review, the department must have regard to the genuine operational requirements of the department and any previous reviews.

[87] The consideration of whether the employee meets the merit principle, and whether there are any genuine operational requirements which prevent the conversion, are with respect to 'the position' occupied by the employee at the time of seeking the review. It is not an unconstrainted review into similar positions or roles. The interpretation which I am compelled to adopt is that which gives effect to the wording of s 149C, and the practical limitations which are inherent to s 149C and the Directive.

[88] I recognise that there is some inconsistent wording applied in the Directive, including terms such as 'role', but that is resolved by paying appropriate heed to the context of those terms. In short, the power to grant the request is contained at s 149C of the PS Act, which is supplemented by the Directive. In several instances, the Directive re-phrases or summarises s 149C, particularly when discussing the objects of the Directive, and in doing so uses slightly different terminology. Such instances do not supersede or disturb the precise wording of the empowering provision, namely s 149C, which establishes review against, and potential appointment to, the position. Indeed, nowhere in s 149C is the term 'role' used.

[89] In conducting the review against the appropriate position, and in their submissions in this appeal, the Department reasoned there is an incumbent of the position, that person is to return to the position. The Department has no need for two persons permanently appointed to the same position. That was said to present a genuine operational reason not to appoint Ms Abbott permanently to the seconded position. I have found that decision to be fair and reasonable. Only one person may occupy the position permanently at any one time in the usual course. As such, I confirm the decision appealed against and dismiss the appeal.

Order:

[90] I make the following order:

That the appeal is dismissed.