

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Forbes v State of Queensland (Department of Education)* [2021] QIRC 115

PARTIES: **Sharon Ann, Forbes**
(Appellant)

v

State of Queensland (Department of Education)
(Respondent)

CASE NO: PSA/2020/388

PROCEEDING: Public Service Appeal – Conversion decision

DELIVERED ON: 01 April 2021

MEMBER: Hartigan IC

HEARD AT: On the papers

ORDER: **1. Pursuant to s 562(C)(1)(a) of the *Industrial Relations Act 2016 (Qld)*, the decision appealed against is confirmed.**

CATCHWORDS: INDUSTRIAL LAW – PUBLIC SERVICE APPEAL – conversion decision – where appellant was acting in a higher classification level – consideration of 'genuine operational requirements'

LEGISLATION: *Directive 13/20 Appointing a public service employee*

Industrial Relations Act 2016 (Qld), s 562B

Public Service Act 2008 (Qld), s 149C, s 201

Public Service and Other Legislation Amendment Act 2020 (Qld)

CASES: *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)

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

Reasons for Decision

- [1] Ms Sharon Ann Forbes appeals a decision not to permanently appoint her to the position in which she has been acting at a higher classification level.
- [2] Since 28 February 2018, Ms Forbes has been acting in the full time position of AO3, International Student Coordinator, Sunshine Beach State High School, North Coast Region within the Department of Education ("the Department"). That temporary contract is to expire on 16 April 2021.
- [3] Ms Forbes holds a substantive position of AO2 Liaison officer, Sunshine Beach State High School, North Coast Region of the Department at 0.14FE. She is employed as a permanent employee.
- [4] By notice of appeal filed on 3 December 2020, Ms Forbes appeals the decision on the grounds that the decision maker did not:¹
- a. [p]roperly consider the mandatory criteria in the PS Act for such a decision, that is, the genuine operational requirements of the department in relation to whether the role is continuing;
 - b. take into account relevant considerations when making the decision.
- [5] The appeal is made pursuant to s 197 of the *Public Service Act 2008* (Qld) ("the PS Act"), which provides that an appeal under Ch. 7, Pt. 1 of the PS Act is to be heard and determined under Ch. 11 of the *Industrial Relations Act 2016* (Qld) ("the IR Act") by the Queensland Industrial Relations Commission.
- [6] Sections 562B(2) and (3) of the IR Act, which commenced operation on 14 September 2020, replicate the now repealed ss 201(1) and (2) of the PS Act.² Section 562B(3) of the IR Act provides that the purpose of an appeal is to decide whether the decision appealed against was fair or reasonable. Accordingly, the issue for my determination in this appeal is whether the decision is fair and reasonable.
- [7] As an IRC Member, I must decide the appeal by reviewing the decision appealed against. The word "review" has no settled meaning and, accordingly, it must take its meaning from the context in which it appears.³ An appeal under Ch. 7, Pt. 1 of the PS Act is not to be re-hearing but, rather, involves a review of the decision arrived at and the decision making process associated with it.⁴
- [8] For the reasons contained herein, I have found that the decision was fair and reasonable.

The decision

- [9] The decision was contained in a letter from Ms Lisa Newbold, Director, Employment Review Human Resources, on 12 November 2020, in the following relevant terms:

¹ Schedule 1 to the Notice of Appeal, [8].

² See the *Public Service and Other Legislation Amendment Act 2020* (Qld).

³ *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 261 (Mason CJ, Brennan and Toohey JJ).

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

...

Decision Outcome

I have decided to **refuse your request** to be appointed to a higher classification level under s. 149C of the PS Act and the Directive.

In accordance with the PS Act and Directive, while I note that you:

- are acting at a higher classification level role in the Department, in circumstances where you hold an appointment with, or are employed by, the Department; and
- have been acting in the higher classification level for a continuous period of at least one year; and
- are eligible for appointment to the position at the higher classification level role having regard to the merit principle,

genuine operational requirements exist to support the refusal of your request to be appointed to the higher classification level.

...

Reasons for Decision

The temporary nature of your higher classification level role arose from the requirements to perform work for a particular project or purpose that has a known end date.

Your role as an International Student Coordinator, relies on the enrolment of international students and due to the current reduction in enrolments, the requirement for the role does not exist past its current end date.

As the temporary nature of your higher classification level role is to assist in the delivery of the International Student Program, and the project will conclude on 11 December 2020, along with the need for your higher classification role, a genuine operational requirement exists to refuse your request for appointment to the higher classification role.

...

Relevant provisions of the PS Act and the Directive 13/20

[10] 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.
- (2) However, this section does not apply to the following public services employees—
 - (a) a casual employee;
 - (b) 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.

...

[11] The phrase "genuine operational requirement of the department" is not defined in the PS Act or Directive 13/20. The phrase in the context of s 149C of the PS Act, was considered in *Morison v State of Queensland (Department of Child Safety, Youth and Women)*,⁵ Merrell DP relevantly stated:⁶

[37] 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

⁵ [2020] QIRC 203.

⁶ *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203, [37] – [38].

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.

[38] 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:

- managing the department in a way that promotes the effective, efficient and appropriate management of public resources;
- 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.

(Citations omitted)

[12] Directive 13/20: Appointing a Public Service Employee to a Higher Classification Level ("Directive 13/20") came into effect on 25 September 2020. Directive 13/20 recognises that the PS Act establishes employment on tenure as the default basis of employment in the public service and sets out the circumstances where employment on tenure is not viable or appropriate.

[13] Clause 6 of Directive 13/20 sets out the decision-making process when determining whether to permanently appoint an employee to a higher classification level, 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.

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.

[14] Clause 7 of Directive 13/20 provides that a decision-maker who refuses a request must provide a statement of reasons, as follows:

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.

[15] Section 295 of the PS Act provides for the transitional provisions for the application of s 149C of the PS Act for employees acting at higher classification levels immediately before the commencement of s 149C of the PS Act. In summary, s 295(3) of the PS Act provides that for s 149C, the period for which the person has been continuously acting at the higher classification level before the commencement will be taken into account for working out how long the person has been acting at that level for a continuous period for s 149C(1)(b).

Was the decision fair and reasonable?

[16] Clause 4.2 of Directive 13/20 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.

[17] At the time Ms Forbes made the request, she had been acting in higher duties for a period in excess of 2.5 years. That is a lengthy period to be acting in a temporary appointment. The Department has refused Ms Forbes request to be appointed to the higher classification level on the basis of genuine operational requirements, being the reduction in international students numbers. That decision must be viewed in the context of the current restriction on international arrivals, including students, due to the current global health pandemic.

Genuine Operational Requirements of the Department

[18] Ms Forbes contends that the decision maker has not properly considered the genuine operational requirements of the Department as they have not taken into account relevant considerations.

[19] As noted above, s 149C(4A)(a) of the PS Act and Clause 6.2(a) of the Directive provides that the decision maker must have regard to the "general operational requirements of the Department".

[20] It has been held,⁷ that when construed in context, the phrase "genuine operational requirements of the Department" would, at least, include consideration of the following:

⁷ *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203 per DP Merrell.

...

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...position at the higher classification level.⁸

- [21] The Department submits that Ms Forbes' temporary appointment to the position at the higher classification level as an International Student Coordinator, relies on the enrolment of international students and due to the current reduction in such enrolments, a genuine requirement exists to refuse Ms Forbes' request.
- [22] I consider that it was relevant for the decision maker to consider whether Ms Forbes should be appointed to the higher classification level in the position of International Student Coordinator in circumstances where there had been a dramatic reduction in international student numbers due to restrictions on entry into Australia by international travellers, including students, and uncertainty as to whether and/or when Australia's borders will re-open. The consideration of enrolment numbers of international students is a relevant consideration when determining whether there is an authentic need, having regard to the effective, efficient and appropriate management of public 'resources' of the Department to make the appointment to the role of International Student Coordinator.
- [23] Accordingly, I consider that the Department did have regard to the genuine operational requirements of the Department and to this extent the decision was fair and reasonable.
- [24] Ms Forbes further contends that the decision maker did not consider relevant matters including that the higher level role is required on an ongoing basis. Ms Forbes submits that the duties associated with the higher classification role that continue to be performed include:
- a. manage in excess of 50 home stay host families to ensure they are ready to receive international students when the borders open which includes:
 - b. manage the homestay register and database;
 - c. conduct Blue Card checks on all families to comply with the new regulations;
 - d. ensure all home, contents and care insurances and registrations are up to date;
 - e. process homestay payments and updating bank account records of families;
 - f. manage recruitment processes, assessment, approvals and home visits of hosts families;
 - g. implement recommendation of the Education Queensland International (EQI) Accreditation Audit,
 - h. maintain regular communication with homestay families, more than 30 education agents and EQI;
 - i. assist with other administrative tasks such as supervising year 12 exams, moderation of assessment and ensuring accreditation of the home stay program.
 - j. develop marketing projects for the homestay program to be utilised in 2021 including for the homestay program, cultural awareness program for the newly formed cultural teachers committee in schools and to design information packs for the education agents.
- [25] Whilst some of the duties referred to above may, at least in a much reduced capacity, still be required to be performed, Ms Forbes does not identify whether such duties relate to her substantive position or to the higher classification position. The

⁸ Ibid [40].

Department contends that some of the lower level duties may be performed by Ms Forbes but in the performance of her substantive role and to that extent may be ongoing.

- [26] In any event, I consider that a significant and substantive component of the role of International Student Coordinator is coordinating and managing the stay of international students and that a significant and genuine reduction in the numbers of enrolled international students presents as a genuine operational requirement of the Department and as such provides a reasonable basis to refuse the request.
- [27] Accordingly, I consider the decision maker did have regard to relevant considerations in accordance with s 149C(4A)(a) of the PS Act when making the decision. Accordingly, I consider the decision was fair and reasonable in this regard.
- [28] Although the decision maker's reasons were somewhat brief, I am satisfied that the decision maker identifies that the decision was based on the consideration of genuine operational requirements and that she identified the material facts relied on in making the the decision including that:
- a. the role of International Student Coordinator relies on the enrolment of international students; and
 - b. due to the current reduction in enrolments, the requirement for the role does not exist past its current end date.
- [29] Accordingly, I consider the decision did provide a statement of reasons that accorded with clause 7 of Directive 13/20. To this extent, I consider the decision to be fair and reasonable.
- [30] Ms Forbes further raises that her engagement in the higher duties position has been extended to 16 April 2021. Ms Forbes submits that the extension until 16 April 2021 is an acknowledgement of the ongoing nature of the role. The Department contends that at the time the decision was made, the information before the decision maker was that the Sunshine Beach State High School was prepared to maintain the role until 16 April 2021.
- [31] I do not consider that the short-term extension of the engagement to be a matter that disturbs the consideration of the genuine operational requirements identified by the Department in the decision.

Conclusion

- [32] For the forgoing reasons, I have determined that the Department's decision to refuse to appoint Ms Forbes to the position at the higher classification to be fair and reasonable.

Order

[33] I make the following order:

- 1. Pursuant to s 562(C)(1)(a) of the *Industrial Relations Act 2016* (Qld), the decision appealed against is confirmed.**