QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Teh v State of Queensland (Queensland Health)* [2021] QIRC 146
PARTIES:	**Teh, Yit Zhan** (Appellant) **v** **State of Queensland (Queensland Health)** (Respondent)
CASE NO.:	PSA/2021/94
PROCEEDING:	Public Service Appeal - Conversion of fixed term temporary employment
DELIVERED ON:	4 May 2021
MEMBER:	Power IC
HEARD AT:	On the papers
ORDER:	**Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016* (Qld), the decision appealed against is confirmed.**
CATCHWORDS	INDUSTRIAL LAW - Public Service Appeal - Fixed term temporary employment review – Mandatory considerations – omission of mandatory content in decision
LEGISLATION:	*Industrial Relations Act 2016* (Qld), ss 562B and 562C *Public Service Act 2008* (Qld), ss 25, 149A and 149B *Directive 09/20 Fixed term temporary employment*, cl 8
CASES:	*Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245 *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018)

Welch v State of Queensland (Queensland Health) [2021] QIRC 056

Reasons for Decision

Introduction

[1] Mr Yit Zhan Teh (the Appellant), is currently employed by the State of Queensland (Queensland Health) (the Respondent) in the position of AO6, Senior Technical Analyst.

[2] By appeal notice filed on 11 March 2021, the Appellant, pursuant to chapter 7 of the *Public Service Act 2008* (Qld) (the PS Act), appealed against a decision that his employment remain as fixed term temporary until 30 June 2021 (the decision).

Appeal principles

[3] Section 562B(1) of the *Industrial Relations Act 2016* (Qld) (the IR Act) provides that the section applies to a public service appeal made to the Commission. Section 562B(2) provides that the Commission must decide the appeal by reviewing the decision appealed against. Section 562B(3) provides that the purpose of the appeal is to decide whether the decision appealed against was fair and reasonable.

[4] The appeal must be decided by reviewing the decision appealed against.[1] Because the word 'review' has no settled meaning, it must take its meaning from the context in which it appears.[2] An appeal under chapter 11, part 6, division 4 of the IR Act is not by way of rehearing,[3] but involves a review of the decision arrived at and the decision making process associated therewith.

[5] The stated purpose of such an appeal is to decide whether the decision appealed against was fair and reasonable.[4] The issue for determination is whether the decision by Mr Dario De Zotti, Executive Director, Technology Services Branch of the Respondent to deny conversion of the Appellant's employment to permanent was fair and reasonable in all of the circumstances. This requires a consideration of s 149B of the PS Act and of *Directive 09/20 Fixed term temporary employment* (the Directive).

What decisions can the Industrial Commissioner make?

[6] In deciding this appeal, s 562C of the IR Act provides that the Industrial Commissioner may:

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[1] IR Act s 562B(2).
[2] *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 261.
[3] *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018), 5 as to the former, equivalent provisions in s 201 of the PS Act.
[4] IR Act s 562B(3).

(a) confirm the decision appealed against; or

(b) set the decision aside and substitute another decision; or

(c) set the decision aside and return the issue to the decision maker with a copy of the decision on appeal and any directions considered appropriate.

Grounds of Appeal

[7] In the appeal notice, the Appellant contends that:

- his contribution with the Respondent does not only include expertise in his current Senior Technical Analyst role and that the Appellant is confident in taking on the following roles:

  (a) technical analyst;

  (b) business analyst;

  (c) data analyst;

  (d) project analyst; and

  (e) project officer; and

- over the course of the Appellant's employment with the Respondent, the Appellant has garnered some work merits, which include:

  (a) being in the first Integrated Electronic Medical Records (IEMR) deliverable team to deliver the IEMR project within the expected timeframe; and

  (b) delivering core Cyber Security Group project deliverables utilising a range of technical, data and business analyst skills.[5]

Relevant provisions of the PS Act and the Directive

[8] Section 149B of the PS Act relevantly provides:

> **149B Review of status after 2 years continuous employment**
>
> (1) This section applies in relation to a person who is a fixed term temporary employee or casual employee if the person has been continuously employed in the same department for 2 years or more.
>
> (2) However, this section does not apply to a non-industrial instrument employee.
>
> (3) The department's chief executive must decide whether to-

[5] Cyber Security Group project includes Identity Access Management, Enterprise Password Management, Enterprise Password Vault and OPS Access Form Migration.

(a) continue the person's employment according to the terms of the person's existing employment; or
(b) offer to convert the person's employment basis to employment as a General employee on tenure or a public service officer.

(4) The department's chief executive must make the decision within the required period after-
(a) the end of 2 years after the employee has been continuously employed as a fixed term temporary employee or casual employee in the department; and
(b) each 1-year period after the end of the period mentioned in paragraph (a) during which the employee is continuously employed as a fixed term temporary employee or casual employee in the department.

(5) In making the decision-
(a) section 149A(2) and (3) applies to the department's chief executive; and
(b) the department's chief executive must have regard to the reasons for each decision previously made, or taken to have been made, under this section or section 149A in relation to the person during the person's period of continuous employment.

(6) If the department's chief executive decides not to offer to convert the person's employment under subsection (3), the chief executive must give the employee a notice stating-
(a) the reasons for the decision; and
(b) the total period for which the person has been continuously employed in the department; and
(c) for a fixed term temporary employee-how many times the person's employment as a fixed term temporary employee or casual employee has been extended; and
(d) each decision previously made, or taken to have been made, under this section or section 149A in relation to the person during the person's period of continuous employment.

(7) If the department's chief executive does not make the decision within the required period, the chief executive is taken to have decided not to offer to convert the person's employment and to continue the person's employment as a fixed term temporary employee or casual employee according to the terms of the employee's existing employment.

…

[9] Section 149A(2) of the PS Act provides:

(2) The department's chief executive may offer to convert the person's employment under section 149(3)(b) only if-
(a) the department's chief executive considers-
(i) there is a continuing need for someone to be employed in the person's role, or a role that is substantially the same as the person's role; and
(ii) the person is eligible for appointment having regard to the merit principle; and
(b) any requirements of an industrial instrument are complied with in relation to the decision.

[10] Section 149A(3) of the PS Act provides:

(3) If the matters in subsection (2) are satisfied, the department's chief executive must decide to offer to convert the person's employment basis to employment as a General employee on tenure or a public service officer, unless it is not viable or appropriate to do so having regard to the genuine operational requirements of the department.

[11] The Directive relevantly provides:

8. Decision on review of status

8.1 When deciding whether to offer permanent employment under section 149A or 149B, a chief executive must consider the criteria in section 149A(2):
- whether there is a continuing need for the person to be employed in the role, or a role which is substantially the same
- the merit of the fixed term temporary employee for the role having regard to the merit principle in section 27 of the PS Act
- whether any requirements of an industrial instrument need to be complied with in relation to making the decision, and
- the reasons for each decision previously made, or deemed to have been made, under sections 149A or 149B in relation to the employee during their period of continuous employment.

8.2 Sections 149A(3) and 149B(5) provide that where the criteria above are met, the chief executive must decide to offer to convert the person's employment to permanent employment as a General employee on tenure or a public service officer unless it is not viable or appropriate having regard to the genuine operational requirements of the agency.

8.3 If the outcome is a decision to offer to convert the fixed term temporary employee to permanent employment:
(a) the written notification must include the terms and conditions of the offer to convert to permanent employment (e.g. full-time or part-time, days and hours of work, pay, location of the employment and any other changes to entitlements)
(b) where the employee is part-time, an explanation of the days and hours of work offered in the decision, and
(c) the chief executive cannot convert the fixed term temporary employee unless they accept the terms and conditions of the offer to convert.

8.4 Notice of a decision not to convert a person's employment must comply with section 149A(4) for applications under section 149 or 149B(6) for reviews under section 149B. In accordance with section 27B of the *Acts Interpretation Act 1954*, the decision must:
(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.

8.5 Sections 149A(5) and 149B(7) of the PS Act provide for a deemed decision not to convert where a decision is not made within the required timeframe (28 days).

…

Submissions

[12] The Commission issued a Directions Order calling for submissions from both parties following receipt of the appeal notice.

Respondent's submissions

[13] The Respondent filed submissions opposing the appeal. In summary, the Respondent submits that:

- the Appellant is currently employed by eHealth Queensland, Department of Health, which is the Information Communications Technology (ICT) services provider for the Respondent. eHealth Queensland provides a range of ICT services to the Department of Health and Hospital and Health Services;

- eHealth Queensland publishes an ICT Services Catalogue which currently identifies 46 different services offered to the Respondent, ranging from Application Development and Support to Cyber Security, to Telephony Infrastructure Support Service to the Workstation Management Service;

- the work undertaken by eHealth Queensland, and the roles required to undertake that work, are for the most part of the Respondent, unique to eHealth Queensland. That is, the roles required to fill the majority of functions are not found within Hospital and Health Services, or elsewhere in the Department of Health;

- the Appellant's employment with the Respondent commenced on 29 August 2018. Since 1 July 2019, the Appellant has been temporarily employed in the role of AO6, Senior Technical Analyst and continues to be employed in this temporary position to undertake project work in the Cyber Security Group, specifically in the following projects:

  (a) Identity and Access Management; and

  (b) Privileged Access Management;

- each of the projects are only funded until 30 June 2021. At that time, all the work currently being performed by the Appellant in his temporarily created role will end;

- the Appellant is aware that he is employed as a fixed term temporary employee for the purpose of performing particular projects that have a known end date. The Respondent asserts that the Appellant was aware of the basis of his fixed term temporary employment from the outset of his current fixed term temporary employment;

- at the time of making the decision (and at the time of submissions), the Appellant's employment is planned to cease on 30 June 2021, as it is expected that the projects currently being performed by the Appellant will be finalised and cease to be funded. At that time, there will be no continuing need for the Appellant to be employed;

- the Appellant is employed to perform work of a type which is ordinarily performed by a public service officer. However, the employment of the Appellant on tenure (i.e. permanent) is not viable or appropriate as the role is to perform work for particular projects that have a known end date;

- a review of the Appellant's employment was undertaken by delegate Mr De Zotti and the letter provided to the Appellant on 22 February 2021 meets the requirements of the PS Act, as the letter:

  (a) provided an analysis of the Appellant's employment history with the Respondent;

  (b) identified gaps in service;

  (c) considered whether or not there was an ongoing need for the Appellant to be employed in the Appellant's role, or a role which is substantially the same as the Appellant's role;

(d) made findings of fact in relation to the above; and

(e) advised the Appellant that for reasons stated in the letter, that there was no continuing need for the Appellant to be employed in the role, or a role which is substantially the same;

- the Appellant's submissions found at Part C of the appeal notice do not appeal, contest or challenge any of the facts or findings of Mr De Zotti's decision, nor does the Appellant appeal, contest or challenge the process;

- the Appellant seeks a review of a decision made under s 149B of the PS Act. Section 149A of the Act applies to a decision under s 149B of the PS Act. For present purposes, s 149A confines the decision to a consideration of whether or not there is a continuing need for someone to be employed in the person's role, or a role that is substantially the same as the person's role. It does not require consideration of what else the Appellant may be able to do for the Respondent; and

- the Appellant's submissions demonstrate that the Appellant appears to hold the belief that he has a skillset which would be of value to the Respondent. The Respondent submits that whether or not the Appellant has a skillset that could be of value to the Respondent is not the test or a consideration under the relevant sections of the PS Act or the Directive. For example, if the Appellant were medically qualified, the Respondent would not be required to offer the Appellant permanent employment as a doctor, despite medical qualifications being of value to the Respondent. The legislation expressly limits consideration to the continuing need for the Appellant to be employed in the Appellant's current role (or a role that is substantially the same), not any role that the Appellant might be able to perform.

Appellant's submissions in reply

[14] The Appellant filed submissions in response to the Respondent's submissions. In summary, the Appellant submits that:

- the letter from Mr De Zotti dated 22 February 2021 failed to recognise the Appellant's employment in West Moreton Hospital and Health Services (WMHHS) with the Respondent, in that:

  (a) the Appellant worked as a Project Officer in WMHHS between 29 August 2018 to 31 January 2019; and

  (b) the Appellant was subsequently employed as a Project Officer in eHealth Queensland within the Respondent on 20 February 2019 and promoted to Senior Technical Analyst on 1 July 2019;

- the non-employment period of three months between the Appellant's employment in WMHHS and eHealth Queensland is less than 12 weeks[6] and should have been regarded as continuously employed with the Respondent since 29 August 2018;

- the Respondent failed to state the total period for which the Appellant has been continuously employed with the Respondent in the decision as required in s 149B(6)(b) of the PS Act;

- the Respondent failed to state the number of extensions on the Appellant's fixed term temporary employment in the decision as required in s 149B(6)(c) of the PS Act;

- in *Welch v State of Queensland (Queensland Health)*,[7] Industrial Commissioner Power noted:

> It is not clear whether consideration of the mandatory criteria would have altered the decision with respect to the Appellant's temporary conversion. Regardless, for a decision to be upheld as fair and reasonable it must be undertaken in accordance with the statutory processes as outlined in the Directive and the PS Act.[8]

- the Respondent only acknowledged the work that the Appellant had undertaken within eHealth Queensland in his current role as Senior Technical Analyst;

- the Appellant rejects the Respondent's statement that "*the roles required to fill the majority of functions are not found within Hospital and Health Services, or elsewhere in the Department of Health*" as the Appellant was previously employed in WMHHS within the Respondent. In the circumstances, the Appellant reasonably believes that the Appellant's role may also be found within Hospital and Health Services or elsewhere within the Respondent;

- the Respondent stated in the decision that the eHealth Queensland Recruitment team was engaged to ascertain whether there were any suitable vacant Senior Technical Analyst roles available. However, it is unclear as to whether any steps have been taken within Hospital and Health Services or elsewhere within the Respondent;

- section 149A(2) of the PS Act and the Directive does not specifically refer to the person's current role;

- it is commonly seen in projects that someone holding a permanent role within the department is seconded to a project to perform a role at higher classification level;

- the Appellant considers it reasonable for the Respondent to consider whether there is a continuing need for a Project Officer (being the role that the Appellant previously occupied) and a Senior Technical Analyst (being the role that the Appellant is currently in) within the Respondent;

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[6] PS Act s 149B(7A)(b).
[7] [2021] QIRC 056.
[8] Ibid [28].

- in response to the medical example by the Respondent, the Appellant clarifies that he simply asked the Respondent to consider his merits (which have been proven within the two year requisite period and confirmed by the Respondent in the decision) rather than his qualifications; and

- the Respondent should endeavour to retain employees who satisfy the merit requirements by fitting them in other ongoing projects within the Respondent.[9]

Consideration

[15] To determine the outcome of this appeal, I am required to assess whether the decision appealed against was fair and reasonable. The decision determined that the Appellant's employment remain as fixed term temporary.

[16] The reasons given for the Respondent's decision, as outlined in the letter dated 22 February 2021, are as follows:

> There are two considerations for deciding whether to convert. These are that there is a continuing need for you to perform your role or a role that is substantially the same and you satisfy the merit principle. I have addressed these two aspects below.
>
> Merit
> Thank you for your performance in various roles in the Cyber Security Group over the period 20 February 2019 until current. You have demonstrated over this time that you satisfy the merit requirements for the roles you performed as Project Officer from 20 February 2019 until 30 June 2019 and Senior Technical Analyst from 1 July 2019 until current.
>
> Continuing need
> The decision not to permanently appoint you is based on continuing staffing needs at this time. Specifically, my reasons are there is no continuing need for you to perform your current role because both Cyber Security Group projects, Identity and Access Management and Privileged Access Management, in which you have worked, are scheduled to complete and are only funded until 30 June 2021. The creation of your current temporary role in Cyber Security Projects was to meet the requirements of the project for the duration of the project which is coming to an end on 30 June 2021.
>
> In reviewing your temporary status, the Office of the Executive Director reviewed the Technology Services Branch establishment and engaged the eHealth Queensland Recruitment team to determine whether there were any suitable vacant Senior Technical Analyst roles available. Unfortunately, no roles were identified. This result indicates that there is no continuing need for a Senior Technical Analyst or similar role.
>
> On 11 February 2021, the Office of the Executive Director, Technology Services emailed all Branches across the agency to determine whether there was a continuing need for a person to be employed in a same or similar role as your current position in eHealth Queensland. There was no role identified at this time.

[17] The decision maker considered the criteria pursuant to s 149A(2) of the PS Act and determined that whilst the Appellant satisfied the merit principle, there was not a continuing need for the Appellant to be employed in the role beyond 30 June 2021 or a role which is substantially the same. The decision demonstrates that the Respondent took steps to identify roles that were substantially the same for which there may be a continuing need, however, no such roles were found.

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[9] citing PS Act s 25(2)(d) and the Queensland Government Employment Security Policy.

[18] The Directive requires only that the Respondent consider whether there is a continuing need for the Appellant to be employed in the role or a role which is substantially the same. It does not require the Respondent to consider every possible role which the Appellant may potentially fulfil based on their skillset.

[19] Section 149B(6) of the PS Act require that where a decision is made not to offer to convert a person's employment, the chief executive must give the person a notice stating:

> (a) the reasons for the decision; and
>
> (b) the total period for which the person has been continuously employed in the department; and
>
> (c) for a fixed term temporary employee – how many times the person's employment as a fixed term temporary employee has been extended; and
>
> (d) each decision previously made, or taken to have been made, under this section or section 149A in relation to the person during the person's period of continuous employment.

[20] The Respondent's decision broadly complied with the requirements of s 149B of the PS Act regarding the mandatory contents of the notice given to the Appellant.

[21] The reasons for the decision were adequate and outlined the basis upon which the decision had been made, in compliance with s 149B(6)(a).

[22] In compliance with s 149B(6)(b), the decision outlined the total period for which the Appellant has been employed, although I note the Appellant's submissions that an additional employment period should have been included due to a temporary absence of less than 12 weeks. The Appellant submits that his contract between 29 August 2018 and 31 January 2019 should have been recognised as part of his history of temporary employment with the Respondent.

[23] Section 149B(7A)(b) of the PS Act provides that periods of non-employment in the department are to be included if the periods total 12 weeks or less in the two years occurring immediately before the date when the duration of the person's continuous employment is being determined. The determination of the Appellant's length of continuous employment for the purpose of the review occurred on 22 February 2021. The two year period prior to this date commenced on 22 February 2019, which is after the date at which the Appellant had ceased his previous contract. It was reasonable for the Respondent to consider periods of temporary employment within the preceding two year period only when considering periods of non-employment.

[24] Although the decision does not state the number of times the Appellant's employment has been extended, it is clear from the following paragraph that it has been extended two times, hence satisfying the requirement of s 149B(6)(c):

> You have demonstrated over this time that you satisfy the merit requirements for the roles you performed as Project Officer from 20 February 2019 until 30 June 2019 and Senior Technical Analyst from 1 July 2019 until current.

[25] The decision maker is not required to refer to s 149B(6)(d) if no decision has previously been made or taken to have been made under this section of s 149A or s 149B of the PS Act.

[26] The decision notice has complied with the notice requirements of s 149B(6) of the PS Act.

[27] In consideration of the material before me and the submissions made by the parties, I am satisfied that the Respondent has complied with the obligations under both the Directive and the PS Act. Consequently, the decision made by the Respondent was fair and reasonable.

Order

[28] I make the following order:

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