

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Bloomfield v State of Queensland (Queensland Health)* [2021] QIRC 45

PARTIES: **Bloomfield, Sarah**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO: PSA/2020/354

PROCEEDING: Public Service Appeal – Conversion Decision

DELIVERED ON: 08 February 2021

MEMBER: Hartigan IC

HEARD AT: On the papers

ORDER: **1. 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 – where the appeal was reviewed under s 149C of the *Public Service Act 2008* – where the appellant was acting up in a role with a higher classification level – where the role is vacant – where the role will be reclassified

LEGISLATION: *Appointing a public service employee to a higher classification level – Directive 13/20*, cl 4.2, 6, cl 7, cl 11

Acts Interpretation Act 1954 (Qld), s 27B

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

Public Service Act 2008 (Qld), s 149C, s 197, s 295

Public Service and Other Legislation Amendment Bill 2020 (Qld)

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)

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

Reasons for Decision

- [1] Ms Sarah Bloomfield appeals a decision not to permanently appoint her to the position in which she has been acting at a higher classification level.
- [2] At the time Ms Bloomfield commenced this appeal, she was acting in the position of Advanced Dietitian, Nutrition and Dietetics (Allied Health – Service Delivery Model) (HP5) on 0.4FTE part-time basis, within Allied Health – Service Delivery Model within the Sunshine Coast Hospital and Health Service ("the Service").
- [3] Ms Bloomfield is permanently employed in two positions by the Service, including:
- (a) Advanced Dietitian HP5, Allied Health Nutrition and Dietetics (0.37FTE); and
 - (b) Dietitian Senior HP4, Allied Health Nutrition and Dietetics (0.43FTE).
- [4] Ms Bloomfield was temporarily engaged in a higher duties position of Dietician Advanced, HP5, Allied Health Nutrition and Dietetics on a part-time basis (approximately 0.4FTE) from 13 February 2017 to 1 November 2020. On 7 October 2020, Ms Bloomfield requested to be permanently appointment to the higher classification level at 0.4FTE.
- [5] By notice of appeal filed on 25 November 2020, Ms Bloomfield, pursuant to Ch. 7 of the *Public Service Act 2008* (Qld) ("the PS Act"), appealed against a decision dated 3 November 2020 determining not to appoint Ms Bloomfield to the higher classification level ("the decision").
- [6] The appeal is made pursuant to s 197 of 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 ("the Commission").
- [7] 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.¹ 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.
- [8] 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.² An appeal under Ch. 7, Pt. 1, of the PS

¹ See the *Public Service and Other Legislation Amendment Act 2020* (Qld).

² *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 261 (Mason CJ, Brennan and Toohey JJ).

Act is not by way of rehearing but, rather, involves a review of the decision arrived at and the decision-making process associated with it.³

- [9] For the reasons contained herein, I have found that the decision was fair and reasonable.

The decision

- [10] The decision was included in a written notice provided by the Service. Relevantly, the decision stated that:

Decision on request

I have considered your request and have determined that, due to the genuine operational requirements of the agency, your higher duties arrangement will not be extending beyond 1 November 2020 and you will not be appointed to the higher classification level.

There are genuine operational reasons being the Nutrition and Dietetics team structure is being reviewed. The structure currently is not reflective of state-wide recommendations for Health Practitioner (HP) levels.

The SCHHS Nutrition and Dietetics team currently has more HP5 and HP4 positions and fewer HP3 positions than recommended by the Allied Health Professions Office Queensland.

This position was identified in August 2020 for consideration of reclassification to address the structural issues as highlighted above. Meeting minutes from 21 September 2020 confirm the HP5 position is to be reviewed and consideration given to classify a new position at the HP3 level to address the structural issues.

Your higher duties contract ceased on 1 November 2020.

As your request has not been approved, and you have more than two years of continuous engagement in the same role at the higher classification level, you are eligible to appeal this decision, as outlined in section 194(1)(e)(iii) of the PS Act.

...

- [11] The Service has included in its submission a summary of Ms Bloomfield's employment as follows:

Dates	Position	Reason for temporary engagement
8 July 2019 – 1 November 2020	Dietitian Advanced HP5 Surgical Services, Allied Health Temporary 0.4FTE	Acting at a level, backfill for substantive incumbent [name retracted]
27 May 2019 – 7 July 2019	Dietitian Advanced HP5 Surgical Services, Allied Health Temporary 0.4FTE	Acting at level extension, backfill for substantive incumbent [name retracted]
28 January 2019 – 26 May 2019	Dietitian Advanced HP5, Surgical Services, Allied Health Temporary 0.4FTE	Acting at level extension, backfill for substantive incumbent [name retracted]
8 October 2018 – 27 January 2019	Dietitian Advanced HP5, Surgical Services, Allied Health	Acting at level extension, backfill for substantive

³ *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018).

	Temporary 0.4FTE	incumbent [<i>name retracted</i>] on secondment
2 July 2018 – 7 October 2018	Dietician Advanced HP5, Surgical Services, Allied Health Temporary 0.2FTE	Higher Duties extension, backfill for substantive incumbent [<i>name retracted</i>] on secondment
23 April 2018 – 1 July 2018	Dietitian Advanced HP5, Surgical Services, Allied Health Temporary 0.2FTE	Higher duties to backfill substantive incumbent [<i>name retracted</i>]
15 January 2018 – 1 July 2018	Advanced Dietitian HP5, Surgical Services, Allied Health Temporary 0.2FTE	Backfill for substantive incumbent [<i>name retracted</i>]

Appellant's grounds of appeal

[12] Ms Bloomfield appeals the decision on the following grounds:

- (a) the Service is not conducting a review of the team structure in accordance with the *Health Practitioners and Dental Officers (Queensland Health) Certified Agreement (No.3) 2019* ("the Agreement"), as no consultations have occurred and a business case for change or organisational restructure has not been prepared;
- (b) vacancies will be filled in accordance with cl 92 of the Agreement, unless an organisation change process is already in place. As such, the Service cannot utilise a position becoming substantively vacant to effect organisational change;
- (c) at the time Ms Bloomfield requested her permanent appointment to the position on 7 October 2020, no organisational change process was occurring, as no consultation was on foot and union representatives had not been advised in accordance with cl 91 of the Agreement;
- (d) it is disingenuous to contend that there is an oversupply of HP4 and HP5 roles as another HP4 role was upgraded to HP5 in January 2020, resulting from a JEMS process;
- (e) having only referenced the Nutrition and Dietetics team structure review, the decision-maker has erred by failing to give consideration to the mandatory criteria in s 149C(4A) of the PS Act; and
- (f) Ms Bloomfield has performed the position for over two years without any adverse finding to conduct or performance and therefore demonstrates the requisite merit.

[13] The Service maintains that the Commission should confirm the decision appealed against, and relies, inter alia, on the following grounds:

- (a) the Dietitian Advanced, HP5, Allied Health Nutrition and Dietetics position is being reviewed and consideration is being given to the abolition of this position and creating a new position, potentially at the HP3 level;

- (b) the Service determined the review of the HP5 position to be a genuine operational requirement not to appoint the employee to the higher classification level, pursuant to Directive 13/20.

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

[14] Section 149C of the PS Act 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) 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.

[15] 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 consideration of s 149C of the PS Act, was considered in *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203. Merrell DP relevantly stated:⁴

[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 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)

[16] 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.

⁴ *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203, [37] – [38].

[17] 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.

[18] 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.

[19] Clause 11 of Directive 13/20 defines the following relevant terms:

...

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.

...

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.

- [20] 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?

Genuine operational requirements

- [21] As noted above, s 149C(4A) of the PS Act and cl 6.2 of Directive 13/20 provide that, when deciding a request, the chief executive must have regard to the genuine operational requirements of the department.
- [22] It has been held,⁵ that the phrase, when construed in context, would at least include:
- [40] ...whether or not there was an authentic need, having regard to the effective, efficient and appropriate management of the public resources of the department, to appoint an employee, who has been assuming the duties and responsibilities of a higher classification level in the department for the requisite period of time, to '...the position at the higher classification level.'
- [23] Ms Bloomfield, together with another employee, were engaged to fill the temporary need arising because the substantive incumbent with respect to the relevant position was on secondment from 13 February 2017 to 1 November 2020.
- [24] On or about 16 August 2020, the Service was advised that the incumbent employee was tendering her resignation from the Advanced Dietician, HP5 role. The Service maintained Ms Bloomfield acting in that role on a temporary basis in accordance with the terms of the temporary contract until 1 November 2020.
- [25] At the time that Ms Bloomfield made the request, the Service was on notice that the substantive position would be made vacant following the resignation of the relevant substantive incumbent employee.

⁵ *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203, [40] (Merrell DP).

[26] The Service maintains that genuine operational requirements exist in relation to supporting the decision not to permanently appoint Ms Bloomfield to the relevant position because:

- (a) the position was substantively vacant at the time discussions were had regarding a review of the workforce;
- (b) in accordance with the *Health Practitioners and Dental Officers (Queensland Health) Certified Agreement (No. 3) 2019*, clause 91, Organisational Change and Restructuring, the position of Dietician Advanced was identified for review on 3 and 21 September 2020, prior to Ms Bloomfield's request for consideration of conversion on 8 October 2020;
- (c) whilst progression to a formal organisational change process, including consultation with Unions, had not yet occurred the Service does intend to undertake its organisational change and consultation requirements in accordance with clause 91 of the Agreement; and
- (d) whilst having regard to *Directive 18/20: Supporting employees affected by workplace change*, a review of the position whilst vacant is in the interest of employees to prevent displacement from a permanent position.

[27] The Service further explains that it is committed to reviewing the positions as vacancies occur to meet not only the requirements set out in s 98 of the Act but to ensure the correct workforce composition is maintained to allow for optimum service delivery to the public.

[28] In this regard, the Service relied on *Queensland Health Allied Health: The last 10 years – achievements and ongoing challenges report* and *Optimising the allied health workforce for best care and best value: A 10 Year Strategy 2019-2029* which identified that the current structure at the Se is over represented at senior lever with 58% of health practitioner staffing being HP5 and HP4 level. Consequently, as a result of this information, the Service is reviewing the Dietician Advanced, HP5, Allied Health Nutrition and Dietetics position and consideration is being given to abolish this position and create a new position potentially, at the HP3 Level.

[29] In response, Ms Bloomfield submits that:

- (a) she was only advised that the position would remain vacant on 3 and 21 September 2020 and on those occasions was given vague information to indicate no decision had been made by the Executive Director of Allied Health as to recruitment to the vacant position;
- (b) at a meeting with the Executive Director of Allied Health and the acting Director of Nutrition and Dietetics on 6 October 2020, Ms Bloomfield was advised that her contract would not be extended beyond the 1 November 2020 date and that the position would not be filled as the "Sunshine Coast Hospital and Health Service and Department of Health Financial Situation, is such that the decision was made to "hold" the position vacant temporarily as a cost saving measure.";

- (c) the Service has failed to advise that a review was underway of the vacant role, and as such they have breached their industrial obligations under the relevant agreement by not consulting with the effected staff, such as Ms Bloomfield and her colleague with respect to backfilling the position, not consulting with the Union and not creating the business case given the change to service delivery arrangements in reclassifying vacant role from HP5 to HP3;
- (d) the Service, in the recruitment of another employee to an abolished HP5 position, conducted itself in a manner which Ms Bloomfield perceived was inequitable, unjust and lacked transparency by converting one temporary employee without a formal recruitment process when there was numerous other employees on long term temporary contracts of greater than 2 years at the HP4 and HP5 levels that should have been provided with the same opportunity to fill a vacant FTE or be converted permanently; and
- (e) the *Optimising the allied health workforce for best care and best value: A 10 Year Strategy 2019-2029*, heavily supports recruitment and retention in succession planning for allied health staff, by increasing opportunities for allied health leadership roles and advocates for the same to support allied health scope of practice, models of care, research, training and education and does not merely support greater recruitment of HP3 graduates.

[30] Ms Bloomfield, together with another employee, have been temporarily backfilling in the role while the employee who substantively holds the role has been on secondment. The role is a 0.8FTE and Ms Bloomfield and her colleague have each worked 0.4FTE, respectively, in the role.

[31] Upon receiving the resignation from the substantive employee, the Service has determined to keep the role vacant on the basis that it intends to conduct a review of the role, including the role's classification level.

[32] I consider, having regard to the efficient and appropriate management of public resources, and in keeping with such notions, that it is reasonable and fair to maintain the vacancy in the role in anticipation of the review. Particularly, when such a review will consider whether the role will be reclassified. In this regard, I accept the Services' submissions that a review of the position whilst vacant is in the interest of the relevant employees to prevent displacement from a permanent position should the role be reclassified.

[33] On the material before me, there is no suggestion that the review has yet commenced. Accordingly, I do not consider that the Service has breached its obligations, including in relation to consultation as required by the Agreement.

[34] Of course, when such a review is commenced, the Service will be obliged to comply with its industrial obligations including with respect to the relevant consultation provisions as set out in the Agreement.

Previous reasons for acting at a higher classification level

[35] Section 149C(4A)(b) of the PS Act and clause 6.2 of Directive 13/20 provide that the Department's chief executive in making a decision about a relevant request for an employee to be appointed to the position at the higher classification level, must have regard to the reasons for each decision previously made, or taken to have been made, under s 149C of the PS Act in relation to the person during the person's continuous period at the higher classification level.

[36] Given the commencement date of the PS Act and the date of the decision, there are no previous decisions which are relevant to my consideration.

[37] For this additional reason, the decision was fair and reasonable.

Compliance with requirements of s 149C(5) of the PS Act

[38] Ms Bloomfield does not complain that the decision does not comply with the requirements of s 149C(5) of the PS Act.

Conclusion

[39] For the forgoing reasons, I have concluded that the decision was fair and reasonable.

Order

[40] I make the following order:

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