

# QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Bailey v State of Queensland (Queensland Health)* [2021] QIRC 049

PARTIES: **Kayla, Bailey**  
(Appellant)

v

**State of Queensland (Queensland Health)**  
(Respondent)

CASE NO: PSA/2020/350

PROCEEDING: Public Service Appeal – Conversion of fixed term temporary employment

DELIVERED ON: 11 February 2021

MEMBER: Hartigan IC

HEARD AT: On the papers

ORDER:

- 1. The appeal is allowed.**
- 2. Pursuant to s 562C(1)(c) of the *Industrial Relations Act 2016*, the decision appealed against is set aside.**
- 3. I direct that a copy of the decision on appeal be provided to the decision maker and that a fresh review be conducted in accordance with the relevant provisions of the *Public Service Act 2008* and Directive 09/20.**
- 4. I further direct that the review is to be conducted by the Respondent within 21 days.**

CATCHWORDS: INDUSTRIAL LAW – PUBLIC SERVICE APPEAL – where appellant had been acting in a higher classification level – where appellant appealed a decision to not be permanently appointed – whether there was consideration of the need for someone to perform a role that is substantially the same as the person's role – whether the deemed decision was fair and reasonable

LEGISLATION: *Fixed term temporary employment – Directive 09/20*, cl 8

*Acts Interpretation Act 1954* (Qld), s 27B

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

*Public Service Act 2008* (Qld), s 27, s 28, s 148, s 149A, s 149B, s 197

*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 Kayla Bailey 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 Bailey commenced this appeal, she was temporarily acting in the position of RN/Dual Diagnosis Clinicians/CN Mental Health Transition Clinician (NG 6), within Prison Health Services within the Park, Wacol Centre for Mental Health Treatment, Research and Education ("Queensland Health"). That temporary contract expired on 23 October 2020.
- [3] Ms Bailey holds a substantive position of Registered Nurse: Grade 5. She is employed as a permanent employee working in a casual pool.
- [4] By notice of appeal filed on 24 November 2020, Ms Bailey, pursuant to Ch. 7 of the *Public Service Act 2008* (Qld) ("the PS Act"), appeals a deemed decision of 3 November 2020 ("the decision").
- [5] 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").
- [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.<sup>1</sup> Section 562B(3) of the IR Act provides that the purpose of an appeal is to decide whether the decision

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

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.<sup>2</sup> An appeal under Ch. 7, Pt. 1, of the PS 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.<sup>3</sup>
- [8] For the reasons contained herein, I have found that the decision was not fair and reasonable

### **The review and decision making process**

#### *Reference to superseded Directive*

- [9] On 6 October 2020, Queensland Health advised Ms Bailey that it was conducting a review of her temporary employment. Relevantly, Ms Bailey was advised that the review would be conducted in accordance with *Temporary Employment Directive: 08/17* ("Directive 08/17"). Queensland Health further advised that should Ms Bailey not receive a decision within 28 days, then the decision is a deemed decision not to convert Ms Bailey's status of employment to permanent in accordance with s 149(4) of the PS Act.
- [10] The anomaly with the advice provided by Queensland Health to Ms Bailey is that at the time the advice was provided, Directive 08/17 had been superseded by *Directive 09/20-Fixed Term Temporary Employment* ("Directive 09/20").
- [11] I listed the matter for mention and subsequently directed that Queensland Health clarify its position with respect to which directive it considered relevant for the consideration of the matter.
- [12] By email correspondence of 1 December 2020, Queensland Health stated that "the older directive was referred to when assessing the conversion decision which can be addressed in the health services response to the matter".
- [13] In its submissions, Queensland Health acknowledges that the advice provided to Ms Bailey on 6 October 2020 was incorrect in so far as it referred to the incorrect directive. Queensland Health further submits that the reference to the incorrect directive was an administrative error only and did not alter Ms Bailey's eligibility or the reasons for the respondent's decision.
- [14] In submissions filed by the Queensland Nurses and Midwifery Union ("the QNMU") on behalf of Ms Bailey, the QNMU submitted that the relevant directive for the purposes of determining Ms Bailey's eligibility is Directive 09/20. No other complaint

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

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

was made by the QNMU regarding Queensland Health's reference to the superseded directive in its correspondence of 6 October 2020 or at all in the proceedings.

[15] Had this matter not involved a deemed decision, I would have held concerns that the review process and decision making process was potentially infected by the reference to the superseded directive. However, as the decision was a deemed decision, such processes were not relevant to my consideration in this appeal.

[16] Accordingly, the parties each respectively made submissions on the appeal by reference to Directive 09/20.

### **Relevant provisions of the PS Act and the Directive 09/20**

[17] 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-
  - (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.

[18] Deputy President Merrell<sup>4</sup> recently considered the operation of s 149A(2) and (3) of the PS Act. Section 149A(2) and (3) of the PS Act are referred to and applied by the operation of s 149B(5) of the PS Act. Relevantly Deputy President Merrell stated:

"[20] Reading sub-ss 149A(2) and (3) of the PS Act together and in context, the purpose of s 149A(2) is to set out the matters of which the chief executive must be satisfied before he or she is required, pursuant to s 149A(3), to offer to convert the relevant person's employment basis to employment as a general employee on tenure or a public service officer. Therefore, in my view, the transitive verb 'considers' in s 149A(2)(a) relevantly means: 'to regard as or deem to be'.<sup>5</sup> Thus, if a chief executive is of the opinion that there is a continuing need for someone to be employed in the employee's role, or a role that is substantially the same as the employee's role, and the employee is eligible for appointment having regard to the merit principle (and where relevant, there is compliance with any requirements of an industrial instrument),<sup>6</sup> the chief executive must decide to make a conversion offer.

[21] Again, reading sub-ss 149A(2) and (3) of the PS Act together and in context, the only circumstance where a chief executive officer can decide not to make a conversion offer is where the chief executive forms the opinion that it is not viable or appropriate to do so having regard to the genuine operational requirements of the department.

[22] As I recently stated in *Morison v State of Queensland (Department of Child Safety, Youth and Women)*<sup>7</sup> in respect of the phrase 'genuine operational requirements of the department' in s 149C(4A)(a) of the PS Act and in cl 6.2(a) of *Directive 13/20 Appointing a public service employee to a higher classification level*:

[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; and

<sup>4</sup> *King-Koi v State of Queensland (Department of Education)* [2020] QIRC 209.

<sup>5</sup> *Macquarie Dictionary* (7<sup>th</sup> ed, 2017) 'consider' (def 2).

<sup>6</sup> *Public Service Act 2008* s 149A(2)(b).

<sup>7</sup> *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203.

- 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.

...

[40] The phrase '... genuine operational requirements of the department' in s 149C(4A)(a) and in cl 6.2(a) of the Directive, construed in context, would at least include whether or not there was an authentic need, having regard to the effective, efficient and appropriate management of the public resources of the department, to appoint an employee, who has been assuming the duties and responsibilities of a higher classification level in the department for the requisite period of time, to '...the position at the higher classification level.'

[19] I consider that given the language of s 149B(5) of the PS Act and that it states that s 149A(2) and (3) applies, that similar reasoning be adopted when considering s 149B of the PS Act (and, as referred to below, in the application of cl 8.2 of the Directive). Accordingly, the relevant question to be asked is whether or not it is viable or appropriate to offer to convert a fixed term temporary employee or casual employee having regard to, for example, authentic requirements for the effective, efficient and appropriate management of the public resources of the department or the authentic planning of the human resources of the department.

[20] I have also considered Directive 09/20. Clause 8 of Directive 09/20 relevantly states:

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*,<sup>8</sup> 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).
- 8.6 Agencies are expected to undertake each review as required by the PS Act and this directive and must not make an intentional decision to rely on a deemed decision referred to in clause 8.5.
- 8.7 Each agency must, upon request, given the Commission Chief Executive a report about the number of known deemed decision.

### **Was the decision fair and reasonable?**

- [21] There is no dispute that Ms Bailey, on 6 October 2020, was eligible for review pursuant to s 149B of the PS Act in respect of her temporary employment status.
- [22] The issue that is in dispute in this matter is whether there is a continuing need for someone to be employed in Ms Bailey's role or a role which is substantially the same.
- [23] Ms Bailey has been continuously employed as a Nurse Grade 6 in Prison Mental Health Services, Forensic and Secure Services, Mental Health and Specialised Services at the Park Centre for Mental Health in a temporary capacity from 8 October 2018 to 25 October 2020.
- [24] On 25 October 2020, following the expiration of the temporary contract, Ms Bailey returned to her previous employment with Queensland Health in the casual nursing pool.
- [25] Ms Bailey submits that she was advised that the reason for her temporary appointment to the role of Transition Clinician was to backfill a vacancy created by the substantive Transition Coordinator being seconded to perform higher duties in the role of Clinical Coordinator. Ms Bailey's final short-term contract in the Transition Coordinator role, states that:
- "this position is backfilling against a Transition Clinician position who is backfilling a Clinical Coordinator position which is a permanent vacancy."
- [26] Ms Bailey submits that the fact there is a permanent vacancy in the role which the incumbent employee is performing higher duties in, strongly indicates that there is also a permanent vacancy in the Transition Clinician Role.

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<sup>8</sup> Section 27B of the *Acts Interpretation Act 1954* provides:

**27B Content of statement of reasons for decision**

If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also-

- (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.

- [27] Queensland Health submits that Ms Bailey was backfilling the permanent incumbent who was currently acting in higher duties. The incumbent was due to return to their substantive role in July 2020 but received a number of extensions for their contract due to an unrelated industrial matter.
- [28] The substantive employee is currently on a fixed term temporary contract until 7 March 2021. Queensland Health submits that it anticipates that the incumbent will return to their role at the end of that fixed term temporary contract in March 2021 and that no further extensions are anticipated. Queensland Health submits that the extensions to the permanent incumbent have only been made due to the unrelated industrial matter and a commitment to maintain the status quo for the duration of that industrial matter.
- [29] Consequently, Queensland Health submits that there is no continuing need for Ms Bailey to be employed in the role due to the anticipated return of the substantive incumbent in March 2021. In this regard, Queensland Health asserts that there are genuine operational reasons not to convert Ms Bailey due to the anticipated return of the substantive incumbent from secondment and therefore there are no duties for Ms Bailey to undertake following the incumbent's return.
- [30] I consider that the matters raised by Queensland Health with respect to the operational reasons not to convert Ms Bailey's employment concern the effective, efficient and appropriate management of public resources of Queensland Health and the planning of human resources. They appear to be genuine and authentic reasons.
- [31] In my view, the reasons provided by Queensland Health not to appoint Ms Bailey to the role she has been acting in on the basis that the incumbent is to return to that role, amounts to genuine operational requirements of Queensland Health. To that extent, the decision was fair and reasonable.
- [32] However, Queensland Health has failed to consider whether there is a continuing need for someone to be employed in a role which is substantially the same as Ms Bailey's role. Section 149B(5)(a) of the PS Act and clause 8.1 of Directive 09/20 requires the decision maker to consider whether there is a continuing need in a role which is substantially the same as the role Ms Bailey occupied at the time she made the request. No such consideration is apparent in the submissions made on behalf of Queensland Health.
- [33] To the extent that the decision does not accord with the requirements of the s 149(5)(a) and clause 8.1 of Directive 09/20, I consider the decision to be not fair or reasonable. Given the absence of any information and/or reasoning with respect to whether there is a need for someone to be employed in a role which is substantially the same as Ms Bailey's role, I am unable to form a conclusion with respect to the matter. For that reason, I will direct that the matter be returned to Queensland Health in order for it to conduct a review in accordance with the relevant provisions of the PS Act and Directive 09/20.
- [34] Finally, The QNMU notes in its submissions that despite the expiration of the temporary contract that Ms Bailey made the request for review prior to the expiration of the temporary contract and Ms Bailey remains employed by Queensland Health. The QNMU submits that neither the PS Act or Directive 09/20 prevent an employee from

appealing a decision made in accordance with s 149B of the PS Act if the employee reverts to their casual engagement.

[35] I accept that the relevant provisions of the PS Act and Directive 09/20 are silent as to these matters. I consider that had the intent been to exclude a class of employee from appealing such a decision, the legislature would have included such an exclusion in the amendments made to the PS Act. I do not consider that Ms Bailey is prevented from appealing the decision and seeking relief as a result of the expiration of the temporary contract and her reversion to her substantive casual role.

### **Conclusion**

[36] The question in this appeal was whether the deemed decision to refuse to permanently appoint Ms Bailey to the position was fair and reasonable.

[37] For the reasons given, the decision was not fair or reasonable.

### **Order**

[38] I make the following order:

1. **The appeal is allowed.**
2. **Pursuant to s 562C(1)(c) of the *Industrial Relations Act 2016*, the decision appealed against is set aside.**
3. **I direct that a copy of the decision on appeal be provided to the decision maker and that a fresh review be conducted in accordance with the relevant provisions of the *Public Service Act 2008* and Directive 09/20.**
4. **I further direct that the review is to be conducted by the Respondent within 21 days.**