

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Stuart v State of Queensland (Department of Transport and Main Roads)* [2021] QIRC 050

PARTIES: **Stuart, Gabrielle**
(Appellant)

v

State of Queensland (Department of Transport and Main Roads)
(Respondent)

CASE NO: PSA/2020/355

PROCEEDING: Public Service Appeal - Higher Duties Conversion Decision

DELIVERED ON: 10 February 2021

MEMBER: Pidgeon IC

HEARD AT: On the papers

OUTCOME: **The decision appealed against is confirmed.**

CATCHWORDS: INDUSTRIAL LAW - Public Service Appeal - where the appellant requests appointment to higher classification level - whether the appellant was eligible to submit request - where the appellant was not appointed due to genuine operational requirements of the department - whether the decision was fair and reasonable

LEGISLATION: *Public Service Act 2008* s 149C

Industrial Relations Act 2016 s 562C

Directive 13/20 Appointing a public service employee to a higher classification level.

CASES: *Clair v State of Queensland (Department of Housing and Public Works)* [2020] QIRC 220

Holcombe v State of Queensland (Department of Housing and Public Works) [2020] QIRC 195

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

Sharma v State of Queensland (Department of Housing and Public Works) [2020] QIRC 199

Reasons for Decision

Appeal Details

- [1] Ms Stuart is employed by the State of Queensland (Department of Transport and Main Roads). Her substantive role is as an AO2 Processing Officer within the Customer Services Branch.
- [2] Ms Stuart's appeal notice states that she commenced acting continuously in higher duties as an AO4 DocBase Officer, Capability Engagement and Learning, Business Management (the higher level role) in March 2018 and at the time of her submissions had a current end date of 31 December 2020.
- [3] On 2 November 2020, the Executive Director (Strategy) wrote to Ms Stuart in response to her request of 7 October 2020 to be appointed to the higher classification level.
- [4] The decision letter stated that due to the genuine operational requirements of the Department, Ms Stuart was to continue to be engaged according to the terms of the existing higher duties arrangement. Specifically:

A DocBase Officer's role is to provide advice and recommendations regarding the presentation and formatting of information relating to transport policies, procedures, projects, services, systems or legislation about service delivery matters to the business owner of the information, as well as updating and editing DocBase. DocBase is a Lotus Notes based application, which is in the process of being phased out and replaced with an alternative knowledge system.

The Service Delivery Knowledge Base (SDKB) project was identified as a viable DocBase replacement and is currently under development. The knowledge replacement project was reinvigorated in April 2018 when CSB recognised a new solution was needed to support the future workforce needs. Environment factors, including resourcing and the COVID response, have slowed progress but not changed the scope of the replacement project.

Currently, you have been engaged at a higher classification level for a total of three years and ten months and your engagement at this higher classification has been extended 26 times. This ongoing level of uncertainty is reflective of the long lead times required to investigate, consult, scope, and seek funding and approvals for major new IT projects such as the SDKB project.

The new solution will result in a likely reduction in the need for specific, technical skills related to the DocBase Officer role. SDKB project intelligence to date indicates the operational effort required to edit, manage and maintain TMR's policy and procedural documents will significantly reduce. This will potentially eliminate the ongoing need for a resource to undertake the role of a DocBase Officer as the nature of the work is not foreseeable at this time. On this basis, it is likely

that the DocBase Officer role in the medium/long term may not be ongoing, subject to the SDKB Project arrangements. With the implementation of the SDKB Project in the first half of 2021, the department will have a clearer understanding of the new solution database and the inherent requirements of the role. As a result of this decision not to convert you to the higher classification level, you will continue in the role of DocBase Officer until 31 December.

Relevant sections of the Act and Directive

[5] In order to determine the appeal, it is necessary to consider the relevant provisions of the *Public Service Act 2008* ("the PS Act") and *Directive 13/20 Appointing a public service employee to a higher classification level* ("the Directive").

[6] 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 one year; and
 - (c) is eligible for appointment to the position at the higher classification level having regard to the merit principle.
- ...
- (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).
- ...
- (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.

The Directive

[7] While all the provisions of the Directive have been considered, particular attention is paid to the following provisions:

4. Principles

- 4.1 An employee seconded to or assuming the duties and responsibilities of a higher classification level in the agency in which the employee is substantively employed can be

appointed to the position at the higher classification level as a general employee on tenure or a public service officer following a written request to the chief executive.

4.2 Secondment to or assuming the duties and responsibilities of a higher classification level should only be used when permanent appointment to the role is not viable or appropriate. Circumstances that would support the temporary engagement of an employee at a higher classification level include:

- (a) when an existing employee takes a period of leave such as parental, long service, recreation or long-term sick leave and needs to be replaced until the date of their expected return
- (b) when an existing employee is absent to perform another role within their agency, or is on secondment, and the agency does not use permanent relief pools for those types of roles
- (c) to perform work for a particular project or purpose that has a known end date
- (d) to perform work necessary to meet an unexpected short-term increase in workload.

...

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 documents 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.

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.

8. Appeals

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

...

What decisions can the Commission make?

[8] In deciding this appeal, s 562C(1) of the *Industrial Relations Act 2016* (IR Act) provides that the Commission may:

- (a) confirm the decision appealed against; or
- ...
- (c) For another appeal-set the decision aside, and substitute another decision or return the matter to the decision maker with a copy of the decision on appeal and any directions considered appropriate.

Ms Stuart's reasons for appeal

[9] Ms Stuart says her appeal is submitted on the grounds that the decision maker has not complied with s 149C(4A) of the PS Act and cl 6.2 of Directive 13/20 and failed to:

- a) Properly 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.

[10] Ms Stuart submits that she meets the eligibility criteria to be appointed as she has been acting at the higher classification level for a continuous period of at least one year, has demonstrated merit, has had no discipline or performance issues raised in relation to this higher-level role and has been extended 26 times.

[11] With regard to the higher duties role, Ms Stuart submits it is "a genuine operational requirement of TMR that the duties I have been undertaking at the higher classification level are likely continuing and TMR has a genuine operational need for the role to be undertaken on a permanent basis". Specifically:

- the work she is performing continues to be required to be performed on a permanent and ongoing basis within TMR;
- when the project is finished, initially there will be a higher volume of work;
- after the initial increase in work, a similar volume of work to that currently performed will likely emerge in the form of governance duties;
- a reduction in FTE would be unfeasible due to already negative impacts on the team when responding to leave arrangements and meal breaks;
- the role is ongoing because documents must be screened through her role for approval and must be formatted to a standard for publishing on the intranet and she does not believe this can be automated;
- as a subject matter expert stakeholder in the SDKB Project, Ms Stuart has seen no evidence that there will be a reduction in the need for her skills; and
- while there may be a reduction in some duties and skills, a corresponding increase in other duties and skills will occur.

[12] Ms Stuart says that although the higher level role is currently being used to assist with a project, it is not a temporary project role. The position is a permanently vacant and funded role.

- [13] Ms Stuart says it would be inconsistent with the objectives of the PS Act and the purpose of Directive 13/20 for the Department to continue the higher duties arrangement in circumstances where there is a documented need for the role to be performed on tenure at that level, and refers to cl 3.4 of the Directive which states the use of higher duties should only be used when permanent appointment is not viable or appropriate.

Department submissions

Eligibility for appointment to the higher classification level

- [14] The Department submits that it investigated the employment history of Ms Stuart as a result of this appeal. While Ms Stuart has been performing the role of DocBase Officer AO4, continuously since March 2018, she commenced in her current position on 28 August 2020.
- [15] Ms Stuart was the incumbent of position number 15584702 when she submitted her written request to be permanently appointed and at that time she had been undertaking the requirements of the position for approximately five weeks. This forms the basis of the Department's submission that Ms Stuart is not eligible under s 149C of the PS Act, and further submission that she should not have been afforded the opportunity to submit a request to be appointed to the higher classification level.

Response to Ms Stuart's submissions

- [16] Ms Stuart has performed the role of DocBase Officer AO4, against two separate position numbers from March 2018 to present and is currently held against position number 15584702. The present known end date for the Ms Stuart in this role is 31 March 2021.
- [17] Section 4.2 of the Directive provides that performing work for a particular project or purpose that has a known end date is a circumstance that supports the temporary engagement of an employee at a higher classification level.
- [18] The purpose of the DocBase Officer role is to provide support for the DocBase knowledge management database. TMR and the team who perform the function have been advised that the database will be decommissioned when the new solution reaches the implementation phase.
- [19] When the role was last advertised, the Manager informed the team by email that the role was being advertised on a temporary basis for a period of 11 months. The email stated: "This decision has been made in terms of the unknown requirements for resourcing for SDKB post implementation".
- [20] Ms Stuart's submissions simply restate the requirements of the current temporary role and her conclusion that these would be the same duties for her going forward.
- [21] The initial end date of the project has been extended due to the impacts of COVID-19 and is now due for completion mid-2021.

[22] With regard to Ms Stuart's submission that the decision is unfair and unreasonable, the Department says:

- The decision maker considered the genuine operational requirements of the Department and provided those in the decision letter;
- Ms Stuart refers to 'whether the role is continuing' and 'take into account relevant considerations when making the decision'; and
- neither the PS Act or the Directive refer to whether the role is continuing or take into account relevant considerations when making the decision.

[23] With regard to genuine operational requirements, the Department says;

- The Department considered genuine operational requirements when deciding the request;
- it is expected that the new solution will involve less administrative and manual activity and more knowledge management design and optimisation;
- it is expected that TMR will be required to re-purpose the substantively vacant DocBase Officer role to align with the support requirements of the new solution; and
- once the functional design stage is complete, the extent of change over the medium and longer term will be progressed along with applicable consultation requirements.

[24] The Department considered a range of supporting materials:

- AO4 DocBase Officer role description – with specific consideration of the primary requirement of the role, that is, to support the current and soon to be decommissioned DocBase system;
- the Service Delivery Knowledge Base Project Plan – with specific consideration of the project objectives and deliverables including implementation timeline;
- the Service Delivery Knowledge Base Project Benefits Plan – with specific consideration of benefits relating to efficiency and solution optimisation; and
- Vendor demonstrations and the executed contract between TMR and the Vendor – with specific consideration of agreed solution functionality and deliverables.

- [25] The decision maker was unable to confirm that the appointment would satisfy genuine operational requirements including that the new solution will be different in its requirements for support and optimisation and a reasonable expectation that the current DocBase role will not be required ongoing in its current form.
- [26] Given the government's commitment to the debt and savings plan it would be remiss of the Department to commit to appointing an employee to a role that would not necessarily meet future requirements.

Ms Stuart in reply

Eligibility

- [27] Ms Stuart disputes the Department's submission that she was not eligible to make an application to be appointed permanently to the higher level position under s 149C of the PS Act.
- [28] Ms Stuart says that the decision in the matter of *Sharma v State of Queensland (Department of Housing and Public Works)* [2020] QIRC 199 indicates that provided a person has been acting at the higher level for one year or more, they may make a request to be appointed to the position they are occupying at the date of the request.
- [29] Ms Stuart says that as she has been acting at the higher level for one year or more, she may make a request to be appointed to the position she was occupying at the time of the request.
- [30] Ms Stuart says that as she has been acting in the role of AO4 DocBase Officer for a period in excess of one year and meets merit for the role, she is eligible to request to be permanently appointed to position number 15584702, which she had occupied for five weeks as at 7 October 2020 when she made the request.

Responses to other submissions of Department

- [31] Ms Stuart used the term 'whether the role is continuing' in her submissions as she refutes the Department's position that her role may not be ongoing as was stated in the decision letter.
- [32] Ms Stuart says that the decision maker did not consider the work required after the SDKB project is rolled out.
- [33] Ms Stuart says that if she returns to her substantive position on 31 March 2021, leaving the role vacant will risk a disruption to the business and to the continuity of information available to frontline staff. Further, with only two team members who are currently working at full capacity, there will be no additional ability to cover if someone is on leave.
- [34] Ms Stuart has, in consultation with her managers and in accordance with her goals and understanding, enrolled to study document design, desktop publishing and HTML coding to facilitate her development in the higher level role on an ongoing basis.

[35] With regard to the Department's submissions that there is an intention to re-purpose the substantively vacant role, Ms Stuart is disappointed that the Department did not directly communicate this to her. Ms Stuart contends that even her direct supervisors were unaware of this intent.

I have laboured for several years now under the belief that I would have the opportunity to apply for the higher level role permanently at some point in time. At no time was I made aware by my employer that the role was to be repurposed until I made my recent application to be appointed permanently to the higher role.

...

Had it been made clear to me earlier that the higher level role was never going to be a permanent role I may have directed my energies toward finding a more secure position rather than dedicating myself to ensuring continuity of information for frontline staff with the management of an ageing and evolving system.

Consideration

Does Ms Stuart meet the eligibility requirement to submit a request pursuant to section 149C

[36] The Department undertook a review in response to Ms Stuart's request. In submissions to this appeal, the Department say that Ms Stuart is ineligible for conversion as she has not been seconded to the higher classification level in her current position for a continuous period of one year. However, this is not a correct description of the situation.

[37] It is not in dispute that Ms Stuart has been engaged at a higher classification level for more than one year and that her higher classification has been extended 26 times.¹

[38] Ms Stuart is correct in identifying that she is a person s 149C(1) refers to. She has been acting at a higher classification level in the Department in which she is employed,² she has been acting at the higher classification level for a continuous period of at least one year³ and is eligible for appointment to the position at the higher classification level having regard to the merit principle.⁴

[39] It does not matter that Ms Stuart was previously acting in the role of DocBase Officer at the higher classification in a different position number. The fact that she was continuously employed at the higher classification level for more than one year is what triggered her eligibility for review.

[40] At the end of one year of acting at a higher classification level, Ms Stuart was eligible to 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 pursuant to s 149C(3) of the PS Act. This is what Ms Stuart did.

¹ Decision Letter dated 2 November 2020.

² *Public Service Act 2008* s 149C(1)(a).

³ *Public Service Act 2008* s 149C(1)(b).

⁴ *Public Service Act 2008* s 149C(1)(c).

- [41] The position she was eligible to ask to be appointed to is position number 15584702, the position she was occupying at the time she requested the review. This is the position that was considered by the decision maker in considering Ms Stuart's request.
- [42] Despite the Department's position that Ms Stuart was ineligible to be employed in position 15584702, submissions were provided in response to her grounds of appeal. Having decided that Ms Stuart was eligible for review, I will now consider whether the decision not to appoint her to the higher classification level was fair and reasonable.

Was the decision not to appoint Ms Stuart to the higher classification level fair and reasonable?

- [43] In deciding whether to appoint Ms Stuart to the position, the chief executive must have had regard to the genuine operational requirements of the Department.
- [44] The phrase 'genuine operational requirement' is defined in neither the PS Act nor the Directive, and has been considered in *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203 where Merrell DP relevantly stated:

[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 including 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.

...

[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.

- [45] The decision letter provides a detailed explanation of the change process currently underway within the TMR and an analysis of how this may change the position Ms Stuart is acting in and the needs of Department in the future.
- [46] The reasons provided in the letter acknowledge that Ms Stuart has been employed in the DocBase role for an extensive period of time and has been extended in the role 26 times. The reasons also set out the nature of the replacement project and the projected changes to the role once the new system has been implemented.
- [47] Clause 4.2 of the Directive makes reference to a range of circumstances that would support the temporary engagement of an employee at a higher classification level. One of these is performing work for a particular project or purpose that has a known end date. The end date for the implementation of the SDKB application is expected to be mid 2021. The list of examples provided in cl 4.2 is not exhaustive and it seems to me that a scenario such as the one set out in the decision letter and in its submissions would also represent a circumstance where permanent appointment to the role is not viable or appropriate.
- [48] While Ms Stuart says that she was unaware of the potential that the DocBase role may change following the replacement of the DocBase program, her final submissions make

it clear that while she has been working in the DocBase Officer role, she has had the new system in her contemplation and has been working to develop her skills to be able to work in a higher classification role with the new SDKB application. When there is more certainty about the role going forward, this will place her in good stead to either apply for relevant roles or request appointment in the future should she still be employed in a position at the higher classification level.

[49] I am satisfied that the decision not to employ Ms Stuart at the higher classification level gave proper consideration to the genuine operational requirements of the Department and was fair and reasonable.

[50] Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016*, the decision appeal against is confirmed.