

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Pulikkottil v State of Queensland (Queensland Health)* [2021] QIRC 052

PARTIES: **Pulikkottil, Vinni**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO: PSA/2020/399

PROCEEDING: Public Service Appeal – Appeal against a conversion decision

DELIVERED ON: 11 February 2021

MEMBER: Pidgeon IC

HEARD AT: On the papers

OUTCOME: **The decision appealed against is set aside.**

Mr Pulikkottil is to be offered conversion from casual to permanent.

CATCHWORDS: INDUSTRIAL LAW - public service appeal - where the appellant requested a review for conversion from casual to permanent employment - where the appellant was not converted for general operational requirements of the department

LEGISLATION: *Public Service Act 2008* s 149B

Industrial Relations Act 2016 s 562C

Directive 08/20 Casual Employment

CASES: *Gilmour v Waddell & Ors* [2019] QSC 170

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

Reasons for Decision

Appeal Details

- [1] Mr Pulikkottil (the Appellant) is currently substantively employed by the State of Queensland (Queensland Health), (the Respondent) as a casual (OO2-4) Operational Services Officer at the Maryborough Hospital, with the Wide Bay Hospital and Health Service (WBHHS). Over the four years Mr Pulikkottil has worked at the hospital, he has been engaged on both temporary contracts and on a casual basis.
- [2] On 14 October 2020, the Australian Workers' Union made a request on behalf of Mr Pulikkottil that he be converted from a casual to permanent employee as per *Directive 08/20 Casual Employment* (the Directive).
- [3] In a decision letter dated 17 November 2020, the Chief Executive of WBHHS (the decision maker) wrote to Mr Pulikkottil stating that he was to continue as a casual employee at this time. The letter informed Mr Pulikkottil that he as he had reverted to casual status, he was eligible for review in line with the Directive.
- [4] Mr Pulikkottil was told that he meets the merit requirements for the role and that there is a continuing need for him to be employed in accordance with the circumstances set out at cl 5.2 of the Directive.
- [5] With regard to cl 5.3 of the Directive, the decision maker said:
- Further, section 5.3 of the Directive states that employment on tenure may be viable or appropriate if a person is required to be employed for a purpose mentioned in clause 5.2, such as covering gaps in various work rosters, on a regular and systematic basis. In reviewing the circumstances relevant to your employment, I have established that it is likely there will be a continuing need to engage you in accordance with the circumstances as outlined in 5.2 of the Directive.
- [6] The decision maker then goes on to consider whether permanent appointment of Mr Pulikkottil at this time is viable or appropriate having regard to the genuine operational requirements of the agency. Specifically,

As the Chief Executive, I am required to manage the full-time equivalent (FTE) establishment taking into account workforce planning considerations, the operational needs of the service and ensuring financial sustainability as outlined with section 98 of the *Public Service Act 2008*, and within the current Service Delivery Agreement for Wide Bay Hospital and Health Service.

Notwithstanding there are currently no budgeted vacancies within the area in which you are engaged, I have determined that there is likely to be a continuing need for you to be engaged in accordance with the circumstances as outlined in 5.2 of the Directive; specifically that the nature of your engagement is required where the service operates in a regional area and in a twenty-four hour, seven day per week service where flexibility in the type of engagement is required.

It is neither viable nor appropriate in this case to convert to permanent.

I therefore find that there is a genuine operational requirement of this agency not to convert your employment to permanent at this time.

[7] On 7 December 2020, Mr Pulikkottil filed his appeal against the decision. I am satisfied that Mr Pulikkottil has made his appeal within the 21 day time period required.

[8] The issue for me to determine in this appeal is whether the decision that Mr Pulikkottil's employment not be converted from casual to a general employee on tenure was fair and reasonable.

Relevant sections of the Act and Directive

[9] 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 08/20 Casual Employment* ("the Directive").

[10] 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.
 - ...
- (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
 - ...
 - (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.

The Directive

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

1. Purpose
 - 1.1 The *Public Service Act 2008* (PS Act) establishes employment on tenure is the default basis of employment in the public service, excluding non-industrial instrument employees and sets out the circumstances where employment on tenure is not viable or appropriate.
 - 1.2 This directive:
 - (a) highlights key sections in the PS Act dealing with the employment and conversion of casual employees
 - (b) provides for the circumstances in which employment on tenure or a fixed term temporary employee is not viable or appropriate
 - (c) sets out procedures for reviews and requirements for decisions

5. Employment of casual employees
 - 5.1 Section 148A of the PS Act (Appendix A) provides that casual employment should only be used when tenured or fixed term temporary employment is not viable or appropriate.
 - 5.2 Use of tenured or fixed term temporary employment is generally not viable or appropriate where there is a need for short term employment, or to meet unpredictable, irregular or variable demand or in emergent situations, and casual employment may appropriately be used to meet these staffing needs. Examples of these types of circumstances include:
 - (a) backfilling tenured or fixed term temporary staff on short-term emergent leave
 - (b) covering short gaps in work rosters of tenured and fixed term temporary employees
 - (c) in a role where work patterns or work demand is variable and difficult to predict, with each engagement standing alone
 - (d) where needed to work irregular, informal, flexible, occasional or non-rostered hours.
 - 5.3 Employment on tenure may be viable or appropriate if a person is required to be employed for a purpose mentioned in clause 5.2, such as covering gaps in various work rosters, on a regular and systematic basis.
...
 - 5.5 An agency should periodically review the use of casual employees to appropriately limit casual employment in accordance with the provisions of the PS Act and to proactively manage its workforce planning.
...

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 set out in section 149A(2):
- whether there is a continuing need for the employee to be employed in the role, or a role which is substantially the same
 - the merit of the casual employee for the role having regard to the merit principle in section 27 of the PS Act
 - whether any requirements of an industrial instrument are complied with in relation to 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) of the PS Act provide that where the criteria above are met, the chief executive must decide, within 28 days, 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.

What decisions can the Commission make?

- [12] In deciding this appeal, s 562C 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.

Mr Pulikkottil's reasons for appeal

- [13] Mr Pulikkottil submits that the decision of the WBHHS was not fair and reasonable when considering the Directive as a whole, and the grounds relied upon by the Respondent.
- [14] Mr Pulikkottil says that the relevant principles in considering whether a decision is 'unreasonable' were established in *Gilmour v Waddell & Ors*.¹ Specifically, that the legal standard or unreasonableness is to be considered by reference to the subject matter, scope and purpose of the statute conferring the power and its real objective.
- [15] With consideration to the above, Mr Pulikkottil says that the Respondent erred by failing to consider all relevant factors within the objects and nature of the relevant legislation. Specifically:
- The State has committed to engage employees permanently wherever possible and limit the use of casual employment;
 - casual employment should only be used when permanent employment is not viable or appropriate;
 - agencies are required to proactively manage their workforce planning to reduce their reliance upon casual and temporary employees;

¹ [2019] QSC 170, [207]-[210], citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [63]-[76].

- an extensive review process was created to facilitate the conversion of casual and temporary employees to permanency and limit inappropriate use of casual employment; and
- that process is subject to appeal in the QIRC, to ensure agency compliance.

[16] With regard to genuine operational requirements, Mr Pulikkottil says that genuine operational reasons preventing conversion to permanency must not be trivial and must be evidenced. Further, if the inconveniences inherent to all permanency conversions were sufficient to constitute genuine operational reasons, there would be no or few conversions. That interpretation would defeat the purpose of the Directive and the review.

[17] Mr Pulikkottil does not dispute that the work undertaken could be done on a temporary or casual basis. However, the issue is not whether it was appropriate to initially employ him on a casual basis but whether it is reasonable for that to continue.

[18] The Respondent does not dispute that Mr Pulikkottil meets the minimum service, merit and systematic employment requirements. His application for permanency failed solely on the grounds of alleged 'genuine operational requirements'.

[19] Mr Pulikkottil says that giving consideration to the principles set out at [15], any genuine operational requirements preventing conversion must not be trivial and must be evidenced. Further, a 'reasonable' genuine operational requirement is one which is sufficiently substantial as to warrant overcoming the government's commitment to permanent employment.

[20] The Directive does not prescribe that a casual employee's conversion relies on the existence of a permanent or 'budgeted vacancy' and even if a new permanent position was required, this is to be expected when converting any casual or temporary employee.

[21] Mr Pulikkottil submits that 'unreasonableness' is a conclusion which may be applied to a decision which lacks any evidence and intelligible justification, in consideration of his submissions above, the decision falls within that class.

Department submissions

[22] The case for the respondent is, in summary:

- Over the last two years, Mr Pulikkottil has only been contracted to cover in roles where the incumbent position holder is temporarily absent due to recreation leave, sick leave, QSuper, training, graduated return to work, WorkCover, or for a short-term vacant position while the position underwent recruitment. Mr Pulikkottil has never been contracted to cover either a long term vacant or unfunded position. In each case the substantive incumbent has returned to their position and Mr Pulikkottil is not longer required.
- There is a legitimate and genuine need for the use of casual and temporary employees within the operational services unit of the Maryborough Hospital. It is

a workforce strategy utilised to ensure resourcing across a 24/7 roster allowing for the types of leave mentioned above.

- The Respondent would not only have Mr Pulikkottil as an FTE over establishment, but also must engage another casual or temporary employee to backfill the ongoing leave of the newly converted Mr Pulikkottil.
- These reasons are not trivial, nor are they managerial inconveniences or simply difficulties.
- The Respondent has converted numerous employees who have made an application for conversion and have met the criteria under the relevant Directives. This is a case where the Respondent relies on the genuine operational requirements of the agency.

Stated Purpose

[23] The Respondent submits that the Directive is a statutory instrument within the meaning of s 7 of the *Statutory Instruments Act 1992* (Qld)² and that s 14 of that Act provides that certain provisions of the *Acts Interpretation Act 1954* (Qld) (AIA) apply to statutory instruments.

[24] One of those is s 14A which provides that in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation. Schedule 1 to the AIA provides that 'purpose', for an act, includes a policy objective.³

[25] The Department says that the stated purpose of the Directive is twofold: it establishes employment on tenure is the default basis of employment in the public service, excluding non-industrial instrument employees **and sets out the circumstances where employment on tenure is not viable or appropriate** (Respondent emphasis). The nature of the Appellant's engagements falls squarely within the confines of the examples in cl 5.2 of the Directive.

[26] With regard to the employment security policy, the Department says the policy outlines the government's commitment to permanent employment where possible, however the policy also sets out a commitment to

developing and maintaining a responsive, impartial and **efficient** government workforce' and '**with workforce planning, career planning and skills development will ensure that the government workforce has the flexibility and mobility to meet future needs'**...and "Agencies are encouraged to utilise workforce planning, career planning and management strategies to assist in determining the appropriate workforce mix for current and future needs".⁴ (Respondent emphasis)

[27] The Respondent says that the nature of the Appellant's engagements aligns with the workforce strategy for the operational services department at WBHHS, ensuring

² *Katae v State of Queensland & Anor* [2018] QSC 225.

³ *Holcombe v State of Queensland (Department of Housing and Public Works)* [2020] QIRC 195 [31]-[33].

⁴ Employment Security Policy, Department of Premier and Cabinet, paragraphs 2, 3 and cl.4.1.

flexibility and an appropriate workforce mix. It is also consistent with the requirements for backfilling under the *Queensland Public Health Sector Certified Agreement (No. 10) 2019* which recognises the use of casual and temporary employees as a legitimate workforce strategy for backfilling.

Merit

- [28] The Department submits that Mr Pulikkottil satisfies the merit requirements for the role and the qualifying conditions at cl 7.2 of the Directive.

Continuing Need

- [29] In reviewing Mr Pulikkottil's employment history, it was determined that he was engaged in accordance with the circumstances set out in cl 5.2; specifically to backfill and/or cover short gaps in work rosters of tenured or fixed term employees, and/or where his work pattern or demand is variable and difficult to predict, with each engagement standing alone, and/or where needed to work irregular, informal, flexible, occasional or non-rostered hours. It was further determined by the decision maker that there is a continuing need to engage Mr Pulikkottil in accordance with cl 5.2 of the Directive.

Genuine Operational Requirements

- [30] The Respondent makes reference to the decision letter which informs Mr Pulikkottil that there is a continuing need for him to be employed in circumstances as outlined in cl 5.2 of the Directive; "specifically the nature of your engagement is required where the service operates in a regional area and in a twenty-four hour, seven day per week service where flexibility in the type of engagement is required."
- [31] In *Holcombe v State of Queensland (Department of Housing and Public Works)* [2020] QIRC 195 (*Holcombe*) it was decided that the authority to determine the review lies squarely with the delegate or decision maker. It is not a question of merit or whether there is work to be done. The question is only whether the genuine requirements relied upon by the Respondent to deny the Appellant's request for fair and reasonable.
- [32] The Respondent refers to *Holcombe* and says that in that decision "just as is the case here, it is a situation where only one person may occupy a numbered position at any one time, where the incumbent's return is not speculative or there is no incumbent".
- [33] The Respondent says that it does not have a genuine operational need to employ two people in the same position. In each case, the substantive incumbent has returned to the position and the Appellant is no longer required.
- [34] Referring to the decision in *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203 where Merrell DP considered the phrase 'genuine operational requirements'. In that decision, the Respondent says that His Honour considered 'genuine' to mean 'authentic' and considered the legislative responsibilities required of chief executives.⁵

⁵ *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203 [37]-[38].

[35] The Respondent submits that determining whether the WBHHS Chief Executive's reasons support a finding that there is a genuine operational reason; and whether it is fair and reasonable, it is relevant to understand both the financial management and performance and accountability frameworks within which such decisions are made:

- The *Financial Accountability Act 2009* (Qld) (FA Act) was enacted to govern public sector financial administration in Queensland and sets out strategic legal obligations with which agencies must comply.
- Subordinate legislation, consisting of the *Financial and Performance Management Standard 2019* and the *Financial Accountability Regulation 2019* have the aim of establishing board requirements within which agencies must operate to meet their obligations under the FA Act.
- The financial management framework is underpinned by concepts of "**efficient**", "**effective**", "**economical**" and "**value for money**".
- Section 61 of the FA Act requires "**the accountable officer or statutory body to achieve reasonable value for money by ensuring the operations of the department or statutory body are carried out efficiently, effectively and economically**".
- Section 11 FPMS requires agencies to "**establish and maintain management systems for efficiently, effectively and economically managing their financial resources.**"
- The HHS is required to deliver the health services outlined in the Service Agreement for which funding is provided. Service Agreements are established with each HHS under the National Health Reform Agreement.
- The Service Agreement contains KPIs and other measures of performance against which the HHS will be assessed.
- Under the WBHHS Service Agreement the relevant KPI states "Efficient – available resources are maximised to deliver **sustainable**, high quality health care; avoid waste; minimise financial risk, maximise available resources, **sustainable**/productive, average **sustainable** Queensland Health FTE, Capital expenditure performance".
- The decision letter does not factor any specific austerity measures nor measures focussed on savings, including those as a result of the economic impacts due to COVID-19, for example the "Responsible Workforce Management – Queensland Health approach".
- Section 19(2) of the HHB states that an HHS has the following function: "to ensure the operations of the Service are carried out **efficiently, effectively and economically**' and 'to manage the performance of the Service against the performance measures stated in the Service Agreement".

- Section 98 of the PSA requires that a Chief Executive manages their department in a way that promotes the "**effective, efficient and appropriate** management of public resources'...'planning human resources, including ensuring the employment here 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 this Act". These responsibilities are delegated to the WBHHS Chief Executive via the Delegations Manual.
- Section 25(1) of the PS Act requires that public service management be directed towards a) providing responsive, effective and efficient services to the community and the Government; and (3) managing public resources efficiently, responsibly and in a fully accountable way.

[36] The Respondent says that its genuine operational requirements along with the Appellant's engagement falling squarely within the confines of the examples in cl 5.2 of the Directive are reasons why the Respondent respectfully submits that the Appeal be dismissed.

Mr Pulikkottil's submissions in reply

[37] Mr Pulikkottil does not dispute that the work previously undertaken could be done on a temporary or casual basis. However, he says that the issue is not whether it was appropriate to initially employ him on a casual basis, but whether that should continue.

[38] Despite being a casual employee, Mr Pulikkottil already takes periods of recreational leave, sick leave or is simply unavailable to work. Albeit unpaid, the Mr Pulikkottil's position is nonetheless backfilled by another employee during his absence. The assertion that the agency must hire another casual or temporary employee simply to backfill the person leave entitlements of the employee is inherently flawed.

[39] Mr Pulikkottil says that the decision in *Holcombe* is about appointing a public service employee to a higher classification level and is not comparable to the principles and purpose of the casual conversion Directive. Those applying under s 149C of the PS Act already hold permanent and secure employment. Mr Pulikkottil does not.

[40] Mr Pulikkottil accepts that only one person may occupy a position at any one time. Mr Pulikkottil did not apply for conversion to a role where a substantive occupant currently has a claim.

[41] The Commission should not accept any argument that this Directive stands alone or exists outside of the framework or legislation the Chief Executive is accountable or responsible for. Complying with Queensland Government Directives forms an integral part of any Chief Executive's financial management framework and planning. They are accountable and responsible for the budgeting and costs associated with complying with Queensland Government Directives.

[42] When considering the 'nature' of any employee's engagement, a decision maker must consider the nature of the employment as a whole.

- [43] The Respondent, like all other agencies, has had four years to evaluate the number of casual and temporary employees who will be eligible for conversion within the proceeding 12-month period. The Chief Executive is responsible for planning their budgetary allocations, backfilling requirements etc. in consideration of those numbers.
- [44] Ongoing changes to the casual and temporary pool in accordance with Queensland Government Directives should be foreshadowed by agencies, all relevant Departments and their Chief Executives.
- [45] The Respondent has stated that cl 5.2 of the Certified Agreement 'recognises the use of casual and temporary employees as a legitimate workforce strategy for backfilling'. Part 5 of the Certified Agreement, Workload Management, simply establishes a process to backfill absences within Operational Services. Clause 5.2 ensures that any additional hours of work are offered to current part-time employees, casual employees and relief pool staff. Clause 5.2 does not encourage, promote or support the ongoing use of casual employment within Queensland Health.
- [46] Mr Pulikkottil maintains that remaining as a casual cannot reasonably be considered appropriate use of his service and is inconsistent with the stated purpose of the Directive.

Consideration

- [47] I note that the Respondent's submissions state that Mr Pulikkottil meets the merit requirement for conversion and that it has been assessed that there is an ongoing need for him to be employed for the types of circumstances set out at cl 5.2 of the Directive which describes circumstances which make tenured or fixed term employment generally not viable or appropriate where there is a need for short term employment, or to meet unpredictable, irregular or variable demand or in emergent situations.
- [48] With regard to cl 5.3 of the Directive, Mr Pulikkottil's employment with the Respondent cannot be described as short-term. He has worked for the Respondent for four years. While Mr Pulikkottil is employed to address the circumstances set out in cl 5.2 of the Directive, it appears to be uncontroversial that his services will be required in an ongoing way. If Mr Pulikkottil is required to meet 'unpredictable, irregular or variable demand or in emergent situations', he is doing so on a regular and systematic basis and it seems to me that this makes his employment on tenure viable and appropriate.

Genuine Operational Requirements

- [49] The Respondent says that the reason Mr Pulikkottil cannot be made permanent is 'genuine operational requirements'.
- [50] I agree with Mr Pulikkottil that that decision relied upon by the Respondent in *Holcombe* addressed a different part of the Act and a different set of circumstances. In the current case, Mr Pulikkottil is regularly employed to replace a number of people who are away from their regular position for a range of reasons at any one time. It is

not the case that if Mr Pulikkottil is made permanent there will be two people employed in one position.

- [51] The phrase 'genuine operational requirements' is defined in neither the PS Act nor the Directive. The phrase was considered in *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203 where Deputy President Merrell stated:

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.

...

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
- 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.⁶

(Citations Omitted)

- [52] The decision letter and submissions of the Respondent state that the Chief Executive is required to manage the full-time equivalent establishment taking into account workforce planning considerations, the operational needs of the service and ensuring financial sustainability as outlined within s 98 of the PS Act, and within the current Service Delivery Agreement for WBHHS. The decision letter states,

Notwithstanding there are currently no budgeted vacancies within the area in which you are engaged in the circumstances as outlined in section 5.2 of the Directive; specifically that the nature of your engagement is required where the service operates in a regional area and in a twenty-four hour, seven day per week service where flexibility in the type of engagement is required.

- [53] The Directive does not require there to be a budgeted vacancy to enable conversion. Converting a person's employment from casual to permanent will often involve the creation of a new permanent position and this is to be expected where the requisite criteria are met.

- [54] The Respondent correctly points out that it is necessary for the Chief Executive to work within financial management and performance and accountability frameworks. Section 25 of the PS Act sets out the management and employment principles for the public service in Queensland. The section requires the management of public resources in an efficient, responsible and fully accountable way. However, that same section also states

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

that public service employment is to be directed towards promoting employment on tenure as the default basis of employment for employees in the public service, other than for non-industrial instrument employees.

- [55] There is no detailed or specific information before me to suggest that the conversion of Mr Pulikkottil will lead the Chief Executive to not manage public resources in an efficient, responsible or fully accountable way. The information I have been provided with by the Respondent includes a list of documents, policies and agreements described at a high level. Nothing provided to me serves to prioritise the 'no budgeted vacancies' over the requirement for workforce planning or consideration of the principle established in the PS Act establishing employment on tenure as the default basis of employment in the public service.
- [56] The Respondent may have converted the employment of 'numerous employees' since conversions commenced in 2017, however Mr Pulikkottil is not one of them. Mr Pulikkottil has been working for the Respondent since before the superseded Directive was in place.
- [57] The implications of conversion set out by the Respondent as genuine operational requirements would apply to any casual conversion decision where there was not an existing vacant and funded position.
- [58] The shift work rostering provisions set out in the relevant Award do allow for changes to be made by agreement, or failing agreement, with 24 hours notice provided by the employer.⁷ Given the regularity with which Mr Pulikkottil has been employed over four years, I do not think it should be beyond the capacity of the HHS to continue to roster Mr Pulikkottil as appropriate to ensure the 24/7 roster can operate. I note that cl 5.2 of the Certified Agreement, Process to Address Absences within Operational Services states that all absences (planned and unplanned) will be backfilled. However, cl 5.2.2 acknowledges that not all positions will be backfilled on all occasions, and cl 5.2.3 acknowledges that for unplanned absences there may be some circumstances where roles may not require immediate backfill.
- [59] For the Directive and relevant legislation to have any real effect in enabling workers in insecure employment to request conversion following the requisite time periods of continuing employment, it will be necessary for Departments or in this case, hospitals and health services, to make adjustments to their staffing allocations, budgets and workforce planning.
- [60] Mr Pulikkottil has been working for WBHHS for over four years. There is a recognised need for him to be employed in a continuing way. I am not satisfied that the operational requirements relied upon by the Respondent are genuine to an extent that would serve to displace the principle that employment on tenure is the default basis of employment in the public service.
- [61] The decision not to offer Mr Pulikkottil permanent employment as a general employee on tenure was not fair and reasonable in the circumstances.

⁷ *Hospital and Health Service General Employees (Queensland Health) Award – State 2015.*

[62] Pursuant to s 562C(1)(c) of the *Industrial Relations Act 2016*, the decision is set aside and substituted with a decision that Mr Pulikkottil's employment is to be converted to permanent.