

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Tait v State of Queensland (Department of State Development, Tourism and Innovation)* [2021] QIRC 054

PARTIES: **Tait, Felicity**
(Appellant)

v

State of Queensland (Department of State Development, Tourism and Innovation)
(Respondent)

CASE NO.: PSA/2020/431

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

DELIVERED ON: 12 February 2021

MEMBER: Power IC

HEARD AT: On the papers

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

CATCHWORDS: INDUSTRIAL LAW – PUBLIC SERVICE APPEAL – where the appellant was reviewed under s 149B of the *Public Service Act 2008* – consideration of the scope of a review under s 149B

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

Industrial Relations Act 2016 (Qld), ss 562B and 562C

Public Service Act 2008 (Qld), ss 27, 148, 149A and 149B

Directive 09/20 Fixed term temporary employment, cl 8

CASES: *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR

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

Reasons for Decision

Introduction

- [1] Ms Felicity Tait (the Appellant), was employed by the State of Queensland (Department of State Development, Tourism and Innovation) (the Respondent) in the position of AO8, Manager, Development Assessment Advisory Team (DAAT).
- [2] By appeal notice filed on 18 December 2020, the Appellant, pursuant to chapter 7 of the *Public Service Act 2008* (Qld) (the PS Act), appealed against a decision that her employment be remain as fixed term temporary (the Decision).

Appeal principles

- [3] Section 562B(1) of the *Industrial Relations Act 2016* (Qld) (the IR Act) provides that the section applies to a public service appeal made to the Commission. Section 562B(2) provides that the Commission must decide the appeal by reviewing the decision appealed against. Section 562B(3) provides that the purpose of the appeal is to decide whether the decision appealed against was fair and reasonable.
- [4] The appeal must be decided by reviewing the decision appealed against.¹ Because the word 'review' has no settled meaning, it must take its meaning from the context in which it appears.² An appeal under chapter 11, part 6, division 4 of the IR Act is not by way of rehearing,³ but involves a review of the decision arrived at and the decision-making process associated therewith.
- [5] The stated purpose of such an appeal is to decide whether the decision appealed against was fair and reasonable.⁴ The issue for determination is whether the Decision by Mr Michael McKee, Deputy Director-General, Corporate, Department of State Development, Infrastructure, Local Government and Planning, to deny conversion of the Appellant's employment to permanent was fair and reasonable in all of the circumstances. This requires a consideration of s 149B of the PS Act and of *Directive 09/20 Fixed term temporary employment* (the Directive).

¹ IR Act s 562B(2).

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

³ *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018), 5 as to the former, equivalent provisions in s 201 of the PS Act.

⁴ IR Act s 562B(3).

What decisions can the Industrial Commissioner make?

- [6] In deciding this appeal, s 562C of the IR Act provides that the Industrial Commissioner may:
- (a) confirm the decision appealed against; or
 - (b) set the decision aside and substitute another decision; or
 - (c) set the decision aside and return the issue to the decision-maker with a copy of the decision on appeal and any directions considered appropriate.

Grounds of Appeal

- [7] In the appeal notice, the Appellant contends that:
- (a) the decision-maker has stated it is 'unable to be confirmed' whether there is a continuing need for the Project Manager role. Given the Respondent is still unclear about their requirements in the future there was accordingly not, at the time of decision, a genuine operational requirement not to convert the Appellant to permanent. Where a particular factor is uncertain or not yet known, the default basis of employment for the public sector should sway that decision to one to convert the member to permanent employment status;
 - (b) the decision-maker erred in their assessment of whether there is a continuing need for the Appellant to be employed in the role. Even though the Respondent has not determined whether there will be an ongoing need for the role, the Appellant submits that her removal would cause delays and dislocation across the division. Accordingly, this is also an operational requirement that supports the Appellant's conversion;
 - (c) the Decision proceeds on the basis that there must be a vacant position in a role that is substantially the same to enable the Appellant's conversion; and
 - (d) the Decision does not provide what was done to identify such roles, what roles were considered, or any evidence, findings or analysis as to whether there was a continuing need for the Appellant to be employed in a role which is substantially the same.

Background

- [8] The Appellant was appointed to the temporary position of Manager on 29 October 2018 with a planned end date of 31 December 2020. The appointment was to backfill the substantive occupant who was undertaking higher duties within another division.
- [9] The Appellant was subsequently offered and accepted a fixed term temporary engagement as an AO7, Principal Project Officer, Policy and Statutory Planning,

Planning Group commencing on 1 January 2021 with a planned end date of 30 June 2021.

- [10] There is no dispute between the parties that the Appellant has demonstrated merit to fill the role pursuant to s 27 of the PS Act.

Relevant provisions of the PS Act and the Directive

- [11] 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.

...

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

- (2) The department's chief executive may offer to convert the person's employment under section 149(3)(b) only if-

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

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

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

[14] The Directive relevantly provides:

- 8. Decision on review of status
 - 8.1 When deciding whether to offer permanent employment under section 149A or 149B, a chief executive must consider the criteria in section 149A(2):
 - whether there is a continuing need for the person to be employed in the role, or a role which is substantially the same
 - the merit of the fixed term temporary employee for the role having regard to the merit principle in section 27 of the PS Act
 - whether any requirements of an industrial instrument need to be complied with in relation to making the decision, and
 - the reasons for each decision previously made, or deemed to have been made, under sections 149A or 149B in relation to the employee during their period of continuous employment.
 - 8.2 Sections 149A(3) and 149B(5) provide that where the criteria above are met, the chief executive must decide to offer to convert the person's employment to permanent employment as a General employee on tenure or a public service officer unless it is not viable or appropriate having regard to the genuine operational requirements of the agency.
 - 8.3 If the outcome is a decision to offer to convert the fixed term temporary employee to permanent employment:
 - (a) the written notification must include the terms and conditions of the offer to convert to permanent employment (e.g. full-time or part-time, days and hours of work, pay, location of the employment and any other changes to entitlements)
 - (b) where the employee is part-time, an explanation of the days and hours of work offered in the decision, and
 - (c) the chief executive cannot convert the fixed term temporary employee unless they accept the terms and conditions of the offer to convert.
 - 8.4 Notice of a decision not to convert a person's employment must comply with section 149A(4) for applications under section 149 or 149B(6) for reviews under section 149B. In accordance with section 27B of the *Acts Interpretation Act 1954*, the decision must:
 - (a) set out the findings on material questions of fact, and
 - (b) refer to the evidence or other material on which those findings were based.
 - 8.5 Sections 149A(5) and 149B(7) of the PS Act provide for a deemed decision not to convert where a decision is not made within the required timeframe (28 days).

...

Submissions

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

Respondent's submissions

[16] The Respondent's submissions are summarised below:

- the Appellant was temporarily employed by the Respondent as an AO8 Manager, Development Assessment Division, Planning Group from 29 October 2018 until 31 December 2020. During this period, the Appellant was engaged as a fixed term temporary employee backfilling the substantive occupant of the role who was on higher duties within another Division;
- the Appellant was engaged on the basis that the incumbent would return to their substantive role following a period of higher duties. Extensions in this role were only made to coincide with the periods of higher duties of the substantive occupant and to ensure business continuity through the critical period of the COVID-19 health pandemic;
- subsequent to the outcome of the Appellant's review, the Appellant was notified on 27 November 2020 about the offer of a new fixed term temporary engagement as an AO7 Principal Project Officer, Policy and Statutory Planning, Planning Group for the period 1 January 2021 until 30 June 2021. The Appellant was engaged in this fixed term temporary role to work on specific Planning Reform project initiatives, in alignment with the current non-recurrent funding approvals for this project;
- the Appellant has been engaged as a fixed term temporary employee to meet operational requirements for a defined period of time to deliver development assessment services. This has allowed the Respondent to provide continuity of service delivery in the area of development assessment within the team. The Appellant's end date in the Manager role was 31 December 2020. The Appellant was extended on several occasions in line with the temporary arrangements of the substantive position owner and the Respondent's requirements throughout the COVID-19 health pandemic;
- the Respondent submits that there were genuine operational requirements for determining not to convert the Appellant's employment to permanent at the point in time when the review was undertaken:
 - (a) the Planning Group identified legacy structural issues in the DAAT Unit where there was an excess of AO8 level Manager roles and other business units within the Development Assessment Division have progressively moved to a hierarchical reporting structure;
 - (b) the substantive incumbent of the Manager role relinquished the position in April 2020. This provided the opportunity to review the role as part of the realignment of the business unit. Prior to the Appellant's temporary employment review, a decision was made to transition the Development Assessment Division to a hierarchical reporting structure to align its

operations with other business units in the Planning Group, following the successful implementation phase of the State Assessment and Referral Agency in 2013; and

- (c) a progressive reduction in Manager roles commenced in 2015 and has been continuing. Shifting to a single manager establishment provides for a single point of team performance accountability and streamlined decision-making. The Appellant's end date was honoured by the Respondent to maintain business continuity while the new structure was progressively implemented;
- the Respondent submits that a decision-maker's task is to consider any application for conversion from temporary to permanent employment at a point in time. In reviewing the Appellant's temporary employment status, it was reasonable for the decision-maker to consider the fact that the DAAT Unit where the AO8 Manager role resided at the time of the review was undergoing structural changes. There was no continuing need for the role the Appellant was backfilling under the new structure and operational requirements. This was in alignment with the planned operational structure of the business unit which was considered prior to the Appellant's review of her temporary employment status. Therefore, it was identified that there was not a continuing need for the Manager role in the business unit;
 - at the time of review, the decision-maker assessed the availability of other ongoing roles the same or substantially the same across the Respondent. This included a review of Planning Group's substantive vacancies in conjunction with AO8 Manager roles, and the ongoing need for these roles. There were no roles identified as being the same or substantially the same, nor any roles available on a permanent or ongoing basis. Consideration was also given to any departmental managerial roles that were approved for advertising and filling at the time of the review. No suitable alternative role was identified that was the same or substantially the same, for consideration;
 - clause 6.2 of the Directive states that the chief executive must have regard to "the genuine operational requirements of the department." In determining this requirement, consideration was given by the decision-maker to the Appellant's fixed term temporary engagement which involved backfilling the permanent occupant of the Manager role. Decision-making also included consideration of the business units resourcing, structure and operational requirements. Planning then commenced prior to the review of the Appellant's temporary employment status, in realigning the structure of the DAAT Unit to align with other business units across the Planning Group and establish a single manager reporting arrangement. As such, the genuine operational requirements of the Respondent did not make it viable or appropriate to convert the Appellant from temporary to permanent employment;
 - the decision-maker has responsibility for decisions under the Directive and provides strategic leadership and direction to the Respondent's operational considerations. The Respondent submits that in making a decision, the decision-maker must consider a range of workforce measures including budget, full time

equivalent (FTE) staffing levels (FTE restrictions and caps), sources and limits of project funding and the requirement to manage human resources that necessitates a mix of temporary, permanent and contingent labour to meet fluctuating and changing strategic objectives and service delivery requirements;

- in reviewing the Appellant's temporary employment status, it was reasonable for the decision-maker to decide that there was no continuing need for the Appellant to perform the Manager role based on the genuine operational requirements of the Planning Group. A need was identified to realign the structure and operations of the DAAT Unit to establish consistency with other business units and optimise the use of FTE's and resourcing to support the delivery of strategic objectives and business requirements;
- the Appellant's role was to initially backfill the permanent incumbent of the role who was performing higher duties in another Division. The realignment of the DAAT Unit also impacted on the role performed by the Appellant. The realignment of the business unit has resulted in the Manager role being repurposed to that of a AO5, Senior Planning Officer to meet resourcing requirements and focus efforts on the efficient and effective assessment management of major development applications that support economic recovery. The Respondent submits that the decision-maker's Decision was consistent with the requirements of s 148(2) of the PS Act;
- in terms of the Appellant's fixed term temporary employment within the department, the Respondent considers that the circumstances of the Appellant's employment align with s 148(2)(a) of the PS Act. The Appellant was initially engaged to backfill the permanent incumbent of the role who was performing higher duties. The Appellant was extended in line with the period in which the permanent incumbent had been on higher duties to another Division. Following a review of the business structure to meet genuine operational requirements, it was identified there was not a continuing need to maintain multiple managerial roles in the DAAT Unit. As such, the additional Manager role will not be operationally required moving forward and it would not be viable to permanently appoint the Appellant on this basis. The Respondent submits that in deciding not to convert the Appellant's employment status to permanent, the decision-maker:
 - (a) gave specific consideration to the criteria prescribed under clauses 8.1 and 8.2 of the Directive, as required by s 149(3) of the PS Act;
 - (b) acted consistently with s 148 of the PS Act;
 - (c) complied with the requirements of the Directive and s 149 of the PS Act; and
 - (d) acted in a manner and provided reasons that were justifiable and fair and reasonable.

Appellant's submissions in reply

[17] The Appellant filed submissions in response to the Respondent's submissions, which have been summarised below:

- the Respondent has relied heavily on the purported realignment and restructure in making the argument that genuine operational requirements exist which meant it was not appropriate to convert the Appellant's employment. Until seeking conversion to permanency, the Appellant was never formally advised that a potential restructure was being considered. There has been no information or documentation provided to the Appellant as an impacted employee about the process or what was being considered and at no time was the Appellant consulted;
- the Appellant has not seen any organisational charts that indicated that DAAT is being restructured to a single manager team, nor has any evidence of the existence and scope of a restructuring process been included as an attachment to substantiate the Respondent's submission in this Appeal. The Appellant submits that if a restructure has been contemplated since April 2020 when the incumbent's role was relinquished, then documentary evidence of this restructure would exist and could have been submitted in support of the recommendation not to convert the Appellant's temporary manager position to permanent. It is also unclear from the Respondent's submissions at what point in time decisions in relation to the proposed restructure were finalised;
- further to the lack of documentary evidence in support of the Respondent's assertions, the Appellant have had two performance reviews since April 2020. The first occurred on 26 June 2020 with the Appellant's former Director, Ms Kate Wall, and the second occurred on 27 October 2020 with the most recent Director, Mr Phil Joyce. At both these reviews, the Appellant's performance was never questioned and a restructure of the DAAT was never mentioned. At the review with Mr Joyce, which occurred one month before the recommendation not to convert the Appellant's temporary manager position to permanent was provided to the decision-maker, Mr Joyce spoke of restructuring the DAAT to create a north/south model, with the Appellant heading the south team and Mr Tim O'Leary (the other DAAT manager) heading the north team. The Appellant was directed on 6 November 2020 to draft an email to this effect to be sent to the regions to formalise this new structure. The Appellant submits that this is evidence that at that time, nothing had formally been communicated to change the DAAT structure to a one manager team;
- in light of the lack of documentary evidence relating to realignment/restructure and the Appellant having not have heard anything about it when it would impact the Appellant's role, the Appellant submits that the Respondent's reliance on it as a genuine operational requirement carries little weight;
- the Appellant refutes the submission that this is an operationally viable repurposing of the Manager role. The ongoing work the Appellant was performing is not commensurate with the AO5 skillset or responsibilities. The role relates to high-risk development applications, which require significant management and oversight, which could not be undertaken by an AO5;

- the nature of the work performed relates to highly complex work that is unable to be resolved by an AO8 in the regions and is required to be escalated to the DAAT to be resolved by a highly skilled AO7, under the close supervision and mentoring of an AO8. The nature of the work is that the AO8 within the team attends all meetings, is required to review and have input into all material and is required to undertake the high-level negotiations with the equivalent Manager/Director within other departments to resolve issues encountered with the application. The DAAT manager is also required to identify potential solutions with the AO7 in order to try and resolve the issues being encountered with the application. An AO5 would not have the experience to undertake the basic DAAT work, nor would they have the management skills or experience to supervise the AO7 within the team and the body of work which they are responsible for;
- due to the amount of work being escalated or delegated to DAAT over the past 1.5 years, the team has grown from four to five people. The team was also required to take on the TUL function which required the assessment of 142 TULs. At the peak of the pandemic there was so much work that the DAAT was required to outsource the assessment of some of the TULs to other teams so as to have capacity for our business-as-usual work, in addition to the TULs. The Appellant was required to supervise the assessments undertaken by the Program Improvement team within Planning and Development Services that assisted with the assessment of the TULs. This supervision would not have been able to be undertaken by an AO5;
- the Appellant submits that there is a genuine ongoing need for the role to be performed in the future at an AO8 level. If the AO8 Manager position is not made permanent and is realigned to an AO5, that will cause severe strain within the Development Assessment Division which will ultimately manifest itself in delays and dislocation and will not meet the genuine operational requirements of the Department or Division;
- the Appellant submits that she meets the criteria outlined in s 149A(2) of the PS Act. In the absence of any genuine operational requirements per s 149A(3) that conversion is not viable, the Appellant submits the decision-maker has erred in coming to their decision not to convert the Appellant's employment;
- the Appellant remains concerned that the Respondent has only considered roles that were substantively vacant, rather than the mandatory consideration of whether there was a continuing need for someone to be employed in the role, or a role that is substantially the same per s 149(2)(a)(i) of the PS Act. As the Fixed term temporary and casual employment FAQs clearly states:

It is important to note that conversion of a fixed term temporary or casual employee to permanent employment is not dependent on the existence of a substantive vacancy.

- the Appellant submits that neither the outcome letter nor the Respondent's submissions have addressed what was done to identify which, if any, roles were considered or provided any evidence, findings or analysis as to whether there was a continuing need for the Appellant to be employed in a role which is substantially the same; and

- in the absence of such reasons and given the Respondent now extends to the Department of State Development, Infrastructure, Local Government and Planning, the Appellant submits that it is unlikely that there is not a role within one of these relevant departments that would be considered to be the same or substantially the same.

Consideration

- [18] To determine the outcome of this appeal, I am required to assess whether the decision appealed against was fair and reasonable. The decision determined that the Appellant's employment remain as fixed term temporary.
- [19] The reasons given for the Respondent's decision, as outlined in the letter dated 27 November 2020, are as follows:
- a) I have considered the conditions for conversion in the PS Act and determined that you have demonstrated merit for you to fill the role in a fixed term capacity. However, there are genuine operational requirements of the agency that mean it is not viable or appropriate to convert you permanently at this time.
 - b) There is no continuing need for you to perform your current role because the role is temporary for a specified period and purpose. Specifically, the Development Assessment Services unit is currently undergoing significant workforce changes and the role has been identified as no longer being required. This is in alignment with the planned operational structure of the team, where the continuing need for the Project Manager role in the team is unable to be confirmed.
 - c) Further, there is no continuing need for you to perform a role that is substantially the same. All potential roles have been considered and there are no vacant positions available that are substantially the same role.
- [20] The decision-maker considered the criteria pursuant to s 149A(2) of the PS Act and determined that whilst the Appellant satisfied the merit criteria, there was not a continuing need for the Appellant to be employed in the role or a role which is substantially the same.
- [21] The Respondent submits that conversion to permanency was not viable due to genuine operational requirements. Although the term 'genuine operational requirements' was not used in the Decision, similar reasons were relied upon in determining there was not a continuing need for the Appellant to perform the role.
- [22] There is no dispute that the Appellant was eligible for review pursuant to s 149B of the PS Act in respect of her temporary employment status. The only issue in dispute in this matter is whether there is a continuing need for someone to be employed in the Appellant's role or a role which is substantially the same.
- [23] The Appellant has been continuously employed as an AO8, Manager in the DAAT in a temporary capacity from 29 October 2018 to 31 December 2020. During this period, the Appellant was backfilling the substantive occupant of the role who was on higher duties within another division. The substantive occupant relinquished the role in April 2020, following which a business review of the structure and operations of the DAAT Unit and subsequent alignment of the team structure was undertaken.

- [24] During this review process there was a commitment by the Respondent to honour existing temporary employment end dates while the new structure was progressively implemented.
- [25] The Respondent submits that the review identified legacy structural issues in the DAAT Unit where there was an excess of AO8 level Manager roles. The Respondent has subsequently engaged in a progressive reduction in Manager roles within this Unit, with the Appellant's end date honoured to maintain business continuity while the new structure was progressively implemented. The structural changes included shifting to a single manager for performance accountability and streamlined decision-making. The reduction of the other AO8 Manager roles, including that occupied by the Appellant, confirms that the role is not ongoing.
- [26] I accept the decision-maker's determination that there was not a continuing need for the Appellant to be employed in the AO8 Manager role under the new structure, and that this decision was fair and reasonable in the circumstances.
- [27] With respect to consideration of whether there is a continuing need for a role which is substantially the same, the Respondent satisfied this requirement by considering other department managerial roles before determining that no suitable alternative role could be identified.
- [28] I note the Appellant's submissions with respect to the new structure, and the concerns raised as to the viability of repurposing the Manager's role. The Appellant also made submissions with respect to the limited consultation regarding the new structure of the Unit. These submissions refer to issues which are beyond the scope of this appeal and cannot be considered in determining whether the decision was fair and reasonable. The relevant considerations are whether the decision-maker complied with the provisions of the PS Act and the Directive as they pertain to fixed term temporary conversions.
- [29] For the above reasons, the decision to decline to convert the Appellant's fixed term temporary employment to permanent was fair and reasonable in the circumstances.

Order

- [30] I make the following order:

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