QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Welch v State of Queensland (Queensland Health)* [2021] QIRC 056
PARTIES:	**Welch, Laurence Anthony** (Appellant) **v** **State of Queensland (Queensland Health)** (Respondent)
CASE NO.:	PSA/2020/396
PROCEEDING:	Public Service Appeal - Conversion of fixed term temporary employment
DELIVERED ON:	16 February 2021
MEMBER:	Power IC
HEARD AT:	On the papers
ORDER:	**1. The decision appealed against is set aside.** **2. The issue is returned to the decision-maker along with a copy of this decision and they are directed to:** **i. Conduct a fresh review of the Appellant's employment status within 28 days of the date of this decision in accordance with s 149B of the *Public Service Act 2008* (Qld); and** **ii. Upon completion of the fresh review of the Appellant's employment status, issue a notice in compliance with s 149B(6) of the *Public Service Act 2008* (Qld) and clause 8.4 of *Directive 09/20 Fixed term temporary employment*.**

CATCHWORDS:	INDUSTRIAL LAW - Public Service Appeal - Fixed term temporary employment review - Mandatory considerations – omission of mandatory content in decision – decision not fair and reasonable.
LEGISLATION:	*Industrial Relations Act 2016* (Qld), ss 562B, 562C and 564
	Public Service Act 2008 (Qld), ss 27, 28, 148, 149A and 149B
	Directive 09/20 Fixed term temporary employment, cl 8
	Directive 08/17 Temporary Employment, cl 9
CASES:	*Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245
	Goodall v State of Queensland (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018)

Reasons for decision

Introduction

[1] Mr Laurence Anthony Welch (the Appellant), is currently employed by the State of Queensland (Queensland Health) (the Respondent) in the position of HP4, Senior Mental Health Clinician, Disaster Recovery at the West Moreton Hospital and Health Service (WMHHS).

[2] By appeal notice filed on 7 December 2020, the Appellant, pursuant to chapter 7 of the *Public Service Act 2008* (Qld) (the PS Act), appealed against a decision that his employment remain as temporary with WMHHS (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 Matthew Tallis, Chief Operating Officer, West Moreton Health, 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).

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 funding for the Appellant's position is from Queensland Health and Federal Government and not an external body. The Appellant's current role concerns disaster recovery, which is an area of work that is unlikely to cease in demand considering the ongoing climatic disasters in Queensland; and

(b) for two years, there was an ongoing need for the Appellant to be employed by the community team and this ended because of financial constraints being placed by Queensland Health on the mental health service, leading to an increased workload on an already beleaguered team.

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[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).

Relevant provisions of the PS Act

[8] 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.
>
> …

[9] 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.

[10] 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.

Public Service Commission Directive

[11] The Respondent relied upon the *Directive 08/17 Temporary Employment* (the former Directive) which has now been superseded by the Directive.

[12] The former Directive outlined the following criteria:

9.6 When reviewing the status of a temporary employee's employment and deciding whether their employment is to be converted to permanent, the chief executive of an agency must consider the following criteria:

a) whether there is a continuing need for the person to be employed in the role, or a role which is substantially the same, and the role is likely to be ongoing; and

b) the merit of the temporary employee for the role by applying the merit criteria in section 28 of the PS Act.

9.7 A temporary employee should have their employment converted to permanent unless there are genuine operational reasons not to do so or the temporary employee does not consent.

…

[13] The Directive outlines the following criteria:

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.

Submissions

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

Appellant's submissions

[15] The Appellant filed submissions in support of the appeal, which can be summarised as follow:

- the Appellant submits that there is a need for more staff in Continuing Care Team (CCT) as there has been an increased workload in relation to referrals to the CCT as well as increased paperwork to meet KPI's from September 2018. However, there has been a decrease in staffing levels since September 2020;

- the feedback provided to the Appellant was that his work was exemplary. The Appellant highlighted that he provided supervision for a Therapy Aide and established and maintained good relationships with his clients and peers;

- the Appellant submits that he meets the merit principle as noted in clause 8 of the Directive, as evidenced by the remark of the Chief Operating Officer in an email to the Appellant dated 7 December 2020:

  > I would note that despite the outcome we value the work and commitment you have shown to our consumers and the Health Service more broadly.

- the Appellant had applied for and was offered a HP4 temporary contract to 30 June 2022 prior to leaving. Although the Appellant's preference was to continue working in the CCT, the Appellant decided to accept the HP4 temporary contract to ensure ongoing employment within the wider mental health service in WMHSS;

- it was not possible for WMHHS to continue the Appellant's employment in between contracts despite the need of temporary staff required in the Acute Care Team, which was a matter the respective team leaders had attempted to remedy by redeployment;

- section 25(2)(d) of the PS Act provides that employment on tenure is the default basis of employment in the public service. The Appellant submits that being employed on a temporary basis is an exception to that rule and it is incumbent on the employer to rectify that;

- the Appellant submits that funding by government bodies should be seen as ongoing and not external;

- the Appellant submits that there is an ongoing need for his position in the CCT given the increased workloads and requirements of the Respondent;

- the Appellant submits that WMHHS did not take into account the totality of the experience the Appellant has with CCT and Disaster Recovery and that there was not any serious consideration for offering the Appellant a permanent position either with CCT or the wider mental health team when making the decision on 17 November 2020;

- the Appellant submits that WMHHS did not explore all avenues available to them to convert the Appellant's employment to permanent status at that stage or had taken into consideration the PS Act in relation to permanent employment;

- there is no ability for the Appellant to be considered for upcoming positions as being on a merit list, instead policy dictates that a review is conducted annually;

- the Appellant submits that the arguments in relation to external funding and reducing staffing levels, coupled with the 12 months wait between reviews, can be used to make it almost impossible for temporary employees to be converted to permanent roles within Queensland Health in the future; and

- the Appellant have had no performance concerns or discipline matters raised in relation to the way his performance in the role and submits that the requirements of s 27 of the PS Act with respect to the merit principle have been met.

Respondent's submissions

[16] The Respondent filed submissions opposing the appeal, summarised below:

- the Appellant's current fixed term employment contract commenced on 28 September 2020 and is due to expire on 30 June 2022. The position currently being filled by the Appellant is not a permanent part of the Respondent's establishment;

- the Respondent does not dispute the eligibility period, however, notes that during the eligibility period the Appellant undertook fixed term temporary employment for different purposes;

- when the Appellant was originally employed in a temporary capacity as a HP3 in the Community and Acute Services team, the purpose of his employment was to fill temporary vacancies arising due to other permanent employees being absent;

- the current temporary contract is to undertake duties in accordance with a separately funded project in the Recovery, Resource and Partnership Team at the HP4 level;

- the purpose of the temporary contracts is distinct, however, the Respondent has recognised the entire period for the purposes of consideration of conversion;

- the Appellant became eligible for review as of 24 September 2020 and was advised that the review had commenced on 3 November 2020 and provided notice of the decision not to convert his employment on 16 November 2020;

- the Respondent submits that the appeal was filed out of time in December 2020 as the end of two years after the Appellant had been continuously employed was 24 September 2020 and the end of the appeal period for the decision was 12 November 2020;

- notwithstanding that the appeal could be considered out of time, the Respondent submits that genuine operational requirements exist in that the Appellant is currently filling a position for which funding is unlikely or unknown;

- the Respondent does not consider that the Appellant satisfies s 149A(2)(a)(i) of the PS Act on the basis that genuine operational reasons exist, as allowed for in s 149A(3) of the PS Act;

- the Respondent asserts that genuine operational reasons exist which prevent the conversion of the Appellant in that future funding for the position is unknown or uncertain and is not expected to extend beyond June 2022 due to the specific purpose of the funding and that s 148(2)(c) of the PS Act provides for this scenario;

- the Appellant's current fixed term temporary contract is to provide disaster-related mental health services to bushfire impacted locations within WMHHS until 30 June 2022;

- the Respondent rejects the Appellant's perspective that disaster recovery is an area of work unlikely to cease and that government funding should not be considered external;

- the Respondent submits that this is new funding and is not a renewal or extension of a previous project funding arrangement. The specific purpose of the funding is to aid recovery from 2019 bushfires;

- the use of fixed term temporary employees to fill temporary vacancies arising because a substantive incumbent is away for a known period is another scenario envisaged at s 148(2)(a) of the PS Act and should not be considered grounds for conversion;

- the Respondent submits that multidisciplinary teams within the Health Service are made up of a mix of practitioners and each team fills vacancies according to the skill set required in that team. The composition of teams is dependent on the skill set required to balance the team and may change depending on the skill set of the person who has vacated a role; and

- the Respondent submits that there is currently no ongoing or continuing need for a HP3 or HP4 with a social work skill set (which the Appellant has) in the Community and Acute Service or other multi-disciplinary teams within the Health Service.

[17] The Respondent further outlined the funding mechanism for the Appellant's current position with respect to the Commonwealth and Queensland Government's Disaster Recovery Funding Arrangements.

Appellant's submissions in reply

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

- the Appellant refutes the statement made by WMHHS implying that his application was 'out of time'. The Appellant refers to the a '*Notification to review the status of your temporary employment*', dated 3 November 2020, where it is clearly stated that the Appellant had 21 days to appeal the decision regarding the conversion of his temporary status of employment. On the 16 November, the Appellant received a letter from WMHHS advising that a decision had been made not to convert the Appellant's temporary employment to permanent employment. Accordingly, on 7 December 2020, a Form 89 was lodged with the Commission, which is 21 days after receipt of the letter from WMHHS;

- the Appellant restates his argument that funding from government bodies should not be viewed as 'external' funding, and that prior to September 2020, the Appellant's role was not subject to DRFA funding, but funded directly from the mental health budget. Additionally, the Appellant's contract had been extended three times over the previous 24 months whilst in the same role, which is indicative of an ongoing need required in order to run an efficient department; and

- the Appellant submits that a HP4 Social Worker/Case Manager position should be available in January 2021, as the previous incumbent resigned from her position in December 2020 and transferred within the service to a Case Manager position in North Queensland commencing in mid-January. The Appellant submits that appointment to this vacancy would resolve the issue under appeal.

Consideration

[19] The first issue to be considered with respect to this appeal is whether it was filed within the 21-day time period pursuant to s 564 of the IR Act. The decision to deny conversion of the Appellant's employment was communicated via a letter dated 16 November 2020. As outlined in this letter, the Appellant was entitled to appeal the decision within 21 days of receipt of the letter. A notice of appeal was filed in the Commission on 7 December 2020, which was the 21st day following the date of the decision.

[20] The Respondent's submissions appear to refer to the time period for a review rather than the time period for an appeal. I am satisfied that the appeal notice was filed within the statutory time period and consequently the Appellant is able to appeal the decision.

[21] As noted above, the decision was made pursuant to the former Directive which was replaced by the Directive on 25 September 2020. Whilst the criteria are broadly consistent, the Directive requires the decision-maker to consider a number of further considerations in making the decision

[22] Both directives require the decision-maker to consider the following criteria:

(a) whether there is a continuing need for the person to be employed in the role, or a role which is substantially the same; and

(b) the merit of the temporary employee for the role by applying the merit principle and criteria under ss 27 and 28 of the PS Act.

[23] The Directive, however, also requires the decision-maker to consider the following criteria:

- 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.

[24] Amendments made to the PS Act require that where a decision is made not to offer to convert a person's employment, the chief executive must give the person a notice stating:[5]

a) the reasons for the decision; and

b) the total period for which the person has been continuous employment in the department; and

c) for a fixed term temporary employee – how many times the person's employment as a fixed term temporary employee has been extended; and

d) each decision previously made, or taken to have ben made, under this section or section 149A in relation to the person during the person's period of continuous employment.

[25] The decision addressed the consideration of the merit principle and whether there is a continuing need for a person be employed in the role on an ongoing basis. However, as the former Directive was relied upon, consideration does not appear to have been given to requirements of an industrial instrument and the reasons for each decision previously made or deemed to have been made under ss 149A or 149B of the PS Act.

[26] The decision as communicated to the Appellant did not comply will the requirements of s 149B(6)(b)-(d) of the PS Act as outlined in clause 8.4 of the Directive regarding the mandatory contents of the notice given to the Appellant.

[27] In my view, the decision was not fair and reasonable in that it did not comply with the Directive and did not provide the Appellant the mandatory information required under s 149B(6) of the PS Act. The Appellant has a statutory right to have his review conducted in accordance with the relevant criteria and to receive the mandatory information relating to his fixed term employee history.

[28] It is not clear whether consideration of the mandatory criteria would have altered the decision with respect to the Appellant's temporary conversion. Regardless, for a decision to be upheld as fair and reasonable it must be undertaken in accordance with the statutory processes as outlined in the Directive and the PS Act.

[29] Following my determination that the decision was not fair and reasonable based on the factors outlined above, consideration of the merits of the appeal is not required. The most appropriate course of action is to set the decision aside and return the matter to the decision-maker to reconsider in accordance with the criteria outlined in the Directive and s 149B of the PS Act.

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[5] PS Act s 149B.

Order

[30] In the circumstances I make the following Order:

1. **The decision appealed against is set aside.**

2. **The issue is returned to the decision-maker along with a copy of this decision and they are directed to:**

    i. **Conduct a fresh review of the Appellant's employment status within 28 days of the date of this decision in accordance with s 149B of the *Public Service Act 2008* (Qld); and**

    ii. **Upon completion of the fresh review of the Appellant's employment status, issue a notice in compliance with s 149B(6) of the *Public Service Act 2008* (Qld) and clause 8.4 of *Directive 09/20 Fixed term temporary employment*.**