QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Parker v State of Queensland (Department of Education)* [2021] QIRC 067
PARTIES:	**Parker, Darrell** (Appellant) **v** **State of Queensland (Department of Education)** (Respondent)
CASE NO:	PSA/2020/353
PROCEEDING:	Public Service Appeal – Conversion to higher classification level
DELIVERED ON:	1 March 2021
MEMBER:	Power IC
HEARD AT:	On the papers
OUTCOME:	**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 149C of the *Public Service Act 2008* – where decision is deemed under s 149C(6) – consideration of 'genuine operational requirement'
LEGISLATION:	*Acts Interpretation Act 1954* (Qld), s 27B *Industrial Relations Act 2016* (Qld), ss 562B and 562C *Public Service Act 2008* (Qld), ss 149C, 194 and 196 *Public Service and Other Legislation Amendment Bill 2020* (Qld) *Directive 13/20 Appointing a public service employee to a higher classification level*, cls 4, 6 and 7
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)

Harbour Radio Pty Ltd & Ors v Wagner & Ors [2019] QCA 221

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

King-Koi v State of Queensland (Department of Education) [2020] QIRC 209

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

Reasons for Decision

[1] Mr Darrell Parker (the Appellant) is currently employed in a higher duties classification as an AO7, Project Manager, Information Communications Technology (ICT) Project Services, Digital Transformation, for the State of Queensland (Department of Education) (the Respondent).

[2] The Appellant appeals a deemed decision by the Respondent that his employment is to continue according to the terms of his higher duties arrangement pursuant to s 194(1)(e) of the *Public Service Act* 2008 (Qld) (the PS Act).

[3] There is no dispute between the parties that:

(a) the Appellant was eligible for review pursuant to s 149C of the PS Act and *Directive 13/20 Appointing a public service employee to a higher classification level* (the Directive) in respect of his request to be appointed at the higher classification level; and

(b) because no review was conducted within 28 days of 19 October 2020, pursuant to s 149C(6) of the PS Act, the chief executive of the Respondent was taken to have decided not to appoint the Appellant to the higher classification level and that he was to continue according to the terms of his higher duties arrangement pursuant.

Appeal principles

[4] 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.

[5] 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.

[6] 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 to refuse the Appellant's request to be appoint to the higher classification level was fair and reasonable in all of the circumstances.

What decisions can the Industrial Commissioner make?

[7] 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

[8] The Appellant outlined the following grounds of appeal:

(a) no decision was made within the required 28 calendar day timeframe which expired on 17 November 2020. The failure to make a decision is not fair and reasonable;

(b) the Appellant has performed the role for more than three years without any adverse finding in respect of performance and has therefore, demonstrated performance to meet the merit criteria of s 28 of the PS Act; and

(c) the Appellant seeks for the deemed decision to be set aside and be substituted with the following decision pursuant to s 208 of the PS Act:

> That Darrell Parker (sic) employment status be converted to permanent in a role similar to the role he has been performing with Department of Education.

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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).

The relevant provisions of the PS Act and the Directive

[9] 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 1 year; and
> (c) is eligible for appointment to the position at the higher classification level having regard to the merit principle.
>
> (2) However, this section does not apply to the following public services employees—
> (a) a casual employee;
> (b) a non-industrial instrument employee;
> (c) an employee who is seconded to or acting in a position that is ordinarily held by a non-industrial instrument employee.
>
> (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).
>
> (4) The department's chief executive must decide the request within the required period.
>
> (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.
>
> (5) If the department's chief executive decides to refuse the request, the chief executive must give the employee a notice stating—
> (a) reasons for the decision; and
> (b) the total continuous period for which the person has been acting at the higher classification level in the department; and
> (c) how many times the person's engagement at the higher classification level has been extended; and
> (d) 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.
>
> (6) If the department's chief executive does not make the decision within the required period, the chief executive is taken to have refused the request.
>
> (7) The commission chief executive must make a directive about appointing an employee to a position at a higher classification level under this section.
>
> (8) In this section—
> ***continuous period***, in relation to an employee acting at a higher classification level, has the meaning given for the employee under a directive made under subsection (7).
> ***required period***, for making a decision under subsection (4), means—
> (a) the period stated in an industrial instrument within which the decision must be made; or
> (b) if paragraph (a) does not apply—28 days after the request is made.

[10] The Directive relevantly provides:

> 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 documented and 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.
>
> 6.3 In accordance with section 149C(6) of the PS Act, if the chief executive does not make the decision within 28 days, the chief executive is taken to have decided that the person's engagement in the agency is to continue according to the terms of the existing secondment or higher duties arrangement.
>
> 6.4 Each agency must, upon request, give the Commission Chief Executive a report about the number of known deemed decisions occurring by operation of section 149C(6) of the PS Act.
>
> 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.
>
> 7.2 A written notice is not required to be prepared 'after the fact' to support a deemed decision made under clause 6.3.

Submissions

[11] The Commission issued a Directions Order calling for submissions from both parties following receipt of the appeal notice. In summary, the submissions of both parties are as follows.

Appellant's submissions

[12] The Appellant filed submissions in support of the appeal. A summary of those submissions are as follows:

- the Appellant is a public service officer employed on tenure by the Respondent in the substantive role of an AO6 Telecommunications Officer;
- the Appellant commenced acting in higher duties as an AO7 Project Manager on 4 September 2017, after being employed with the Respondent since 2008.

The Appellant submits that he has been successful in an open merit recruitment process for this role as the most meritorious candidate, has had no discipline or performance issues raised and am currently engaged in the high duties role until June 2021;

- on 10 October 2020, the Appellant made a request pursuant to s 149C(3)(b) of the PS Act to be appointed to a higher classification level as a public service officer;

- on 27 October 2020, the Appellant received a confirmation of the Appellant's request but have not been notified of any decision;

- section 149C(4) of the PS Act requires the Agency's chief executive to decide the request within the required period, however, no decision was made within the 28 day period as defined in s 149C(8)(b) of the PS Act which ended on 16 November 2020;

- the Appellant subsequently lodged an appeal pursuant to s 194(1)(e)(iii) of the PS Act on the basis that the deemed decision and the failure of the Respondent to consider the mandatory criteria in the PS Act and the Directive is unfair and unreasonable;

- the decision-maker has not complied with ss 149C(4), (4A) and (5) of the PS Act and clauses 5.5, 6.1 and 6.2 of Directive and failed to:

  (a) make a decision required to be made under the PS Act within the required period;

  (b) consider the mandatory criteria in the PS Act for such a decision;

  (c) provide a written notice of the decision;

  (d) provide written reasons of the decision including the findings on material questions of fact; and

  (e) refer to the evidence or other material on which those findings were based;

- the Appellant submits that any decision that fails to consider a relevant consideration is regarded as not being fair and reasonable and further, that a decision without reasons is also unfair and unreasonable;

- the deemed decision *ipso facto* has no reasons and has not considered the mandatory criteria in clause 6.1 of the Directive and is therefore, unfair and unreasonable;

- in failing to make a decision in relation to the Appellant's employment status in the higher classification, the decision-maker failed to properly apply the mandatory criteria and has failed to properly take into account the facts that would lead a reasonable person to conclude that the most fair and reasonable decision would be to appoint the Appellant as a public service officer to that classification;

- the decision-maker has not considered the genuine operational requirements of the Respondent as required by s 149C(4A) of the PS Act;

- the Appellant submits that he continues to demonstrate considerable merit in the role by applying the merit criteria in s 28 of the PS Act in that the previous four years, the Appellant has had no performance or disciplinary issues and has received positive performance feedback to date and as such, meets the criteria for appointment;

- the Appellant submits that the decision-maker has not provided any operational reasons or any evidence of the existence of operational reasons not to appoint the Appellant to the higher classification position; and

- this is a situation where if the employee has been denied the benefit of legislation characterised as beneficial legislation by a deficiency in the reviewable decision, justice for the employee can be best satisfied by the substitution of the decision as sought in the Appellant's application.

Respondent's submissions

[13] The Respondent filed submissions in response to the Appellant's submissions, in summary:

- section 149C(4) of the PS Act provides that the decision-maker must decide the request within the required period of 28 days and in making that decision, have regard to factors in s 149C(4A) of the PS Act. If the decision-maker decides to refuse the request, the decision-maker must give the employee notice stating the items laid out in s 149C(5) of the PS Act. However, these requirements only relate to when an active decision is made;

- section 149C(6) of the PS Act expressly anticipates the situation where a decision cannot be, or is not, made within the strict timeframe and explicitly allows for a default position of refusal to be automatically deemed through the effluxion of time;

- clause 7 of the Directive confirms that it is only when an active decision to refuse a request is made that a written notice, that meets the requirements of s 149C(5) of the PS Act, is required to be provided to the employee. It further stands to reason that if an active decision is not made by the chief executive, a chief executive cannot have regard to ss 149C(4A)(a) and (b) in making that decision;

- it is perfectly plausible for ss 149C(4), 149C(4A) ,149C(5) and 149C(6) of the PS Act to coexist without an inherent conflict, or giving rise to unfairness or unreasonableness. The Respondent submits that deemed decisions have been found fair and reasonable with the decision appealed against confirmed on appeal;[5]

[5] citing *King-Koi v State of Queensland (Department of Education)* [2020] QIRC 209 at [41]-[43].

- the Respondent submits that as both the PS Act and the Directive expressly provide for deemed decisions, the Appellant's claim that a deemed decision is, in and of itself, unfair and unreasonable is untenable. Deemed decisions may be fair and reasonable because they are part of the legislative scheme and were specifically contemplated and intended when the PS Act was amended, and the Directive was created. As such, a deemed decision cannot automatically be considered unfair and unreasonable. The fairness and reasonableness of the deemed decision has to turn on the particular facts and circumstances in question at the time the decision was deemed and/or the relevant reasons, elucidated on appeal, to uphold the decision. The Respondent encountered relevant circumstances, which meant that in this case the deemed decision, in conjunction with the Respondent's submission, is fair and reasonable;

- with regard to the fairness of the process, the Appellant's request under s 149C(3) of the PS Act and clause 5 of the Directive, was processed in accordance with the basic principles of procedural fairness, which the circumstances would allow, specifically the Appellant had the opportunity to present his case. The Respondent advised the Appellant of the possibility of a deemed decision and his right of appeal;

- the Respondent does not contest to the Appellant's claim that he has satisfied the merit principle as per s 149C(1)(c) of the PS Act;

- the Respondent submits that the deemed decision should not be set aside. This is on the basis that there is a genuine operational requirement of the department which means that the Appellant's engagement needs to continue according to the terms of the existing higher classification level arrangement, that is, only up until 30 June 2021;

- the temporary nature of the Appellant's higher classification level role arose from the requirement to perform work for a particular project that has a known end date. This is in line with a circumstance specifically contemplated in clause 4.2 of the Directive, being a circumstance '*that would support the temporary engagement of an employee at a higher classification level*' [emphasis added];

- the Wireless Upgrade Project ('the Project') is scheduled for completion and will be finalised by 30 June 2021, without the possibility of extension. The Appellant's role as Project Manager within the Project, is to provide specific technical aspects regarding the rollout of the wireless upgrade to Queensland state schools. There will be no further requirement for the higher classification level role as the work will no longer be required to be performed by the higher classification level role past the Project end date. The Project and its funding are ending in its current capacity within the ICT Projects. The Project is being finalised by 30 June 2021, with the business unit having met the requirements of delivering wireless capability to state schools in Queensland. Due to the current economic climate, there are no new ICT Projects in the pipeline suitable for this position to continue;

- the Respondent submits that a genuine operational requirement does in fact exist within the department to support the deemed decision to refuse the Appellant's

request for permanent appointment to the Project Manager position at the higher classification level; and

- in relation to the Appellant's request that the Commission substitute the decision that '*Darrell Parker (sic) employment status be converted to permanent in a role similar to the role he has been performing with Department of Education*' [emphasis added], the Respondent submits that this is not a decision available to the Respondent under s 149C of the PS Act and the Directive. Accordingly, it should not be a relief available to the Appellant. Section 149C(3) of the PS Act stipulates that the employee may ask to be appointed *'to the position at the higher classification level*' [emphasis added] and it is this decision that is to be decided at the time or on appeal. Section 149C of the PS Act '*does not empower the department chief executive to review the employee against positions which are substantially the same or appoint them to another comparable position. The power is expressly confined to the position occupied by the employee at that time*'.[6] Further, the Respondent submits that '*[t]here is no contemplation* [in the PS Act and the Directive] *that the meaning of the position would be so broad as to encapsulate any position with the same title and classification anywhere in the workplace, or the city, or indeed the State*'.[7]

[14] The Respondent submitted the following reasons for the deemed decision:

- the amended PS Act, effective from 14 September 2020, and the Directive, effective from 25 September 2020, in conjunction with *Directive 09/20 Fixed term temporary employment*, which also contained expanded employee request rights, resulted in a significant increase in employee requests to the Respondent's centralised Employment Review Team (ERT);

- the significant increase in the demand on the ERT's time and resources, having the decision-maker actively decide every application within the strict 28-day timeframe became impracticable; and

- relevant to this case, the ERT attempted to prioritise applications for a decision based on several relevant factors including the employee's base employment status (temporary or permanent), the end date of the employment arrangement in question based on chronological order and the potential cascading effect if a decision of a higher-level position helped determined the decision(s) of lower level position(s) as part of an interdependent follow-on effect. For example, a temporary employee whose employment would cease on 11 December 2020, and whose appeal rights would correspondingly lapse, was prioritised for an active decision, where possible, over a permanent employee whose higher classification level would cease on 30 June 2021.

Appellant's submissions in reply

[15] The Appellant, in accordance with the Directions Order, filed submissions in reply to the Respondent's submissions, in summary:

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[6] *Holcombe v State of Queensland (Department of Housing and Public Works)* [2020] QIRC 195 at [56].
[7] Ibid at [54].

- the reasons provided by the Respondent in relation to the deemed decision relate to the workload of the Respondent and are not relevant to the consideration of whether the s 149C(6) of the PS Act deemed decision not to appoint the Appellant was fair and reasonable. The Appellant submits that the reasons that the Respondent allowed that deemed decision to be made have no bearing on the review into whether the deemed decision not to appoint based on the merits of the Appellant's request in accordance with the mandatory criteria in the PS Act and the Directive;

- the Appellant submits that the Respondent, in advancing reasoning in support of their decision which was not put to the Appellant at any point during or immediately after the review process is unreasonable;

- a decision-maker is not expected to provide reasons tantamount to a court or tribunal and the adequacy of reasons depends on the nature and circumstances of the decision to be made. However, the proper exercise of statutory power inherently requires that the decision-maker's reasons consider the relevant facts and legal criteria, and explain the conclusions drawn. Those explanations need not be lengthy, but they must be adequate such that rights of appeal are not rendered meaningless, and so that a losing party is not left with a justified sense of grievance that the case has not been properly considered,[8] which would be an unfair and unreasonable outcome;

- the Appellant submits that submissions on an appeal should not supplant the decision, nor can they be said to constitute the requirement to provide reasons. A person receiving a decision must not have their appeal rights negated merely by reason of inadequate reasons. It was only by lodging this appeal that these reasons were put to the Appellant. Even if it were accepted that the submissions were valid considerations to deny the Appellant's conversion, they are not the delegated decision-maker's reasons; they are the retroactive reasons provided by the Respondent;

- while these may have been valid considerations for the decision-maker to take into account during the review process, the Appellant submits it is insufficient to raise them at this point. Sub-section 149C(4) of the PS Act provides that '*The department's chief executive must decide the request within the required period*'. This indicates that it is not optional as to whether the Respondent will provide a decision, it is an imperative in order to comply with statutory obligations;

- the reasons must be set out in the decision itself in the form of a written notice as required by s 149C(5)(a) of the PS Act. The reasons in the decision 'must have regard to the genuine operational requirements of the department' in accordance with s 149C(4A)(a) of the PS Act and the Directive. The standard that these written reasons must conform to are provided under s 27B of the *Acts Interpretation Act 1954* (Qld);

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[8] *Harbour Radio Pty Ltd & Ors v Wagner & Ors* [2019] QCA 221.

- the Explanatory Memorandum to the *Public Service and Other Legislation Amendment Bill 2020* (Qld) (the Bill) provides in relation to s 149C of the PS Act that:

> appeal rights are available at the mandatory two-year conversion review and giving full effect to the Government's commitment to maximise employment security in public sector employment to promote best practice workforce management. This is intended to help drive good practice in workforce and resource planning so that employees are provided with regular reviews and communication about their employment status and conversion where appropriate.

- the Appellant outlined that the Parliamentary Committee Report noted the Bridgeman Reports concerns that:

> On appeal to the QIRC, the employee has no basis to argue their case, and the chief executive effectively has a right of ambush because the QIRC quite properly requires the necessary information to be [filed]. That systemic unfairness results in a perverse incentive for decisions not to be made, but to let them lapse.

, and:

> the Bill's requirement for the provision of reasons for a decision may help inform reasoned decision-making processes, as well as supporting transparency and accountability on such matters. However, the committee notes that such transparency and accountability may not be guaranteed in relation to a conversion request for which the chief executive does not make a decision within the required period… The situation could see the employee potentially being denied the reasoned explanation that they fairly deserve, contrary to the principles of clear communication and effective workforce management the Bills seeks to promote.

- the Appellant submits that any interpretation which supports a deemed decision being fair and reasonable is not an interpretation which is consistent with or best serves the stated purposes of the PS Act and the Directive, and goes against the significant body of work conducted during the Bridgeman Review, the Parliamentary Committee and by the legislators of the Bill;

- to allow the Respondent to rely on reasons only provided in submissions in response to the appeal would be to go against the stated objectives of the recent amendments, which is to restore fairness in the public service, provide transparency, maximise employment security and promote best practice workforce management;

- the Appellant submits that the complete lack of demonstrated consideration of the mandatory criteria and lack of any stated reasons for decision render any inquiry as to the fairness and reasonableness of the decision to be inherently futile and speculative;

- the Appellant submits that the reasons provided for the project having a defined end date of 30 June 2021 are inadequate. This is within the context that of the three Project Managers in the team, one of the Project Managers was told they now report to another director and will continue as a Project Manager for ongoing projects. However, the Appellant and the remaining Project Manager have been

told to report to Digital Transformation and will not continue as Project Managers; and

- as the Appellant have been acting meritoriously in the higher level PO7 Project Manager role since 4 September 2017, the Appellant submits that it is unfair and unreasonable that he was not provided reasons in accordance with the requirements of s 149C(5)(a) of the PS Act in denying the request. The way one of the Appellant's colleagues has been picked to work in the role on an ongoing basis, and why the other colleague and the Appellant were not picked, is unclear and lacks transparency, which is contrary to the intention of the s 149C of the PS Act and the Directive. Subsequently, the decision is unfair and unreasonable.

Consideration

[16] A decision following a review of the Appellant's request to be appointed at the higher classification level was required to be made pursuant to s 149C of the PS Act. Such a decision was not made by the Respondent within the required period pursuant to s 149C(6) of the PS Act.

[17] The chief executive of the Respondent was taken to have made a decision against which the Appellant can appeal.[9] The Appellant has subsequently filed an appeal notice and submission have been filed by both parties. The deemed decision to not appoint the Appellant to the higher classification level must be reviewed to determine if it is fair and reasonable.

[18] I note the Appellant's submission that the decision cannot be considered fair and reasonable because of the Respondent's failure to consider the mandatory criteria in the PS Act and the Directive. In my view, the provision that the chief executive is '*taken to have refused the request*' to appoint the Appellant to the higher classification level[10] and provision that the deemed decision may be appealed indicates that the decision should not be summarily dismissed as unfair and unreasonable.

[19] Section 149C(6) of the PS Act provides the following:

> (6) If the department's chief executive does not make the decision within the required period, the chief executive is taken to have refused the request.

[9] PS Act ss 194(1)(e)(iii) and 196(e).
[10] PS Act s 149C(6).

[20] Clause 6.3 of the Directive provides the following:

> In accordance with section 149C(6) of the PS Act, if the chief executive does not make the decision within 28 days, the chief executive is taken to have decided that the person's engagement in the agency is to continue according to the terms of the existing secondment or higher duties arrangement.

[21] Both s 149C(6) of the PS Act and clause 6.3 of the Directive contemplate circumstances in which a decision has not been made with respect to a conversion. In these circumstances, the employment continues according to the terms of the existing arrangement.

[22] The 'decision' is a specific action associated with subsection (4) that invokes the provisions under s 149C(4A) and (5) of the PS Act. The requirement for a notice pursuant to subsection (5) applies only when a decision has been made to refuse the request for conversion. The specific requirements that are mandatory[11] following a decision do not apply to subsection (6) as the 'decision' has not been made.

[23] The Directive outlines the requirements for 'Statement of Reasons' in clause 7 (emphasis added):

> 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.
>
> 7.2 A written notice is not required to be prepared 'after the fact' to support a deemed decision made under clause 6.3.

[24] Where a chief executive decides to refuse a request, clause 7.1 requires that a notice be provided to the employee in accordance with s 27B of the *Acts Interpretation Act 1954* (Qld). However, clause 7.2 clearly states that a written notice is not required to be provided to support a deemed decision.

[25] In consideration of both clause 7.2 of the Directive and the interpretation of s 149C(6) of the PS Act, the Respondent was not obliged to provide the Appellant with a written notice in these circumstances.

[26] I note the Appellant's submissions that considering a deemed decision to be fair and reasonable is inconsistent with the commentary in the Bridgeman Review, the Parliamentary Committee Report, and the legislators of the Bill. Whilst it is clear that discussion was had in the Review and Report with respect to the consequences of allowing for a decision to be 'deemed', it is equally clear that the legislators determined that deemed decisions be included in the PS Act.

[27] Although I am of the view that there is no statutory requirement that reasons be furnished if the decision is deemed in accordance with s 149C(6) of the PS Act, a fair appeal process relies upon the Appellant being made aware of the Respondent's determinations for the outcome of his employment review. I am satisfied that the

[11] As per subsections (4), (4A) and (5).

Appellant has had the opportunity to examine the Respondent's submissions outlining the considerations of his employment review and was afforded the opportunity to provide submissions in reply.

Genuine operational requirements

[28] The PS Act requires that in making the decision, the decision-maker must have regard to the following pursuant to s 149C(4A):

> (a) the genuine operational requirements of the department;

[29] As outlined by Deputy President Merrell in *Morison v State of Queensland (Department of Child Safety, Youth and Women)*[12] (*Morison*), the phrase '… genuine operational requirements of the department' in s 149C(4A)(a) of the PS Act and in clause 6.2(a) of the Directive, construed in context, would at least include consideration of the following:

> … whether or not there was an authentic need, having regard to the effective, efficient and appropriate management of the public resources of the department, to appoint an employee, who has been assuming the duties and responsibilities of a higher classification level in the department for the requisite period of time, to '…the position at the higher classification level.'[13]

[30] The Respondent submits that the Appellant's higher classification level role is for a particular project that has a known end date. This is consistent with circumstances contemplated in clause 4.2 of the Directive that would support the temporary engagement of an employee at a higher classification level.

[31] The Respondent submits that the Project is scheduled to be finalised by 30 June 2021, without the possibility of extension. The Appellant's role as Project Manager is to provide specific technical aspects regarding the rollout of the wireless upgrade to Queensland state schools.

[32] This Project will no longer require the higher classification level role following the Project end date, with the Project and its funding ending by 30 June 2021.

[33] I accept that a genuine operational requirement exists in that the Respondent will not require an AO7 Project Manager in this position upon completion of the Project.

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[12] [2020] QIRC 203.
[13] *Morison* at [40].

[34] In considering the genuine operational requirements of the Department, it was relevant for the Respondent to consider the proposed length of the Project and the Project's known end date. Consequently, it was reasonable to conclude that there is no genuine operational requirement for the Respondent to permanently appoint the Appellant to the Project Manager position.

[35] The Appellant submits that the Commission make a decision that he be converted to permanent in a role similar to the role he has been performing with the Respondent. Section 149C(3) of the PS Act provides that an employee may request to be appointed to "*the position at the higher classification level*". As outlined in *Holcombe v State of Queensland (Department of Housing and Public Works)*,[14] this section provides that an employee may be appointed to the position occupied by the employee at that time and does not allow for appointment to a comparable position.

[36] Consideration of the future requirements of the Appellant's role is consistent with the obligation to have regard to the effective, efficient and appropriate management of the public resources of the Respondent.

[37] I note that there is no dispute that the Appellant satisfies the merit principle as per s 149C(1)(c) of the PS Act.

[38] In consideration of the material before me and the submissions made by the parties, I am of the view that the decision made by the Respondent was fair and reasonable.

Order

[39] I make the following order:

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

[14] [2020] QIRC 195.