

**QUEENSLAND INDUSTRIAL RELATIONS COMMISSION**

CITATION: *Ryan McDonald v State of Queensland  
(Department of Housing and Public Works)  
[2021] QIRC 078*

PARTIES: **Ryan McDonald, Louise**  
(Appellant)

v

**State of Queensland (Department of  
Housing and Public Works)**  
(Respondent)

CASE NO: PSA/2020/282

PROCEEDING: Public Service Appeal – Appointment to  
position at higher classification

DELIVERED ON: 11 March 2021

MEMBER: Industrial Commissioner Dwyer

HEARD AT: On the papers

ORDER: **1. The decision appealed against is  
confirmed.**

CATCHWORDS: INDUSTRIAL LAW – Public Service  
Appeal – application for permanent  
employment at higher classification –  
applicable Directive – limits of consideration  
– review limited to the position occupied at  
the time of application – substantive position  
holder – genuine operational requirements.

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

*Directive 13/20 Appointing a public service  
employee to a higher classification level cls  
4, 5, 6, 7*

*Directive 08/17 Temporary employment*

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

*Public Service Act 2008 (Qld) ss 149A, 149B, 149C*

CASES:

*Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10

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

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

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

*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24

*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 232

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

*Page v John Thompson and Lesley Dwyer, As Chief Executive Officer, West Moreton Hospital and Health Service* [2014] QSC 252

## **Reasons for Decision**

### **Background**

- [1] Ms Louise Ryan McDonald is substantively employed as a Senior Property Registration Officer (classification level AO4) by the Department of Housing and Public Works ('the Department').
- [2] Since 16 October 2018, Ms Ryan McDonald has been performing the position of Program Officer within the Housing Partnerships Office (classification level AO5).
- [3] The appointment has been extended six times and was scheduled to end on 4 March 2021. Ms Ryan McDonald had, at the time of her review, been employed in the position for a total period of two years and four days.
- [4] On 23 September 2020, Ms Ryan McDonald wrote to the Department requesting that she be permanently employed in the AO5 position of Program Officer. She noted that in accordance with the amendments to the *Public Service Act 2008* (Qld) ('the PS Act') and *Directive 13/20 Appointing a public service employee to a higher classification level* ('the Directive') she had been acting at the higher classification level for longer than one year.
- [5] On 20 October 2020, Ms Ryan McDonald was advised in correspondence from Ms Tully Stewart that a review of her employment status had been conducted. The correspondence advised Ms Ryan McDonald that she would continue the temporary placement in the role in accordance with its existing terms ('the decision'). Ms Ryan McDonald was advised that there were no merit issues and she could again submit a request for permanency in the role on 16 October 2021.
- [6] The reasons for the decision were set out as follows:
- The purpose of your current placement in the position of AO5, Program Officer within Housing Partnerships Office is to backfill the substantive employee, while the substantive employee is relieving in an alternative position.
- On return of the substantive employee, there will no longer be a continuing need for you to be engaged in the position of AO5, Program Officer within Housing Partnerships Office.
- [7] Ms Ryan McDonald filed an Appeal Notice on 5 November 2020. In her appeal, she submitted that:
- the substantive occupant of the AO5 role had been acting in a higher duties role for the last five years and will be extended until 30 June 2021;
  - she will likely be extended in the temporary AO5 role as she has not been advised otherwise; and

- due to previous extensions and the occupant's absence in the role, she will continue to be extended indefinitely and there is little risk in being appointed to the position permanently.

### **What decisions can the Industrial Commissioner make?**

- [8] In deciding this appeal, section 562C(1) of the *Industrial Relations Act 2016* (Qld) ('the IR Act') provides that the Commission 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 matter to the decision maker with a copy of the decision on appeal and any directions considered appropriate.

### **Nature of appeal**

- [9] Under Chapter 11 of the IR Act, the role of the Commission is to review the decision appealed against.<sup>1</sup> The IR Act does not define the term 'review'. The term 'review' will take its meaning from the context in which it appears.<sup>2</sup>
- [10] An appeal under Chapter 11, of the IR Act is not a rehearing of the matter,<sup>3</sup> but rather, it is a review of the decision and the decision-making process.<sup>4</sup> The purpose of such an appeal is to have the Commission decide whether the decision appealed against was fair and reasonable.<sup>5</sup>
- [11] The issue for my determination in the matter before me is whether the decision to refuse to permanently appoint Ms Ryan McDonald to the higher position was fair and reasonable.<sup>6</sup>
- [12] For the reasons set out below I have determined that the decision was fair and reasonable.

### **Relevant sections of the PS Act and Directive**

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<sup>1</sup> *Industrial Relations Act 2016* (Qld) s 562B.

<sup>2</sup> *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10.

<sup>3</sup> *Goodall v State of Queensland* (unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018), 5.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Industrial Relations Act 2016* (Qld) s 562B(3).

<sup>6</sup> *Page v John Thompson and Lesley Dwyer, As Chief Executive Officer, West Moreton Hospital and Health Service* [2014] QSC 252, 60-61.

[13] The relevant provisions of the PS Act and the Directive for consideration of this appeal are set out below.

[14] 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.
- ...
- (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.
- ...
- (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.

[15] Clause 4 of the Directive provides as follows:

4. Principles

- 4.1 An employee seconded to or assuming the duties and responsibilities of a higher classification level in the agency in which the employee is substantively employed can be appointed to the position at the higher classification level as a general employee on tenure or a public service officer following a written request to the chief executive.
- 4.2 Secondment to or assuming the duties and responsibilities of a higher classification level should only be used when permanent appointment to the role is not viable or appropriate. Circumstances that would support the temporary engagement of an employee at a higher classification level include:
- ...
- (b) when an existing employee is absent to perform another role within their agency, or is on secondment, and the agency does not use permanent relief pools for those types of roles
- ...

[16] Clause 5 of the Directive provides as follows:

5. Employee may request to be appointed at the higher classification level
- 5.1 Section 149C of the PS Act provides that an employee seconded or engaged in higher duties may submit a written request to the chief executive to permanently appoint the employee to the higher classification level as a general employee on tenure or a public service officer.
- 5.2 To be eligible to request consideration for appointment at the higher classification level under clause 5.1 the employee must:
- (a) have been seconded to or assuming the duties and responsibilities of the higher classification level
- (b) for a continuous period of at least one year
- (c) be eligible for appointment to the higher classification level having regard to the merit principle.
- 5.3 Under section 149C(3) of the PS Act, an eligible employee may request the chief executive to permanently appoint the employee to the higher classification level:
- (a) one year after being seconded to or assuming the duties and responsibilities of the higher classification level, and
- (b) each subsequent year where the employee continues their engagement at the higher classification level in the same role.
- 5.4 An employee may make one request for appointment in each one year period commencing on the employee becoming eligible to request under clause 5.3(a) or 5.3(b), and may make an additional request if the role becomes a substantive vacancy.
- 5.5 The chief executive must consider permanently appointing the employee to the higher classification level where a written request has been made under this clause.

[17] Clause 6 of the Directive provides as follows:

#### 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.

[18] Clause 7 of the Directive provides as follows:

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.

[19] The PS Act was amended in 2020, with the amendments taking effect on 14 September 2020. Ms Ryan McDonald's application for review falls under the amended PS Act.

[20] Importantly, I note that the Directive (relied on by both parties) did not come into effect until 25 September 2020, i.e. three days *after* Ms Ryan McDonald requested a review. I will deal with the effect of this on the decision below.

**Submissions of the parties**

[21] The parties filed written submissions in accordance with a Directions Order dated 5 November 2020. The parties' submissions are largely directed at the genuine operational requirements of the Department.

*Submissions of the Department*

[22] The Department contends, for reasons set out in their submissions dated 10 November 2020, that the decision is fair and reasonable. In summary it submits:

- Ms Ryan McDonald is in temporary placement in the AO5 position for the purpose of backfilling the substantive occupant;

- In accordance with clause 6.2 of the Directive and section 149C(4A) of the PS Act, it must have regard to the genuine operational requirements of the department and the reasons for each decision previously made, or deemed to have been made, under section 149C in relation to the employee;
- There will not be a continuing need for Ms Ryan McDonald to be in the AO5 position once the substantive occupant returns;
- The Department does not have a genuine operational need to permanently employ two employees in the same AO5 position as it is not appropriate or viable for the Department to do so;
- No decisions had been made to extend the substantive occupant in their alternative role past 4 March 2021 and likewise, no decision had been made to extend Ms Ryan McDonald in the acting AO5 position;
- Citing clause 4.2(b) of the Directive, the Department submits that the Directive provides that temporary employment is appropriate where an existing employee is absent due to secondment and will be returning to their substantive position. This being the case with Ms Ryan McDonald's temporary appointment makes the decision fair and reasonable; and
- Ms Ryan McDonald was given notice per the requirements in section 149C(5) of the PS Act as required.

*Submissions of Ms Ryan McDonald*

[23] Ms Ryan McDonald contends, for reasons set out in her submissions, that the decision is not fair and reasonable. In summary she submits that:

- There was no dispute between the parties regarding her eligibility to request permanent appointment;
- Citing *Minister for Immigration and Multicultural Affairs v Yusuf* and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,<sup>7</sup> the Department had erred in their decision as it failed to have regard to the mandatory considerations in section 149C(4A) of the PS Act and accordingly, the decision was not fair and reasonable;

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<sup>7</sup> (2001) 206 CLR 232, 348; (1986) 162 CLR 24, 39-40.

- Citing *Katae v State of Queensland & Anor* ('*Katae*') and the Directive,<sup>8</sup> the principles should only inform a decision maker and conversion should not be denied on the basis that the position is not substantively vacant or that the employer is backfilling;
- The Department did not have proper regard to the genuine operational requirements when making the decision to refuse conversion as required in section 149C(4A) of the PS Act;
- The Department did not provide the material facts and evidence relied on which formed the basis of the decision as required by the Directive and the *Acts Interpretation Act 1954* (Qld);<sup>9</sup>
- Regarding the genuine operational requirements of the Department, the substantive employee had been extended in their secondment until 30 June 2021 and will likely be further extended to 30 June 2022, accordingly Ms Ryan McDonald expects to be similarly extended in the AO5 position.
- Throughout her time in the position she has implemented various systems, built relationships with stakeholders and brought value to the role.
- In circumstances where the secondment ended and there was an additional permanent employee in the same position, the Department has processes which enable it to ensure permanent employees have security and can 'detach from or relinquish their roles but not their substantive qualifications'.<sup>10</sup>

### Consideration

[24] At the outset I note that both parties have erroneously referred to the Directive. The Directive was not operative at the time Ms Ryan McDonald made her application on 23 September 2020.

[25] The circumstances relevant for consideration of an application pursuant to s 149C, including the application of any statutory provisions, are the prevailing circumstances at the time the application is made. There is no provision in the Directive for retrospective application. The Directive cannot be validly applied to Ms Ryan McDonald's application.

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<sup>8</sup> [2018] QSC 225; *Directive 13/20 Appointing a public service employee to a higher classification level* cls 4.2, 6.

<sup>9</sup> *Directive 13/20 Appointing a public service employee to a higher classification level* cl 7; *Acts Interpretation Act 1954* (Qld) s 27B.

<sup>10</sup> Appellant's Submissions filed 12 November 2020, page 4.

- [26] Further, the only statutory instrument containing provisions applicable to Ms Ryan McDonald's application at the time it was made was the PS Act, and specifically, s 149C.
- [27] Had the Department relied more substantially on specific terms of the Directive I would be inclined to the view that such an error would have had the effect of invalidating the decision. The Department relies broadly on the presence of an incumbent employee in the position occupied by Ms Ryan McDonald. It relies on this as a genuine operational requirement precluding appointment to the higher classification.
- [28] The term 'genuine operational requirement' is a consideration available to the Department when considering applications for appointment to a higher classification in both the Directive *and* section 149C(4A) of the PS Act. In the circumstances, I am of the view that the error of the Department lies only in the naming of the source of their considerations as the Directive. The basis of the decision was validly available to them under the PS Act and as such, I consider the erroneous reference to the Directive to be an error of form rather than substance.
- [29] There is a further and more significant flaw in the submissions of Ms Ryan McDonald. Ms Ryan McDonald submits at paragraph 7 of her submissions filed 12 November 2020:
- I believe the DDG has erred in making that decision as they have considered only the role I am acting in is substantially owned and in doing so they have failed to have regard to the mandatory considerations under s 149C(4A) of the Act. For this reason, I submit the decision is unfair and unreasonable.
- [30] The submission by Ms Ryan McDonald significantly overstates the requirements imposed on the Department by section 149C. Contrary to the primary complaint made by Ms Ryan McDonald, section 149C expressly refers to appointment to 'the position'.<sup>11</sup>
- [31] In fairness to Ms Ryan McDonald, her submissions were filed prior to the release of the decision of *Holcombe v State of Queensland (Department of Housing and Public Works)* ('*Holcombe*') delivered by Commissioner McLennan on 19 November 2020.<sup>12</sup> The conclusion reached in *Holcombe*, with which I agree, limits the scope of consideration for appointment to the higher classification to the position occupied at the time of application. Section 149C does not extend the chief executive's powers to a review of the applicant's employment against positions that are substantially the same.<sup>13</sup>

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<sup>11</sup> *Public Service Act 2008* (Qld) ss 149C(1)(c), 149C(3).

<sup>12</sup> [2020] QIRC 195.

<sup>13</sup> *Ibid* [45]-[56].

- [32] Further, notwithstanding my conclusions about the Directive having no application in this matter, I note that the language of the Directive introduces a broader consideration by reference to ‘the role’ in various key provisions. While this broader consideration might be relevant to questions about the length of time a person has acted in the higher classification e.g. ‘in the same role’, it does not create an obligation to consider an applicant for appointment to *any* position at the higher classification. Even if the Directive did apply, which it does not, it would not assist Ms Ryan McDonald.
- [33] Ms Ryan McDonald has further sought to extend an application of the principles espoused in *Katae* and imply the terms of the superseded *Directive 08/17 Temporary Employment* to her matter. In particular Ms Ryan McDonald has sought to expand the consideration of a decision maker on review to include ‘the role or a role which is substantially the same’ consistent with the language of the superseded Directive.<sup>14</sup>
- [34] With respect to Ms Ryan McDonald, the language of the superseded Directive and the matters traversed in *Katae* are starkly different to the language of section 149C. There can be no comparison, nor any application, of those terms in a matter of this nature.
- [35] The broad type of consideration proposed by Ms Ryan McDonald is a feature of other types of conversion applications dealt with under sections 149A and 149B of the PS Act. The contrast between these provisions and the narrow language of section 149C evinces a clear intent by the legislature to take a different, narrower, approach to applications for appointment to a higher classification.<sup>15</sup>
- [36] The presence of a substantive position holder for the position in which Ms Ryan McDonald was working at the time of her application is an almost insurmountable barrier to a successful application under section 149C of the PS Act. It is clearly within the type of circumstances contemplated by the term ‘genuine operational requirements’.<sup>16</sup> Only uncontroversial evidence of a substantive position holder having relinquished, or imminently intending to relinquish, that substantive position could overcome the genuine operational requirement that precludes appointing two people permanently to the same position.
- [37] In all of these circumstances I consider the decision to be fair and reasonable.

### **Order**

- [38] In the circumstances I make the following Order:

#### **1. The decision appealed against is confirmed.**

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<sup>14</sup> Appellant's Submissions filed 12 November 2020, paragraphs 15-19.

<sup>15</sup> *Holcombe v State of Queensland (Department of Housing and Public Works)* [2020] QIRC 195, 17 [55]-[56].

<sup>16</sup> *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203, 12 [37]-[38].