

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Berndt v State of Queensland (Department of Environment and Science)* [2021] QIRC 082

PARTIES: **Berndt, Christine**
(Appellant)

v

State of Queensland (Department of Environment and Science)
(Respondent)

CASE NO: PSA/2020/377

PROCEEDING: Public Service Appeal - Higher Duties Conversion Decision

DELIVERED ON: 16 March 2021

MEMBER: Pidgeon IC

HEARD AT: On the papers

OUTCOME: **The decision appealed against is confirmed.**

CATCHWORDS: INDUSTRIAL LAW - Public Service Appeal - where the appellant requests appointment to higher classification level - where the appellant was not appointed due to genuine operational requirements of the department - whether the decision was fair and reasonable

LEGISLATION: *Public Service Act 2008* s 27, s 149C

Industrial Relations Act 2016 s 562C

Directive 13/20 Appointing a public service employee to a higher classification level.

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

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

Reasons for Decision

Appeal Details

- [1] Ms Berndt is employed by the State of Queensland (Department of Environment and Science). At the time her employment was reviewed, Ms Berndt was engaged in a higher duties role as an AO6 Communications Officer (position number: 746895). The end date of her engagement in that position is 31 December 2020 and this would mean that her total engagement in the position was approximately 27 months.
- [2] Ms Berndt commenced employment with the Department on 5 May 2014. Her substantive classification is an AO4/4 (with a qualification allowance).
- [3] On 6 November 2020, the Deputy Director-General Environment Policy and Programs (EPP) wrote to Ms Berndt in response to her request to be appointed to the higher classification level.
- [4] The decision letter stated that due to the genuine operational requirements of the Department, Ms Berndt was to continue to be engaged according to the terms of the existing higher duties arrangement. Specifically:

The AO6 Senior Communications Officer was created for a short-term trial period of a Communications Partnership Team. The trial will conclude from 31 December 2020 and the communications function will return to Corporate Services. As such, there is not a continuing need for you to be engaged in the AO6 Senior Communications Officer role past 31 December 2020 in EPP.

Currently you have been engaged at the higher classification level for a total of 25 months. Your engagement at this higher classification level has been extended five times. As you may know, you have been extended due to the ongoing trial of the communications partnership team within EPP.

As a result of this decision not to convert you to the higher classification level, you will continue in the role of Senior Communications Officer until 31 December 2020 when the communications partnership trial concludes and you will return to your substantive role in Corporate Services.

Relevant sections of the Act and Directive

- [5] In order to determine the appeal, it is necessary to consider the relevant provisions of the *Public Service Act 2008* ("the PS Act") and *Directive 13/20 Appointing a public service employee to a higher classification level* ("the Directive").
- [6] 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 one 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).
- ...
- (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.

The Directive

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

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:
 - (a) when an existing employee takes a period of leave such as parental, long service, recreation or long-term sick leave and needs to be replaced until the date of their expected return
 - (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
 - (c) to perform work for a particular project or purpose that has a known end date
 - (d) to perform work necessary to meet an unexpected short-term increase in workload.
- ...

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 documents an 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.
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.
8. Appeals
 - 8.1 An employee eligible for review under clause 149C(3)(b), that is after two years of continuous engagement at the higher classification level, has a right of appeal provided for in section 194(1)(e)(iii) of the PS Act in relation to a decision not to permanently appoint the employee to the higher classification level.

What decisions can the Commission make?

- [8] In deciding this appeal, s 562C(1) of the *Industrial Relations Act 2016* (IR Act) provides that the Commission may:
- (a) confirm the decision appealed against; or
 - ...
 - (c) For another appeal-set the decision aside, and substitute another decision or return the matter to the decision maker with a copy of the decision on appeal and any directions considered appropriate.

Ms Berndt's reasons for appeal

- [9] Ms Berndt submits that the decision maker has erred in their consideration of the genuine operational requirements of the Department.
- [10] Ms Berndt says that there is continuing work at the AO6 level that she has been requested to complete beyond her current contracted finish date and that the requirement for the work will be ongoing.

- [11] Ms Berndt understands that every other employee within the EPP Communications Partnership Team have had their temporary contracts extended until at least mid-2021 and some until mid-2022. Ms Berndt says that this, coupled with the continual demand for her services seems at odds with the assertion that there is not a genuine operational requirement for her role.
- [12] Ms Berndt says that she has demonstrated merit with respect to s 27 of the PS Act.

Department submissions

Background of Position Number 746895

- [13] The Department says that position number 746895 is a temporary position that was created on 28 August 2018 as part of a communication partnerships trial.
- [14] The trial was initially extended until 30 June 2020 due to a number of initiatives that were being run by EPP. A further extension was then granted until 30 September 2020 due to the COVID-19 Pandemic. A final extension was provided due to an agreement made between corporate communications and officer of resource recovery, EPP to provide funding for Ms Berndt's position in the communications partnership team until 31 December 2020.
- [15] Following a review, it was decided that the trial will cease on 31 December 2020 and the communication services will return to corporate communications, corporate services, as per the previous arrangements.
- [16] Position number 746895 will be abolished upon completion of the Communications Partnership Team trial at the end of 2020.

Genuine operational reasons

- [17] The trial arrangements are due to cease on 31 December 2020 with no further extensions being granted.
- [18] The position Ms Berndt is currently occupying will no longer be required and will be abolished.
- [19] At this time, Ms Berndt will return to her substantive AO4 communications officer role.
- [20] Some of the work that was being performed by the Communications Partnership Team may be absorbed back into corporate communications however, Corporate Communications will then be responsible for reviewing and assigning work within their business area.
- [21] The Directive only requires the Department to determine whether a person should be appointed permanently to the position held at the time of requesting the review.
- [22] There is no operational need for the position Ms Berndt currently occupies within EPP beyond 31 December 2020.

- [23] As such, there is no genuine need to permanently appoint Ms Berndt to the higher classification level position.

Response to Ms Berndt's submissions

- [24] With regard to Ms Berndt's submission that there is continuing work at the AO6 level, the Department submits that while there may be ongoing work at the AO6 level, that work will be absorbed back into Corporate Communications. It will be Corporate Communications who will need to review and allocate work beyond 31 December 2020.
- [25] With regard to Ms Berndt's submission that every other employee within the EPP Communications Team have had their temporary contracts extended, the Department submits that this is not accurate. Three employees from the Communications Partnership Team will cease in their current engagements on 31 December 2020. Ms Berndt is one of them.
- [26] Two other employees were initially engaged by EPP for a longer period (until June 2021 and June 2022 respectively) to work on specific projects within EPP. These two employees will remain within EPP as per their initial engagements but will no longer be in the Communications Partnership Team as that trial is ending.

Conclusion

- [27] The Department submits that the review of Ms Berndt's request for appointment to the higher classification level complied with the Directive and consideration was given to the genuine operational requirements of the Department.

Ms Berndt in reply

- [28] Ms Berndt refers to the mandatory criteria to be considered under s 149C(4A).
- [29] With regard to genuine operational requirements, Ms Berndt points to the decision of Merrell DP in *Morison*:

The adjective 'genuine' relevantly means '... being truly such; real; authentic.' The phrase 'operational requirements of the department' is obviously a broad term that permits a consideration of many matters depending upon the particular circumstances of the department at a particular time. In considering the context of s 149C(4A)(a) of the PS Act, the chief executive of a department, under the PS Act, is responsible for, amongst other things:

- managing the department in a way that promotes the effective, efficient and appropriate management of public resources; and
- planning human resources, including ensuring the employment in the department of persons on a fixed term temporary or casual basis occurs only if there is a reason for the basis of employment under the PS Act¹ [citations omitted].

¹ *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC [38].

[30] Ms Berndt also draws my attention to cl 4.2 of the Directive as well as statements made in the Explanatory Notes to the Public Service and Other Legislation Amendment Bill 2020:

A primary objective of the Bill is to drive more effective and consistent application of the existing commitment to maximise employment security... This includes amendments to definitions and provisions to

...

- Clarify that the only matter a chief executive can have regard to when determining if the conversion review is viable or appropriate is the 'general operational requirements' of a department.

[31] Ms Berndt relies on the fact that a placement may have originally been to perform work for a particular trial that has an expected end date may be consideration as to why a permanent appointment should not be made. It is not, however, a threshold question, nor should it be a blanket reason to decline an appointment.

[32] Ms Berndt submits that the PS Act outlines at s 148(2) circumstances where employment of a person on tenure is not viable or appropriate which displaces the default position that employment in the public service is on tenure as per s 25(2)(d). One of those circumstances is when an employee is 'to perform work for a particular project or purpose that has a known end date'. Ms Berndt submits that her circumstances are not an example of this, and that while her higher classification role may have been created for a trial period, the work she is undertaking is ongoing and will continue to be required even if her role is moved back to corporate services.

[33] Ms Berndt points to the following as evidence that there is continuing work for her to do:

- The Department submissions which state that 'there may be ongoing work at the AO6 level, that work will be absorbed back into corporate communications';
- a status report Ms Berndt provided at the end of last year which details the ongoing project work which will have to cease and the deliverables that will be unmet;
- an email from the Executive Director corporate communications indicating that corporate communications cannot commit to any further communications activities for EPP, due to her contract not being extended and listing the projects EPP will be unable to complete without her role; and
- an example of work she has had to cease on an advertising campaign as there will not be capacity to support it post 31 December 2020 unless alternative funding is sourced.

[34] Ms Berndt contends that genuine operational requirements and priorities of the Department are very closely aligned to the work she is performing and would continue to perform for the foreseeable future were resourcing made available.

- [35] Ms Berndt says that despite the fact that her role is not presently permanently funded the work she is performing is integral to the communications priorities of the Department and will continue to be required.
- [36] Ms Berndt seeks that the decision be set aside and a substituted decision be made to permanently appoint her to the AO6 senior communications role within corporate communications.

Further submissions of the Department

- [37] The Department restates its submission that s 149C(3) of the PS Act provides for an employee to ask the Department's Chief Executive to appoint the employee to **the position** at a higher classification level as a general employee on tenure or a public service officer.
- [38] The Department says that in her submissions, Ms Berndt appears to ask to be appointed as an AO6 Senior Communications Officer within Corporate Communications, not in the communications partnership team, EPP.
- [39] The Department submits that in accordance with s 149C, the Department was only required to consider appointing Ms Berndt to the position she held at the time of the request.
- [40] The Department says that this is supported by the decision of McLennan IC in *Holcombe v State of Queensland (Department of Housing and Public Works)* [2020] QIRC 195:

[54] The PS Act at s 149C, in concert with the Directive, creates a framework where if a person has been acting at a higher classification for a particular period, they may be permanently appointed to the position they occupy. There is no contemplation in those materials 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.

...

[56] The language of s 149C is narrower: 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. That 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.

- [41] The Department reiterates the genuine operational reasons to not appoint Ms Berndt to the higher duties position, communication partnership team, EPP, as there is no need for the position beyond 31 December 2020.
- [42] The position was abolished at the end of 2020. The Department provides the establishment information for the position at Attachment 1 of their submissions. The field named 'staffing restriction' was updated on 6 January 2021 and says 'Abolish when vacant' with 'date abolished' listed as 1 January 2021.
- [43] The Department says that there is no ability to appoint Ms Berndt to any other position.

Final submissions of Ms Berndt

[44] Ms Berndt clarified that at all times during this appeal and in her submissions, it was her intention to seek permanent appointment to the AO6 Communications Officer role within EPP.

Consideration

[45] It is clear that Ms Berndt was eligible for review at the time the review was undertaken, as she had been acting at the higher classification level for over two years. Ms Berndt also met the merit requirement for conversion.

[46] The genuine operational requirement outlined by the Department for not converting Ms Berndt in position number 746895 is that the position was being abolished on 30 December 2020 and Ms Berndt would be returning to her substantive role.

[47] The circumstances were that the position Ms Berndt was eligible to seek appointment to was going to cease to exist on a known date in circumstances where the project or trial she (and others) had been working on was coming to an end.

[48] This is the type of situation envisaged by clause 4.2 of the Directive as supporting the temporary engagement of an employee at a higher classification level. Specifically, cl 4.2(c) refers to 'to perform work for a particular project or purpose that has a known end date'.

[49] The Directive does not require the Department to consider if there is AO6 senior communications work needing to be done elsewhere in the Department.

[50] The review to be undertaken under the legislation and the Directive was specifically in relation to position number 746895.

[51] The material provided to me confirms that position number 746895 has indeed been abolished. Ms Berndt referred me to the consideration of the term 'genuine operational requirements' in *Morison*. It seems to me that the abolition of a position because the particular purpose for the position has ceased and the end date is known, meets the definition of a genuine or 'truly such; real; authentic' operational requirement.

[52] On the date that Ms Hussey made the decision not to appoint Ms Berndt to position number 746895, the role was only going to exist for another seven weeks. It would not have been in keeping with the effective, efficient and appropriate management of public resources per s 149C(4A)(a) of the PS Act for Ms Hussey to permanently appoint Ms Berndt to the role in such circumstances.

[53] I am satisfied that the decision not to employ Ms Berndt at the higher classification level gave proper consideration to the genuine operational requirements of the Department and was fair and reasonable.

[54] Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016*, the decision appeal against is confirmed.