

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Fennell v State of Queensland (Queensland Health)* [2021] QIRC 092

PARTIES: **Fennell, Travis**  
(Appellant)

v

**State of Queensland (Queensland Health)**  
(Respondent)

CASE NO: PSA/2021/5

PROCEEDING: Public Service Appeal - Conversion Decision

DELIVERED ON: 22 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 was reviewed for conversion to permanent employment - whether there was a continuing need for the Appellant to be employed

LEGISLATION: *Public Service Act 2008*, s 148, s 149, s 149B.

*Industrial Relations Act 2016*, s 562C

*Directive 09/20 Fixed term temporary employment*

### Reasons for Decision

#### Appeal Details

- [1] Mr Fennell is employed by the State of Queensland (Queensland Health) at Metro South Hospital and Health Service (MSHHS) as a fixed term Administration Officer (AO3), Medical Records, Health Information Management Services (HIMS) with the Princess Alexandra Hospital (PAH). Since 9 November 2015 Mr Fennell has

undertaken multiple fixed term contracts with his current contract set to cease 2 May 2021.

- [2] In a decision dated 9 December 2020 regarding the outcome of a review of Mr Fennell's fixed term temporary employment status, Director of Human Resources Adam Lavis ("the decision maker") gave the following reasons:

The decision not to permanently appoint you is based on continuing staffing needs at this time. Specifically, my reasons are that there is no continuing need for you to perform your current role because the role is not continuing due to the implementation of documented organisational change.

Additionally there is no continuing need for you to perform a role that is substantially the same as all alternative roles have been considered.

I have considered the conditions for conversion in the PS Act and determined that you have demonstrated merit and there is a continuing need for you to fill the role or a role that is substantially the same. However, there are genuine operational requirements of the agency that mean it is not viable or appropriate to convert you at this time. Specifically, Metro South Health's Medical Record Department is undergoing significant workforce change following the Digital Hospital Implementation.

- [3] Mr Fennell provides his grounds of appeal in a four page document attached to his appeal notice. The document appears to state that the decision maker failed to provide sufficient reasons for their decision in order for Mr Fennell to understand why the role would not be ongoing. Mr Fennell goes on to explain the types of day to day duties he performs and does not believe the PAH Scanning Unit/Medical Records Department will not be ongoing.

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

- [4] 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 09/20 Fixed Term Temporary Employment* ("the Directive").
- [5] 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 person 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 mention 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.
- (7A) For working out how long the person has been continuously employed in the Department —
  - (a) All periods of authorised leave are to be included; and
  - (b) The person is to be regarded as continuously employed even if there are periods during which the person is not employed in the Department, if the periods of non-employment in the Department total 12 weeks or less in the 2 years occurring immediately before the time when the duration of the person's continuous employment is being worked out.

## **The Directive**

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

### **4. Principles**

- 4.1 Section 25(2) of the PS Act provides that employment on tenure is the default basis of employment in the public service, excluding non-industrial instrument employees. This section gives full effect to the Government's Employment Security Policy.
- 4.2 Chief executives who are managing and deciding the employment or conversion of fixed term temporary employees must consult and comply with the relevant provisions of the PS Act, including sections 148 to 149B.

- 4.3 Section 148(1) of the PS Act (Appendix A) defines a fixed term temporary employee.
- 4.4 Sections 148(2) and 148(3) list purposes where employment of a person on tenure may not be viable or appropriate.
- 4.5 Under the *Human Rights Act 2019* decision makers have an obligation to act and make decisions in a way that is compatible with human rights, and when making a decision under this directive, to give proper consideration to human rights. ...

...

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

- 8.6 Agencies are expected to undertake each review as required by the PS Act and this directive and must not make an intentional decision to rely on a deemed decision referred to in clause 8.5.
- 8.7 Each agency must, upon request, give the Commission Chief Executive a report about the number of known deemed decisions.

### **What decisions can the Commission make?**

- [7] 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
  - ...
  - (b) 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.

### ***Grounds for Appeal/Submissions of the Appellant***

- [8] Mr Fennell has worked for Queensland Health in a full-time temporary capacity for five years.
- [9] Mr Fennell refers to the reasons for the decision (see [2] above) and submits that there is no information provided to him about what the organisational change is and why the change, if it proceeds, means that his role is not ongoing.
- [10] Mr Fennell says that there is no information in the decision letter to enable him to understand the decision or to challenge the factual basis for the decision. It is not clear what aspects of the proposed change would operate as a genuine operational reason not to convert his employment to permanent.
- [11] Mr Fennell believes that a fair and reasonable conclusion on the available evidence is that the role is likely to be ongoing.
- [12] Mr Fennell refers to s 27B of the *Acts Interpretation Act 1954* and the decision of the High Court in *Minister for Immigration and Citizenship v Li* [2013] HCA 18 and says that the decision is unreasonable as it does not set out the findings on material questions of fact and does not refer to the evidence or other material on which the findings were based.
- [13] Mr Fennell does not believe that the PAH Scanning Unit/Medical Records Department will not be ongoing.
- [14] Mr Fennell says that he is one of only two members of staff who are able and trusted to undertake all roles within both Medical Records and Scanning Department.
- [15] Mr Fennell says that the PAH Scanning Unit:
- is a facility within the Health Information Service at the PA Hospital created in concurrence with the introduction of the integrated election Medical Record (ieMR);

- converts patient records into a digital system to enable health professionals to access patient information on computers instead of paper files;
- is responsible for verifying that scanned documents are high quality and true representations of original documents, while cross checking the correct patient, encounter and form type;
- also does scanning for QEII Jubilee Hospital;
- if the scanning unit were not to be ongoing the PAH and QEII Jubilee Hospital would have to revert back to the previous paper filing system

[16] There is no information provided in the decision about what sort of enquiry or analysis was undertaken to identify roles that are substantially the same or what analysis or consideration was made as to whether there was a continuing need for these roles.

[17] Mr Fennell meets the merit requirement for conversion and submits that the role he is performing is continuing despite MSHHS's assertions about proposed organisational change.

[18] Mr Fennell says that there has been no decision that his position is not continuing and that while there has business case prepared for consultation in relation to the proposed organisational change, the business case does not identify any specific roles that will cease in the scanning unit.

[19] The business case expressly provides on page six in section 5.1.2 that: "to be clear there are no permanent reduction in roles but a reallocation", and Mr Fennell's position along with two other positions is undertaking the same role, that are not permanently filled, are being reallocated from the medical administration team to the scanning unit. These are to be filled with priority given to staff like him in the medical administration unit.

[20] Mr Fennell says that the above is evidence that there is a continuing need for a person to be employed in his role or a role which is substantially the same. Further, the evidence does not support an operational reason not to convert, in fact, it supports that there is a requirement to fill a role that is substantially the same.

[21] Mr Fennell says that there has been no decision made and that the change is subject to consultation with staff and the Union and to a decision by the Chief Executive and/or the Board.

### ***Submissions of the Respondent***

[22] MSHHS submits that at the time the appeal was filed, there were genuine operational reasons for not converting Mr Fennell to permanent, as the position Mr Fennell occupies is within a unit undergoing organisational change and restructure which directly impacts on the role being performed by Mr Fennell, and the long-term viability

of Mr Fennell's role cannot be definitively determined until the organisational change process is finalised.

- [23] MSHHS confirm that Mr Fennell is employed as a fixed term Administration Officer, Medical Records, HIMS, PAH. Mr Fennell does not and has never occupied a position in the Scanning Unit.
- [24] MSHHS, in accordance with Queensland Government Employment Security Policy is committed to maximising permanent employment and only using fixed term employment where it is not viable or appropriate to appoint permanently as outlined in s 148 of the PS Act. The review of Mr Fennell's employment was undertaken in accordance with the Directive.

#### *Operational Issues*

- [25] Consideration was given to whether there is a continuing need to place Mr Fennell in a role and the likelihood of the role being ongoing. Mr Fennell is currently employed on a fixed term basis due to the implementation of significant change impacting the Medical Records Service. There is no assurance that the role occupied by Mr Fennell will be required beyond the cessation date of the current fixed term engagement.
- [26] MSHHS is unable to convert an employee's employment status to permanent where the role performed by the employee is subject to a current organisational change consultation process or where a restructure may be imminent. MSHHS submits that large scale ongoing change which calls into question the ongoing requirement for a role constitutes a genuine operational reason not to convert an employee in accordance with section 8.2 of the Directive.

#### *PAH Medical Records transition to the integrated electronic Medical Record (ieMR)*

- [27] MSHHS accepts that the PAH Medical Records Service is an integral component of continued patient service delivery however maintains that the role Mr Fennell occupies will not be required in the same capacity it once operated in on an ongoing basis following the move away from paper-based medical records.
- [28] MSHHS provides the following background regarding ieMR:
  - In 2015, the PAH was the first large hospital in Australia to replace paper-based medical records with electronic medical records via introduction of ieMR;
  - the foundations for the program were built in 2014 and the program was progressively implemented until it was fully realised in 2018;
  - the implementation of ieMR is aligned to the Queensland Health Digital Health Strategic Vision for Queensland 2026;
  - since the planning stages of ieMR, MSHHS has been monitoring the workloads of the PAH Medical Records Service to identify the impacts of the implementation of ieMR on service delivery requirements;

- service delivery requirements have rapidly declined but have not yet completely abated since ieMR implementation;
- the introduction of ieMR has significantly impacted daily operations for Administration Officers within the Medical Records department;
- the vast majority of public patients are now being recorded and managed on the ieMR, resulting in a drastic reduction of overall workload amongst the Medical Records Service;
- the decline in service delivery requirements is deemed to have largely stabilised at the beginning of 2020;
- MSHHS has been able to determine that due to the significantly reduced requirement for paper medical records, it is not viable to continue the existing operating model of the Medical Records Service;
- although service delivery requirements are accepted as having stabilised, it is also noted that some further declines are to be expected as clinicians become more experienced with the ieMR system; and
- the stabilisation of the decline in workload has placed the MSHHS to consider the implementation of changes to the staffing structure of the Medical Records Service, and other functions within the larger HMS.

#### *PAH HMS restructure*

- [29] On 2 December 2020, a business case for change was provided to interested unions and impacted employees, including Mr Fennell in accordance with the consultation processes in the Award.
- [30] The business case and associated changes were cited by Mr Lavis as key considerations in determining whether Mr Fennell's employment should be converted to permanent.
- [31] The existence of the business case and its relevance to the position being performed by Mr Fennell are not in dispute.
- [32] Mr Fennell has not identified which findings of fact or evidence beyond the documented and widely communicated existence of an organisational change process directly impacting his position within a potentially imminent restructure may be necessary to better inform him of the primary impetus for Mr Lavis' decision.
- [33] Mr Fennell submits that the reasoning contained in Mr Lavis' correspondence was lacking to the extent he was not provided with sufficient information to support the decision made. This is a difficult position for Mr Fennell to maintain, given that he has had access to the business case, and the ability to seek further information about it and



understand its contents prior to the appeal documentation being filed in the Industrial Registry.

- [34] Mr Lavis' correspondence specifically refers to the change process on foot. Although the change process does not propose a reduction in permanent full time equivalent (FTE) across the HIMS, it is clear that temporary engagements within the Medical Records Service may not be continued beyond their current date of cessation.
- [35] Although there is some realignment of some roles proposed from Medical Records to the Scanning Unit, section 5.1 of the business case also notes that three full time equivalent temporary engagements within Medical Records Administration will be honoured until their contract end dates only, and not realigned.
- [36] MSHHS submits this clearly denotes that the temporary engagement, at the point in time of Mr Lavis' decision demonstrates that the role undertaken by Mr Fennell is not ongoing beyond its nominal expiration.
- [37] Section 6 of the business case further highlights considerations that will be taken into account by the decision maker in determining whether the proposed changes will be implemented, including that temporary staff within Medical Records may have their engagements ceased as a result of the proposed changes.
- [38] Employees within the Medical Records Service were asked to provide feedback to the proposed changes before 11 January 2021. An extension to the feedback period to 18 January 2021 was sought by a Union party and granted.
- [39] No final decisions have yet been determined and MSHHS was continuing to accept feedback about the proposed changes until the day prior to filing submissions in this matter.
- [40] There was, and continues to be, a genuine inability for MSHHS to definitively determine whether there would or wouldn't be an ongoing or continuing need for Mr Fennell to continue undertaking the same or substantially the same duties on a permanent basis, however, there is significant doubt surrounding the long term viability of his position as outlined above and in the business case.

*Mr Fennell submissions in reply*

- [41] With regard to the submissions of MSHHS at [34]-[37] above, Mr Fennell says that it may be the case that the temporary engagements will not be ongoing beyond their contracted end dates but that is not the sole consideration the decision maker is obliged to turn their mind to in undertaking a s 149B review.
- [42] When deciding whether to offer permanent employment under s 149A, 149B, a Chief Executive must consider the criteria in s 149A(2) of the PS Act, including whether there is a continuing need for the person to be employed in the role, or a role which is substantially the same.

- [43] Mr Fennell says that the Business Case clearly outlines that there is an increasing workload in the Scanning Unit and that additional administration staff will be required to meet the ongoing demand. The Business Case at 5.1.2 specifically proposes that 3.0 AO3 FTE be reallocated to the Scanning Unit to be filled permanently by "appropriate industrial mechanisms with priority given to the current employees with the HMS unit".
- [44] Mr Fennell submits that as the functions of an AO3 in the Scanning Unit are functions he currently performs as part of his position in Medical Records, that these 3.0 FTE positions are roles which are substantially the same as his present AO3 role which should have been considered for conversion into. The failure to consider this makes the decision unfair and unreasonable.

### **Consideration of submissions**

- [45] The decision letter dated 9 December 2020 states that genuine operational requirements preclude Mr Fennell from being converted to permanent. In determining that there is no continuing need for Mr Fennell to perform his role, Mr Lavis makes reference to 'the implementation of documented organisational change' and the 'Metro South Health's Medical Record Department is undergoing significant workforce change following the Digital Hospital Implementation'.
- [46] MSHHS states that the business case for change was provided to "the unions and impacted employees, including Mr Fennell..." on 2 December 2020.
- [47] Mr Fennell makes reference to the business case for change in his submissions. In his reply submissions he does not challenge MSHHS submission that he had been provided with the business case for change prior to receipt of the decision letter.
- [48] I have reviewed the business case for change which was attached to MSHHS's submissions. The document sets out the reduction in workload experienced by the PAH Medical Records Department over the time since ieMR was introduced. The business case refers to a trial underway until 5 May 2021 to determine whether the workload is ongoing or temporary in nature. The business case says, "Further consideration will be given to any staffing and budget shortfall once the workloads are clear at the end of this trial".
- [49] 5.1.2 of the report says that current temporary arrangements will be honoured until the contract end dates (2 May 2021). As Mr Fennell points out, the business case also says that any permanent vacancy will be filled by appropriate industrial mechanisms with priority given to current employees within HMS Unit.
- [50] The decision clearly indicates to Mr Fennell the reason that the decision maker has determined there is no continuing need for Mr Fennell to perform his current role and that the genuine operational requirements of MSHHS preclude his conversion to permanent at this time.
- [51] In circumstances where Mr Fennell is aware of the organisational change currently under consideration and subject to consultation with unions and employees, and has

access to detailed information about the workload changes affecting his area, I find that the level of detail provided by the decision maker with regard to the genuine operational requirements of MSHHS was fair and reasonable.

- [52] I further find that the circumstances outlined by the MSHHS with regard to the organisational change process currently under consultation as a result of changes to the workload of the area Mr Fennell works in make it fair and reasonable to determine that at the time of making the decision, there is not a continuing need for Mr Fennell to be employed in the role.
- [53] Given that the business case for change affects HMS at PAH, I find it was also fair and reasonable for the decision maker to find that there was no continuing need for Mr Fennell to be employed in a role substantially the same.
- [54] It is not in dispute that Mr Fennell is eligible for review of his fixed term temporary employment status or that he meets the merit requirement for conversion. Should the organisational change once implemented lead to there being a continuing need for Mr Fennell to be employed in the role or a role which is substantially the same, one would expect that it may be reasonable for the Respondent to consider converting Mr Fennell's employment from temporary to permanent at that time.
- [55] The decision appealed against is confirmed.