

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Travers v State of Queensland (Queensland Treasury)* [2021] QIRC 098

PARTIES: **Travers, Lisa**  
(Appellant)

v

**State of Queensland (Queensland Treasury)**  
(Respondent)

CASE NO: PSA/2021/18

PROCEEDING: Public Service Appeal - Higher Duties  
Conversion Decision

DELIVERED ON: 11 March 2021

MEMBER: Pidgeon IC

DATES OF WRITTEN  
SUBMISSIONS Appellant's submissions: 15 January 2021  
Respondent's submissions: 22 January 2021  
Appellant's further submissions: 1 February 2021

OUTCOME: **1. The decision appealed against is set aside;**  
**2. the matter is returned to the decision maker with a copy of this decision on appeal; and**  
**3. a fresh review is to be conducted by 1 June 2021.**

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 149C

*Industrial Relations Act 2016, s 562C**Directive 13/20 Appointing a public service employee to a higher classification level.****Ex Tempore Reasons for Decision (as edited)*****Appeal Details**

- [1] Ms Travers is employed by the State of Queensland (Queensland Treasury). Since 27 March 2017, Ms Travers has been performing higher duties in the role of Senior Project Officer (AO6), the arrangement was scheduled to end on 31 December 2020.
- [2] On 18 December 2020, Michael McKee, the Deputy Director-General (the decision maker) wrote to Ms Travers in response to her request of 29 September 2020 to be appointed to the higher classification level.
- [3] The decision letter stated that due to the genuine operational requirements of the Department, Ms Travers was to continue to be engaged according to the terms of the existing higher duties arrangement. Specifically:

The role in which you are performing higher duties is a temporary position for a specified period and purpose. Closure of the Grant Programs is under consideration by government. This means that there is no ongoing need that would support the permanent conversion to a higher classification in the current temporary senior Project Officer, AO6 role in the Investment Incentives team.

**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 13/20 Appointing a public service employee to a higher classification level* ("the Directive").
- [5] 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**

- [6] 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 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?**

- [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
  - ...
  - (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 Travers' reasons for appeal**

- [8] Ms Travers submits the decision not to convert her is unfair and unreasonable for the following reasons:
- I disagree with the findings of fact and reasoning of the decision maker in respect of the operational reasons provided and believe that they are unfair and unreasonable;
  - The operational reasons provided by the respondent according to the meaning of the words of the PS Act and their context are insufficient to displace the obligation to employ me on tenure as the default basis of employment; and
  - The respondent has not demonstrated that it is not viable or appropriate for me to be employed on tenure in the higher classification position.

### **Ms Travers' submissions**

- [9] Ms Travers made a number of submissions in support of her reasons for appeal:
- The cessation of the program is not a valid reason for determining her role is not ongoing, and that this is evidenced by her further extension until 25 June 2021;
  - the role as described by the position description merely uses the funding program to attract investment to the state. The role is not centred on the funding program;
  - Ms Travers states she responsible for attracting companies to establish and/or expand their operations in the state of Queensland and outlines a number of duties she performs in doing so;
  - disagrees that her role falls into the categories outlined in cl 4.2 of the Directive and believes that occupation of her role as project officer for four years having been extended three times is evidence to the contrary that the work she performs has a known end date; and
  - the decision letter focuses on a program that is not part of Ms Travers' position description. Ms Travers believes the key accountabilities that are listed in her position description are requirements of the Department, noting the decision letter is silent as to those functions ceasing.

#### **Department submissions**

- [10] Written submissions of the Department in response to Ms Travers' appeal accept she meets the merit principle and restate the decision to refuse conversion was based on genuine operational requirements in accordance with cl 6.2 of the Directive.
- [11] The Department deny reasons contained in the decision letter are inadequate and believe the limited funding of the Grants Program and its defined end date is evidence of the genuine operational requirements not to convert Ms Travers.
- [12] The recent extension of the program, and subsequently, Ms Travers' higher duties role to 30 June 2021 was the result of an "immediate increase in workload in closing the key initiatives which the Grants Program funds", however the program is now closed to new applications and existing applications are to be finalised prior to 30 June 2021.
- [13] The Department appear to agree with Ms Travers on the duties of the role, however differ in their characterisation of the role the Grants Program plays, where Ms Travers' believes the program is merely a tool, the Department submit all the functions are performed in support of the program. In response to Ms Travers' submissions regarding the program not featuring in the position description, the Department submit it is not required as it is a generic position which outlines the accountabilities of a Senior Project Officer which are 'broad and all-encompassing'.

#### **Ms Travers' further submissions**

- [14] Ms Travers concentrates on the issue of her eligibility in response to the Department and works through s 149C of the PS Act and the Directive to demonstrate her eligibility regarding the deemed decision 28 days following her request of 29 September 2020.
- [15] The reasons for decision delivered 18 December 2021 appear to be based on the situation at that particular time, which had evolved substantially due to machinery of government changes as well as the Grants Program review. Given these events occurred after the date of the deemed decision, they should not have featured as reasons in support of genuine operational requirements not to appoint Ms Travers to the higher duties position.

### **Consideration**

- [16] As there was no review conducted, a deemed decision was made not to appoint Ms Travers to a higher classification 28 days following the Directive coming into effect on 29 September 2020. I accept there may have been genuine operational requirements involving machinery of government changes that were in place at the time of the deemed decision. However on 18 December 2020 by way of letter, a further decision was provided to Ms Travers and it is this decision that is subject of this appeal.
- [17] The December decision was provided to Ms Travers some considerable time after her request for review and the deemed decision being made and indicated again that genuine operational requirements prevented appointment to the higher classification level. However this time it was due to the project Ms Travers was acting in being under review. It is clear that this review is ongoing and I note the submission of the employer in that regard.
- [18] Due to the length of time between the date of review eligibility and delivery of the decision, Ms Travers was potentially disadvantaged by what occurred in the meantime, it is for this reason the decision was unfair and unreasonable.
- [19] Noting the submissions that are before me, it is clear that the Department do not know what the situation for the project Ms Travers is working on in the longer term. I accept the submission that there are CBRC processes underway and a State budget to be delivered in a few months and that these factors mean that if a fresh review were to be undertaken straight away, it would likely result in a decision with similar reasons to those provided to Ms Travers in the decision subject of this review.
- [20] I also note submissions of Ms Travers that many parts of her role are not directly related to the grants program and are, in fact, ongoing and are important work of the government, highlighting the appointment of a Minister for Investment and the ongoing commitment of the government in this area.
- [21] Having heard from the parties and considering their shared position as to a fair way forward arising from this appeal, I order that the decision of 18 December 2020 is set aside and a fresh review is to be undertaken by 1 June 2021.