

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Ellison v State of Queensland (Queensland Health)*
[2022] QIRC 174

PARTIES: **Ellison, Simone**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO.: PSA/2022/379

PROCEEDING: Public Service Appeal – Promotion decision

DELIVERED ON: 24 May 2022

MEMBER: McLennan IC

HEARD AT: On the papers

ORDER: **The appeal is dismissed for want of jurisdiction.**

CATCHWORDS: PUBLIC SERVICE – CLASSIFICATION,
PROMOTION OR TRANSFER – public service
appeal – appeal against a promotion decision –
where the appellant unsuccessfully applied for a
position – where appellant is employed on a
casual basis – appeal dismissed

LEGISLATION: *Industrial Relations Act 2016* (Qld) s 562B, s
562C

Public Service Act 2008 (Qld) s 8, s 9, s 27, s 28,
s 194, s 214B

Directive 07/20 Appeals cl 5

Directive 12/20 Recruitment and Selection

CASES: *Brandy v Human Rights and Equal Opportunity*
Commission (1995) 183 CLR 245

Goodall v State of Queensland (Supreme Court of
Queensland, Dalton J, 10 October 2018)

Reasons for Decision

Introduction

- [1] Ms Simone Ellison ('the Appellant') is employed by the State of Queensland (Queensland Health) ('the Respondent') as a Registered Nurse (NG5) within the Gold Coast Mental Health Service, Gold Coast University Hospital ('GCUH'), Gold Coast Hospital and Health Service ('GCHHS').
- [2] Relevantly, the Appellant has been employed on a casual basis since November 2021.¹
- [3] The Appellant applied for the position of Clinical Nurse, Inpatient Mental Health Units (NG6) within the Gold Coast Mental Health Service, GCUH. Though she was shortlisted for interview, the Appellant was unsuccessful in obtaining the promotional position.
- [4] By appeal notice filed on 14 March 2022, the Appellant appeals the promotion decision of the Respondent, pursuant to ch 7 of the *Public Service Act 2008* (Qld) ('the PS Act').

Appeal principles

- [5] The appeal must be decided by reviewing the decision appealed against.² As the word 'review' has no settled meaning, it must take its meaning from the context in which it appears.³ An appeal under ch 11 pt 6 div 4 of the *Industrial Relations Act 2016* (Qld) ('the IR Act') is not by way of rehearing,⁴ but involves a review of the decision arrived at and the associated decision making process.
- [6] The stated purpose of such an appeal is to decide whether the decision appealed against was fair and reasonable.⁵ The issue for determination is whether the promotion decision of the Respondent was fair and reasonable. Findings which are reasonably open to the decision maker are not expected to be disturbed on appeal.

What decisions can the Industrial Commissioner make?

- [7] In deciding this appeal, s 562C(1) of the IR Act provides that the Industrial Commissioner may:
 - confirm the decision appealed against; or
 - set the decision aside and return the matter to the decision maker with a copy of the decision on appeal and any directions permitted under a directive of the commission chief executive under the PS Act that the Commission considers appropriate.

¹ Appellant's submissions, 24 March 2022, Attachment 'Statement of Service', 22 February 2022.

² *Industrial Relations Act 2016* (Qld) s 562B(2) ('IR Act').

³ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 261.

⁴ *Goodall v State of Queensland* (Supreme Court of Queensland, Dalton J, 10 October 2018), 5 as to the former, equivalent provisions in s 201 of the PS Act.

⁵ IR Act s 562B(3).

Relevant legislative provisions and directives

- [8] Section 562C(2) of the IR Act provides:

In deciding an appeal against a promotion decision, the commission may set the decision aside only if the commission finds that the recruitment or selection process was deficient, having regard to whether the process complied with the *Public Service Act 2008*, a regulation or a directive of the commission chief executive under that Act.

- [9] Section 194(1)(c) of the PS Act relevantly provides that a promotion decision may be appealed against:

194 Decisions against which appeals may be made

- (1) An appeal may be made against the following decisions—
 ...
 (c) a decision to promote a public service officer (a *promotion decision*);
 ...

- [10] Section 196(c) of the PS Act describes who may appeal against a particular decision (emphasis added):

196 Who may appeal

- (c) for a promotion decision – a public service officer aggrieved by the decision who is entitled to appeal under a directive of the commission chief executive.

- [11] Section 214B of the PS Act states that the commission chief executive must make a directive that makes provision for:

- (i) the decisions, if any, against which an appeal may be made; and
 (ii) the persons who are entitled to appeal against a decision mentioned in section 194(1); and
 (iii) the directions, if any, the IRC may give under section 208(1)(b); and
 ...

Directive 07/20 Appeals ('Appeals Directive') fulfils the requirement that the commission chief executive must make such directive under s 214B of the PS Act. The particular relevance of the Appeals Directive is explained below at paragraphs [14] – [15] of this Decision.

- [12] Section 27 of the PS Act provides that the merit principle must be applied for an appointment or secondment as a public service employee:

27 The merit principle

- (1) The selection, under this Act, of an eligible person for an appointment or secondment as a public service employee must be based on merit alone (the *merit principle*).
 ...

- [13] Section 28 of the PS Act sets out the merit criteria to be considered when applying the merit principle:

28 Merit criteria

In applying the merit principle to a person, the following must be taken into account—

- (a) the extent to which the person has abilities, aptitude, skills, qualifications, knowledge, experience and personal qualities relevant to the carrying out of the duties in question;
- (b) if relevant—
 - (i) the way in which the person carried out any previous employment or occupational duties; and
 - (ii) the extent to which the person has potential for development.

[14] The Appeals Directive, *Directive 12/20 Recruitment and Selection* ('Recruitment and Selection Directive') and Queensland Health Human Resource Policy Recruitment and Selection ('Recruitment and Selection Policy') are relevant to the determination of the appeal.

[15] Clause 5.2(e) of the Appeals Directive provides that an appeal against a promotion decision may only be lodged if particular conditions are satisfied (emphasis added):

5.2 An appeal may only be lodged by the following persons:

- ...
 - (e) for a decision under section 194(1)(c) of the PS Act (promotion decision)—a tenured general employee or public service officer aggrieved by the decision (an aggrieved officer), provided the following conditions are met:
 - (i) the decision relates to the gazetted promotion of a public service officer or tenured general employee
 - (ii) the aggrieved officer's application to the role being appealed was received on or before the deadline for the receipt of applications or in the case of continuous applicant pools, the application was received prior to the date of distribution to the selection panel for the relevant promotion
 - (iii) the aggrieved officer has sought post-selection feedback in accordance with the provisions of the directive relating to recruitment and selection, and
 - (iv) for an appeal against a promotion from a limited advertising process conducted in accordance with the directive relating to recruitment

Consideration

[16] The term "tenure" is defined as "the right to remain permanently in a job".⁶

[17] In the Appeal Notice filed 14 March 2022, Ms Ellison checked all the boxes in Part A of the form, including that confirming "I am a tenured public service employee." That form clearly advertises that "If all boxes above are not ticked you are not entitled to lodge an appeal. Your application will not be processed."⁷

[18] The requirement for a person appealing a promotion decision to be either "a public service officer" or "a tenured general employee" is also contained in the Public Service Appeal Guide, publicly available on the QIRC website. I note that email correspondence to the parties sent from the Industrial Registry on 15 March 2022 includes a link to the Public Service Appeal Guide.

⁶ According to the Cambridge Dictionary.

⁷ Appeal Notice, 14 March 2022, 2.

[19] When the Appellant filed submissions on 24 March 2022, she attached a Statement of Service. That document evidenced that the Appellant has in fact been employed on a casual basis from 15 November 2021.⁸

[20] The Respondent raised a jurisdictional objection to the appeal in its submissions filed 6 April 2022, in these terms:

Gold Coast Hospital and Health Service (GCHHS) rejects Ms Ellison's appeal and submits that it must fail on the basis she does not have standing to bring a Public Service Appeal. That standing to appeal a promotion decision under section 194(1)(c) of the Public Service Act 2008 only exists if the appellant is a tenured general employee or public service officer. Ms Ellison is neither, as she is employed by GCHHS on a casual basis only.

The Appellant does not hold a permanent role with GCHHS. Her last permanent role, in another Hospital and Health Service, ended on 25 September 2019. Since 21 October 2019 she has been engaged by GCHHS in various temporary and casual roles.⁹

[21] As a consequence, the Respondent submitted that the appeal must fail on jurisdictional grounds.

[22] In reply, the Appellant asserted that:

The statements by the Respondent demonstrate not only a flaw in GCHHS knowledge of obligations under the *Public Service Act*, 2008 but also a preference not to answer to the appeal which demonstrates a lack of respect for human rights of employees. Furthermore, all employees must be treated fairly and equitably (*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 the R & S Directive, to give proper consideration to human rights.*"

The *Public Service Act 2008 – Chapter 1, Part 2, Division 1, Section 9*, states: that a casual employee is a "Public Service Employee and employees for the Industrial Relations Act" and therefore has the right to appeal. Specifically,

"Public service employees include:

- (1) *A person is a public service employee if the person is employed under this Act as –*
 - (a) *a public service officer; or*
 - (b) *a general employee; or*
 - (c) *a fixed term temporary employee; or*
 - (d) *a casual employee.*
- (2) *Public service employees are employees for the Industrial Relations Act 2016." (Public Service Act, 2008)¹⁰*

[23] With respect to the Appellant's submission above, I would firstly acknowledge the Respondent did in fact proceed to elaborate the reasons why the "process undertaken for the subject Clinical Nurse role within Adult Inpatient Mental Health was not flawed, unfair or unreasonable..."¹¹ In doing so, the Respondent has explained the basis upon which candidate selections were made and provided a response to the Appellant's claims.

[24] Secondly, the Appellant has argued above that a "casual employee" is also a "public service employee" under the Act "and therefore has the right to appeal". However, a

⁸ Appellant's submissions, 24 March 2022, Attachment 'Statement of Service', 22 February 2022.

⁹ Respondent's submissions, 6 April 2022, 1 [1] – [2].

¹⁰ Appellant's reply submissions, 11 April 2022, 1 [1].

¹¹ Respondent's submissions, 6 April 2022, 1 [3].

"public service employee" is not the same as a "public service officer". Section 9(1) of the PS Act clearly suggests there is a difference by differentiating between "a public service officer" and a "casual employee" with the use of "or". Further, s 8 of the PS Act provides that a "public service officer" is a person employed under the PS Act as a chief executive, a senior executive or an officer of another type. Therefore, although the Appellant may be a "public service employee" I am not satisfied that she is a "public service officer" that is eligible to appeal a promotion decision.

[25] Further, in spite of that, it remains the fact that a casual employee is not a "tenured" one. That is the critical point the Appellant has missed in my view.

[26] I am not satisfied that the requirements of cl 5.2(e) of the Appeals Directive have been met, so this matter cannot proceed to appeal.

[27] For the reasons above, I will dismiss this appeal for want of jurisdiction.

Order

[28] I make the following order:

- 1. The appeal is dismissed for want of jurisdiction.**