

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Zhao v State of Queensland (Queensland Health)* [2022] QIRC 185

PARTIES: **Zhao, Ming**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO: PSA/2022/302

PROCEEDING: Public Service Appeal – Appeal against a conversion decision

DELIVERED ON: 27 May 2022

MEMBER: Pidgeon IC

HEARD AT: On the papers

OUTCOME: **The decision of 11 February 2022 is set aside and substituted with a decision that Ms Zhao's temporary employment be converted to tenure.**

CATCHWORDS: PUBLIC SERVICE - EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY - PUBLIC SERVICE APPEAL - where the appellant requested a review for conversion to permanent employment - whether there is a continuing need for the appellant to be employed in the role or a role substantially the same - whether there are genuine operational requirements preventing conversion - whether employment on tenure is viable or appropriate

LEGISLATION: *Public Service Act 2008*, s 149B
Industrial Relations Act 2016, s 562C
Directive 09/20: Fixed term temporary employment

Reasons for Decision

Appeal Details

[1] Ms Ming Zhao (the Appellant) is currently employed by the State of Queensland (Queensland Health) as a Radiation Therapist at Princess Alexandra Hospital (PAH) in the Metro South Hospital and Health Service (MSHHS). Ms Zhao has been employed by the State of Queensland since 14 February 2018.

[2] In a decision dated 11 February 2022, Renee Staats, Manager, Human Resources, advised Ms Zhao her employment will remain on a fixed term temporary basis:

The decision not to permanently appoint you is based on continuing staffing needs at this time. Specifically, you have been engaged as a fixed term temporary employee where a temporary vacancy has been created due to the following genuine operational reasons:

- Backfill of tenured employees on parental leave and/or secondment;
- Backfill of tenured employees returning to work part-time from a period of parental leave.

You are currently backfilling a temporary vacancy created by the substantive occupant who is currently on parental leave and/or secondment for a known period. At the cessation of this period, the substantive occupant will be returning to their position. This type of coverage is contemplated in the directive as to a reason a person's employment should remain temporary.

Furthermore, there is no continuing need for you to perform a role that is substantially the same as the duties you were previously undertaking as all alternative roles have been considered.

[3] Ms Zhao filed an appeal with the Industrial Registry on 21 February 2022. I am satisfied Ms Zhao is a person who may appeal, and the appeal was lodged within the 21 day appeal period.

Legislative Framework

[4] Section 149B of the *Public Service Act 2008* (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.

...
- (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) 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.

148 Employment of fixed term temporary employees

- (1) A chief executive may employ a person (a fixed term temporary employee) for a fixed term to perform work of a type ordinarily performed by a public service officer, other than a chief executive or senior executive officer, if employment of a person on tenure is not viable or appropriate, having regard to human resource planning carried out by the chief executive under section 98(1)(d).
- (2) Without limiting subsection (1), employment of a person on tenure may not be viable or appropriate if the employment is for any of the following purposes—
 - (a) to fill a temporary vacancy arising because a person is absent for a known period;
Examples of absences for a known period—

approved leave (including parental leave), a secondment
 - (b) to perform work for a particular project or purpose that has a known end date;
Examples—

employment for a set period as part of a training program or placement program
 - (c) to fill a position for which funding is unlikely or unknown;
Examples—

employment relating to performing work for which funding is subject to change or is not expected to be renewed
 - (d) to fill a short-term vacancy before a person is appointed on tenure;
 - (e) to perform work necessary to meet an unexpected short-term increase in workload.
Example—

an unexpected increase in workload for disaster management and recovery
- (3) Also, without limiting subsection (1), employment on tenure may be viable or appropriate if a person is required to be employed for a purpose mentioned in subsection (2) on a frequent or regular basis.
Example—

an ongoing requirement to backfill multiple absences because of approved leave (including parental leave) or secondments
- (4) The employment may be full-time or part-time.
- (5) A person employed under this section does not, only because of the employment, become a public service officer.
- (6) The commission chief executive may make a directive about employing fixed term temporary employees under this section.

Directive 09/20: Fixed term temporary employment (the Directive)

- [5] 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?

- [6] 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.

Grounds of appeal

- [7] Ms Zhao's appeal notice states that the reason for her appeal is that she has been working continuously as a full-time Radiation Therapist since 2018 and meets the conversion criteria in that she has met the merit principle and believes there is a continuing need for her to perform the role.
- [8] Ms Zhao also mentions in her appeal notice that she is contributing to the department development projects and states details of these can be provided if required.

Respondent's submissions

Background

- [9] The Respondent says that since 8 January 2018, Ms Zhao has been employed in multiple fixed term engagements ranging in length. From 8 January 2018 to 3 February 2019, Ms Zhao was engaged as a Graduate Radiation Therapist.
- [10] Since Ms Zhao advanced to the position of Radiation Therapist in February 2019, she has been engaged on a fixed term basis primarily to backfill permanent employees who

are on leave. The Respondent says that each of these employees have retained the entitlement to return to their substantive positions. When the employee returns, the hours Ms Zhao is backfilling will no longer be required.

- [11] Ms Zhao's current contract ends on 29 January 2023. The Respondent states that the review of Ms Zhao's employment status was undertaken in accordance with the Directive. The Respondent says that cl 8.1 of the Directive outlines the factors that must be considered when determining conversion: continuing need to be employed in the role or a role which is substantially the same; merit; any requirements of an industrial instrument which need to be complied with; and the reasons for each decision previously made or deemed to be have been made under sections 149A or 149B in relation to the employee.

Merit

- [12] The Respondent acknowledges Ms Zhao's merit for the position.

Continuing Need

- [13] The Respondent says that the employee Ms Zhao is currently backfilling has indicated an intention to return to the workplace around late January or early February 2023. The Respondent says that this is the operational requirement which prevented Ms Zhao's conversion and that this is what was communicated to her in the letter of 11 February 2022.
- [14] The Respondent says that whether Ms Zhao is offered another fixed term engagement beyond the current fixed term contract is contingent on whether another employee accesses leave.
- [15] The Respondent says that while Ms Zhao's appeal notice notes she is taking part in departmental development projects, she has provided no further information with regard to that statement.
- [16] The Respondent says that there is an ongoing need for the duties Ms Zhao is currently undertaking to be performed but that there is not an ongoing need for Ms Zhao to perform them, as a permanent employee is already employed to perform the duties on an ongoing basis.
- [17] The Respondent says that it explored other opportunities in a same or similar role for Ms Zhao within other work areas of the PAH and within other facilities under the control of MSHHS, but that at the time of the review, there were no ongoing roles of a permanent nature available that were suitable to Ms Zhao.
- [18] The Respondent says that if a permanent vacancy arises within Ms Zhao's work unit, that permanent vacancy will be filled either by a closed merit recruitment process open to fixed term employees in the work unit with fixed term service or two years or more, or by the conversion of a fixed term employee to permanent where appropriate when accounting for the requirements of the Directive.

Temporary nature of Ms Zhao's employment

- [19] The Respondent points to s 148(2) of the PS Act and says that the non-exhaustive list of circumstances that indicate an appointment should be on a fixed term temporary basis rather than a permanent basis specifically includes a situation where an employee is engaged to fill a vacancy arising because a person is absent for a known period.
- [20] At the time of the review, Ms Zhao occupied a position that was temporarily vacant because the permanent incumbent is on leave for a known period.
- [21] The Respondent says that it is unable to convert an employee to permanency where the role already has an incumbent and that incumbent employee is eligible to, and has indicated an intention to, return to their substantive position when their leave concludes. This is a genuine operational reason not to convert Ms Zhao's employment to permanent.

Submissions made on behalf of Ms Zhao by United Voice

- [22] The Appellant says that the circumstances of Ms Zhao's employment are exactly what is contemplated in s 148(3) of the PS Act.
- [23] The Appellant says that the decision not to convert Ms Zhao's employment is unfair and unreasonable.

Continuing need for someone to be employed in the role or a role which is substantially the same

- [24] The Appellant says that since 14 February 2018, Ms Zhao's contract has been extended multiple times but it is unclear if this has consisted of extensions of the same position or new contracts to backfill for different employees.
- [25] With regard to the submissions of the Respondent at [18] above, the Appellant says that the Directive does not allow for the Respondent to use a closed merit process where there are multiple employees eligible for review.
- [26] The Appellant says that there is a continuing need for the work of Radiation Therapists in PAH and that conversion is viable and appropriate due to the multiple ongoing temporary engagements available at PAH and MSHHS.
- [27] The Appellant says that contrary to any evidence, the Respondent has adopted a position that the engagement is temporary in nature. Further to this, the Appellant says that the Directive does not require there to be a substantive or budgeted vacancy available for conversion to occur.

Mandatory content to be provided in the decision

- [28] The Appellant says that the decision-maker has omitted to include mandatory content required by s 149B(6) of the PS Act in its decision of 11 February 2022. The Appellant says that the decision maker may not have given accurate reasons for the decision not to convert the appellant's employment to permanent. The decision-maker did not state the

total period for which Ms Zhao has been continuously employed and did not state how many times Ms Zhao's employment has a fixed term temporary employee has been extended.

- [29] The Appellant submits that the decision letter fails to provide what was done to identify potential roles, what roles were considered, or any evidence, findings or analysis as to whether there was a continuing need for Ms Zhao to be employed in the role or a role substantially the same. The Appellant says that cl 8.4 of the Directive and s 27B of the *Acts Interpretation Act 1954* require the provision of material findings of fact and evidence relied upon.
- [30] The Appellant says it is concerned that the Respondent only considered roles that were substantively vacant rather than the mandatory consideration of whether there was a continuing need for someone to be employed in her role or a role substantially the same.
- [31] The Appellant says that the decision does not state what the 'genuine operational requirements' it refers to are. Given the public service principles in s 25 of the PS Act and the purpose of the Directive 9/20 include that 'employment on tenure is the default basis of employment in the public service', the Appellant says that it is unfair to decline conversion without articulating the genuine operational requirements which would displace the default position.
- [32] The Appellant says that the legal standard of reasonableness is to be considered by reference to the subject matter, scope and purpose of the statute conferring the power and its real objective.¹
- [33] The Appellant submits that the decision-maker erred by failing to consider all relevant factors, specifically; the requirements for agencies to proactively manage their workforce planning to reduce their reliance on casual and temporary employees; and the existence of an extensive review process designed to facilitate conversion of casual and temporary employees to permanent positions, which is subject to appeal to ensure compliance.

There is an ongoing need to employ Ms Zhao

- [34] The Appellant says that the Respondent was required to consider whether there is a continuing need to employ Ms Zhao in the same role, not necessarily the same position. There is an ongoing need to employ Ms Zhao in a role that is substantially the same given the increased workloads, requirements of the Respondent, requirements of backfilling and the existence of multiple ongoing temporary engagements available in PAH and MSHHS.
- [35] The Appellant understands that there is approximately 80 FTE working in Radiation Oncology PAH and that approximately 10 of this 80 FTE are currently engaged as fixed term temporary employees.
- [36] The Appellant points to department development projects Ms Zhao has contributed to, including two projects she says are ongoing/continuing:

¹ *Gilmour v Waddell & Ors* [2019] QSC 170, [207]-[210]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [63]-[76].

- a) An evaluation of modern radiotherapy planning, treatment delivery and verification processes in oesophageal cancer patients – A single institutional analysis (ongoing project).
- ...
- d) Mandarin translation for ROPAH Patient Guides (a continuing project)

Genuine Operational Reasons

- [37] With reference to Merrell DP's decision of *Morison*,² the Appellant says that no 'authentic' reasons prevented MSHHS from converting the employment of Ms Zhao.

Further submissions of Respondent

- [38] MSHHS confirms that each of Ms Zhao's engagements with MSHHS have been to backfill a different temporary need, including a temporarily funded position, and backfill for different permanent employees accessing leave or a temporary reduction in hours on return from parental leave. The Respondent says that this is evidence that Ms Zhao's fixed term engagements are temporary in nature and do not demonstrate an ongoing need for Ms Zhao to perform these duties.
- [39] With regard to the Appellant's contention that the Directive does not allow for the Respondent to use a closed merit process where there are multiple employees eligible for review, the Respondent clarifies that it does not use that process where multiple employees are eligible for conversion.
- [40] The Respondent says that section 8.4.2 (Advertising of Non-Base Grade Positions) of *Queensland Health Human Resources Policy Recruitment and Selection* (Policy B1) provides that a closed merit process for non-base grade positions will be applied where appropriate. If a permanent vacancy arises in Ms Zhao's current work unit, MSHHS may fill the position pursuant to section 8.4.2 of Policy B1 or by conversion in accordance with the Directive, subject to eligibility.
- [41] With regard to the projects Ms Zhao is involved in, the Respondent says that this is not an indication of a continuing need for Ms Zhao to perform these roles as a permanent employee is already engaged to undertake this role. Further to this, the purpose of each project is to complete a defined task within the Radiation Oncology unit at the PAH and there is no indication of an ongoing need for these tasks to be undertaken beyond their completion.
- [42] With regard to the Appellant's contention that the Respondent has not provided any detail around the steps undertaken to determine whether there is a need for Ms Zhao to be employed in a role the same or substantially the same, the Respondent confirms that at the time of the decision, a search was undertaken and no similar roles or a permanent or ongoing nature were available within any of the facilities under the control of MSHHS and this was communicated to Ms Zhao in the letter of 11 February 2022.

² *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203.

Consideration

- [43] The Appellant states that the letter does not comply with s 149B(6). In particular, the Appellant says that the letter: does not provide adequate reasons for the decision; does not list the total period for which the Appellant has been employed; and did not state how many times the Appellant's employment as a fixed term temporary employee has been extended.
- [44] Having reviewed the letter, I am satisfied that the letter gives reasons for the decision. It is clear that the conversion has been refused on the grounds that the employee Ms Zhao is backfilling is returning from leave in early 2023. Further to that, the letter states that a search of other roles the same or similar has not identified a vacancy for Ms Zhao to be appointed to.
- [45] I am also satisfied that the letter states the total period Ms Zhao has been continuously employed. At the bottom of page one of the letter under the heading 'merit', the letter states: 'Thank you for your performance in the role over the period 19 February 2018 to 4 February 2022'. While the letter does not specifically state that this is the total period for which Ms Zhao has been employed in the department; Ms Zhao's material lists her start date with the employer as the beginning of 2018. It is clear that the reference in the letter is to the total period Ms Zhao has been employed in the role.
- [46] The letter does not comply with s 149B(6) in that it does not list how many times Ms Zhao's employment as a fixed term temporary employee or casual employee has been extended. This is not addressed in the Respondent's submissions. I have been provided with a list of Ms Zhao's temporary appointments at Exhibit B:

Commenced employment: 8 January 2018

Fixed term temporary contract: 14/01/2018 – 30/01/2019

Fixed term temporary contract: 30/01/2019 – 30/01/2020

Fixed term temporary contract: 30/01/2020 – 30/01/2021

Fixed term temporary contract: 30/01/2021 – 30/01/2022

Fixed term temporary contract: 30/01/2022 – 30/01/2023

- [47] The Appellant states that it is unclear if each extension is of the same position or if the extensions were new contracts to backfill for different employees.³ In its further submissions, the Respondent confirms that each of Ms Zhao's engagements have been 'to backfill a different temporary need, including a temporarily funded position, and backfill for different permanent employees accessing leave or a temporary reduction in hours on return from parental leave. The Respondent says that this is evidence that the fixed term engagements are temporary in nature and do not demonstrate an ongoing need for Ms Zhao to perform the duties.

³ Submissions of Appellant filed 21 March 2022, paragraph 9(b)(ii).

- [48] As the decision letter does not list the previous temporary engagements Ms Zhao has undertaken, it is unclear to me whether the number and nature of Ms Zhao's continuing temporary engagements was considered by the decision maker.
- [49] It seems to me that rather than evidence that there is no ongoing need for Ms Zhao to perform the duties, continuing fixed term temporary contracts over a period of five years (at the end of the current temporary appointment) are a good indication that there is a continuing need for Ms Zhao to undertake the role or a role substantially the same. Even if I were to consider Ms Zhao's continuing employment period as commencing at the end of her first year of employment when she advanced from Graduate Radiation Therapist to the position of Radiation Therapist, at the conclusion of Ms Zhao's current fixed term temporary engagement, she will have been working continuously for four years.
- [50] I understand that s 148(2) of the PS Act lists backfilling a temporary vacancy because a person is absent for a known period as an example of where employment of a person on tenure may not be viable or appropriate. However, I also note s 148(3) which states that employment on tenure may be viable or appropriate if a person is required to be employed for purposes listed in s 148(2) on a frequent or regular basis.
- [51] Ms Zhao is now in her fifth year of temporary employment in the position. If she had only been backfilling the one employee on parental leave and that employee had a known return date, there may be a genuine operational reason preventing conversion. However, in Ms Zhao's case, she has backfilled a number of employees on a consistent basis for a period of some years.
- [52] In the circumstances, I do not think it was fair and reasonable for the decision maker to give consideration only to the role Ms Zhao is currently undertaking in determining whether there is a continuing need for her to perform the role. Her history of temporary appointments is relevant.
- [53] Ms Zhao's employment history demonstrates a continuing need to employ her over a four to five year period. I find it is more likely than not that there will be a continuing need for Ms Zhao to undertake the role. On that basis, it was not reasonable for the decision maker to determine that there is no continuing need for Ms Zhao to perform her role or a role substantially the same.
- [54] The PS Act provides that if the employee meets the merit requirement and there is a continuing need for them to perform the role, their employment should be converted to tenure unless precluded by the genuine operational requirements of the Respondent. The letter provided to Ms Zhao states that 'the reason for this decision is that it is not viable or appropriate to convert you having regard to genuine operational requirements which prevents your conversion at this time' and then goes on to inform her that there is no continuing need for her employment.
- [55] When applying the PS Act or Directive, the decision maker is first required to consider whether there is a continuing need for someone to be employed in the role or a role that is substantially the same. In this case, the decision maker determined that there was not a continuing need for Ms Zhao to be employed in the role. Having decided that there was no continuing need, the decision maker was not required to consider the genuine operational requirements of the Respondent per s 149A(3). It appears that the decision

maker has characterised the circumstances in which it has determined there was no continuing need for Ms Zhao to be employed in the role or any of the alternative roles it considered as its 'genuine operational requirement' to not employ her.

- [56] The Respondent has made submissions regarding the genuine operational requirements it says precluded it from offering to convert to employment on tenure. The PS Act provides that public service employment is to be directed towards promoting employment on tenure as the default basis of employment for employees in the public service.⁴ Nothing put forward in the submissions before me represents a genuine operational requirement which services to displace the principle that employment on tenure is the default basis of employment.
- [57] I accept that Ms Zhao cannot be employed in the particular position she is currently backfilling as it has a substantive position holder with a right to return to work from parental leave. I also accept that when the Respondent undertook a review of other positions, it did not find an existing vacancy to offer Ms Zhao. However, an existing vacancy is not a requirement to enable conversion. In this case, having established, based on her employment history, that there is a continuing need for Ms Zhao to perform the role, or a role substantially the same, and in the absence of genuine operational requirements precluding appointment on tenure, Ms Zhao's temporary employment should be converted to permanent.
- [58] The decision of 11 February 2022 is set aside and substituted with a decision that Ms Zhao's temporary employment be converted to tenure.

⁴ PS Act, s 25(2)(d).