

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Davies v State of Queensland (Queensland Health)* [2022] QIRC 020

PARTIES: **Davies, Sandra**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO: PSA/2021/436

PROCEEDING: Public Service Appeal - Conversion Decision

DELIVERED ON: 28 January 2022

MEMBER: McLennan IC

HEARD AT: On the papers

ORDERS: **That pursuant to s 562C(1)(c) of the *Industrial Relations Act 2016 (Qld)*:**

- 1. The appeal is allowed.**
- 2. The matter be given to a decision maker with a copy of this Decision.**
- 3. The decision maker conduct a review of Mrs Davies' employment status in accordance with *Directive 09/20 Fixed term temporary employment* and the *Public Service Act 2008 (Qld)*, including the provision of adequate reasons regarding each of the mandatory criteria prescribed therein.**
- 4. The outcome of the review must be provided to Mrs Davies by 1 February 2022. If Mrs Davies' temporary engagement has been sufficiently extended to afford her the opportunity to appeal that decision, I direct that the**

review be undertaken and communicated within 21 days from the release of this Decision.

CATCHWORDS:

PUBLIC SERVICE – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY – casual and temporary employment – where appellant appealed a deemed decision not to convert her employment status to permanent – where the respondent argued the appellant was not eligible for review under s 149B of the *Public Service Act 2008* – consideration of "continuously employed" – where appellant had been employed under a combination of casual and temporary contracts – where appellant had been continuously employed in the same department for two years– where respondent's failure to commence a review was not fair or reasonable – where respondent's deemed refusal to convert was not fair or reasonable – where decision returned to decision maker to commence review

LEGISLATION AND OTHER INSTRUMENTS:

Acts Interpretation Act 1901 (Cth) s 36

Industrial Relations Act 2016 (Qld) s 451, s 562B, s 562C, s 564, s 567

Public Service Act 2008 (Qld) s 149, s 149A, s 149B, s 194, s 196, sch 4

Directive 08/20 Casual employment cl 3

Directive 09/20 Fixed term temporary employment cl 8, cl 10

CASES:

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

Page v John Thompson and Lesley Dwyer, As Chief Executive Officer, West Moreton Hospital and Health Service [2014] QSC 252

Reasons for Decision

Introduction

- [1] Mrs Sandra Davies (the Appellant) is substantively employed as an OO2 Operational Services Officer within the Casual Pool at Maryborough Base Hospital.¹
- [2] Since 30 October 2019, Mrs Davies has been employed with the Wide Bay Hospital and Health Service (WBHHS) by Queensland Health, State of Queensland (the Department; the Respondent) on a casual basis and in various temporary contracts.²
- [3] On 20 December 2021, the Australian Workers' Union (the AWU) on behalf of Mrs Davies filed an Appeal Notice against the Respondent's deemed decision not to convert Mrs Davies' employment status to permanent pursuant to s 149B(7) of the *Public Service Act 2008* (Qld) (the PS Act).
- [4] In her Appeal Notice and initial submissions, Mrs Davies stated she is employed on a casual basis and indicated "Casual employment, no end date to contract" at the time of filing.³ However, the Respondent's submissions revealed that at the time of filing her Appeal Notice, Mrs Davies was and still is currently employed on a temporary contract that is due to expire on 6 February 2022.⁴ In her reply submissions, Mrs Davies admitted error and accepted the Respondent's submissions in this regard.
- [5] On 22 December 2021, I issued a Directions Order seeking the parties' submissions with respect to the Appeal Notice. The Respondent's submissions were lean by virtue of its argument that Mrs Davies is not yet eligible for review under s 149B of the PS Act.⁵
- [6] In determining whether the decision appealed against was fair and reasonable, I will first decide the following preliminary issues:
1. Was Mrs Davies' employment status eligible for review?
 2. If so, should Mrs Davies' employment status have been reviewed under *Directive 08/20 Casual employment* (Directive 08/20) or *Directive 09/20 Fixed term temporary employment* (Directive 09/20)?
 3. What constitutes the decision subject of this appeal?
- [7] I have carefully considered all submissions and annexed materials. I have determined not to approach the writing of this Decision by summarising the entirety of those submissions but will instead refer to the parties' key positions in my consideration of each question to be decided.

¹ Appeal Notice, 20 December 2021.

² Ibid Attachment 1, [1].

³ Appeal Notice, 20 December 2021.

⁴ Respondent's Submissions, 13 January 2022, 1 [1].

⁵ Ibid [8].

Was Mrs Davies' employment status eligible for review?

[8] The Respondent submits that a review of Mrs Davies' employment status has not yet commenced "as she has not been continuously engaged as a fixed term temporary employee for a period of two (2) years."⁶

[9] In submitting that Mrs Davies' employment status is not yet eligible for review, the Respondent refers to its "statewide Queensland Health Employment Conversion database ("VADER")." VADER is said to monitor and track review dates for employees and records Mrs Davies' due date for review as 24 February 2022.⁷ The Respondent argues that 24 February 2022 marks 2 years post Mrs Davies commencing as a temporary employee in the position of a Cleaner.⁸

[10] Section 149B of the PS Act provides for the "Review of status after 2 years continuous employment" and "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 department for 2 years or more."⁹

[11] Schedule 4 of the PS Act defines "continuously employed" (emphasis added):

...in relation to a person employed in a department for a period, means the person is employed in the department—

- (a) continuously as a fixed term temporary employee for the period; or
- (b) as a casual employee on a regular and systematic basis during the period; or
- (c) continuously as an employee mentioned in subparagraphs (i) and (ii) for the period.¹⁰

[12] Section 149B(7A) of the PS Act relevantly provides:

(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.

[13] Although Mrs Davies was "not engaged" for some weeks over the past two years,¹¹ the Respondent has not contended that she was at any stage "not employed" over the past two years. On that basis, I am satisfied Mrs Davies has been continuously employed by

⁶ Respondent's Submissions, 13 January 2022, 1 [8].

⁷ Ibid

⁸ Ibid [1].

⁹ *Public Service Act 2008* (Qld) s 149B(1).

¹⁰ As noted by the Appellant, I agree that the reference to "(i) and (ii)" appears to be a typographical error that should instead read "(a) and (b)".

¹¹ Respondent's Submissions, 13 January 2022, Annexure marked "WB-01".

the Respondent in a combination of casual and fixed term temporary roles since 30 October 2019.¹² Therefore, s 149B of the PS Act is applicable to Mrs Davies.

- [14] Section 149B(4)(a) and (9)(b) of the PS Act requires the Department's chief executive to make a conversion decision within 28 days from "the end of 2 years after the employee has been continuously employed as a fixed term temporary employee or casual employee in the department". I have already established Mrs Davies was eligible for review under s 149B of the PS Act - the review of her employment status ought to have occurred between 30 October 2021 and 27 November 2021.¹³
- [15] It is concerning that Mrs Davies' eligibility for review was confused and/or missed by WBHHS. The failure to identify Mrs Davies' review eligibility date is not fair or reasonable. I recommend that any future reliance on VADER is carefully crosschecked to avoid future mistakes like this.

Should Mrs Davies' employment status have been reviewed under *Directive 08/20 Casual employment (Directive 08/20)* or *Directive 09/20 Fixed term temporary employment (Directive 09/20)*?

- [16] Although Mrs Davies is substantively employed in the Casual Pool, she was employed on a temporary contract during the period that the review of her employment status should have been conducted pursuant to s 149B(4)(a) and (9)(b) of the PS Act.¹⁴ That is, during the period between 30 October 2021 and 27 November 2021.¹⁵
- [17] Clause 3.4 of Directive 08/20 provides that "Public service employees who are currently employed on a fixed term temporary basis under section 147 or 148 of the PS Act should refer to the fixed term temporary employment directive." On that basis, I accept the Respondent's submission that as Mrs Davies is currently engaged as a fixed term temporary employee, Directive 09/20 is to be applied.

What constitutes the decision subject of this appeal?

- [18] Clause 11.1 of Directive 09/20 provides that "A fixed term temporary employee eligible for review under section 149B has a right of appeal provided for in section 194(1)(e) of the PS Act in relation to a decision not to convert."
- [19] Section 194(1)(e)(i) of the PS Act provides that an appeal may be made against "a decision (each a conversion decision) – under section 149B not to convert the basis of employment of an employee".
- [20] Mrs Davies submits she commenced employment with the Department on 30 October 2019.¹⁶ Notwithstanding, the Department's submissions indicate Mrs Davies was first engaged as a casual employee on 28 October 2019.¹⁷ It is unclear why there is a slight discrepancy between dates, however it may be the case that Mrs Davies became an

¹² Appeal Notice, 20 December 2021, Attachment 1, [1].

¹³ *Public Service Act 2008* (Qld) s 149B(4)(a), (9)(b).

¹⁴ Respondent's Submissions, 13 January 2022 - Annexure.

¹⁵ *Ibid.*

¹⁶ Appeal Notice, 20 December 2021, Attachment 1, [1].

¹⁷ Respondent's Submissions, 13 January 2022 - Annexure.

employee of the Department on 28 October 2019 but did not actually commence work until 30 October 2019. As the difference between dates is minor, I will proceed on the basis that 30 October 2019 was the first date on which Mrs Davies' continuous employment with the Department commenced.

- [21] The Department's chief executive was required to make a conversion decision within 28 days from 30 October 2021. No decision was forthcoming by the Department, presumably because a review had not commenced, and so a decision rejecting conversion was deemed to have occurred 28 days later on 27 November 2021 in accordance with s 149B(7) of the PS Act. That is the decision that forms the subject of this appeal.

Timeframe for appeal

- [22] Section 564(3) of the IR Act requires that an appeal be lodged within 21 days after the day the decision appealed against is given.
- [23] The deemed decision was given on 27 November 2021 - 21 days following this date fell on Saturday, 18 December 2021. Pursuant to s 36(2) of the *Acts Interpretation Act 1901* (Cth):

(2) If:

- (a) an Act requires or allows a thing to be done; and
- (b) the last day for doing the thing is a Saturday, a Sunday or a holiday;
then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday.

Example: If a person has until 31 March to make an application and 31 March is a Saturday, the application may be made on Monday 2 April.

- [24] As the 21 day appeal period ended on Saturday, 18 December 2021, it is acceptable that Mrs Davies filed the Appeal Notice on Monday, 20 December 2021.¹⁸

What decisions can the QIRC Member make?

- [25] Section 562C(1) of the IR Act prescribes that the Commission may determine to either:
- 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 considered appropriate; or
 - Set the decision aside and substitute another decision.
- [26] In accordance with the Directions Order issued on 22 December 2021, the parties filed written submissions.

¹⁸ *Acts Interpretation Act 1901* (Cth) s 36(2).

[27] Pursuant to s 451(1) of the IR Act, no hearing was conducted in deciding this Appeal. The matter was decided on the papers.

Appeal principles

[28] Section 562B(2)(3) of the IR Act provides that the appeal is decided by reviewing the decision appealed against "to decide whether the decision appealed against was fair and reasonable".

[29] The appeal is not conducted by way of re-hearing,¹⁹ but rather involves a review of the decision arrived at by the Department and the associated decision-making process.²⁰

[30] Findings made by the Department, which are reasonably open to it, should not be disturbed on appeal. Even so, in reviewing the decision appealed against, the QIRC member may allow other evidence to be taken into account.²¹

[31] The issue for my determination is whether the decision not to convert Mrs Davies' employment status to permanent was fair and reasonable in the circumstances.²²

Relevant provisions of the PS Act and Directive 09/20

[32] Section 149B of the PS Act relevantly provides:

- (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.
...
- (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.

[33] Section 149A(2)-(3) of the PS Act provides (emphasis added):

- (2) The department's chief executive may offer to convert the person's employment under section 149(3)(b) only if-
 - (a) the department's chief executive considers-
 - (i) there is a continuing need for someone to be employed in the person's role, or a role that is substantially the same as the person's role; and
 - (ii) the person is eligible for appointment having regard to the merit principle; and
 - (b) any requirements of an industrial instrument are complied with in relation to the decision.

¹⁹ *Goodall v State of Queensland* (Supreme Court of Queensland, Dalton J, 10 October 2018), 5; *Industrial Relations Act 2016* (Qld) s 567(1).

²⁰ *Ibid*; *Industrial Relations Act 2016* (Qld) s 562B(2).

²¹ *Industrial Relations Act 2016* (Qld) s 567(2).

²² *Page v John Thompson and Lesley Dwyer, As Chief Executive Officer, West Moreton Hospital and Health Service* [2014] QSC 252, [60] - [61]; *Industrial Relations Act 2016* (Qld) s 562B.

- (3) If the matters in subsection (2) are satisfied, the department's chief executive must decide to offer to convert the person's employment basis to employment as a general employee on tenure or a public service officer, unless it is not viable or appropriate to do so having regard to the genuine operational requirements of the department.

[34] Directive 09/20 relevantly provides:

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.

Was the decision fair and reasonable?

[35] I am required to decide this appeal by assessing whether or not the decision appealed against was fair and reasonable. This involves a review of the decision-making process utilised and the decision arrived at.

[36] Clause 10 of Directive 09/20 requires the following (emphasis added):

10.1 The agency must notify the employee when the agency starts a review of the status of the fixed term temporary employee's employment under section 149B of the PS Act.

10.2 The notification must be in writing and include:

- (a) the name and contact details of the agency contact for the review
- (b) the date by which the decision must be made
- (c) that the employee or their representative may choose to provide a written submission for consideration during the review process
- (d) that if the chief executive does not make a decision within the required period as defined in section 149B(9), the chief executive is taken to have decided not to convert the fixed term temporary employee, and
- (e) that section 194(1)(e) and 196(e) of the PS Act, provide that a conversion decision under section 149B may be appealed, and the timeframe for appeal.

[37] I note that the requirement under cl 10 of Directive 09/20 was not complied with. Therefore, I accept the Respondent failed to commence the review under s 149B in the erroneous belief Mrs Davies was not yet eligible. Had the Respondent thought Mrs Davies was eligible for review, it would have been compelled to issue a notice and conduct the review accordingly.

- [38] As outlined above, a review of Mrs Davies' temporary employment status was not commenced by the Respondent in error. Therefore, the deemed decision to refuse conversion was not based on any consideration of the abovementioned mandatory criteria. Further, the Respondent's subsequent submissions shed little light on those mandatory criteria.
- [39] Clearly the Respondent's failure to commence a review of Mrs Davies' temporary employment status was not fair or reasonable to Mrs Davies. The inevitable deemed refusal that stemmed from the failure to commence a review can therefore not be fair or reasonable. For those reasons, the appeal must succeed. The issue then becomes determining the appropriate remedy.
- [40] In circumstances where I have found that there was no decision maker and the Respondent has effectively stopped short of engaging with the totality of the review process, I have determined that the appropriate remedy is to return the matter to the Respondent with a copy of this decision.²³
- [41] A fresh review should be conducted, with reasons demonstrating full and thorough consideration of the mandatory criteria and the relevant factual circumstances, in accordance with the PS Act and Directive 09/20.
- [42] I acknowledge Mrs Davies' most recent fixed term temporary employment contract is due to expire on 6 February 2022. Therefore, the review is to occur and be communicated to Mrs Davies (via the AWU) by 1 February 2022. That review may result in a different decision being made. In the alternative, it would at least provide Mrs Davies the opportunity for a more fulsome consideration of the circumstances in any subsequent appeal.
- [43] I appreciate that the turnaround time for review is tight - however it is necessary in light of the impending expiry of Mrs Davies' fixed term temporary contract. In the event that the Respondent sufficiently extends Mrs Davies' fixed term temporary employment contract to afford the opportunity to appeal that decision, I will afford the Respondent more time to conduct the review and instead order that the review be conducted within 21 days from the release of this Decision.

Conclusion

- [44] For the reasons detailed above, I find the failure to commence a review of Mrs Davies' employment status and subsequent deemed refusal decision was not fair or reasonable. On that basis, the appeal must succeed and I have determined this Decision should be given to a decision-maker to conduct a review and issue Mrs Davies (via the AWU) with written communication of the outcome and reasoning.
- [45] I order accordingly.

²³ *Goodall v State of Queensland* (Supreme Court of Queensland, Dalton J, 10 October 2018).

Orders:

That pursuant to s 562C(1)(c) of the *Industrial Relations Act 2016* (Qld):

- 1. The appeal is allowed.**
- 2. The matter be given to a decision maker with a copy of this Decision.**
- 3. The decision maker conduct a review of Mrs Davies' employment status in accordance with *Directive 09/20 Fixed term temporary employment* and the *Public Service Act 2008* (Qld), including the provision of adequate reasons regarding each of the mandatory criteria prescribed therein.**
- 4. The outcome of the review must be provided to Mrs Davies by 1 February 2022. If Mrs Davies' temporary engagement has been sufficiently extended to afford her the opportunity to appeal that decision, I direct that the review be undertaken and communicated within 21 days from the release of this Decision.**