

# QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Wood v State of Queensland (Queensland Health)*  
[2022] QIRC 246

PARTIES: **Wood, Maria**  
(Appellant)

v

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

CASE NO: PSA/2022/618

PROCEEDING: Public Service Appeal – Appeal against a  
conversion decision

DELIVERED ON: 23 June 2022

MEMBER: Hartigan IC

HEARD AT: On the papers

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

- (a) the appeal is allowed;
- (b) the decision is set aside;
- (c) the matter is returned to a new decision maker with a copy of this decision on appeal; and
- (d) the decision maker is directed to conduct a fresh review in accordance with the terms of the *Public Service Act 2008* (Qld) and the *Fixed term temporary employment directive (Directive 09/20)* by no later than 4.00pm on 24 June 2022.

**CATCHWORDS:**

PUBLIC SERVICE – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY – public service appeal – appeal against a conversion decision – where appellant's temporary employment was reviewed pursuant to s 149B of the *Public Service Act 2008* (Qld) – where respondent determined not to convert appellant's employment on the basis of genuine operational requirements of the department – consideration of genuine operational requirements – where respondent refers to the reduction of funding in two programs as a genuine operational requirement to not convert the appellant's employment – where decision does not meaningfully address the circumstances surrounding the funding – where decision is deficient – where decision not fair and reasonable – decision appealed against set aside and matter returned to new decision maker with a copy of the decision on appeal and directions to conduct a fresh review by a specified date

**LEGISLATION:**

*Industrial Relations Act 2016* (Qld), s 562B, s 562C  
*Public Service Act 2008* (Qld), s 148, s 149A, s 149B, s 194  
*Fixed term temporary employment directive* (Directive 09/20) cl, 8

**CASES:**

*Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245  
*Finn v State of Queensland* [2021] QIRC 144  
*Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018)  
*Katae v State of Queensland & Anor* [2018] QSC 225

**Reasons for Decision****Introduction**

- [1] Ms Maria Wood is employed by the State of Queensland (Queensland Health) ('the Department'), in the position of Team Leader Senior Psychologist HP4 on a fixed term

temporary basis. Ms Wood's position is within the Health Contact Centre ('the HC Centre').

- [2] Ms Wood commenced in the role of Team Leader Senior Psychologist, Preventive Health HP4 on 20 June 2016, and prior to this, was employed within Allied Health, Health Contact Centre, Queensland Ambulance Service.
- [3] On 24 April 2022, the Department advised Ms Wood that it was conducting a review of her fixed term temporary employment in accordance with s 149B of the *Public Service Act 2008* (Qld) ('the PS Act') and the *Fixed term temporary employment directive (Directive 09/20)* ('Directive 09/20'). Ms Wood provided a written submission for the Department's consideration in the review.<sup>1</sup>
- [4] By letter dated 7 June 2022, the Department advised Ms Wood that she was not being converted to permanent employment and that she would continue to be engaged on a fixed term temporary basis until the natural cessation of her contract, namely 26 June 2022.
- [5] On 15 June 2022, Ms Wood filed an appeal notice in the Industrial Registry appealing the decision of the Department dated 7 June 2022 to not convert her fixed term temporary employment to permanent employment. Ms Wood relies on the following grounds in support of her appeal, as relevantly summarised:
  - (a) the Department has erred in applying s 149A(2)(i) of the PS Act;
  - (b) Ms Wood's employment is not constrained to the *Tackling Indigenous Smoking Program* or the *HCC Schedule 8 Enquiry Service* and has extended across more 'business-as-usual' functions which are likely to be ongoing;
  - (c) Ms Wood does not consider that the changed funding arrangements was a relevant consideration in deciding whether there is a continuing need for someone to be employed in the role;
  - (d) Ms Wood has been employed in the position since 20 June 2016 with no break in service; and
  - (e) Ms Wood is eligible for appointment having regard to the merit principle.
- [6] As noted above, the cessation of Ms Wood's contract is 26 June 2022. Accordingly, the Commission issued expedited directions to determine the matter prior to the contract end date. The directions required the Appellant to file her submissions by 4.00pm on 21 June 2022 and the Respondent to file its submissions by 12 noon on 22 June 2022.

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<sup>1</sup>This written submission is attached to the Respondent's submissions filed on 22 June 2022.

- [7] Both parties complied with the directions.
- [8] The appeal is made pursuant to s 197 of the PS Act, which provides that an appeal under Ch. 7, Pt. 1 of the PS Act is to be heard and determined under Ch. 11 of the *Industrial Relations Act 2016* (Qld) ('the IR Act') by the Queensland Industrial Relations Commission.
- [9] Sections 562B(2) and (3) of the IR Act, which commenced operation on 14 September 2020, replicates the now repealed ss 201(1) and (2) of the PS Act.<sup>2</sup> Section 562B(3) of the IR Act provides that the purpose of an appeal is to decide whether the decision appealed against was fair and reasonable. Accordingly, the issue for my determination in this appeal is whether the decision is fair and reasonable.
- [10] I must decide the appeal by reviewing the decision appealed against. The word 'review' has no settled meaning and, accordingly, it must take its meaning from the context in which it appears.<sup>3</sup> An appeal under Ch. 7, Pt. 1 of the PS Act is not a re-hearing but, rather, involves a review of the decision arrived at and the decision-making process associated with it.<sup>4</sup>
- [11] For the reasons contained herein, I have found that the decision was not fair and reasonable.

### **The decision**

- [12] The decision maker relied on the following reasons in support of its decision:

...

I have considered the requirements of the Public Service Act 2008, the Fixed term temporary employment directive 09/20, and your employment history, including any previous conversion review decisions and your submission. There are two considerations for deciding whether to convert. These are that there is a continuing need for you to perform your role or a role that is substantially the same and you satisfy the merit principle. I have addressed these two aspects below.

#### **Merit**

You have undertaken the following roles in Allied Health, HCC, QAS:

- Telephone Counsellor TMP (004) from 11 March 2010 to 19 June 2016
- Team Leader Senior Psychologist (HP4) from 20 June 2016 to 13 January 2019
- Team Leader Senior Psychologist TMP (HP4) from 14 January 2019 to current date

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<sup>2</sup> See the *Public Service and Other Legislation Amendment Act 2020* (Qld).

<sup>3</sup> *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 261 (Mason CJ, Brennan and Toohey JJ).

<sup>4</sup> *Goodall v State of Queensland* (Unreported decision of the Supreme Court of Queensland, Dalton J, 10 October 2018).

Thank you for your performance in these roles, you have demonstrated over this time that you satisfy the merit requirements for the roles.

#### **Continuing need**

The decision not to permanently appoint you is based on continuing staffing needs at this time. Specifically, my reasons are:

- There is no continuing need for you to perform your current role. Your role was temporarily established to provide Team Leader and Psychologist support for the Allied Health Services, Preventive Health. There has been a reduction in funding for the 2022/2023 financial year for Preventive Health specifically:
  - The cessation of non-recurrent Commonwealth funding for the Tackling Indigenous Smoking program. This funding will come to an end on 30 June 2022 as detailed in the Service Level Agreement. Communications regarding this change were provided on 23 February 2022.
  - The cessation of the HCC Schedule 8 Enquiry Service on 28 February 2022. Communications regarding this change were provided on 20 September 2021, 11 January 2022, 14 February 2022 and 28 February 2022.
- There is no continuing need for you to perform a role that is substantially the same. An environmental scope has been completed of roles across the Department of Health and regrettably, there are no other ongoing roles currently available that have the same or substantially the same capability requirements as the role you have performed over the preceding two years.

#### **Relevant legislation and Directive**

- [13] Section 194 of the PS Act provides for decisions against which appeals may be made and relevantly includes:

##### **194 Decisions against which appeals may be made**

- (1) An appeal may be made against the following decisions –

...

- (a) a decision (each a *conversion decision*) –

- (i) under section 149B not to convert the basis of employment of an employee; or

- [14] Section 148 of the PS Act provides for the employment of fixed term temporary employees and is in the following terms:

##### **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

[15] 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.

[16] Section 149B(5) of the PS Act states that ss 149A(2) and (3) applies to the department's chief executive when making a decision. Relevantly, ss 149A(2) and (3) states:

**149A Decision on review of status**

...

- (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
- (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.

...

- [17] The phrase 'genuine operational requirements of the department' as referred to in s 149A(3) of the PS Act, is not defined in the PS Act. The phrase, in the context of s 149C of the PS Act, was considered by Merrell DP in *Morison v State of Queensland (Department of Child Safety, Youth and Women)*<sup>5</sup> as follows: <sup>6</sup>

...that phrase must take its meaning from the words used in it and the context in which it appears in the PS Act; and consideration of the context includes surrounding provisions, what may be drawn from other aspects of the instrument, the instrument as a whole and it extends to what the instrument seeks to remedy. The same considerations apply to the construction of the same phrase in cl 6.2(a) of the Directive.

The adjective 'genuine' relevantly means '... being truly such; real; authentic.' The phrase 'operational requirements of the department' is obviously a broad term that permits a consideration of many matters depending upon the particular circumstances of the department at a particular time. In considering the context of s 149C(4A)(a) of the PS Act, the chief executive of a department, under the PS Act, is responsible for, amongst other things:

- managing the department in a way that promotes the effective, efficient and appropriate management of public resources;
- planning human resources, including ensuring the employment in the department of persons on a fixed term temporary or casual basis occurs only if there is a reason for the basis of employment under the PS Act

- [18] Directive 09/20 came into effect on 25 September 2020. Directive 09/20 applies to public service employees who are employed on a full-time or part-time fixed term temporary basis under ss 147(2)(a) or 148 of the PS Act.
- [19] Directive 09/20, amongst other things, highlights sections of the PS Act which deal with the employment and conversion of fixed term employees and sets out procedures for reviews and requirements for decisions.
- [20] Clause 8 of Directive 09/20 relevantly requires a decision on a review of status to address certain matters as follows:

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

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<sup>5</sup> [2020] QIRC 203.

<sup>6</sup>Ibid, [37] - [38].



- 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.

...

8.4 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*,<sup>12</sup> 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).

### **Health Contact Centre**

- [21] The HC Centre is a virtual health care provider staffed by nurses, various health practitioners, counsellors, and several business and operational team members. The HC Centre provides confidential health assessments, advice and information services to customers in Queensland on a 24/7 basis.
- [22] The Department submits that the HC Centre receives mainly non-recurrent funding to deliver a number of health programs from either the commonwealth or state governments. The Department submits that the temporary positions in the HC Centre, for example, the Team Leader role which Ms Wood is employed in, have had various sources of funding. The Department submits that the non-recurrent funding involves the yearly negotiation of service delivery agreements for each program, and that the Team Leaders are both aware of and involved in this process, including receiving communication on several dates in 2021 and the start of 2022. The Department contends that it was communicated to Ms Wood that the funding for the *Tackling Indigenous Smoking Program* and the *HCC Schedule 8 Enquiry Service* program would be ceasing on 30 June 2022 and 28 February 2022 respectively, as per the service agreements.
- [23] The Department further submits that in May 2021, permanent funding was secured for the Team Leader Psychologist, Preventive Health role and that Ms Wood applied for this position but was ultimately unsuccessful.
- [24] Ms Wood submits, to the best of her knowledge, that her position is substantively vacant and not tied to any funding type.

### Whether the decision was fair and reasonable

- [25] The decision addresses the three matters that must be considered, including whether there is an ongoing need for Ms Wood to be employed in the role, or in a role that is substantially the same, Ms Wood's merit, and the genuine operational requirements of the Department. Ms Wood's merit is not an issue in this matter.

#### *Continuing need*

- [26] As noted above, the PS Act, together with cl 8 of Directive 09/20, requires the decision maker, when determining whether to convert an employee to permanent under s 149B of the PS Act to consider, inter alia, whether there is a continuing need for the employee to be employed in a role, or a role that is substantially the same.
- [27] Ms Wood submits that, s 149A(2)(i) of the PS Act requires a consideration of whether 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 that the decision maker has not considered 'factors which would consider that there is a continuing need for [Ms Wood] to perform the work that [she has] performed for more than six years, on a continuous fixed term basis.' Additionally, Ms Wood submits that 'there is no consideration of the work itself required of the Team Leader position, irrespective of its funding source which is a matter of contention later.' Ms Wood relies on the findings of *Katae v State of Queensland & Anor*<sup>7</sup> ('Katae') in this regard.
- [28] In the matter of *Katae*, his Honour Crow J, made findings in respect of the interpretation of clauses 9.6(a) of *Temporary employment (Directive 08/17)*. Clause 9.6(a) is in the following terms:

When reviewing the status of a temporary employee's employment and deciding whether their employment is to be converted to permanent, the chief executive of an agency must consider the following criteria:

- (a) whether there is a continuing need for the person to be employed in the role, or a role which is substantially the same, and the role is likely to be ongoing; and (emphasis added)

- [29] The findings in *Katae* relate specifically to the second element of cl 9.6(a) of *Temporary employment (Directive 08/17)*, namely, whether 'the role is likely to be ongoing'.
- [30] Ms Wood's employment was reviewed in accordance with the current directive, namely, Directive 09/20. Directive 09/20 does not impose an obligation on the decision

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<sup>7</sup> [2018] QSC 225.

maker to consider whether 'the role is likely to be ongoing' in making a determination to convert an employee to permanent.

- [31] The Department submits that the decision maker used the terminology as provided for in Directive 09/20 and the PS Act and specifically, whether 'there is a continuing need for the person to be employed in the role or a role that is substantially the same'.
- [32] Ms Wood submits that she is aware that a colleague engaged in an identical Team Leader, Allied Health HC Centre role has been extended in their role and further, an employee who has been engaged to fill Ms Wood's role, whilst she is currently accessing an extended period of leave, has been offered a further temporary contract in the role.
- [33] The Department submits that there is only one Team Leader Psychologist role within the Department and that whilst there is a continued need for the role, the resourcing requirements are 2.66 Full-Time Equivalent ('FTE'), of which 2 FTE is substantively occupied. The Department acknowledges that whilst previously, there has been a higher requirement for FTE, this funding has been reduced and contends that Ms Wood is aware there is uncertainty with funding and that backfill is currently being used to ensure that the HC Centre provides the agreed levels of service.
- [34] Ms Wood submits that the decision maker has relied on two sources of funding reduction to conclude that there is no continuing need for Ms Wood to perform the role. Ms Wood submits that the decision maker has failed to articulate why the cessation of the programs referred to in the decision, namely *Tackling Indigenous Smoking Program* and the *HCC Schedule 8 Enquiry Service* impacts the continuing nature of her role, having regard to the fact that Ms Wood's work has never been specifically tied to those programs.
- [35] Ms Wood submits that the decision maker did not provide evidence of any particular resourcing strategy and how such strategy may be impacted if she were converted to permanent employment. In this regard, Ms Wood refers to the findings of IC McLennan in *Finn v State of Queensland*<sup>8</sup> regarding the consideration of budget in conversion requests:

101. It is an inherent requirement of converting any temporary employee to permanency that there will be budgetary reallocations, backfilling requirements and the like. There is no indication that the difficulties faced by the Respondent in this instance would be any different than those posed to most agencies converting employees.

102. I find that within any staffing budget provision, it is a somewhat superficial concern as to whether wages for a staff member come from a 'permanent' or 'temporary' line item allocation. As Mr Finn has been engaged as a temporary employee for a period of eight

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<sup>8</sup> [2021] QIRC 144.

years and paid accordingly, I do not consider the expressed 'budgetary concerns' to be reasonable in this circumstance.

103. The considerable length of time for which Mr Finn has been backfilling other employees suggests that there is a need for another permanent employee and it would be unreasonable for the Respondent to refute Mr Finn's request on the basis of budget when he has already been paid and utilised in the roles extensively.

104. Those claimed operational reasons are therefore not reasonable in this context.

[36] Ms Wood further submits that she is concerned the decision maker only considered other vacant roles in determining whether there is a continuing need for Ms Wood to perform a role that is substantially the same and that the absence of an existing vacant and funded position should not be a genuine operational requirement to preclude conversion.<sup>9</sup>

[37] The Department contends that the circumstances of this matter differ from that of *Finn* on the basis that the HC Centre has negotiated agreements to provide services and developed strategic plans which include the nature, scope and resourcing for the delivery of the agreed service. Further, the Department submits that it would face significant difficulties if Ms Wood was converted, including re-negotiating service agreements and changing the nature, scope and resources of the HC Centre.

[38] The Department does not accept that the decision maker only considered whether a vacancy existed at the time of the review and submits that it is 'self-evident' the decision maker considered the genuine operational requirements of the Department.

### *Consideration*

[39] The Department contends that there is no continuing need for Ms Wood to perform her current role as the role was temporarily established and there has been a reduction in funding for the 2022/2023 financial year for Preventive Health. The decision then refers to the cessation of two programs in 2022. There is no direct information as to how Ms Wood's role is directly affected by the cessation of those programs, nor is there any meaningful explanation as to why, because of the reduction in funding, there would cease being a need for Ms Wood to be employed in the role.

[40] This is particularly so in circumstances where Ms Wood has been employed in the temporary role for well over six years and where the Department has recently extended the contract of a person backfilling for Ms Wood whilst she is on leave.

[41] It may well be the case that the cessation of the programs referred to by the Department will result in the role being performed by Ms Wood to be no longer required. However, I am not satisfied, on the reasons for the decision, that such a conclusion is able to be

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<sup>9</sup> *Deverge v State of Queensland (Queensland Health)* [2021] QIRC 046, [59].

made. There is no consideration of the source of the funding for Ms Wood's role and why the need for the role to be performed is necessarily linked to the two programs (which have now been ceased) referred to in the reasons for the decision.

- [42] I consider that the decision is deficient in so far as it does not set out the findings on material facts, nor does it refer to the evidence or other material on which these findings were based.
- [43] Consequently, the decision does not accord with the requirements of cl 8.4 of Directive 09/20.
- [44] Further, consideration as to whether there is a continuing need for Ms Wood to perform a role that is substantially the same as her current role does not end with the enquiry as to whether there are any roles *available*. The correct enquiry to make is whether there is an ongoing *need* for Ms Wood to perform a role which is substantially the same. It is not clear on the reasons for the decision that such an enquiry was conducted.
- [45] For the foregoing reasons, I consider that the decision is not fair and reasonable.
- [46] Given the paucity of evidence and material referred to in the decision, I am unable to determine, on the material before the Commission, the operational requirements of the Department in so far as they relate to Ms Wood's request.
- [47] Consequently, I will set aside the decision and return the matter to the Department for it to conduct a fresh review in accordance with the terms of the PS Act and Directive 09/20. Given Ms Wood's contract is due to expire by 26 June 2022, I will require such a review to be conducted by no later than 4.00pm on 24 June 2022.

### **Order**

- [48] For the foregoing reasons, I make the following order:

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

- (a) the appeal is allowed;**
- (b) the decision is set aside;**
- (c) the matter is returned to a new decision maker with a copy of this decision on appeal; and**
- (d) the decision maker is directed to conduct a fresh review in accordance with the terms of the *Public Service Act 2008* (Qld) and the *Fixed term***

***temporary employment directive (Directive 09/20) by no later than 4.00pm on 24 June 2022.***