

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Ford v State of Queensland (Queensland Health)*
[2022] QIRC 320

PARTIES: **Ford, Sondra**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO.: PSA/2022/622

PROCEEDING: Public Service Appeal - Conversion of fixed term
temporary employment

DELIVERED ON: 16 August 2022

MEMBER: Power IC

HEARD AT: On the papers

ORDER: **Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016 (Qld)*, the decision
appealed against is confirmed.**

CATCHWORDS: PUBLIC SERVICE – EMPLOYEES AND
SERVANTS OF THE CROWN GENERALLY
– Public Service Appeal – fixed term temporary
employment review – where the appellant was
reviewed under s 149B of the *Public Service Act 2008* (Qld) – consideration of the scope of a
review under s 149B – decision fair and
reasonable

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

Public Service Act 2008 (Qld), ss 98, 148, 149A
and 149B

CASES: *Brandy v Human Rights and Equal Opportunity
Commission* [1995] HCA 10; (1995) 183 CLR
245

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

Reasons for decision

Introduction

- [1] Mrs Sondra Ford ('the Appellant'), is currently employed by the State of Queensland (Queensland Health) ('the Respondent') in a fixed term temporary position of Clinical Nurse Facilitator, Clinical Nurse Grade 6, within the Student Hub, Nursing Education within the Sunshine Coast Hospital and Health Service ('SCHHS').
- [2] By letter dated 13 June 2022, the Appellant was advised by Mr Silven Simmons, Executive Director People and Culture, SCHHS, that her employment would remain as fixed term temporary with the Respondent ('the decision').
- [3] By appeal notice filed on 17 June 2022, the Appellant appealed against the decision pursuant to s 194(1)(e) of the *Public Service Act 2008* (Qld) ('the PS Act').

Appeal principles

- [4] The appeal must be decided by reviewing the decision appealed against.¹ Because the word 'review' has no settled meaning, it must take its meaning from the context in which it appears.² 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,³ but involves a review of the decision arrived at and the decision making process associated therewith.
- [5] The stated purpose of such an appeal is to decide whether the decision appealed against was fair and reasonable.⁴ The issue for determination is whether the decision to deny conversion of the Appellant's employment to permanent was fair and reasonable in all of the circumstances. This requires a consideration of s 149B of the PS Act and of *Directive 09/20 Fixed term temporary employment* ('the Directive').

What decisions can the Industrial Commissioner make?

- [6] In deciding this appeal, s 562C of the IR Act provides that the Industrial Commissioner may:
 - (a) confirm the decision appealed against; or
 - (b) set the decision aside and substitute another decision; or
 - (c) set the decision aside and return the issue to the decision maker with a copy of the decision on appeal and any directions considered appropriate.

¹ *Industrial Relations Act 2016* (Qld) s 562B(2) ('IR Act').

² *Brandy v Human Rights and Equal Opportunity Commission* [1995] HCA 10; (1995) 183 CLR 245, 261.

³ *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.

⁴ IR Act s 562B(3).

Grounds of Appeal

- [7] In the appeal notice, the Appellant outlined the following reasons for appeal, that:
- (a) the Appellant believes that she meets the criteria required for conversion to permanent;
 - (b) there have been no performance management issues to be addressed;
 - (c) the Appellant's line manager supports the Appellant to be converted to permanent;
 - (d) there is an ongoing and continuing need for Clinical Nurse Facilitator role within the SCHHS; and
 - (e) no new precedent will be set by the Appellant's conversion to permanent.

Relevant provisions of the PS Act and the Directive

- [8] 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 period 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 mentioned 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.
- ...

[9] Section 149A(2) of the PS Act provides:

- (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.

[10] Section 149A(3) of the PS Act provides:

- (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.

[11] The Directive 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.
- 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).

...

Submissions

[12] The Commission issued a Directions Order calling for submissions from both parties following receipt of the appeal notice. The submissions are summarised below.

Appellant's submissions

[13] The Appellant made submissions addressing each of the criteria and requirements for conversion from temporary to permanent. The Appellant highlights, in summary, that:

- (a) the Appellant meets the required performance objectives of the role;
- (b) there is a continuing need to support undergraduate nursing students from both TAFE Queensland and The University of Sunshine Coast within the SCHHS; and
- (c) there is evidence that the role is ongoing due to the fact that there are currently students booked to attend placements within the SCHHS until 31 December 2022, with planning currently ongoing for the 2023.

[14] The Appellant further submits, in summary, that:

- (a) an ongoing need remains for a role or similar role in the SCHHS as a need for consistency is required for supervising, assessing, and supporting nursing students;
- (b) organisational change in the SCHHS within the education area has been rumoured since December 2021, however there is yet to be a Business Case for Change released or any firm decisions made and distributed for consultation; and
- (c) organisational change occurring in the education area will not negate the requirement for a role or similar role to be in existence for supervising, assessing, and supporting nursing students.

Respondent's submissions

[15] The Respondent submits that the Clinical Nurse Facilitator position in which the Appellant is performing in has a known end date and as such, the Appellant's employment as a temporary employee is consistent with s 148(2)(b) of the PS Act.

- [16] The Respondent further submits that funding for the Clinical Nurse Facilitator positions is uncertain and is dependent upon the number of students placed at the health service by education providers. In support, the Respondent outlines the following:

...Once the number of students is known, Clinical Nurse Facilitators are appointed via temporary fixed term contracts or secondment to fill the temporary vacancies. The Health Service has agreed parameters to control the number of students supplied, and the funding for the students' placements is paid by the education providers based on the numbers of students placed (per student per day). A maximum of 30 Full Time Equivalent (FTE) Clinical Nurse Facilitators are appointed based on student numbers. Cancellations less than 8 weeks prior to placement incur fees; however, cancellations outside of 8 weeks do not incur costs.

Since the opening of the Sunshine Coast University Hospital in March 2017, for reasons including the withdrawal of students due to COVID 19 and fewer numbers of students being placed than predicted, the Health Service has on occasion terminated secondments of Clinical Nurse Facilitators or has terminated the employment of temporary Clinical Nurse Facilitators before the completion of their contract end date.

The Health Service submits that, consistent with section 148(2)(c) of the Act, funding for the Clinical Nurse Facilitators is unknown more than 8 weeks prior to placement, rendering employment on tenure not viable or appropriate.

The Health Service employs five Clinical Nurse Facilitators on tenure within an establishment of four FTE to meet service requirements. The service ramps capacity to 30 FTE via secondment and temporary contracts throughout the year, depending on the numbers of students placed by the education providers.

- [17] With reference to cl 8.1 of the Directive, the Respondent submits the following:

...the Health Service:

- a. is unable to confirm whether there is a continuing need for Ms Ford to be employed in the role...
- b. acknowledges there are no concerns about Ms Ford with regard to her merit for the position;
- c. identifies no requirements of an industrial instrument in relation to the decision; and
- d. notes this is Ms Ford's first application under sections 149A or 149B of the Act, therefore Mr Simmons did not address this in his notification to Ms Ford on the 14 June 2022.

- [18] The Respondent submits that a review of Clinical Nurse Facilitator positions is being progressed and that as part of the review, consideration is being given to the ongoing requirement of the Clinical Nurse Facilitator position. Further, the SCHHS determined there to be a genuine operational requirement not to appoint the Appellant to permanent pursuant to the Directive, specifically, that an organisational change program is underway in which the Clinical Nurse Facilitator position is proposed to be abolished.

- [19] The Respondent outlines that Clinical Nurse Facilitators within the Student Hub, Nurse Education were provided formal notification of the change program on 4 July 2022 via the release of a Business Case for Change and that consultation with Clinical Nurse Facilitators is taking place pursuant to the *Nurses and Midwives (Queensland Health and Department of Education) Certified Agreement (EB10) 2018* ('EB10') and the *Queensland Health Organisational Change Guidelines*. The Respondent further outlines the following proposals made under the Business Case for Change regarding Clinical Nurse Facilitator positions:

- The clinical units hosting nursing students each have, within their existing establishment, Clinical Nurse Coaches.

- Clinical Nurse Coaches do not currently facilitate student nurse placements or support nursing students. This is the function of the Clinical Nurse Facilitator.
- The Clinical Nurse Coach roles are proposed to be redesigned to include an expanded function of facilitating student placements and providing support to nursing students.
- Accordingly, Clinical Nurse Facilitator positions are proposed to be abolished.
- Permanent Clinical Nurse Facilitator employees are proposed to be suitability assessed against Clinical Nurse Coach positions within the Health Service, in accordance with Queensland Health *HR Policy B36 Employees Requiring Placement*. In addition, any employee, including Clinical Nurse Facilitators, displaced because of this organisational change will be managed in accordance with the Public Service Commission Directive 18/20 *Supporting Employees Affected by Workforce Change*.

[20] The Respondent submits that an underpinning driver for the organisation change process and the decision to not convert the Appellant includes the SCHHS's fiscal obligations to the public purse and commitment for service delivery to meet the requirements of s 98(1)(b) of the PS Act and to ensure the correct workforce composition to allow for optimal service delivery to the public.

Appellant's submissions in reply

[21] In reply to the Respondent's submissions, the Appellant submits that the Respondent fails to provide any clear evidence as to the reasons the Appellant's conversion to permanent cannot occur.

[22] With respect to the Respondent's submissions regarding the change program, the Appellant submits the following:

- A. The Appellant acknowledges that the SCHHS 'A new approach to Nursing Education for future success, aligning to the EDNM, Nursing and Midwifery Professional lead' – Business Case for Change (BCfC) has now, on the 4th of July 2022, been released for consultation.
- B. The Australian Nursing and Midwifery Federation (NMNF) has submitted an extension to the consultation period as this BCfC impacts many roles and may impact patient and student safety. This submission was successful. The time frame to reply to the BCfC has been extended until 1st August 2022.
- C. Union involvement and response is underway and proposed for submission before the consultation period is ends (sic).
- D. There have been several meetings within the cohorts affected by the BCfC to formulate a response
- E. There have been two 'Teams' online meetings with the owner of the BCfC (21st July & 25th July 2022 – 1 hour sessions). During these sessions the BCfC owner has made it clear that she is open for discussion and will examine all feedback prior to the planning component of the process.
- F. Some of the affected cohorts will be proposing other options for consideration to the listed Option 1 and 2.

[23] The Appellant submits that even if all/some of the proposed changes included in the Business Case for Change occur, the Clinical Nurse Facilitator position will continue to exist and is ongoing.

Consideration

[24] To determine the outcome of this appeal, I am required to assess whether the decision appealed against was fair and reasonable having regard to the requirements of the Directive and the PS Act.

Merit

- [25] The decision confirms that the decision maker had regard to the merit principle and determined that the Appellant has demonstrated over time that she satisfied the merit requirements for the role consistent with the requirements of s 149A(2)(a)(ii) of the PS Act.

Is there a continuing need for the Appellant to be employed in the role, or a role which is substantially the same?

- [26] The decision maker was not satisfied that there was a continuing need for the Appellant to be employed in the role of Clinical Nurse Facilitator or a role which is substantially the same. The major reason provided for this determination was the 'genuine organisation change' occurring within Nursing and Midwifery Education in which the position of Clinical Nurse Facilitator is in scope.
- [27] The first step in considering a review requires a determination of whether there is a continuing need for the Appellant to be employed in the role or a role which is substantially the same.⁵ If s 149A(2)(a)(i) of the PS Act is not satisfied, there is no requirement to consider the genuine operational requirements as outlined in s 149A(3). However, if the decision maker is satisfied that there is a continuing need for the Appellant to be employed in the role or a role substantially the same, a decision must be made to convert the employee's employment basis to permanent unless it is not viable or appropriate to do so having regard to the genuine operational requirements of the department.
- [28] The Appellant has been appointed to successive fixed term positions since 28 May 2020 as a Clinical Nurse Facilitator to support the learning experiences of undergraduate students whilst on clinical placement. The Respondent submits that the circumstances outlined in s 148(2)(b) and (c) support the conclusion that the Appellant's employment should not be converted to tenure. I note that s 148(3) provides that employment on tenure may be viable or appropriate if a person is required to be employed for a purpose mentioned in s 148(2) on a frequent or regular basis.
- [29] The Respondent submits that because the students are placed by the education providers for periods with known end dates, the Appellant's employment as a temporary employee is consistent with s 148(2)(b) of the PS Act which outlines employment on tenure may not be viable or appropriate if the employment is to perform work for a particular project or purpose that has a known end date. In my view, the circumstances of the Appellant's temporary engagements are dissimilar to s 148(2)(b) in that there are rolling end dates for each period of student placement rather than a singular project end date. The fact that the Appellant's appointment to the role has been extended for over two years is evidence of appointment on a frequent or regular basis. I note the Respondent's submissions that four Full Time Equivalent ('FTE') are employed to meet service requirements and that 30 FTE are engaged via secondment and temporary contracts depending on the number of students placed by the education providers. In those circumstances, it would appear more probable than not that there is a continuing need for the Appellant's role. I also consider that s 148(3) of the PS Act provides that the regular basis upon which the Appellant's role has been extended is evidence of a continuing need for the Appellant to be employed in the

⁵ PS Act s 149A(2)(a)(i).

role. In consideration of s 148(2)(c), the continued extension of the role is also a reflection of the frequent and regular funding provided by the education providers.

- [30] In consideration of the above, I am satisfied that there is a continuing need for someone to be employed in the Appellant's role.

Genuine operational requirements

- [31] As outlined above, in circumstances where the requirements of s 149A(2) of the PS Act are satisfied, the chief executive must decide to offer to convert the person's employment basis to employment on tenure unless it is not viable or appropriate to do so having regard to the genuine operational requirements of the department.
- [32] The decision maker outlined that the current process of 'genuine organisational change' does not support the employment of the Appellant on tenure. The Respondent submits that, specifically, an organisational change program is underway in which the position of Clinical Nurse Facilitator is proposed to be abolished. The Respondent states that Clinical Nurse Facilitators within the Student Hub, Nurse Education were provided formal notification of this change program on 4 July 2022 through the release of a Business Case for Change. This consultation with Clinical Nurse Facilitators is taking place pursuant to EB10 and the Queensland Health *Organisational Change Guidelines*.
- [33] The Business Case for Change proposes a number of measures that impact on the role of Clinical Nurse Facilitator, specifically the proposal to abolish the positions altogether.
- [34] The Appellant has acknowledged that the Business Case for Change has been released for consultation, noting that an extension of time has been provided for the consultation period. The Appellant submits that even if all of the proposed changes occur the role of supervising/facilitating nursing students will be ongoing. The Business Case for Change proposes as an option that the permanent Clinical Facilitator positions be realigned to Clinical Coach positions to support new and improved services or where a current deficit exists. The Business Case for Change outlines that these positions will 'initially' be utilised to assist with cross skilling the current Clinical Coach cohort relating to student placements. It seems to me that the proposed organisational change has sufficiently progressed to impact on the operational requirements of the department.
- [35] It is not clear from the material before me that the role of Clinical Coach will be the same as the Clinical Nurse Facilitator. This is reflected in the decision maker's statement that 'the ongoing nature of the role is unknown'. In circumstances where the organisational unit is in the midst of significant organisational change, it was fair and reasonable for the decision maker to determine that genuine operational requirements prevent the conversion of the Appellant to employment on tenure at this time.

Conclusion

- [36] On the material before me, the Appellant satisfied the criteria of the Directive and the PS Act. However, as there are genuine operational requirements preventing conversion, the decision not to convert the Appellant's employment was fair and reasonable.

Order

[37] I make the following order:

Pursuant to s 562C(1)(a) of the *Industrial Relations Act 2016* (Qld), the decision appealed against is confirmed.