

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Cherukupalli v State of Queensland (Department of Education)* [2023] QIRC 015

PARTIES: **Cherukupalli, Anvesh Reddy**
(Appellant)

v

State of Queensland (Department of Education)
(Respondent)

CASE NO: PSA/2022/1011

PROCEEDING: Public Service Appeal – Appeal against a conversion decision

DELIVERED ON: 19 January 2023

MEMBER: Pidgeon IC

HEARD AT: On the papers

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

CATCHWORDS: PUBLIC SERVICE – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY – PUBLIC SERVICE APPEAL – Appeal against a conversion decision – where the Appellant requests appointment to the higher classification level – where the Appellant's temporary appointment arose as an existing employee was absent from the role for a known period – where the Appellant was not appointed to the higher classification level as the existing employee is returning to role following a period of approved leave – whether the decision was fair and reasonable – decision appealed against confirmed

LEGISLATION AND OTHER INSTRUMENTS: *Directive 09/20 Fixed term temporary employment cl 8*

Directive 13/20 Appointing a public service employee to a higher classification level cls 4, 6, 7, 8

Industrial Relations Act 2016 s 562C

Public Service Act 2008 s 149A, 149B, 149C

CASES:

Barker v State of Queensland (Department of Housing and Public Works) [2020] QIRC 224

Reasons for Decision

Appeal details

- [1] Mr Anvesh Cherukupalli (the Appellant) is substantively employed by the State of Queensland (Department of Education) in Central Office as a ServiceNow Administrator, Application Development and Delivery Unit, classification AO5.
- [2] Since 3 August 2020, the Appellant has undertaken higher duties as an AO6 Senior ServiceNow Administrator.
- [3] On 27 October 2022, Mr Cherukupalli wrote to the Respondent requesting appointment to the higher classification level in accordance with s 149C of the *Public Service Act 2008* (the PS Act) and the Public Service Commission *Directive 13/20 – Appointing a public service employee to a higher classification level* (the Directive).
- [4] Mr Boyd Clifford, A/Director, Employment Review, HR Services, subsequently responded to Mr Cherukupalli on 16 November 2022 to advise the following:

...

Decision Outcome

I have decided to refuse your request to be appointed to a higher classification level under s 149C of the PS Act and Directive.

In accordance with the PS Act and Directive, while I note that you:

- are acting at a higher classification level role in the Department, in circumstances where you hold an appointment with, or are employed by, the Department; and
- have been acting in the higher classification level for a continuous period of at least one year; and

- are eligible for appointment to the position at the higher classification level role having regard to the merit principle,

genuine operational requirements exist to support the refusal of your request to be appointed to the higher classification level...¹

- [5] Page 2 and 3 of the decision addresses the genuine operational requirements of the Department and states in part:

Reasons for Decision

The temporary nature of your higher classification level role was the result of a temporary vacancy arising from an existing employee being absent from the role for a known period. The existing employee was absent for a period of approved leave, requiring replacement until the date of their expected return. I have now been advised that the existing employee on a graduated return to work plan is now back at work fulltime. After a hand over period, a genuine operational requirement exists to refuse your request for appointment to the higher classification role and you will return to your substantive role of (AO5) ServiceNow Administrator on 1 December 2022...

- [6] Mr Clifford also points to cl 4.2 of the Directive which provides that circumstances that would support the temporary engagement of an employee at a higher classification level include where an existing employee takes a period of leave and needs to be replaced until the date of their expected return (see paragraph [12] below).

- [7] Mr Clifford states that the Commission has generally considered that the return of a substantive employee to the position represents a genuine operational requirement to support the temporary appointment of an employee at a higher classification level.² Further, the letter states that the consequence of appointing Mr Cherukupalli to the higher classification position would be that two permanent employees would then occupy the one position of AO6 Senior ServiceNow Administrator, Application Development and Delivery upon the substantive employee's return.

- [8] Mr Clifford concludes:

In these circumstances, it is reasonable to conclude that the effective, efficient and appropriate management of the department's resources does not require two employees in this role. The genuine operational requirements of the department therefore support the retention of your appointment on a temporary basis only, prior to the return of the substantive incumbent to the role.

- [9] It is this decision not to appoint him to the position at the higher classification that Mr Cherukupalli appeals. I am satisfied that the decision is one which may be appealed and the appeal was lodged with the 21-day timeframe.

¹ Letter from Mr Boyd Clifford, A/Director, Employment Review, HR Services to Mr Anvesh Cherukupalli dated 16 November 2022, page 2 (the decision letter).

² Ibid page 3 citing *Barker v State of Queensland (Department of Housing and Public Works)* [2020] QIRC 224.

Relevant sections of the Act and Directive

[10] In order to determine the appeal, it is necessary to consider the relevant provisions of the the PS Act and the Directive.

[11] Section 149C of the PS Act relevantly provides:

149C Appointing public service employee acting in position at higher classification level

- (1) This section applies in relation to a public service employee if the employee –
- (a) is seconded to, under section 120(1)(a), or is acting at, a higher classification level in the department in which the employee holds an appointment or is employed; and
 - (b) has been seconded to or acting at the higher classification level for a continuous period of at least one year; and
 - (c) is eligible for appointment to the position at the higher classification level having regard to the merit principle.
- ...
- (3) The employee may ask the department's chief executive to appoint the employee to the position at the higher classification level as a general employee on tenure or a public service officer, after –
- (a) the end of 1 year of being seconded to or acting at the higher classification level; and
 - (b) each 1-year period after the end of the period mentioned in paragraph (a).
- ...
- (4A) In making the decision, the department's chief executive must have regard to –
- (a) the genuine operational requirements of the department; and
 - (b) the reasons for each decision previously made, or taken to have been made, under this section in relation to the person during the person's continuous period of employment at the higher classification level.

The Directive

[12] While all of the provisions of the Directive have been considered, particular attention is paid to the following provisions:

4. Principles

- 4.1 An employee seconded to or assuming the duties and responsibilities of a higher classification level in the agency in which the employee is substantively employed can be appointed to the position at the higher classification level as a general employee on tenure or a public service officer following a written request to the chief executive.
- 4.2 Secondment to or assuming the duties and responsibilities of a higher classification level should only be used when permanent appointment to the role is not viable or appropriate. Circumstances that would support the temporary engagement of an employee at a higher classification level include:
- (a) when an existing employee takes a period of leave such as parental, long service, recreation or long-term sick leave and needs to be replaced until the date of their expected return
 - (b) when an existing employee is absent to perform another role within their agency, or is on secondment, and the agency does not use permanent relief pools for those types of roles
 - (c) to perform work for a particular project or purpose that has a known end date
 - (d) to perform work necessary to meet an unexpected short-term increase in workload.

...

6. Decision making

- 6.1 When deciding whether to permanently appoint the employee to the higher classification level as a general employee on tenure or a public service officer, the chief executive may consider whether the employee has any performance concerns that have been put to the employee and documents and remain unresolved, that would mean that the employee is no longer eligible for appointment to the position at the higher classification level having regard to the merit principle.
- 6.2 In accordance with section 149C(4A) of the PS Act, when deciding the request, the chief executive must have regard to:
- (a) the genuine operational requirements of the department, and
 - (b) the reasons for each decision previously made, or deemed to have been made, under section 149C of the PS Act in relation to the employee during their continuous period of employment at the higher classification level.

7. Statement of reasons

- 7.1 A chief executive who decides to refuse a request made under clause 5 is required to provide a written notice that meets the requirements of section 149C(5) of the PS Act (Appendix A). The notice provided to the employee must, in accordance with section 27B of the *Acts Interpretation Act 1954*:
- (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. Appeals

- 8.1 An employee eligible for review under clause 149C(3)(b), that is after two years of continuous engagement at the higher classification level, has a right of appeal provided for in section 194(1)(e)(iii) of the PS Act in relation to a decision not to permanently appoint the employee to the higher classification level.

What decisions can the Commission make?

[13] In deciding this appeal, s 562C(1) of the *Industrial Relations Act 2016* (the 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.

Mr Cherukupalli's reasons for appeal and submissions

[14] Mr Cherukupalli sets out his reasons for appeal in Part C of the appeal notice. In summary, Mr Cherukupalli argues that:

- He is eligible for appointment to the position at the higher classification having undertaken the role for more than two years.
- He has highly developed skills and is performing the duties of the role. (I take this to mean that he meets the merit requirement for appointment).
- Prior to working with the Department of Education, he worked with Queensland Shared Services (QSS) and gained knowledge and experience relevant to the role.
- If appointed to the position at the higher classification, his skills will be an asset to deliver projects and he can continue his Senior ServiceNow administrative skills.

[15] Mr Cherukupalli filed submissions in support of his appeal on 6 January 2023. He submits that he should be permanently appointed to the position at the higher classification level because he satisfies the conversion criteria and 'there are no genuine operational requirements preventing my conversion'.

- [16] Mr Cherukupalli argues that there is a continuing need for his role and that the Department's ServiceNow 'instance' has grown exponentially and that to maintain and sustain the team in the way that it is working, an additional AO6 resource is required as there has been so much work in the pipeline.
- [17] Mr Cherukupalli says, 'There is definitely a need of resource in our team to perform at its best and high performance, as there are so many projects in-line and on-going'.
- [18] Mr Cherukupalli says that the decision was unfair because 'it deprived me of my entitlement to be permanently appointed to the higher classification level'. Mr Cherukupalli says that he satisfies the conversion criteria and therefore the Respondent 'was required to appoint me to the higher classification level'.

Submissions of Respondent

- [19] The Respondent filed its submissions on 21 December 2022. The Respondent says that at the time of the decision on 16 November 2022, Mr Cherukupalli's higher duties arrangements in the AO6 role were due to end on 30 November 2022, however this did not occur and as at the date of the Respondent's submissions, the higher duties arrangement was due to end on 2 January 2023.
- [20] The Respondent submits that as an appeal is dealt with by way of a review, the task of the Commission is to determine if the decision is fair and reasonable. The Respondent says that if the Commission considers that a decision was reasonably open to a decision-maker, the decision ought not be disturbed, regardless of whether the Commissioner hearing the appeal would have decided the matter differently. The Respondent says that before the decision can be set aside, the Commission must first decide that the decision was not fair and reasonable and that Mr Cherukupalli bears the onus of assisting the Commission to identify reasons why a decision was not fair and reasonable.
- [21] The Respondent says that the difficulty with the present appeal is that the appeal notice does not contain grounds upon which the Appellant has asked the Commission to decide that the decision is not fair and reasonable. The Respondent says it is unable to defend the appeal on grounds which are not made out by the Appellant.

Consideration of submissions

- [22] It is not in dispute that Mr Cherukupalli has undertaken the position in the higher classification for more than two years or that he is eligible for appointment in the position having regard to the merit principle. However, the application for appointment to the position at the higher classification was not refused on the basis that Mr Cherukupalli was not eligible for conversion.

- [23] It is clear that the decision was made on the basis of the genuine operational requirements of the Respondent. The decision letter clearly sets out the circumstances which Mr Clifford decided gave rise to a genuine operational requirement to refuse the application. Mr Clifford explained that the employee Mr Cherukupalli has been replacing is returning to the role following approved leave and undertaking a return-to-work plan.
- [24] Mr Cherukupalli has not made any submissions that this is not true and that the employee is not returning as stated in the decision letter.
- [25] Clause 4.2 of the Directive identifies the situation which exists here as a circumstance which would support the temporary engagement of an employee at the higher classification level. The Respondent says that to appoint Mr Cherukupalli to the position would result in two people being employed in the one role. I find that the Department did not have an 'authentic need, having regard to the effective efficient and appropriate management of the public resources of the department'³ to continue to employ Mr Cherukupalli in the role after the return of the substantive incumbent.
- [26] I note Mr Cherukupalli's submissions about his capacity to undertake the role, the value he is adding and the relevant experience he brings with him from his previous employment. These are all factors which demonstrate his merit for the role. However, merit is not a relevant consideration in this appeal as it is not in dispute that Mr Cherukupalli satisfies the merit requirement to be appointed to the position.
- [27] With regard to Mr Cherukupalli's submission that there is a continuing need for someone to be employed in his role, or a role that is substantially the same, because there is a lot of work to do and that the Department needs an additional resource, I note that this is not a factor that Mr Clifford needed to consider. The consideration Mr Cherukupalli refers to, is a matter which must be addressed when deciding a review of status under section 149A or 149B when deciding whether to convert a fixed term temporary employee to permanent employment.⁴
- [28] Mr Cherukupalli submits that the decision was unfair as it has deprived him of his 'entitlement to be permanently appointed to the higher classification level'. Mr Cherukupalli was entitled to request appointment to the higher classification level but he has no automatic right to be appointed to the position. The Directive clearly states that its purposes are to 'establish employment on tenure as the default basis of employment in the public service' but also that it 'sets out the circumstances where employment on tenure is not viable or appropriate'.
- [29] I am satisfied that Mr Clifford has complied with the requirements of the PS Act and the Directive and that he has properly considered the genuine operational requirements

³ *Morison v State of Queensland (Department of Child Safety, Youth and Women)* [2020] QIRC 203, [40].

⁴ *Directive 09/20 Fixed term temporary employment* cl 8.

of the Department noting that the substantive employee was returning to the higher duties role on a known date, and that he properly considered whether any previous decisions had been made under section 149C. The decision addresses both of the matters which must be considered per cl 6 of the Directive.

[30] The statement of reasons provided to Mr Cherukupalli was provided to him within 28 days of his request. As is required by cl 7 of the Directive and the relevant legislative provisions, the decision sets out the findings on material questions of fact and refers to the evidence or other material on which the findings were based.

[31] Mr Cherukupalli does not make submissions regarding the consideration of his human rights in the decision. However, for completeness, Mr Clifford explained to Mr Cherukupalli that he considered the *Human Rights Act 2019* (the HR Act) and other laws and ultimately determined that he was respecting and acting compatibly with the HR Act as required.

Conclusion and Order

[32] While Mr Cherukupalli had a right to appeal the decision not to appoint him to the position at the higher classification, the onus was on him to put forward a cogent set of reasons, supported by submissions and relevant evidence, to explain why the decision was not fair and reasonable. He has not discharged this onus.

[33] The decision of Mr Clifford dated 16 November 2022 refusing Mr Cherukupalli's request to be appointed to the higher classification level was fair and reasonable.

[34] For the reasons I have given above, the decision appealed against is confirmed.