

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION *Sutaria v State of Queensland (Queensland Health)* [2023] QIRC 326

PARTIES: **Sutaria, Amit**
(Appellant)

v

State of Queensland (Queensland Health)
(Respondent)

CASE NO: PSA/2023/168

PROCEEDING: Public Sector Appeal – Appeal against a fair treatment decision

DELIVERED ON: 15 November 2023

MEMBER: Pidgeon IC

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

CATCHWORDS: PUBLIC SECTOR – EMPLOYEES AND SERVANTS OF THE CROWN GENERALLY – appeal against a fair treatment decision – where the appellant applied for a flexible work arrangement – where the appellant’s flexible work arrangement was accepted on a temporary basis for a period of three months – where the appellant seeks that the flexible work arrangement be made permanent – consideration of the respondent’s operational requirements – decision fair and reasonable

LEGISLATION: *Human Resources Policy C5 – Flexible Work Requests* (QH-POL-242) cl 3

Industrial Relations Act 2016 (Qld) ss 27, 28, 562B, 562C

Public Sector Act 2022 (Qld) ss 129, 131, 133

Reasons for Decision

Background

- [1] Dr Amit Sutaria ('the Appellant') is employed by the State of Queensland (Queensland Health) ('the Respondent') as a Principal Dentist within Oral Health Services. Dr Sutaria appeals the decision of Mr Ron Calvert, Chief Executive of the Gold Coast Hospital and Health Service ('GCHHS'), dated 9 August 2023 to approve a temporary flexible work arrangement ('FWA') but reject a permanent change to Dr Sutaria's working hours.
- [2] For a period of three months following the date of decision, 9 August 2023, Dr Sutaria has an approved temporary flexible work arrangement which involves 10-hour shifts over 8 eight days per fortnight.
- [3] It was open to Dr Sutaria to notify an industrial dispute regarding the outcome of his request for a flexible work arrangement, however he appears to have chosen to request an internal review of the decision about his FWA and when dissatisfied with that outcome, has lodged an appeal against a fair treatment decision where he seeks an external review of the outcome of that internal review.

Legislative framework

- [4] Section 131 of the *Public Sector Act 2022* (Qld) ('the PS Act') lists various categories of decisions against which an appeal may be made. Section 131(1)(d) provides that an appeal may be made against a fair treatment decision.
- [5] Section 129 of the PS Act relevantly states:
- 129 Definitions for part**
 ...
fair treatment decision means a decision a public sector employee believes is unfair and unreasonable.
- [6] Section 133 of the PS Act explains who may appeal a fair treatment decision:
- 133 Who may appeal**
 ...
 (d) for a fair treatment decision—a public sector employee aggrieved by the decision...
- [7] Flexible working arrangements are dealt with by ch 2, pt 3, div 4 of the *Industrial Relations Act 2016* (Qld) ('the IR Act').

[8] The IR Act relevantly provides:

27 Request for flexible working arrangements

- (1) An employee may ask the employee's employer for a change in the way the employee works, including—
 - (a) the employee's ordinary hours of work; and
 - (b) the place where the employee works; and
 - (c) a change to the way the employee works, for example, the use of different equipment as a result of a disability, illness or injury.
- (2) The request must—
 - (a) be in writing; and
 - (b) state the change in the way the employee works in sufficient detail to allow the employer to make a decision about the request; and
 - (c) state the reasons for the change.

28 Decision about request for flexible working arrangements

- (1) The employer may decide to—
 - (a) grant the request; or
 - (b) grant the request in part or subject to conditions; or
 - (c) refuse the request.
- (2) The employer may grant the request in part or subject to conditions, or refuse the request, only on reasonable grounds.
- (3) The employer must give the employee written notice about its decision within 21 days after receiving the request.
- (4) If the employer decides to grant the request in part or subject to conditions or to refuse the request, the written notice about the decision must state—
 - (a) the written reasons for the decision, outlining the reasonable grounds for granting the request in part or subject to conditions or for the refusal; and
 - (b) that the commission has jurisdiction to hear and decide a dispute over the request under chapter 6.

Appeal principles

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

[10] Findings made in the decision which are reasonably open on the relevant material or evidence before the decision-maker, should not be expected to be disturbed on appeal.

[11] A public sector appeal is not an opportunity for a fresh hearing, but a review of the decision arrived at by the decision-maker.

[12] In deciding this appeal, s 562C(1) of 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.

[13] With respect to decisions about requests for flexible working arrangements, s 28(2) of the IR Act provides that, ‘The employer may grant the request in part or subject to conditions, or refuse the request, only on reasonable grounds’.

The decision under appeal

[14] In the decision, Mr Calvert provides a background to the matter and notes that in the grievance, Dr Sutaria has requested:

- *Permanent change to 10 hours shifts over 8 days fortnightly instead of substantive 9 days a fortnight arrangement or*
- *3 months temporary extension of 10 hours shifts over 8 days fortnightly arrangement with **SMART goal setting** (from 10 July 2023 as rosters are currently being generated until 9 July 2023) and if I meet the goal set for those 3 months, then a commitment to convert 10 hours shifts over 8 days fortnightly arrangement permanently.*

[15] Mr Calvert states the following:

My findings and decision

I am **approving** your request to work 10-hour shifts, over 8 days per fortnight on a temporary basis. The duration of the temporary arrangement will be three (3) months effective. My approval of your request is on the basis of:

- You continuing to meet the full inherent requirements of the Principal Dentist role.
- A ‘buddy system’ being formulated between all Principal Dentists within Oral Health Services (OHS) to ensure sufficient clinical coverage is always available during ordinary operating hours to ensure OHS is able to provide the services our community expects within clinically recommended timeframes, including:
 - Attending to urgent referrals within three (3) days and routine referrals within five (5) days.
 - Management of the General Anaesthetics waiting lists within the clinically recommended timeframes in partnership with other Principal Dentists.

I understand you are seeking either a permanent change to your working hours or a temporary change for three (3) months, followed by a commitment to a permanent change. Unfortunately, I cannot facilitate a permanent change at this time. However, I do acknowledge the uncertainty associated if the arrangement were to be extended three (3) months at a time. As such, a commitment is being made that a longer period may be negotiated following the initial three (3) months, pending all goals being met. The longer period will be subject to operational

requirements at the time of negotiation and is consistent with Ms Lenehan's correspondence to you advising FWA are reviewed at least annually.

[16] Mr Calvert then goes on to address another matter that is outside of the scope of the grievance and subsequent FWA and to provide Dr Sutaria with information about seeking external review.

Dr Sutaria's grounds of appeal

[17] Dr Sutaria says that the request for a permanent change of his working hours has been declined on unreasonable grounds. In summary, those reasons are:

- The request was denied due to interpersonal issues with line managers, Ms Naomi Thompson and Ms Robyn Griffiths, since April 2023 rather than operational reasons.
- Another dental officer in a leadership role, Dr Chang, works 10 hour shifts in a 0.5 full-time equivalent ('FTE') role.
- The rostering officer has been allowed to permanently reduce their working days to four days a week and is allowed to work outside normal operating hours despite the need for the position to be full time.
- At least five oral health staff members are allowed to permanently work outside normal operating hours starting on or before 7.30 am, but Dr Sutaria's request to do so has been denied.
- There is no genuine commitment to extend the temporary arrangement.
- The extension of the temporary arrangement is based on unreasonable workload targets and conditions being put in place.
- Another dentist has been offered an FWA of two days per week for about two years with no 12-monthly review.

Respondent's submissions

Reply to Dr Sutaria's grounds of appeal

[18] With regard to the grounds of appeal set out above, the Respondent says, in summary:

- The FWA request was not declined on unreasonable grounds.

- The Health Service considers all FWA requests on a ‘case-by-case’ basis as prescribed for in its human resources policy.¹
- With regard to the ‘interpersonal’ issue Dr Sutaria refers to, GCHHS confirms that one line manager was only responsible for the initial decision approving a two-month trial on the basis that Dr Sutaria was reasonably open to a temporary arrangement. The other line manager, Ms Griffiths, was not a decision-maker or delegate with regard to the decision and commenced in her current position after the grievance was lodged.
- Dr Chang commenced in October 2021 as a permanent part-time employee and no changes have been made to his terms of employment since commencement.

[19] With regard to Dr Sutaria’s ground of appeal that other employees have flexible arrangements and are able to work outside of normal hours, GCHHS says that all employees are expected to complete the full inherent requirements of their roles. GCHHS says that underperformance at a service level has been raised at Oral Health Management Meetings and that Dr Sutaria was noted to be argumentative at these meetings. GCHHS says that a meeting was proposed to be held with Dr Sutaria and his line managers and that he has refused to attend meetings with both line managers present.

[20] Further, regarding other FWAs in place, GCHHS says that all FWA requests are on a case-by-case basis. FWAs which have been implemented with other staff members influence the operation of the unit and its capability to deliver required health outcomes to the public.

[21] GCHHS says that for staff members in roles whose duties are senior, any FWA request submitted must be considered in the context of the existing operational requirements on the basis that they ensure there is no interruption to clinical service delivery. GCHHS says that except for one employee named by Dr Sutaria in his grounds of appeal, all other employees working pursuant to a FWA are Administration Officers and the inherent requirements of those roles are significantly different to senior clinical dental roles.

[22] GCHHS says that it has supported Dr Sutaria’s FWA request on a temporary basis whilst addressing the performance concerns of the service. GCHHS refutes Dr Sutaria’s ground of appeal that there has already been a decision made by the service that the FWA will not be reviewed prior to its expiration.

The decision to grant a temporary FWA

¹ *Human Resources Policy C5 – Flexible Work Requests (QH-POL-242).*

- [23] GCHHS submits that while Dr Sutaria escalated the matter to a Stage 3 Grievance, he also advised that he would accept a temporary FWA arrangement.
- [24] GCHHS says that the decision to grant the temporary arrangement for three months was influenced by the current consultation it is undertaking regarding the minimum clinical time for all dentists. As part of that process, Dr Sutaria has refused to meet with his supervisor as part of his annual Performance Development Plan ('PDP') process and to date, he is the only dentist within Oral Health Services who has not completed his annual PDP.
- [25] Regarding Dr Sutaria's ground of appeal that unreasonable targets and workload have been imposed as a part of consideration of the FWA, GCHHS says that Dr Sutaria is currently performing between 55-60% clinical time each month compared to a previous 30%. GCHHS says that the 30% figure needs to be considered in light of the service requirements at that time and says that Dr Chang had commenced consultation with two Health Services. GCHHS says that since that time, over 3.5 million dollars in funding has been 'clawed back' due to underperformance of the service and that further consultation has commenced with three other Health Services.
- [26] GCHHS says that on 7 June 2023, staff were advised that a review of clinical and administration workloads had been undertaken as the uplift of Oral Health Services was required due to funding and performance issues. GCHHS says that all changes to clinical targets are based on operational requirements and are rolled out consistently across Oral Health Services.
- [27] GCHHS says that Dr Sutaria is engaged as a Principal Dentist and that Principal Dentists within Oral Health Services are not engaged to solely deal with adults or children. While a Principal Dentist may have a special interest area, it is a requirement that all public patients are dealt with.
- [28] With regard to Dr Sutaria's final ground of appeal, the dentist Dr Sutaria refers to is completing a Master's degree which the Respondent says is directly relevant to her role and of benefit to Oral Health Services and that her FWA is monitored regularly and may be revoked if performance expectations are not met.
- [29] The Respondent notes that since the outcome letter of 9 August 2023, the Health Service has been in discussions with Dr Sutaria regarding implementation of the trial and that agreement has been reached with Dr Chris Tran, Principal Dentist, regarding the 'buddy system' to ensure clinical coverage during the trial period.
- [30] The Respondent submits that it is fair and reasonable for it to ensure clinical coverage requirements are met and that the full inherent requirements of Dr Sutaria's role are performed.

Appellant's submissions

- [31] Dr Sutaria's submissions begin with an expansion on some of the matters raised in his grounds of appeal regarding the working arrangements of other employees. I have read these submissions but do not intend to set them out here. I confirm that I have read and considered all of Dr Sutaria's submissions, even if I do not specifically address them here.
- [32] Dr Sutaria also makes submissions regarding Ms Lenehan's decision which was subject of his grievance. I have read and noted those submissions, however it is the decision of Mr Calvert which is the subject of this appeal and so I now turn to the submissions Dr Sutaria makes regarding that decision.
- [33] Dr Sutaria is critical of Mr Calvert's decision that he is not able to facilitate a permanent change to Dr Sutaria's hours of work. Dr Sutaria is aggrieved at the goals set by Mr Calvert as the basis of a review of the flexible working arrangement following a three- month implementation period. Dr Sutaria provides submissions regarding the goals which have been set out for the Health Service and says that they are not 'SMART' goals and are unfair and unreasonable.
- [34] Dr Sutaria says that his engagement in a discussion regarding a 'buddy system' is not an indication that he thinks the decision made by Mr Calvert is fair or reasonable.
- [35] Dr Sutaria disputes the Respondent's submission that he has not participated in the annual PDP and says that he has not refused to meet with his supervisor to have PDP meetings but that he had requested to have the PDP meeting with his supervisor only and not with Dr Chang. Dr Sutaria says the reason he has been given for the requirement for Dr Chang to be present at the PDP meeting is that Ms Griffiths had indicated that she did not wish to meet with Dr Sutaria by herself. Dr Sutaria says that he will attend a meeting with Ms Griffiths and Dr Chang once he 'receives email response from Ms Griffiths to his 3rd July email outlining reasons for not meeting with appellant by herself as [the] appellant's line manager'. Dr Sutaria points out that he has been participating in one-on-one meetings with Ms Paton and with Dr Chang.
- [36] Dr Sutaria goes on to provide some background about reporting structures for GCHHS principal dentists and how these reporting arrangements have changed over time. Dr Sutaria identifies and names a colleague who he says has a PDP due for completion soon.

Dr Sutaria sets out his reasons for seeking a permanent flexible working arrangement

Personal circumstances

- [37] Dr Sutaria says that his wife has provided the majority of care for their 10-year-old son and that after 10 years as a ‘house maker’, she has decided to enrol in a certificate course and wishes to return to the workforce in a part-time capacity.
- [38] Dr Sutaria says that if his FWA request to permanently work 10-hour shifts over eight days a fortnight is approved, he will be able to provide more parental care to his son and also support his wife’s goal to return to work.
- [39] Dr Sutaria also says that he used to regularly participate in theatre performances until November 2018 and that an FWA will help with his work-life balance and help him to follow his passion for the theatre again.

Impacts on workplace if FWA approved

- [40] Dr Sutaria cannot think of any urgent non-clinical tasks that need to be actioned on a regular basis if he is away from work for one day a week and says that tasks can wait until he returns to work.
- [41] Dr Sutaria says that he has undertaken extensive work in upskilling his ‘line staff senior dentists’ for them to be able to perform any urgent non-clinical tasks when he is away from work.
- [42] Dr Sutaria says that he has participated in a ‘buddy system’ to meet clinical coverage requirements and that even in the absence of a ‘buddy system’ he has been willing to step in if the Service Director needs assistance in dealing with urgent matters when his colleagues are away from work.
- [43] Dr Sutaria says that urgent referrals must be actioned within three days and so there will be no additional workload issue for any other staff, as he will only be away on Mondays or Tuesdays if his FWA request is approved on a permanent basis. Dr Sutaria also points to arrangements which are currently in place to deal with urgent matters when a staff member is not present in the workplace.
- [44] Dr Sutaria says that he is committed to continue performing the inherent requirements of his role and that his Weighted Occasions of Service (WOOS) is significantly higher than the average. Dr Sutaria says that during his previous role, he significantly reduced waitlists for the eligible population.

[45] On the final page of his written submissions, Dr Sutaria sets out what he believes are the benefits of approving his request to permanently work shifts of 10 hours, eight days a fortnight. I have read these submissions, but reiterate that I am not redeciding the outcome of the Stage 3 grievance. I am reviewing the decision to determine if the decision to grant the request on a temporary basis subject to conditions was made on reasonable grounds per *Human Resource Policy C5 – Flexible Work QH-POL-242*.

Further submissions

[46] The Respondent filed further submissions on 4 October 2023 and Dr Sutaria filed further submissions in reply on 10 October 2023. I have read those submissions and they have informed my consideration of the matter below.

Consideration

[47] While the temporary arrangement approved by Mr Calvert was not Dr Sutaria's first preference, it is reflective of the second option Dr Sutaria had put forward in his correspondence to Mr Calvert regarding the grievance.

[48] Mr Calvert's decision does not suggest that there is no commitment to an ongoing arrangement that reflects the hours of work Dr Sutaria is seeking. In fact, the letter acknowledges that it is not ideal for Dr Sutaria to lack certainty and commits to the negotiation of a longer period in the event the goals which have been set are met.

[49] While Dr Sutaria seeks a permanent arrangement, it is the case that all flexible work arrangements, while ongoing, are reviewed on a regular basis per the policy.² This is because a flexible work arrangement must 'ensure ongoing suitability for the employee, the work team and the organisation'³ recognising that the circumstances of employees, teams and work areas change over time.

[50] I have had regard to the submissions made by the parties regarding Dr Sutaria's PDP and other matters related to performance or interpersonal issues with his line manager (see [24] and [35]). I do not think information about the PDP, or for that matter the conditions Dr Sutaria appears to have set before he will meet with his line manager, are relevant to this appeal.

[51] Dr Sutaria raises matters about workplace change and says that he has not been consulted about changes to Oral Health. Again, if Dr Sutaria is concerned about consultation in the workplace, he has avenues to address this.

² Ibid cl 3.1: 'Flexible working arrangements should be reviewed on a regular basis e.g. every three months to ensure ongoing suitability for the employee, the work team and the organisation.'

³ Ibid.

- [52] The Respondent submits that Dr Sutaria's personal reasons for seeking the FWA (and set out in his submissions for this appeal) were not before Mr Calvert when he was considering the stage 3 grievance, and that Mr Calvert considered all information put to the Respondent formally as part of the FWA or grievance. Dr Sutaria says that Ms Thompson was aware of his parental responsibilities and personal circumstances at the time of the request and that 'it has been mentioned in Oral Health management huddles' and that Dr Tran had attended one of his stage performances. I do not think it was incumbent upon Mr Calvert to undertake an investigation to determine what Dr Sutaria's personal circumstances are which give rise to his request for an FWA. Dr Sutaria lodged the grievance and it was a matter for him to tell Mr Calvert if there was particular information he wanted considered.
- [53] I have reviewed the 'Flexible working arrangements – Application and agreement form' lodged by Dr Sutaria on 21 June 2023 and I note that the form does not refer to Dr Sutaria's personal circumstances. It seems to me that regardless of Dr Sutaria's personal circumstances, his grievance was properly considered by Mr Calvert. There is no evidence in the decision that Mr Calvert had determined that Dr Sutaria's personal circumstances did not warrant the approval of the FWA. The decision appears to be squarely focused on operational matters and the need for a trial and review of the arrangement.
- [54] In circumstances where the decision-maker had identified a range of operational matters regarding clinical coverage which would need to be addressed for Dr Sutaria's flexible work request to be implemented on an ongoing basis, it was reasonable for the request to be approved for a period of three months with a further review.
- [55] I have had regard to submissions Dr Sutaria has made regarding the working arrangements of his colleagues. I understand that Dr Sutaria raised those matters as examples of colleagues working outside of the service's operating hours. However, it seems that Dr Sutaria has a different understanding of the employment arrangements of members of the team to that which is the case. For example, Dr Chang does not have a FWA. A flexible working arrangement is different to a permanent part-time arrangement or a permanent appointment made on the basis of a particular spread of hours.
- [56] Mr Calvert addresses Dr Sutaria's concerns about the benchmarks and goals which have been set regarding clinical time and states that these are separate to the grievance. I understand Dr Sutaria's view that the two are linked as any review of the three-month arrangement will involve a review of whether the full inherent requirements of the Principal Dentist role have been met and that benchmarks regarding urgent referrals and the management of General Anaesthetics waiting lists are within clinically recommended timeframes. However, it seems to me that these are not benchmarks or goals that have been set specifically for Dr Sutaria, rather they have emerged from a benchmarking activity undertaken by Dr Chang regarding the Oral Health Service as a

whole. Mr Calvert states in the letter that the ‘minimum clinical time’ is still in consultation and that any proposed change will be implemented across Oral Health Services and in compliance with industry obligations.

- [57] At the time I am writing this decision, the three-month trial must have ended or be just about at its conclusion. I understand that a review will be undertaken and a decision will be made about whether the arrangement will be accommodated on an ongoing basis, subject to review like any other FWA.
- [58] While the FWA policy is framed in positive terms and places an onus on decision-makers to attempt where possible to accommodate reasonable requests, the priority of the organisation must be to balance FWA requests with the need to meet clinical responsibilities and ensure that any FWA does not result in a negative impact on the workplace or service provision.
- [59] I note matters Dr Sutaria has raised about interpersonal relationships in the workplace and his suggestion that his FWA was rejected on the grounds of interpersonal issues. Dr Sutaria has exercised his right to raise a grievance and have the matter reviewed. The decision to implement the FWA on an interim basis has been made by Mr Calvert. Mr Calvert is not Dr Sutaria’s line manager, nor does he work in or manage Oral Health Services.
- [60] I find that it was reasonable for Mr Calvert to identify and implement one of Dr Sutaria’s two suggested options to resolve the grievance, being the three-month implementation of the FWA with a review to be undertaken. It was reasonable to implement some conditions which would need to be met during the three-month trial period as this would clearly inform any decisions about the feasibility of a continuing arrangement.
- [61] I am satisfied that Mr Calvert has reviewed all material available to him and has provided sufficient reasons to support the decision such the Dr Sutaria can understand the basis upon which it was made. Dr Sutaria was informed of his appeal rights and has exercised those rights. That Dr Sutaria does not agree with the decision, does not make it unreasonable.
- [62] The next step appears to be for Dr Sutaria to work with GCHHS to review the three-month arrangement. The matters raised by Dr Sutaria above at [40]-[45] should be considered as part of that review. Should Dr Sutaria be unhappy with the outcome of that process, I am satisfied that he is aware of the avenues he will need to pursue to have the decision reviewed.
- [63] The decision appealed against is confirmed.

Order

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