SUPREME COURT OF QUEENSLAND

CITATION:	*Janette August v State of Queensland (Department of Education and Training) & Anor* [2019] QSC 31
PARTIES:	**Janette August** (Applicant) **v** **State of Queensland (Department of Education and Training)** (First Respondent) **And** **Queensland Industrial Relations Commission** (Second Respondent)
FILE NO/S:	BS No 3544 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 December 2018
JUDGE:	Lyons SJA
ORDER:	**I will hear from the parties as to the form of the order and as to costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW - GENERALLY - where a decision to convert temporary employment as an administrative officer to permanent was refused - where the applicant lodged an appeal – where the Queensland Industrial Relations Commission confirmed the delegate's decision - where the appeal was subsequently dismissed by the Commission – where the applicant filed an application for Statutory Order of Review of that decision pursuant to the *Judicial Review Act* 1991 (Qld) – whether the applicant was an employee under s 148 of the *Public Service Act* 2008 (Qld) – whether the decision of the delegate was erroneous *Public Service Act* 2008 (Qld) *Judicial Review Act* 1991 (Qld) *Katae v State of Queensland & Anor* [2018] QSC 225 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 *Hunter Development Corporation v Save our Rail NSW*

Incorporated and Ors (No 2) (2016) NSWCA 375

COUNSEL:	S Keim SC and M J Woodford for the Applicant J M Horton QC for the First Respondent
SOLICITORS:	Maurice Blackburn Lawyers for the Applicant Crown Law for the First Respondent

[1] Ms Janette August worked as a Teacher Aide for three years on either a casual or temporary basis until she was made permanent in 2015. Since then she has worked as a temporary Administrative Officer. After two years performing in that role she applied to have that employment made permanent.

[2] On 20 November 2017 a delegate of the Chief Executive of the Department of Education and Training determined that Ms August was not eligible to have her employment status as a temporary Administrative Officer reviewed under the Public Service Commission Directive (Directive 08/17 - Temporary Employment) because she was already employed as a Teacher Aide on a permanent basis and therefore could not apply to have a temporary appointment as an Administrative Officer made permanent pursuant to that Directive.

[3] Ms August appealed that decision to the Queensland Industrial Relations Commission and on 1 March 2018 an Industrial Relations Commissioner confirmed the delegate's decision.[1]

[4] Ms August now seeks a Statutory Order of Review of that decision pursuant to s 20 *Judicial Review Act* 1991 (Qld).

History

[5] Ms August has been employed as a general employee pursuant to s 147 of the *Public Service Act* ("PS Act") since 10 February 2012. She was initially employed on a casual basis as a Teacher Aide at the Bay View State School and then between 10 October 2012 and 10 July 2015 she was employed in that role under a combination of casual and temporary engagements.[2] On 12 July 2015 her employment status as a Teacher Aide was converted to permanent.

[6] However, from 13 July 2015 Ms August was employed in a different role as an Administrative Officer ("A02").[3] She was initially employed at the Bay View State School and then from 18 July 2016 at the Victoria Point State High School following her application for that position via an expression of interest. Accordingly she has worked continuously in that capacity as an Administrative Officer at either the Bay View State School or the Victoria Point State High School since 13 July 2015. From 13 July 2015, Ms August has not performed any duties as a Teacher Aide. [4] It is not in

[1] QIRC decision at Exhibit 16 to Affidavit of Claire Gosewisch affirmed 29 June 2018.
[2] Affidavit of Janette August affirmed 1 June 2018 at [2]-[6].
[3] Affidavit of Janette August affirmed 1 June 2018 at [21].
[4] Affidavit of Janette August affirmed 1 June 2018 at [23].

contention that in performing work as an Administration Officer Ms August was performing the work of a public service officer.

[7] On 13 October 2017 Ms August requested that her temporary A02 employment be reviewed for appointment as a permanent public service officer under s 149 of the PS Act. She was advised on 20 November 2017 as follows:

> "The outcome of this assessment is that you are not eligible for review under the Directive due to you currently being a permanent employee of the Department."[5]

[8] No other reasons were provided. On 1 December 2017 Ms August lodged an appeal to the Queensland Industrial Relations Commission.

Relevant provisions of the *Public Service Act* 2008 (Qld)

[9] Section 149 of the PS Act provides that temporary employees must be considered for conversion to permanent employment after a certain period of time:

> "**149 Review of status of temporary employee**
>
> (1) This section applies—
> (a) at the end of 2 years after a temporary employee has been continuously employed as a temporary employee in a department; and
> (b) at the end of each 1-year period, after the period mentioned in paragraph (a), that a temporary employee has been continuously employed as a temporary employee in the department.
> (2) The department's chief executive must, within the required period, decide whether the person's employment in the department is to—
> (a) continue as a temporary employee according to the terms of the existing employment; or
> (b) be as a general employee on tenure or a public service officer.
> (3) In making the decision, the chief executive must—
> (a) consider any criteria for the decision fixed under—
> (i) a directive by the commission chief executive; and
> (ii) an industrial instrument; and
> (b) if an industrial instrument provides for the way the decision must be made—comply with the industrial instrument.
> (4) If the chief executive does not make the decision within the period, the chief executive is taken to have decided that the person's employment in the department is to continue as a temporary employee according to the terms of the existing employment.
> (5) In this section—
> *continuously employed as a temporary employee* has the meaning given under a commission chief executive directive or an industrial instrument.
> *required period*, for making a decision under subsection (2), means—
> (a) the period stated in an industrial instrument within which the decision must be made; or

[5] Exhibit CCG-2 to Affidavit of Claire Gosewisch affirmed 29 June 2018.

(b) if paragraph (a) does not apply—the period starting on the last day of the period mentioned in subsection (1)(a) or (b) and ending 28 days later.

temporary employee—

(a) includes a general employee employed on a temporary basis; but

(b) does not include a person employed under section 147 or 148 on a casual basis."

[10] Section 147 of the PS Act provides:

"**147 Employment of general employees**

(1) A chief executive may employ a person as a general employee to perform work of a type not ordinarily performed by a public service officer.

(2) The employment may be—

(a) on tenure, or on a temporary basis and full-time or part-time; or

(b) on a casual basis.

(3) A person employed under this section does not, only because of the employment, become a public service officer.

(4) *Subsections (1) and (2)* are subject to any relevant directive about general employees."

[11] Section 148 of the PS Act provides:

"**148 Employment of temporary employees**

(1) To meet temporary circumstances, a chief executive may employ a person as a temporary employee to perform work of a type ordinarily performed by a public service officer other than a chief executive or senior executive.

(2) The employment may be—

(a) on a temporary basis and full-time or part-time; or

(b) on a casual basis.

(3) A person employed under this section does not, only because of the employment, become a public service officer.

(4) *Subsections (1) and (2)* are subject to any relevant directive about temporary employees."

[12] The Temporary Employment Directive 08/17 is also relevant. The Directive was made by the Public Service Commission pursuant to s 53 of the PS Act and it came into effect on 1 July 2017. As Crow J outlined in *Katae v State of Queensland & Anor*[6]:

> 'Directive 08/17 is a "statutory instrument" under s 7 of the Statutory Instruments Act 1992 (Qld). Section 14B of the Acts Interpretation Act 1954 (Qld), which concerns the use of extrinsic material in the interpretation of a provision of an Act, applies to statutory instruments, via s 14 and Schedule 1 of the Statutory Instruments Act 1992 (Qld).'

[13] That Directive dealt with the process of reviewing the status of temporary employees in the Queensland Public Service for the purpose of deciding whether or not they should

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6 [2018] QSC 225 at [26].

be converted from temporary to permanent employment. The directive sets out the criteria to be applied in relation to such decision. Clause 5.1 of the Directive provides as follows:

> "…
>
> 5.1 This directive applies where a chief executive has employed a person as a temporary employee on a full-time or part-time basis under section 147 or section 148 of the PS Act.
>
> …"

The history of the proceedings before the Industrial Relations Commission

[14] In her submissions before the Industrial Relations Commission, Ms August argued that she became a s 147 employee of the Public Service on tenure on 12 July 2015. She also argued that she commenced performing work of a type ordinarily performed by a public service officer from 13 July 2015 when she commenced work as an Administrative Officer rather than as a Teacher Aide. Ms August argued that the decision maker within the Department has determined that she was never employed pursuant to s 148 of the PS Act and therefore she was not eligible for consideration of being converted to a permanent employee pursuant to s 149 of the Act or the Temporary Employment Directive 08/17. The submissions also noted that the Department was asserting that Ms August was performing duties as an Administrative Officer pursuant to the Directive 18/16 on higher duties.

[15] Ms August's argument before the Commission was that the statutory scheme only allows a person to be employed to perform work of a type ordinarily performed by a public service officer in two ways. Firstly, by being appointed as a Public Service Officer or secondly, by being employed pursuant to s 148 of the PS Act. It was therefore argued that as Ms August was not appointed as a public service officer on tenure, she must therefore have been employed pursuant to s 148 of the Act and therefore she was eligible for her temporary employment to be reviewed. It was argued that the only sources of legislative power to enable a person to be employed to perform work ordinarily performed by a public service officer are ss 119 and 148 of the Act. Therefore, Ms August could only have been employed in these roles pursuant to either s 119 or s 148 and as she was not employed pursuant to s 119, she was therefore employed pursuant to s 148. It was argued that a combination of s 147 and Directive 18/16 does not provide a legislative source of power to enable a person to be employed to perform work ordinarily performed by a public service officer.

[16] Furthermore the submission stated that even if the Department has not correctly recorded that Ms August had been employed pursuant to s 148 of the PS Act that was the reality as there was no other way in which she could be employed. Accordingly, it was argued that the conclusion drawn by the decision maker that Ms August was not employed pursuant to s 148 and not eligible for review was in error.

[17] The submissions from the Department of Education however argued that Ms August was not temporarily employed as an Administrative Officer at Victoria State High School pursuant to s 148 of the Act. It was argued that s 193 of the Act confers on a person a right to appeal against a decision if the decision is of a type prescribed under s 194 of the Act and the person has an entitlement to lodge an appeal under s 196.

Accordingly the decision of the Delegate dated 20 November 2017 was not a decision that could be appealed pursuant to s 194(1)(e) of the Act by virtue of the fact that the decision was not a decision about a temporary employee's employment.

[18] It was further argued that s 196(e) of the Act limits the scope of persons who can lodge an appeal pursuant to s 194(1)(e) to temporary employees who were the subject of a decision made under s 149. Therefore, Ms August was not permitted to lodge an appeal pursuant to s 194(1)(e) by virtue of the limitation at s 196(e) which precludes her from lodging an appeal. Accordingly, it was argued that the member should decline to hear the appeal on the basis that she was not permitted to lodge an appeal by virtue of the limitation in section 200(3) and (4) of the PS Act.

[19] The submissions of Ms August were dated 19 December 2017 and the submissions of the respondent were dated 13 December 2017. Further submissions were then sought from the respondents by the Commissioner. The affidavit of Claire Gosewisch affirmed 29 June 2018 sets out the circumstances surrounding the provision of further material to the Industrial Relations Commission after the filing of those initial submissions. She swears that on 2 January 2018 she received an email from the Associate to the Commissioner enclosing the submissions from Ms August and inviting a brief submission in response.[7] Further submissions were then supplied on 17 January 2018.[8] On 6 February 2018 a further email from the Associate inquired whether a conference was required.[9] On 15 February 2018 Ms August placed further evidence before the QIRC under the cover of an email from her Union representative and on the same date the respondent indicated it wished to place further evidence before the QIRC in response to that of the applicant.[10] Leave to file further submissions in response to the further evidence was given.[11]

[20] On 22 February 2018 the Associate requested further information from the respondent in relation to the relevant award and that information was provided. On the same day, a further email was sent to the respondent by the Associate seeking further clarification in relation to the award. On 23 February 2018 the respondent filed a written submission in response to the evidence filed by the applicant on 15 February 2018. On 26 February 2018 Ms Gosewisch states that she received a phone call from the Associate seeking further information in relation to the Appointment Form and further information was sent by the respondent to the Associate. Further information was also provided on 28 February 2018.

[21] On 1 March 2018 the Industrial Relations Commissioner delivered his decision. The Commissioner determined that the decision under appeal dated 20 November 2017 stated that the appellant Ms August was not eligible for review under the Directive due to being a permanent employee of the Department. The Commissioner indicated that while the decision of the delegate did not include developed reasoning, he took the decision maker to be saying that as Ms August was already employed on tenure, it was not possible to employ her again on the same basis. He considered that such a conclusion would most likely rely on s 149(2) of the Act which says in effect that the decision that must be made is whether Ms August's employment in the Department was

[7] Affidavit of Claire Gosewisch affirmed 29 June 2018, [11].
[8] Affidavit of Claire Gosewisch affirmed 29 June 2018, [12].
[9] Affidavit of Claire Gosewisch affirmed 29 June 2018, [13].
[10] Exhibit CCG – 9 to the Affidavit of Claire Gosewisch affirmed 29 June 2018.
[11] Affidavit of Claire Gosewisch affirmed 29 June 2018, [15].

to continue as a temporary employee according to the terms of the existing employment or whether it should become an employment on tenure.

[22] The Commissioner summarised the arguments before him and stated that the starting point for Ms August was that the administrative work performed by her was work ordinarily performed by a public service officer and that as she was a general employee, she was statute barred from performing this work unless she had been appointed under s 119 as a public service officer or unless she was employed under s 148 as a temporary employee to perform the work ordinarily performed by public service officers. Accordingly, it was argued that in circumstances where there was no evidence of a s 119 appointment, and given the factual circumstances in which she had in fact been performing administrative work in those roles as an Administrative Officer since 2015, then, "the rationalisation advanced was that, either under administrative arrangements, or by the operation of law, the Administrative Officer work had been performed under a series of s 148 temporary contracts".

[23] The Commissioner then noted that the Department opposed Ms August's submissions on two grounds. Firstly, it was argued that whilst the Act provides for different categories of public service employees and provides particular provisions for each category, it does not restrict or prevent performance of work across the categories. He stated that it was further argued by the Department that the performance of administrative work by Ms August had been affected under higher duties arrangements and it was asserted that between 12 July 2015 and the date of the decision and the present, Ms August's substantive and permanent position was that of Teacher Aide and that the administrative work performed had been undertaken during higher duties assignments at an Administrative Officer A02 level. It was argued by the Department that it was open for the Department to direct or otherwise arrange for Ms August to undertake work as an Administrative Officer by way of higher duties without having to specifically employ her as a s 148 temporary employee or a public service officer.

[24] The Commissioner noted that the submissions concluded by stating that engagement as a public service employee in one of the s 9 categories of employment did not preclude work being performed under another category and if performed did not require a separate appointment under s 119 or s 148 of the Act. He stated that it was submitted that the Act should not be construed to impose a restriction or prohibition on the utilisation of general employees in other areas of public sector employment. It was argued that to do so in the Department's view would be contrary to an underpinning purpose of the Act which was to mandate or allow the Chief Executive of a department to effectively and efficiently manage the human resources of the Department.

[25] The decision continued as follows:

> "…
>
> [40] It should not be in dispute that a tenured part-time general employee can be offered additional work or additional hours to supplement her fixed allocation of hours under her tenured status. Together does not press this argument. Positions diverge however around how any such additional hours can be arranged under the legislation, and whether such arrangement constitutes a separate contract of employment.

[41] In general terms I accept Together's [Ms August's Union] proposition that, on the facts and circumstances of this case, the appellant's itinerant performance of public service officer work needs to be undertaken consistent with s 148 of the Act.

[42] The statutory framework regulating the use of temporary employment, except in one important respect, does not differ in terms of its application to general employee work or public officer work. The relevant provisions of s 147 and s 148 are substantially the same. Temporary work in both instances can involve work performed on a temporary basis, full-time basis, or part-time basis.

[43] These provisions are considered in the broader statutory context where both s 148 "temporary employees" and s 147 "general employees" are engaged by the chief executive officer under employment arrangements with no s 119 appointment conditions. Both are "public service employees" who are part of the Queensland Public Service (ss 5 and 9 of the Act). Neither are public service officers under s 119 of the Act, nor by virtue of their employment. In respect to the latter proposition, both s 147(3) and s 148(3) of the Act provide that both types of public service employees do not "only because of the employment, become a public service officer".

[44] The significant difference between s 147 and s 148 of the Act is that, under s 148, there is a condition that must be satisfied before a person is used temporarily or casually to perform work ordinarily performed by a public service officer. This condition, which is to the effect that the supplementary labour may only be used "to meet temporary circumstances", does not apply to temporary employment under s 147 of the Act.

[45] In my view, in circumstances where a general employee may be asked to perform public service officer work on a temporary or casual basis, such arrangement must recognise the condition attached to the use of such an employment arrangement. To this extent, I agree with Together's submission that if the appellant is to be asked to perform public service officer work on some form of itinerant basis, section 148 should be applied and the relevant decision maker should be satisfied that the relief arrangement is to meet temporary circumstances. **It is possible that the appointment form provided by Together may serve this purpose.** (my emphasis)

[46] Where I disagree with Together is that the use of the appellant to supplement her tenured part time arrangement under s 147 to perform higher duties under s 148 does not constitute or involve the entering into of a separate contract of employment. The respondent is required to ensure that the appellant's utilisation is to meet temporary circumstances, but it does not flow from this that the appellant enters into a separate contract of employment with DET. If the appellant was performing other general employee work under s 147 to supplement her part-time tenured income, such arrangement would not require a separate contract of employment. Nor is a separate

contract required if the additional work performed is "public service officer" work.

[47] In my view, the appellant's work for the one and same employer does not involve multiple contracts of employment and cannot involve multiple and simultaneous engagements on tenure. While the word "employ" is used in s 148, I do not take the use of the term to mandate that temporary work could only be done if a contract of employment under s 148 of the Act was in place.

[48] I do not accept that as a general employment principle, either under public service law or at common law, a person could enjoy multiple employments on tenure. The appellant is employed at the discretion of the chief executive of the Department of Education and Training. There is no reason why the chief executive could not offer a tenured part time public service employee additional work under either s 147 or s 148 of the Act under the same contract of employment. Further, simply because the chief executive asks an employee to perform work under another award cannot translate into two separate tenured employments. Nor does such an arrangement interfere with the continuation of the applicant's substantive employment as a general employee on tenure.

[49] **The consequences of multiple tenured employments were not discussed nor explained in Together's submissions. Unanswered questions include whether the appellant might receive two redundancy payments in the event of a school closure or a forced redundancy;** whether the termination of one employment for misconduct or other reason also results in the termination of the other contract of employment; and whether any such termination of employment might result in the prosecution of two separate unfair dismissal claims? (My emphasis)

[50] I do not consider that the operation of the Higher Duties Directive becomes a determinative consideration in the appeal. The determination of the appellant's employment arrangements are resolved by s 147 and s 148 of the Act. The higher duties directive becomes relevant if, as with the appellant's circumstances, additional work is to be performed by at higher classification level, remunerated at a higher level. The directive becomes only incident to, not the mechanism for, whatever administrative arrangements are put in place to effect the engagement of the appellant on administrative duties.

Right to Conversion

[51] Consistent with the above conclusion, I do not consider, on balance, that the terms of s 149 of the Act nor the terms of Directive 08/17 support a conclusion that the appellant is eligible to invoke the provisions of the Act and the Directive.

[52] The right to a review of temporary status is derived from s 149 of the Act. Section 149(1)(a) of the Act confers a right on an employee who has at the end of two years "been continuously employed as a

temporary employee in a department". The definition of "temporary employee" in s 149(5) of the Act includes a general employee employed on a temporary basis. Both temporary employees engaged under s 147 of the Act and temporary employees engaged under s 148 of the Act are entitled to conversion if particular conditions are satisfied.

[53] The effect of s 149 is to lay out the statutory basis for the conversion of temporary employees to permanent status. The determination to be made by the department's chief executive is whether an **employee's employment** is to continue as a temporary employee, or whether the **employee's employment** should be tenured.

[54] Clause 9.1 of the Temporary Employment Directive 08/17 states that a temporary employee "can be converted to permanent" following a review of their status. Clause 9.2 of the directive requires an agency to review "the status of a temporary employee's employment" provided particular conditions have been satisfied. Both clause 9.6 and clause 9.7 of the directive refer to a decision to be made about whether a temporary employee's **employment** should be converted to permanent.

[55] Any review of the appellant's status (if it were held that she was engaged on temporary contracts during administrative work) would reveal that she was already employed on a permanent basis. If an employee enjoys permanent status within a department, they could not seek to be permanently employed again. The term "permanent" is defined in Clause 14 of the directive to mean "an employee employed under the PS Act either as a general employee on tenure or a public service officer employed on tenure". Arguably, the definition does not contemplate both.

[56] The employee's employment must refer to the employee's substantive employment. There is no other employment. The use of the appellant on other types of work, whether under a higher duties arrangement or otherwise, does not displace the substantive form of employment nor does it create a second contract of employment.

[57] In circumstances where, notwithstanding any periods of employment on a temporary basis as an administrative officer, and notwithstanding whether these engagements were deemed to be undertaken pursuant to s 148 of the Act, the appellant was already employed on tenure with the Department of Education and Training. She could not be permanently appointed to the same department because she already enjoyed tenure.

Decision

[58] The decision of the respondent dated 20 November 2017 is confirmed. The appeal is dismissed."

This Application

[26] Pursuant to an amended application for a statutory order of review, Ms August argues that she has been continuously employed as a temporary employee for two years in the same role with the Department of Education and that the first respondent was obliged to review her employment status. It is argued that in breach of the obligations in paragraphs 9.2 and 9.3 of the Directive, the delegate determined the Department was not under any obligation to review the employment status and determined that no such obligation arose on the basis that immediately prior to her appointment as a temporary employee performing the duties of an Administrative Officer A02, she had been granted tenure as a general employee of the Department. Ms August argues that in making that decision, the delegate made an error of law and took into account an irrelevant consideration which affected the decision.

[27] The applicant also argues that on 1 March 2018 when the second respondent dismissed the appeal pursuant to s 208 of the Act and confirmed the delegates decision, the second respondent was wrong in law in a number of respects as follows:

(i) The second respondent expressed the proposition that as a matter of law Ms August's employment with the first respondent could not involve multiple and simultaneous engagements on tenure when the law places no restrictions on the number of tenured engagements an employee may have provided that the employment is in accord with provisions and scheme of the Act.

(ii) The second respondent expressed the proposition as a matter of law that references to Ms August's employment in the Directive must be construed as a reference to her employment as a general employee on tenure as a Teacher Aide when the employment referred to in paras 9.2, 9.3, 9.6 and 9.7 of the Directive was a reference to her employment as a temporary employee performing the duties of an administration officer.

(iii) The second respondent expressed the proposition as a matter of law that the circumstance that prior to Ms August's employment as a temporary employee she was converted to a general employee on tenure precluded a review of her temporary employment pursuant to para 9.6 of the Directive and precluded her temporary status from being converted into a permanent employee pursuant to s 9.7 of the Directive when neither the Directive nor s 149 of the Act are affected in their operation by any previous obtained employment status of Ms August or any continuing rights arising from that previous employment.

[28] Accordingly it was argued that as a result of those erroneous propositions the second respondent made errors of law and took into account irrelevant considerations which affected the decision.

[29] It was also submitted that there was a breach of the rules of natural justice by the second respondent in making the decision because the first respondent made submissions and supplied further material to the second respondent on 15, 16, 22, 26 and 28 February 2018 to be taken into account by the second respondent in relation to the determination without notifying the applicant of those exchanges and affording the applicant the opportunity to consider and respond to those submissions.

[30] Ms August argues that as a result of the errors set out namely the taking into account the irrelevant considerations as a result of the errors of law and the breach of the rules of natural justice, the decision is invalid and has no lawful affect.

[31] Counsel for Ms August therefore seeks a declaration that the decision is void ab initio and an order is sought setting aside the decision ab initio and referring the appeal from the decision of the delegate back to the Commission for further consideration subject to a direction that the member set aside the decision of Ms Pickering and return the issue of the review pursuant to s 149 of the Act to the Chief Executive for determination in accordance with law.

[32] At the hearing of the application Counsel for the first respondent conceded that there had been a breach of the rules of natural justice and argued that the impugned decision should be set aside and that Ms August's appeal to the Commission dated 27 November 2017 should be remitted back to the Commission for consideration. Counsel opposed the making of any order which directed the Commission to set aside the initial decision of the delegate dated 20 November 2017.

[33] Accordingly, given the acknowledgment that there has been a breach of natural justice there is no doubt that the decision of the Commission should be set aside. The real issue now in contention relates to what other orders should be made. Should the decision of the delegate dated 20 November 2017 be declared void ab initio and should there be an order with a direction in the terms sought by the applicant?

Should there be a remittal back to the Commission with a direction in the terms sought by the applicant?

[34] As I have outlined, Counsel for the applicant seeks an order pursuant to s 30(1)(b) of the *Judicial Review Act* 1991 that the matter be remitted back to the Commission with a direction that the Commission send it back to the original decision maker (the delegate of the first respondent) to determine the question in accordance with law. Counsel argues that the same error of law was made by both decision makers.

[35] Section 30 of the *Judicial Review Act* 1991 is in the following terms:

> "**30 Powers of the court in relation to applications for order of review**
>
> (1) On an application for a statutory order of review in relation to a decision, the court may make all or any of the following orders—
>
> (a) an order quashing or setting aside the decision, or a part of the decision, with effect from—
>
> (i) the day of the making of the order; or
>
> (ii) if the court specifies the day of effect—the day specified by the court (which may be before or after the day of the making of the order);
>
> (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions (including the setting of time limits for the further consideration, and for preparatory steps in the further consideration) as the court determines;

> (c) an order declaring the rights of the parties in relation to any matter to which the decision relates;
>
> …"

[36] Counsel for Ms August argues that the decision should not simply be sent back to the Commissioner for reconsideration because "the Commissioner won't, necessarily, have all the facts because the original decision maker didn't seek the facts."[12] Furthermore, the question that Ms August's Counsel argues this Court should determine is a question of law concerning the legal nature of the applicant's employment and particularly whether or not she is employed in her AO2 position as an Administration Officer as a temporary employee under s 148 of the Act and therefore has a right to be considered for conversion pursuant to s 149 of the Act and paragraph 9.2 of the Directive.

[37] Counsel argues that simply remitting the matter back to the Commissioner will leave intact the finding of law that sits at the core of the dispute between the parties unless it is remitted in a way which determines the question of law and requires the Commissioner to act on that basis.

[38] In this regard Counsel for Ms August places reliance on a number of authorities, in particular *Bass v Permanent Trustee Co Ltd*[13] where a number of questions of law had been referred to the Full Court of the Federal Court by a trial judge in relation to the *Trade Practices Act* 1974 (Cth), to argue that in the present case we have the findings of the Commissioner in relation to certain facts and that the Court would not be providing answers to a theoretical question and would not therefore be providing an advisory opinion. Counsel relied on the following passage:

> "The purpose of a judicial determination has been described in varying ways. But central to those descriptions is the notion that such a determination includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy. In *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd*[52], Kitto J said:
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> "[J]udicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons... [T]he process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which ... entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist."

[39] The decision of *Hunter Development Corporation v Save our Rail NSW Incorporated and Ors (No 2)*[14] is also relied upon by Counsel who argues that this Court should decide the legal question as the New South Wales Court of Appeal had done in that case when it determined that it should proceed to hear the appeal as it involved a question of

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[12] Transcript 1-10 at ll 45-47.
[13] (1999) 198 CLR 334 at [45].
[14] (2016) NSWCA 375 at 22.

statutory construction which was pivotal to at least one other pending proceedings as follows:

> "47. There is also a line of authority to the effect that a court may proceed to determine a matter notwithstanding that, for whatever reason, the substantive issue is no longer in issue, where the decision may affect other cases. In *People with Disability Australia Inc v Minister for Disability Services* proceedings were brought in relation to certain institutional accommodation which had been closed after the notice of appeal was filed but well before the matter was set down for hearing. The Court was only made aware of the closures shortly before the close of the oral submissions of the Minister.
>
> 48. The question arose as to whether the Court should proceed with the hearing and the determination of the appeal. The Court observed, at [12], that as the centres had been closed, any decision the Court made would not have any effect on those institutions. The Court noted, at [13], that it nonetheless retained a discretion whether to determine the appeal, stating at [14]:
>
> > "One of the factors which would cause the Court to exercise its discretion and determine the matter is where the decision subject of the appeal is likely to affect other cases: see *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; 198 CLR 334; *Long v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 438; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54; *Hope Downs Management Services v Hamersley Iron Pty Ltd* [1999] FCA 1652; *Bonan v Hadgkiss* [2007] FCAFC 113."
>
> 49. In the circumstances, the Court proceeded to determine the appeal as it involved a question of statutory construction that was relevant, indeed pivotal, to at least one other pending proceeding, adding however, at [15], that:
>
> > "Had the position between the parties in this case been known to the Court when the matter first became moot, a different position may have been taken."
>
> 50. To the same effect are the observations of Campbell JA in *Jardine and Jardine Investments v Metcash Ltd* at [30] where his Honour noted that one aspect of the Court's power to ensure its proceedings are not abused is the power "*to halt proceedings (including an appeal) that pose a question that has become moot, ie that will produce no foreseeable consequence for the parties*". Nonetheless, Campbell JA observed that the Court had a discretion to permit an appeal to proceed, "*if a practical point would be served by doing so*": at [32]. Campbell JA observed that circumstances where the Court might do so was when there were live questions of costs which depended upon the outcome of the appeal or, relevantly for the point presently being made, where the decision was likely to affect other cases.
>
> …"

[40] Accordingly Counsel for Ms August argues as follows:

> "…
>
> So where there has been an issue in dispute – that issue has disappeared as a result of agreement between the parties. But it's significant for other parties, and the court has a discretion to go ahead and decide the matter, the substantive matter, but we say it's – the facts in this case are much stronger than that, because what our learned friends are saying is the narrow question of whether the decision of the commissioner should be set aside has been conceded but the more significant question as to what is the law on which your rights under the directive should be determined will not only have significance for other parties, other employees, and the state government, but it has significance for the actual parties in this case with regard to how the broader dispute will be determined. So that line of authority that's discussed in those paragraphs applies a fortiori to the facts of this case.
>
> …"

[41] The first respondent argues however that the decision of the Commissioner should be set aside given that ground 16A of the Amended Application has been conceded by the first respondent, but that the decision should not be declared void ab initio. Counsel argued that it would be beyond power for this Court to direct the Commissioner to set aside the decision of the delegate and to return the issue of the review, pursuant to s 149 of the Act for determination by the delegate of the first respondent because the only decision before this Court is the decision of the Commissioner. It is argued that it would only be in extremely rare cases where such an order would be made.

[42] Counsel also argued that there are some factual matters which are still in contention and that given those contentions this is not an appropriate case for declarations in the terms sought by the applicant.

[43] In terms of the decision made by the Commissioner, Counsel for the first respondent stated that the first respondent endorsed the decision made by the Commissioner below and submitted that Ms August's work as an Administrative Officer did not constitute a separate arrangement pursuant to s 148 but rather that there is only one characterisation of a tenured public servant's employment. Whilst the underlying policy is that at a fundamental level people should have the certainty of tenured employment that is not a guarantee of tenure at higher and other levels.

[44] I accept that the application does not impugn any decision other than the decision of the Commissioner.

[45] Having considered the affidavit material, I consider that there is some force to the submissions by Counsel for the first respondent that there are some factual matters which still need to be considered and that in the circumstances of this case, this is not an appropriate vehicle for the declaration sought. In this regard I accept that there were a number of ex parte communications between the Associate to the Commissioner and the Department. Clearly, Ms August and her legal representatives were unaware of those communications and the content of those communications. In this regard I note in

particular the email of 28 February 2018[15] refers to the usual practice of the Department in relation to an "individual undertaking work of the type undertaken by Ms August as an Administrative Officer is appointed as a public service officer, and is therefore covered by the *Queensland Public Service Officers and Other Employees Award - State 2015."* That award was then attached and a number of submissions were then made with the email concluding;

> "The approach to be adopted in resolving which Award applies is to consider the major and substantial purpose of the work being performed. It is the Department's view that an Administrative Officer under the 2012 and/or 2015 Public Servants Award is a more comprehensive match to the 'higher duties' work undertaken by Ms August than under the *Employees of Queensland Government Departments (Other than Public Servants) Award- State 2012."*

[46] In my view those communications reveal that there may well be some factual matters which are contentious and indeed it would seem to me the matters I have highlighted at paragraphs [45] and [49] of the Reason for Decision may also require further evidence. It would also seem that there are also some factual matters in the affidavit of Ms August sworn 29 June 2018 which she wishes to rely upon in this hearing which are objected to by Counsel for the first respondent on the basis that they are not relevant to this application for Judicial Review. I also note that if the matter is remitted to the Commissioner the procedure on appeal is outlined in s 201 of the PS Act and that s 201(2) provides '[t]he purpose of the appeal is to decide whether the decision appealed against was fair and reasonable.' The evidence on appeal to the Commissioner is the evidence available to the decision maker and Ms August can therefore argue that the original decision was not fair and reasonable and she can therefore put to the Commissioner all the evidence which was available but not tendered.

[47] In particular it would seem to me that should a declaration be made by this Court on incomplete facts then Ms August's rights of appeal could in fact be compromised as argued by Counsel for the first respondent.

[48] Furthermore the Court should not give hypothetical or advisory opinions.

[49] On that basis I do not consider that this case falls within the category of cases relied upon by Counsel for Ms August.

[50] There should therefore be an order in the terms sought by the first respondent that the Decision of the Second Respondent dated 1 March 2018 be set aside and Ms August's appeal to the Commission dated 27 November 2017 should be remitted back to the Commission for consideration in accordance with law. I will hear from the parties in relation to the form of the order and as to costs.

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[15] Exhibit CCG-15 to Affidavit of Claire Gosewisch affirmed 29 June 2018.