

Katae v State of Queensland & Anor [2018] QSC 225

Notable case | Date of decision: 4 October 2018

Overview

In early February 2018 the delegate determined that Ms Katae (the employee) was unable to be converted from a temporary role to a permanent role in the public service.

The reasons given for the decision were that:

- the employee's temporary engagements as an AO5 were to backfill substantive incumbents
- the temporary circumstances ceased on the return of the substantive incumbents to their role,
- there were no other AO5 Contract Officer positions available within Contract Management, or another role with the same or substantially the same capability requirements for the employee to be appointed to.

On 22 February 2018 the employee appealed the decision in the Queensland Industrial Relations Commission (QIRC), under section 194(1)(e) of the *Public Service Act 2008* (PS Act).

On 3 April 2018 the appeal was dismissed by Linnane VP ("the VP") and on 1 May 2018 the employee lodged an application for statutory order of review under section 20 of the *Judicial Review Act 1991*.

Ms Katae had been employed in a temporary capacity as set out in the table below:

Employment period	Role title	Reason for engagement
14 July 2014 to 24 February 2015	Business support officer (AO4)	Not stated
25 February 2015 to 30 June 2015	Contract Manager (AO5)	Backfill a secondment
1 July 2015 to 30 June 2016	Not stated	Backfill secondment to a temporary project role
1 July 2016 to 29 July 2016	Not stated	Backfill parental leave
1 August 2016 to 19 August 2016	Contract officer role	Temporary vacancy
22 August 2016 to 9 January 2017	Not stated	Backfill secondment to a temporary project role
10 January 2017 to 22 February 2017	AO5	Backfill leave
23 February 2017 to 14 April 2017	Contract officer (AO5)	Designated additional resource
18 April 2017 to 27 May 2017	Contract officer (AO5)	Backfill leave
28 May 2017 to 30 June 2017	Contract officer (AO5)	Backfill
1 July 2017 to 10 July 2017	Contract officer (AO5)	Backfill parental leave
From 10 July 2017, initially for six months but extended	Senior project officer, subject matter expert (AO6)	Project role to assist with delivery of a new housing

twice at the time of the judicial review decision

management system that was replacing the existing system.

At the time of the temporary employment decision by the delegate, the project that Ms Katae was employed on was expected to finish at 30 June 2018. Project completion did not occur by the expected date and as a result the employee's contract was extended to 31 December 2018 with the possibility of further extension pending project completion.

No performance concerns had been raised with Ms Katae and her satisfaction of the merit requirement was not in dispute.

In her application for judicial review, the employee alleged that the decisions of the VP in the QIRC and the delegate in the first instance involved an error of law in interpreting section 149 of the PS Act and section 7 of Directive 08/17 (the directive). In addition, it was argued decision makers had:

- failed to take into account relevant considerations in section 9 of the directive
- taken into account irrelevant considerations being sections 1(b) and 7.2 of the directive or had impermissibly and inflexibly applied a policy.

Decision

The application for judicial review was allowed, and the appealed decision was found not to be fair and reasonable to the extent that the VP had failed to consider the application of the directive to the AO6 Senior Project Officer role.

In allowing the application for judicial review, His Honour found there needed to be a consideration of whether the AO6 was the same role. While there was one difference in the capability requirements – and having regard to the fact that the legislation is remedial – His Honour found that the roles were substantially the same.

His Honour considered that because the applicant had moved to the AO6 role before the decision was made, the directive requirements had to be applied against both the AO5 and AO6 roles and this did not occur for the AO6 role. Whether there was a continuing need for the applicant to be employed in the AO6 role should have been considered.

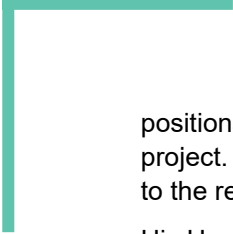
The question of whether a role is likely to be ongoing is determined by objective analysis based on the circumstances. Ongoing – not permanent – is the test, and the ordinary dictionary meaning of ongoing applies, meaning: going on, proceeding or continuing.

The fact the agency was unable to guarantee the project would end at the set date was considered by the VP. On appeal, this was considered an insufficient basis to conclude the role was not likely to be ongoing.

While the project had an end date of 30 June 2018, it ought not to be presumed it would end on that date – not all projects end on time. Similarly, the broad definition of roles meant that prior to the decision, the applicant had found similar roles within the department for three and a half years. On the then available evidence, it was considered that a fair and reasonable conclusion was that the role was likely to be ongoing. His Honour concluded that the appealed decision was not fair and reasonable.

Ms Katae's submissions were not accepted in relation to the decisions by the delegate and the VP when applying the directive to the AO5 roles held by her. His Honour did not accept the argument that the VP made an error of law that clause 9 of the directive had no relevance.

It was clear through the VP's reasons that she set out most of the provisions, considered and applied them. The VP analysed the evidence and concluded the appellant was backfilling



positions, that each role was temporary and that the more recent role was not in an ongoing project. While the AO5 role was found to be ongoing, the applicant was not needed to fill it due to the return of substantive incumbents.

His Honour also found it was not correct to say that the VP misinterpreted section 7 of the directive. The rider of “unless there are genuine operational reasons” must be interpreted with consideration given to clause 9.6(a).

A critical consideration is whether there is a continuing need for the person to be employed in the same role or a substantially similar role and whether the role is likely to be ongoing. For this, the decision maker needs to refer to the indicators in section 7.2. Where a temporary employee is backfilling an employee on leave, they ought not be converted (in circumstances where there are no other substantially similar roles available). [See related FAQs 8 to 10.](#)

Messages and reminders for managers

- The test for conversion is not whether there is a substantive vacancy but whether there is a continuing need for the employee to be employed in the role or a role that is substantially the same and likely to be ongoing.
- Ongoing does not mean permanent – decision makers should consider the ordinary meaning of ongoing.
- When considering substantially the same roles, agencies should consider roles with substantially the same capability requirements.