Appointing a public service employee to a higher classification level

Directive: 13/20  Effective date: 25/09/20

1. Purpose
1.1 The Public Service Act 2008 (PS Act) establishes employment on tenure is the default basis of employment in the public service, excluding non-industrial instrument employees, and sets out the circumstances where employment on tenure is not viable or appropriate.
1.2 This directive:
   (a) highlights key sections in the PS Act dealing with appointing a public service employee assuming the duties and responsibilities of a position at a higher classification level
   (b) supports the opportunity to appoint an employee to a higher classification level where that employee has performed the role for one year and is eligible for appointment having regard to the merit principle
   (c) sets out procedures for requests and decisions.

2. Authorising provisions
This directive is made pursuant to sections 53 and 149C of the Public Service Act 2008 (PS Act).

3. Application
3.1 This directive applies to:
   (a) a public service officer who is seconded to, or
   (b) a public service employee (including a fixed term temporary employee) who is assuming the duties and responsibilities of,
       a higher classification level in the public service agency (agency) in which the employee is substantively employed.
3.2 This directive does not apply to:
   (a) a casual employee
   (b) a non-industrial instrument employee
   (c) an employee who is seconded to or acting in a position that is ordinarily held by a non-industrial instrument employee.
3.3 This directive applies to the following entities (each entity being an “agency” for this directive) and their employees:
   (a) departments
(b) public service offices listed in Schedule 1 of the PS Act
(c) an entity declared to be a public service office under a regulation and where the regulation applies this directive to the entity (sections 22-23 PS Act).

3.4 The requirement to advertise roles in the directive relating to recruitment and selection does not apply to the appointment of an employee to a higher classification level under this directive. However, if an agency is seeking to permanently appoint an employee to a higher classification level prior to the employee becoming eligible to request an appointment under section 149C of the PS Act, the appointment must comply with the recruitment and selection directive.

3.5 Section 52 of the PS Act outlines the relationship between a directive and industrial instrument including how to deal with inconsistencies.

**Directive**

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

4.3 Under the *Human Rights Act 2019* decision makers have an obligation to act and make decisions in a way that is compatible with human rights, and when making a decision under this directive, to give proper consideration to human rights.
5. Employee may request to be appointed at the higher classification level

5.1 Section 149C of the PS Act provides that an employee seconded or engaged in higher duties may submit a written request to the chief executive to permanently appoint the employee to the higher classification level as a general employee on tenure or a public service officer.

5.2 To be eligible to request consideration for appointment at the higher classification level under clause 5.1 the employee must:
   (a) have been seconded to or assuming the duties and responsibilities of the higher classification level
   (b) for a continuous period of at least one year
   (c) be eligible for appointment to the higher classification level having regard to the merit principle.

5.3 Under section 149C(3) of the PS Act, an eligible employee may request the chief executive to permanently appoint the employee to the higher classification level:
   (a) one year after being seconded to or assuming the duties and responsibilities of the higher classification level, and
   (b) each subsequent year where the employee continues their engagement at the higher classification level in the same role.

5.4 An employee may make one request for appointment in each one year period commencing on the employee becoming eligible to request under clause 5.3(a) or 5.3(b), and may make an additional request if the role becomes a substantive vacancy.

5.5 The chief executive must consider permanently appointing the employee to the higher classification level where a written request has been made under this clause.

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 documented 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.

6.3 In accordance with section 149C(6) of the PS Act, if the chief executive does not make the decision within 28 days, the chief executive is taken to have decided that the person’s engagement in the agency is to continue according to the terms of the existing secondment or higher duties arrangement.

6.4 Each agency must, upon request, give the Commission Chief Executive a report about the number of known deemed decisions occurring by operation of section 149C(6) of the PS Act.

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.

7.2 A written notice is not required to be prepared ‘after the fact’ to support a deemed decision made under clause 6.3.

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.

8.2 In accordance with section 195(1)(j) of the PS Act, an employee does not have a right of appeal in relation to a decision not to permanently appoint the employee to the higher classification level in response to an application made under clause 149C(3)(a), that is if the employee has been seconded to or acting at the higher classification level for less than two years.

9. Exemption from advertising

9.1 Any requirement to advertise a role in a directive dealing with recruitment and selection does not apply when permanently appointing an employee under this directive.

10. Transitional provisions

10.1 Section 295 of the PS Act sets out the transitional arrangements for employees seconded to or assuming the duties and responsibilities of a higher classification level who may now be eligible to request appointment at the higher classification level as a general employee on tenure or a public service officer.

11. Definitions

Agency has the meaning provided in clause 3.3 of this directive.

Chief executive, in the context of exercising a decision making power, includes a person to whom the chief executive has delegated the decision making power.

Continuous period for the purposes of this directive, means a period of unbroken engagement, including periods of authorised leave or absence, at the higher classification level in the same role, in the same agency.

Higher classification level means a classification level which has a higher maximum salary than the maximum salary of the classification level actually held by the employee. An employee who has assumed less than the full duties and responsibilities of the higher classification level and as a result receives remuneration at a relevant percentage of less than 100 per cent is not considered to be performing at the higher classification level.

Non-industrial instrument employee has the meaning given under the Industrial Relations Act 2016.
Public service agency means a department or public service office as provided for in section 49A of the PS Act.

Secondment has the meaning given under section 120(1)(a) of the PS Act.

Substantive vacancy means a recurrently funded position identified on an agency’s establishment list that does not have an ongoing incumbent appointed.

12. Related resources and reference materials
This material does not form part of the directive but may assist in the interpretation and application of the directive and should be considered by decision makers.

- Template letters
- Decision making checklist
- Find resources about managing employees in the Queensland Government
- Directives relating to
  - supporting employees affected by workplace change
  - fixed term temporary employment
  - casual employment.
Appendix A – section 149C

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 1 year; and

(c) is eligible for appointment to the position at the higher classification level having regard to the merit principle.

(2) However, this section does not apply to the following public services employees—

(a) a casual employee;

(b) a non-industrial instrument employee;

(c) an employee who is seconded to or acting in a position that is ordinarily held by a non-industrial instrument employee.

(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).

(4) The department’s chief executive must decide the request within the required period.

(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.

(5) If the department’s chief executive decides to refuse the request, the chief executive must give the employee a notice stating—

(a) reasons for the decision; and

(b) the total continuous period for which the person has been acting at the higher classification level in the department; and

(c) how many times the person’s engagement at the higher classification level has been extended; and

(d) 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.

(6) If the department’s chief executive does not make the decision within the required period, the chief executive is taken to have refused the request.

(7) The commission chief executive must make a directive about appointing an employee to a position at a higher classification level under this section.

(8) In this section—

continuous period, in relation to an employee acting at a higher classification level, has the meaning given for the employee under a directive made under subsection (7).

required period, for making a decision under subsection (4), means—

(a) the period stated in an industrial instrument within which the decision must be made; or

(b) if paragraph (a) does not apply—28 days after the request is made.