

# Directive 03/23 – Review of acting or secondment at higher classification level

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## Purpose

The *Public Sector Act 2022* (PS Act) establishes employment on a permanent basis as the default basis of employment in the Queensland public sector.

*Directive 03/23 – Review of acting or secondment at higher classification level* sets out procedures for reviews and requirements for decisions in the context of reviewing whether an employee acting, or seconded to, a higher classification level meets the requirements of the Public Sector Act.

This directive:

- a. highlights the key sections in the PS Act dealing with the employment of a public service employee in a position at the higher classification level on a permanent basis
- b. supports and supplements the provisions of the Act with respect to the review of employees acting at, or seconded to, a higher classification level
- c. sets out procedures and requirements for decisions in the context of reviewing an employee acting, or seconded to, a higher classification level.

Under the directive:

- At the end of each additional year of acting at, or being seconded to, the higher classification level, an employee may ask the department to employ them in the position at the higher classification level on a permanent basis, where they have been acting at, or seconded to, a higher classification level for a continuous period of at least one year. There are three circumstances in which a public sector employee may make an additional request for the department to employ them in the position at the higher classification level on a

permanent basis, provided for in section 121 of the Act.

- The department declined a request made under section 120 because the employee was not suitable to perform the role, but within three months the employee considers they may have become suitable.
- The department is taken, under section 120(6), to have refused a request made under section 120 (i.e. a deemed decision) and the employee has not appealed against the decision under section 130 within three months of the deemed decision.
- The position at the higher classification in which the employee is acting, or to which the employee is seconded, becomes vacant and they apply within three months of the position becoming vacant under section 121(i)(c).

The directions:

- provide for the meaning of “continuous period”, as required under section 120(8) of the Act
- provide for the meaning of “suitable”, as required under section 120(8) of the Act
- establish procedural requirements for conducting a review and employing an employee at a higher classification level under sections 120 and 121 of the Act.

## How to apply

If you believe you may be eligible to have your higher duties considered for conversion to permanency, you can email the Employment Review Team at [EmploymentReview@qed.qld.gov.au](mailto:EmploymentReview@qed.qld.gov.au)

You will need to include the following information in the email request:

- a statement to the effect of: “Pursuant to section 120 of the Public Sector Act 2022, I

am requesting to have my higher duties converted to permanent”, which also includes your full name, including any previous names

- your employee number
- your school, region or business unit
- any submissions you wish to provide to the Employment Review Team outlining why you believe you should have your higher classification role converted to permanent. Please note:
  - you are not required to provide submissions in support of your application
  - your application will not be negatively impacted in the event that you do not provide submissions.

The department will be required to consider your application and provide you with a response within 28 days. If the department does not make a decision regarding the conversion of your employment status within 28 days, the department is taken to have decided not to offer to convert your employment to a permanent basis, and you will continue your employment as a non-permanent employee according to the terms of your existing employment.

Please be aware that you will only have an avenue to appeal a decision made by the Employment Review Team if you have been engaged in your higher classification role for a period of two years or more, as provided for in section 131(1)(a) of the Act.

There is no mechanism for appeal to the Queensland Industrial Relations Commission if you have been engaged in the role for less than two years.

## How is the decision made by the department?

*The principles that guide the department responsible for making decisions are:*

- *a requirement to act in a way that is compatible with the main purpose of the Act and how the main purpose is achieved, including fair treatment of public sector employees and maximising employment security and permanency of employment.*
- *under the Human Rights Act 2019*
  - *act and make decisions in a way that is compatible with human rights*
  - *give proper consideration to human rights when making a decision under the*

*Act and Public Sector Commissioner (Commissioner) directives*

- *public sector reframing entities have a unique role in supporting the state government in reframing its relationship with Aboriginal peoples and Torres Strait Islander peoples by fulfilling certain responsibilities.*

*If the employee has been acting at, or seconded to, a higher classification level for a continuous period of at least one year, the employee may ask the department to employ the employee in the position at the higher classification level on a permanent basis, after—*

- (a) *the end of one year of acting at, or being seconded to, the higher classification level; and*
- (b) *the end of each subsequent 1-year period.*

*If the department considers the employee is suitable to perform the role and with regard to:-*

- *the genuine operational requirements of the public sector entity; and*

*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 acting at, or secondment to, the higher classification level.*

If the department decides to refuse the request, the chief executive must give the employee a notice stating:

- the reasons for the decision
- the total continuous period for which the employee has been acting at, or seconded to, the higher classification level in the public sector entity
- how many times the employee’s acting arrangement or secondment has been extended
- each decision previously made, or taken to have been made, under this section in relation to the employee during the employee’s continuous period of acting at, or secondment to, the higher classification level.

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

## Employee's right to make additional request for review

This section applies in relation to an employee mentioned in section 120(1) if—

- (a) both of the following apply—
- i. the department has decided under section 120 not to employ the employee in the position at the higher classification level on a permanent basis because the chief executive considered the employee was not suitable to perform the role
  - ii. the employee considers they may have become suitable to perform the role
- (b) both of the following apply—
- i. the department is taken, under section 120(6), to have refused the employee's request to be employed in the position at the higher classification level on a permanent basis
  - ii. the employee has not appealed against the decision under section 130
- (c) the position in which the employee is acting, or to which the employee is seconded, at the higher classification level becomes vacant.

If any of these three scenarios exist, the employee may ask the department to employ them in the position at the higher classification level on a permanent basis.

The employee must make the request:

- (a) within 3 months after the employee first considers they may have become suitable to perform the role; or
- (b) within 3 months after the chief executive is taken to have refused the employee's request as mentioned in (b) above; or
- (c) within 3 months of the position becoming vacant.

The department must decide the request within 28 days of receiving the request. If the department does not make the decision within the period required under subsection (4), the chief executive is taken to have refused the request.

The employee may make only one request under this section in relation to each separate decision made, or taken to have been made, under section 120.

## Obligations when a decision is made to refuse a request to employ a public sector employee at a higher classification level on a permanent basis

Any notice provided to the employee must: -

- set out the findings on material questions of fact.
- refer to the evidence or other material on which those findings were based.

Any notice provided to the employee must include information about any relevant appeal rights available to the employee.

Where the department decides to refuse a request made under section 120 of the Act because the person was not suitable to perform the role, any notice provided to the employee must include information about an employee's right to request an additional review under section 121 of the Act, in the event the employee considers they have become suitable to perform the role.

## Appeals

An employee who is the subject of a decision under section 120 or section 121 of the Act to not employ the person at the higher classification level on a permanent basis, has a right of appeal provided for in section 131(1)(a) of the Act, if the employee has been acting at or seconded to the higher classification level for a continuous period of two years.

An employee does not have a right of appeal in relation to a decision made under section 120 or 121 of the Act not to employ the employee at the higher classification level on a permanent basis if the employee has been seconded to or acting at the higher classification level for less than two years, as provided for in section 132(1)(k).

## How to lodge an appeal against a decision to refuse a member's request or a deemed decision.

If the employee would like to lodge an appeal, they may do so by applying directly to the Industrial Registry of the Queensland Industrial Relations Commission (QIRC) by completing Form 89 – Appeal notice – Public Sector Act 2022, which must be received by the Industrial Registry by 5pm, 21 days after the expiry of the 28 day period that began when DoE received the initial application.

For further information about the appeal process, please contact the Industrial Registry on 1300 592 987 or email [girc.registry@qirc.qld.gov.au](mailto:girc.registry@qirc.qld.gov.au).

The Public Service Appeal Guide can be accessed through this link: [Public service appeal guide \(qirc.qld.gov.au\)](https://www.qirc.qld.gov.au/public-service-appeal-guide)

## How to fill out form 89 (for guidance only)

Form 89 and all other forms can be filed at the registry via the following methods:

- By e-mail: [girc.registry@girc.qld.gov.au](mailto:girc.registry@girc.qld.gov.au)
- In person over the counter:
  - Industrial Registry
  - Level 21 Central Plaza Two
  - 66 Eagle St
  - Brisbane Qld 4000
- By post: Industrial Registry GPO Box 373 Brisbane Qld 4001
- By fax: (07) 3221 6074.

Form 89 requires the member to tick a number of boxes. In this particular type of appeal, you need to complete sections 1-5 plus 7.

Section 5 requires you to attach a copy of the decision that you are appealing against. That might be a letter/email or a more formal document that provides the reasons to you. The copy of the decision must be attached if your Form 89 is to be processed by the registry.

Section 7 requires that you state the grounds on which you are appealing. This means that you must outline why you do not think that the decision reached was fair or reasonable. For readability purposes, we suggest that each paragraph is numbered and spaces are incorporated if possible.

You must not attach supporting documents to Form 89, other than the relevant decision. Supporting documents will not be accepted. If the QIRC requires more information, then it will be requested later.

What happens after Form 89 is submitted?

- Form 89 will be allocated to a member of the commission, who will issue a directions order that sets out the further conduct of the matter. Depending on the matter in question, the parties may be asked for all relevant information and written submissions supporting their case. Once you receive a directions order, we encourage you to contact the QIU and speak to an Officer about the requirements of the directions order.
- The timelines in the directions order must be adhered to.
- These directions orders can vary.
- You will need to provide a written submission in support of the appeal by the prescribed date and time. This can be no more than five pages in length, but you can attach any relevant documents. This

submission needs to be filed in the Industrial Registry and served to the respondent (the department). Again, for readability purposes each paragraph should be numbered and spaces incorporated.

Submissions to the Industrial Commission can be emailed, faxed, delivered in person or posted, but they must be received by the prescribed date and time.

To serve the department, email the Employee Relations Team on [EmployeeRelations.HUMANRES@qed.qld.gov.au](mailto:EmployeeRelations.HUMANRES@qed.qld.gov.au).

The department will have a chance to respond, and you should have another chance to respond too, but it will most likely be only three pages. Timelines are prescribed. This is all outlined in the directions order.

## The role of the QIRC

With regards to Directive 03/23, the only thing the commission can consider is whether the determination by the decision maker was fair and reasonable. Therefore, they can only look at the information that was available to the decision maker at the time they made the decision.

## Frequently asked questions (from Public Service Commission's website)

### 1. What is the meaning of suitable?

An employee is to be considered suitable to perform the role where:

- a. the employee has provided evidence of possessing any relevant mandatory qualification/s (as reflected in the role description), and
- b. the employee meets any relevant mandatory condition/s of the role (as reflected in the role description), and
- c. the employee is not subject to any unresolved and documented conduct or performance matters that have been put to the employee in writing, and where required, managed in accordance with the requirements of a relevant directive, such as the directives relating to positive performance management and discipline.

### 2. What does "continuous period" mean? What is an authorised leave or absence?

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 public sector entity. Additionally, a public sector employee has been acting at, or seconded to, the higher classification level, where they have been



remunerated at the full rate of the higher classification level during the period of unbroken engagement mentioned above.

Authorised leave, as provided for in clause 8.1, includes any period of leave that has been approved by the chief executive, including leave without pay for any period, where it is intended that the employee will return to the position at the higher classification level following the period of leave.

Periods of approved leave (including parental leave and leave without pay) or periods of absence (including the performance of alternative higher duties) where it was always intended that the employee would return to the higher duties role may be considered as authorised leave or absence and not break the continuous period.

### **QIRC decisions affecting appointment and employment conversion (PSC website)**

Below is a summary of principles from recent decisions of the Queensland Industrial Relations Commission (QIRC) relating to the superseded Directive 13/20 – *Appointment to the higher classification level position*. These decisions have been made under different framework and although they may be considered by the QIRC they should not be relied upon as a measure of a potential successful outcome.

*Please note that below we have only provided a precis of the information provided from this summary. The full summary can be accessed through this link:*

<https://www.forgov.qld.gov.au/qirc-decisions-affecting-appointment-and-employment-conversion>

Process/eligibility

In conducting a review, the agency is only required to determine whether a person should be permanently appointed to the position held at the time of requesting the review as identified by the title and classification and the position number.

### **Genuine operational requirements:**

- Genuine operational requirements of the department would at least include consideration of whether or not there was an authentic need, having regard to the effective, efficient and appropriate management of the public resources of the department to appoint an employee who has been assuming the duties and responsibilities to the position at the higher classification level (PSA/2020/297).

Genuine operational requirements can include consideration of allocated funding, consistent with managing in a way that promotes the effective, efficient and appropriate management of public resources (PSA/2020/371, PSA/2022/646)

- Genuine operational requirements do not require slavish concurrence to clause 4.2 of the directive. However, it is entirely fair and reasonable for an agency to consider those factors in arriving at a conclusion of whether to permanently appoint an employee to the position (PSA/2020/305).
- The abolishment of a role or the impending return of the substantive occupant of a position are genuine operational requirements that support a decision not to permanently appoint an employee to a higher classification level (PSA/2020/274, PSA/2020/351).
- Appeal scope – the authority to determine the review lies squarely with the department chief executive or their delegate. It is not a question of **merit** (*no longer used*) or whether there is work to be done. The question is only whether the genuine operational requirements relied upon by the department to deny the request are fair and reasonable (PSA/2020/271, PSA/2020/351).