

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Kumar v State of Queensland (Department of Transport and Main Roads)* [2024] QIRC 084

PARTIES: **Kumar, Brijesh**
(Appellant)

v

State of Queensland (Department of Transport and Main Roads)
(Respondent)

CASE NO: PSA/2024/21

PROCEEDING: Public Sector Appeal – Appeal against promotion decision

DELIVERED ON: 18 April 2024

MEMBER: Pidgeon IC

HEARD AT: On the papers

ORDER: **The decision appealed against is confirmed.**

CATCHWORDS: PUBLIC SECTOR – CLASSIFICATION, PROMOTION OR TRANSFER – appeal against a promotion decision – where the appellant is permanently employed by the respondent as a Senior Engineer (PO4) – where the appellant applied for the Principal Officer (PO6) role – where the appellant’s application was unsuccessful – consideration of whether the recruitment and selection process was deficient – promotion decision confirmed

LEGISLATION AND OTHER INSTRUMENTS: *Appeals (Directive 04/23)* cl 10
Industrial Relations Act 2016 (Qld) ss 562B, 562C

Public Sector Act 2022 (Qld) ss 44, 45
Recruitment and selection (Directive 07/23)
cls 8, 12

Reasons for Decision

Introduction

- [1] Mr Brijesh Kumar ('the Appellant') is permanently employed by the State of Queensland (Department of Transport and Main Roads) ('the Respondent') as a Senior Engineer, Project Planning and Corridor Management, classification level PO4 within the Infrastructure, Management and Delivery division of the Respondent.
- [2] Mr Kumar appeals a promotion decision in a recruitment process for the Principal Officer role (PO6), within the Infrastructure Management and Delivery/Program Delivery and Operations Unit.
- [3] The promotion of the successful appointee, Ms Lesley Branch, to the position of Principal Officer, was published by way of the Queensland Government Gazette on 25 January 2024.
- [4] The Appellant then filed his appeal on 14 February 2024.

Is the Appellant entitled to appeal?

- [5] *Appeals (Directive 04/23)* addresses promotion appeals at cl 10. Mr Kumar is a public sector employee employed on a permanent basis and he is aggrieved by the decision and is entitled to appeal under a directive.¹ Specifically, Mr Kumar applied for the role the subject of the promotion decision and sought post-selection feedback prior to lodging his appeal.
- [6] I am satisfied that Mr Kumar is a person who may appeal the promotion decision and that he lodged his promotion appeal within 21 days following the public notification of the successful applicant on 25 January 2024 in the Queensland Government Gazette.

Appeal Principles

- [7] A public sector appeal to the Commission is by way of review and the purpose of the appeal is to decide whether the decision appealed against was fair and reasonable.²

¹ *Appeals (Directive 04/23)* cl 10.

² *Industrial Relations Act 2016 (Qld)* s 562B.

- [8] For an appeal against a promotion decision, the Commission must decide the appeal having regard to the evidence available to the decision-maker when the decision was made but may allow other evidence to be considered if the Commission deems it appropriate.³
- [9] In deciding an appeal against a promotion decision, the Commission may only set the decision aside if it finds that the recruitment or selection process was deficient. In determining if the process was deficient, the Commission is required to have regard to whether the process complied with the *Public Sector Act 2022* (Qld) ('the PS Act'), a regulation or a directive made by the Public Sector Commissioner under that Act.⁴

Mr Kumar's appeal grounds

- [10] Mr Kumar filed his appeal on 14 February 2024. His appeal grounds are that:
- He has the relevant mandatory qualifications as well as the experience required for the position.
 - The position requires management of engineering works and appropriate experience, skills, and qualifications to generate/delivery of the main/intended output.
 - The feedback Mr Kumar received from the panel was that the leadership/management area was not addressed. Mr Kumar says that the 3rd party works that he manages and have managed, covers most of the leadership/management relevant for the position.
 - He has undertaken various supervision, leadership and management courses/training that also cover external parties that he deals with in his work.
 - He has 20 years of leadership, knowledge and skills and management experience, including mentoring, leading, supervising, managing external parties working for the department and internal contractors/entities/individuals mainly performing the role of this subject position.
 - He is confident he is the best and most suitable applicant for the position.

Respondent's submissions

Why the promotion decisions were fair and reasonable

³ Ibid s 562B(4).

⁴ Ibid s 562C(2).

- [11] The Respondent submits that the recruitment process and delegate's decision to permanently appoint the applicant deemed best suited to the position is in accordance with the principles of recruitment and selection as outlined in sections 44 and 45 of the PS Act. The Respondent says that the process was undertaken in a fair, transparent, and reasonable manner, in accordance with the *Recruitment and Selection (Directive 07/23)* and the Transport and Main Roads Recruitment and Selection Procedure.
- [12] The Respondent's submissions address key aspects of the process being panel formation, selection process and the feedback provided by the panel. I will summarise those submissions here.

Panel formation

- [13] The panel chair was Brad Garrett, Regional Manager (PP&CM) (Senior Officer), and the panel members were Kim Forsyth, Regional Manager (Technical Services) (AO8 classification level) and Tom Orr (Director, Corridor Management and Protection) (Senior Officer). The Respondent says that the panel ensured gender diversity, a panel representative from outside of the development application field and a combination of technical and non-technical expertise.
- [14] The Respondent says that all panel members completed declarations in compliance with the Department's Conflict of Interest policy and procedure. The panel member declaration was considered and approved by the relevant Conflict of Interest delegate, Dan Johnson, Deputy Regional Director.

Selection Process

- [15] The role of Principal Officer (PO6) was advertised on the Queensland Government website, SmartJobs, (QLD/512340) on 11 September 2023 with a closing date of 25 September 2023.
- [16] The advertisement for the Principal Officer (PO6) role was advertised for a two-week period pursuant to *Recruitment and Selection (Directive 07/23)* at cl 8.10.
- [17] The panel received and assessed 13 applications. The applications consisted of a one-page cover letter highlighting the applicant's approach to leading multi-disciplinary teams in complex environments; a CV or resume of no more than four pages, outlining the applicant's relevant skills and experience; and a response to question online via SmartJobs.
- [18] The Respondent submits that as the role consists of both a compliance and a team planning function, it is responsible for leading a combination of technical and non-technical staff, including engineers, town planners and administrative staff. The Respondent says that the panel were seeking demonstrated experience in leading

multi-disciplinary teams in complex environments and that this was considered by the panel when assessing suitability.

- [19] Panel members undertook shortlisting individually and then met to moderate shortlisting outcomes to determine which applicants would be invited to interview. The shortlisting was based on the applications as described in [17] above.
- [20] The Respondent submits that the panel considered Mr Kumar's application and assessed its content alongside the experience, skills and capabilities of the other twelve applications received. While Mr Kumar's application demonstrated extensive years of experience, the panel found that compared to other applications, it did not demonstrate the breadth of leadership experience in complex, multi-disciplinary teams required to address the specific requirements identified for the role.
- [21] The panel determined to invite four applicants to interview. Mr Kumar was not selected to progress to the interview stage. One applicant withdrew from the process and the panel interviewed three applicants. Of these three applicants, two were deemed suitable for appointment. Referee reports were sought for each of the suitable applicants.
- [22] On the basis of the written applications, the interviews and the referee reports, the panel recommended Lesley Branch for appointment and Rebecca Taylor was recommended as suitable for current or future vacancies.
- [23] The panel provided a written recommendation to the delegate noting that Ms Branch was 'best suited for the position due to her demonstrated highly developed technical development application and leadership skills'. The panel also noted Ms Branch's specific experience with the Department and the transport infrastructure sector and her approach to managing people and teams. Ms Branch's written application and interview demonstrated relevant leadership experience gained across the Department.
- [24] The Respondent says that the panel's documented process, including their comparative assessment of the applicants and recommendations were presented to the relevant HR delegate. Having been satisfied that the process had been conducted in accordance with the PS Act and relevant directive, the delegate approved the appointment.
- [25] The Respondent notes that Ms Branch was also required to provide documentary evidence that she possessed the mandatory requirements to be eligible for appointment to the role.

Feedback provided by the panel to Mr Kumar

- [26] On 14 February 2024, following a request for feedback, the panel chair and one panel member met with Mr Kumar and provided him with verbal feedback based

on the panel's shortlisting assessment of his written application.⁵ The feedback provided to Mr Kumar acknowledged that his letter outlined how he managed third party and/or developer works including coordinating input from various areas. However, the panel found that further evidence of experience in the land management/development applications component of the role would have been beneficial. It was also noted that Mr Kumar had detailed some elements of working in multi-disciplinary teams and with developments and Mr Kumar was advised that further evidence and/or explanation of the leadership component and leading teams in a related context would have been beneficial to his application. The panel also noted reference to Mr Kumar managing and setting up teams 'in various aspects of road engineering in Fiji including 300 men day labour' as well as his work as a Principal Engineer (Civil) in road operations and program development, however stated that further focus on leadership and management would be useful.

Requested outcome

- [27] The Respondent submits that the recruitment process and appointment decision were conducted in a fair and reasonable manner and in compliance with the legislation, the directive and departmental policy and procedures. The Respondent notes that the panel recorded its assessment process, documented any conflict of interest, made recommendations and demonstrated reasons for its recommendation as to the most suitable candidate. On this basis, the Respondent asks that the decision to appoint Ms Branch to the position be upheld.

Appellant's submissions

- [28] Mr Kumar filed his submissions in reply to the Respondent on 22 March 2024. Mr Kumar claims that he is the best applicant for the position and has 'superior qualifications, experience and skills underpinned by 20 years of local knowledge and experience to fulfil the subject position's duties and responsibilities'.

Mr Kumar believes the role description is flawed and should require the successful candidate to be an engineer

- [29] Mr Kumar complains that the position is 'too generic and covers a wide range of the stated disciplines that could be considered at a PO-6 level'. Mr Kumar notes the mandatory requirements and highly desirable requirements of the role as set out in the Role Description.⁶

Mandatory requirements:

⁵ Attachment 4, Respondent's submissions.

⁶ Attachment 2, Respondent's submissions.

- Possession of tertiary qualifications in Town Planning, Law, Engineering, Environmental Science or other like relevant qualifications from a recognised tertiary institution suitable to discharge the required responsibilities.

Highly desirable requirements:

- Experience in leading multi-skilled teams.
- Extensive experience in the development industry practices as well as negotiation with internal and external government stakeholders concerning development projects.
- Drivers Licence – C Class.

- [30] Mr Kumar expresses an opinion that ‘in practice the Position demands and warrants a Registered Professional Engineer appropriately experienced and skilled for third party works within departmental managed corridors and State land to maintain and always deliver a safe and efficient transport network’. Mr Kumar says, ‘Simply put, the duties and responsibilities of the position is 80% or more engineering and technical based’.
- [31] At paragraph 10 of his written submissions, Mr Kumar provides a list of what he personally believes the position description should have listed as the mandatory, desirable and additional requirements of the role. It is unnecessary to list those here.
- [32] From paragraphs 11 – 21 of his submissions, Mr Kumar argues further that the role requires an engineer and provides examples of why this is the case. I will not outline those submissions further here as they do not address any deficiency in the selection process.
- [33] From paragraphs 22 – 30, Mr Kumar outlines why he believes that filling the role with a person who is not an engineer may breach the *Professional Engineers Act 2002* (Qld). Again, these submissions do not reveal a deficiency in the selection process, and I will not address them further here.
- [34] Finally, on page 6 of 9 of his submissions, Mr Kumar turns to the matters he must address and demonstrate to be successful in this appeal.

Panel formation

- [35] Mr Kumar submits that the panel does not have the appropriate composition, qualifications or experience to assess the requirements of the role/position and therefore to decide the best candidate. Further, Mr Kumar submits that two of the panel members are not Registered Professional Engineers and do not possess the requisite construction, operation, and maintenance experience to provide the necessary knowledge and understanding of the role.

Selection process

- [36] Mr Kumar states that the ‘position description and the selection process allowed the Respondent to avoid recruiting an appropriately qualified and experienced engineer with the required skills for the duties and responsibilities of the position’.
- [37] Mr Kumar reiterates his opinion that the bulk of the role is engineering-based and says the fact he did not make the shortlist is ‘sufficient evidence that the process was predetermined by the panel’. Mr Kumar says further that the ‘predetermined outcome set the scene for this biased and unfair selection process’.
- [38] Mr Kumar says that the panel concentrated on minor roles performed by the shortlisted applicants, forgetting the ‘actual outcome related functions and responsibilities’ of the position.
- [39] Mr Kumar points to his ‘superior planning and compliance qualifications’ and his 20 years of ‘local experience’ and ‘skills dealing with multi-disciplinary technical/engineering internal departmental teams covering planning, construction, operation and network stewardship, maintenance, and finalisation of transport infrastructure projects/works as well as managing external contractors, developers including Local Government Authorities.
- [40] Mr Kumar then goes on to provide detail about his work in Fiji and his contributions in this current role. Mr Kumar notes that between 2018 and 2020, he supervised the successful appointee in relation to engineering and related works/roles performed by the unit. He says that he also supervised two of the other shortlisted applicants. Mr Kumar says that as the only Registered Professional Engineer for the unit over the course of the last 20 years, he has mentored and/or supervised nearly all who worked or are working in the unit, including the Chair of the panel.

Feedback provided by the panel

- [41] Mr Kumar says that despite the feedback provided by the panel, he has all the relevant attributes and he disputes the panel’s assessment of his leadership experience and skills. Mr Kumar submits that he has significant experience and involvement in mentoring planners to provide the conditions of development underpinning the mitigation of the proposed development that eventuates in the development, construction and finalisation of the scoped or conditioned works.

Outcomes requested by Mr Kumar

- [42] Mr Kumar requests that the Respondent provide detail as to why his 20 years of experience working in the Department as a Registered Professional Engineer is not suited for the position compared with the successful applicant who he says will be ‘dependent’ on him.

- [43] Mr Kumar also requests that the Respondent detail why the position description does not mandate that the role is filled by a Registered Professional Engineer. Mr Kumar also wants the Respondent to detail why it did not shortlist any Registered Professional Engineers.
- [44] Mr Kumar requests the Respondent ‘commence an independent investigation as to why the Respondent does not appoint the best qualified, skilled and experienced candidates’.
- [45] Mr Kumar also requests that an investigation is conducted to understand the functions performed by the team and accordingly develop roles, responsibilities and positions that are fit for purpose.

Respondent’s submissions in reply

The role is not a professional engineering role

- [46] The Respondent submits that the role is not a professional engineering role and does not require professional engineering services, therefore there are no issues regarding compliance with the *Professional Engineers Act 2002* (Qld).
- [47] The Respondent says that when determining workforce resourcing and planning and subsequently advertising the positions to be filled, it is for the business area to determine the nature and accountabilities of roles required to ensure effective workforce planning and to deliver on business objectives. As such, the advertised role was for a Principal Officer rather than a Principal Engineer. The Respondent says the role was advertised through the approved role description and the recruitment panel assessed applications in consideration of the accountabilities, requirements and responsibilities identified for the role that was advertised in the role description.
- [48] The Respondent says that the role description reflects the holistic set of capabilities and clearly identifies the purpose of the role being to lead a team of professionals in the planning and management of development assessment functions within the region. The Respondent says that this aligns with the Team Leader occupation competency within the *Public Service Commission Leadership Competencies for Queensland*.
- [49] The Respondent says that the competencies detailed in the role description do not include any reference to professional engineering services being required for the role. The Respondent also notes that the previous substantive holder of the role was not a Registered Professional Engineer and did not hold qualifications in engineering.

Panel formation

- [50] The Respondent submits that it is unnecessary for all panel members to have technical experience in the areas specified, and also disputes that they were required to be

registered professional engineers in order to make a valid assessment of applications, especially as the role is not an engineering role.

- [51] The Respondent points to the *Recruitment and Selection (Directive 07/23)* and states that agencies are required to ensure that panels are composed to promote integrity and diversity in assessment processes. When forming a panel, the panel's diversity and representation must be considered for a successful recruitment process. The Respondent says it also complied with internal principles for forming a panel.
- [52] The Respondent says that the panel was intentionally selected to ensure diversity including considerations of gender, age, experience, and level in the organisation, including a panel member from outside the relevant branch.
- [53] The Respondent says that all three panel members, including the panel chair, had direct development assessment experience regarding land management matters and two of the panel member's teams regularly worked with the role as well as the wider Land Management team and that this was a key consideration informing panel composition. The Respondent says that this was important given the wide range of stakeholders, both internal and external, to the department that the PO6 role works with.⁷

Selection process

- [54] The Respondent acknowledges that Mr Kumar has over 20 years of experience. The Respondent points to the principles underpinning recruitment and selection defined in section 44 of the PS Act and states that recruitment and selection processes must be directed to the selection of the eligible person best suited to the position.
- [55] The Respondent notes that the assessment of the person best suited to the position incorporates a range of considerations broader and more extensive than overall years of experience.

Feedback provided by the panel

- [56] The Respondent submits that feedback was provided to Mr Kumar in line with clauses 12.1 and 12.2 of the *Recruitment and Selection (Directive 07/23)* which requires feedback to be timely, specific and constructive and reasonable in the circumstances. The Respondent says that the panel chair and one of the panel members met with Mr Kumar to provide feedback.
- [57] The panel acknowledges Mr Kumar's experience, however, says that on a comparison assessment with other applicants, the panel determined that four of the other applicants

⁷ Attachment 2 to the submissions of 28 March 2024 is a summary of the experience and background of each of the panel members.

had demonstrated their skills, capabilities and experience to meet the requirements of the role to a greater extent than Mr Kumar.

Conclusion

- [58] The Respondent says that Mr Kumar has not demonstrated any deficiencies with the process that was undertaken by the panel in its assessment and recommendations to the delegate. The Respondent says that the process was conducted in an equitable, fair and reasonable manner and in compliance with all of the relevant industrial instruments and departmental policy and procedures.
- [59] The Respondent reiterates its initial submissions outlining that the proper process as followed and seeks that the decision of the delegate to appoint the successful candidate be upheld and that the appeal be dismissed.

Consideration

- [60] All submissions and related attachments have been considered in this appeal, even if I do not refer to them specifically in this decision.

Appeal ground: Mr Kumar believes he is the best and most suitable person for the position

- [61] I understand the Mr Kumar is confident he is the best and most suitable applicant for the position. I also understand that Mr Kumar has extensive years of experience and a range of knowledge and skills he says are relevant to the role. The Respondent does not dispute that Mr Kumar has 20 years of relevant experience or that he possesses a range of knowledge and skills relevant to the role. Mr Kumar's assertion that he is the best person for the role does not, without more, lead to a conclusion that the recruitment or selection process was deficient.

Appeal ground: The role description should require the successful candidate to be an engineer

- [62] Much of Mr Kumar's submissions address his personal view that the role should be filled by a registered professional engineer. While Mr Kumar may hold that view and is free to pursue that issue through other avenues, it is irrelevant to the current appeal. The determination of the essential skills or qualifications required for the role was a matter for the Respondent. Having determined that it was not essential for the person undertaking the role to hold an engineering qualification, it follows that the panel was

not required to consider only those candidates who are registered professional engineers. This appeal ground fails.

Appeal ground: Two of the panel members were not registered professional engineers and do not possess the experience to understand the role

- [63] As I have stated above, the Respondent determined that it was not necessary for the successful applicant to be a registered professional engineer. I have reviewed the role description and the information provided by the Respondent about the professional background and experience of the panel members and I am satisfied that each of them was appropriately selected for the panel and had the capacity to comprehensively understand the task before them. There is no information before me to suggest that the panel was deficient because only one member is an engineer. This appeal ground fails.

Appeal ground: Selection process

- [64] Mr Kumar submits that the position description and selection process allowed the Respondent to 'avoid' recruiting an engineer to the position. This is correct to the extent that the role did not require the successful candidate to be an engineer, and therefore the panel were properly able to appoint someone who was not an engineer. As stated above, mandatory qualifications for the role were a matter for the Respondent to consider prior to advertising. No deficiency in the process arises from the fact that the selection process led to the appointment of a person who was not an engineer.
- [65] I understand Mr Kumar's dismay that people he says he has previously supervised were shortlisted and that he has also supervised the successful applicant in aspects of her work. I also note Mr Kumar's submission that he has mentored or supervised the chair of the panel and all who worked or are working in the unit. Mr Kumar's professional skills and contribution to his department are admirable, however I accept that the panel were seeking a particular set of skills and determined that there were more suitable candidates for the role than Mr Kumar. I also accept the Respondent's submission to the effect that while experience is important, determinations about the suitability of candidates are not based on the length of time employed in the work unit.
- [66] I have considered all the material available to me. Based on that material, I have no reason to believe that the selection process was deficient. I am satisfied that the panel was properly constituted, and that conflict-of-interest declarations were properly made. The process undertaken to consider the 13 applications as outlined in the Respondent's submissions complies with what was required. Following interviews and determination of suitable applicants, referee checks were undertaken. A recommendation was made to appoint the successful applicant and it included

information to support the panel's decision. The delegate accepted the recommendation and approved the appointment. Nothing in the material available to me suggests that the Respondent has not undertaken the process in accordance with the relevant legislation, directive, and policy.

- [67] While it is clear that Mr Kumar is dissatisfied with the outcome and believes that he should have been selected for the job, he has not demonstrated a deficiency in the selection process undertaken by the Respondent.

Appeal Ground: Panel feedback

- [68] Mr Kumar disputes the panel's assessment of his leadership experience and skills. It is not unusual for an unsuccessful candidate to be dissatisfied with the outcome and to disagree with the feedback provided by the panel. However, disagreement with the panel feedback does not equate to a deficiency in the process of recruitment and selection. It seems to me that Mr Kumar exercised his right to receive feedback and that it was provided to him in a timely manner via a discussion with the panel chair and one other panel member. No deficiency in the process emerges from this appeal ground.

Outcomes sought by Mr Kumar

- [69] I understand the Mr Kumar is seeking to pursue his view that the role should be filled by an engineer.⁸ Mr Kumar requests 'an investigation' to understand the functions performed by the team and to develop roles and positions that are fit for purpose. Mr Kumar also requests that the Respondent provide detail as to why the position description does not require the applicant to be an engineer and why no engineers were shortlisted. As discussed above, it is open to the Respondent to determine that an engineering qualification was not a requirement for the role. A promotion appeal is not the avenue for Mr Kumar to attempt to influence policy or resourcing decisions related to staffing.
- [70] Mr Kumar seeks the Respondent to provide detail to him as to why he was not selected for the position. I am satisfied that Mr Kumar has received feedback about the selection process and that by exercising his right to appeal, he has now also had the benefit of the Respondent's submissions further addressing the reasons why the successful applicant was selected. I will not make the order Mr Kumar asks for as I do not think it reasonable or appropriate to direct the Respondent to provide further feedback.
- [71] This appeal is not the appropriate place for Mr Kumar to seek an 'independent investigation' into the Respondent's appointment processes. I am considering only the promotion relevant to this appeal and for the reasons given above, I find that Mr Kumar

⁸ Mr Kumar appears to have been raising this matter for some time and attached two emails to his submissions where he is advocating this view within the Department.

has not demonstrated any deficiency in the recruitment and selection process or that the successful applicant was not the most suitable candidate.

Conclusion and order

[72] For the reasons given above from [60] – [71], I find that Mr Kumar has not demonstrated that the recruitment or selection process was deficient. I am satisfied that the process complied with the relevant sections of the PS Act, the directive and the Respondent's internal recruitment and selection procedure.

Order

- 1. The decision appealed against is confirmed.**