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GENERAL ORDERS—

2026 WAIRC 00066

VARIATION OF MINIMUM CASUAL LOADING RATE FOR SPECIFIED AWARDS GENERAL ORDER 2025 WAIRC 00136

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2026 WAIRC 00066
CORAM : SENIOR COMMISSIONER R COSENTINO
 COMMISSIONER T EMMANUEL
 COMMISSIONER T B WALKINGTON
HEARD : ON THE PAPERS, LAST SUBMISSIONS RECEIVED ON 20 JANUARY 2026
DELIVERED : THURSDAY, 5 FEBRUARY 2026
FILE NO. : CICS 13 OF 2025
BETWEEN : UNIONSWA INCORPORATED
 Applicant
 AND
 (NOT APPLICABLE)
 Respondent

CatchWords : Industrial Law (WA) - General Order under s 50 - Variation of Minimum Casual Loading Rate General Order - Extension of General Order to public sector awards - General Order varied
Legislation : *Industrial Relations Act 1979* (WA)
Minimum Conditions of Employment Act 1993 (WA)
Result : General Order varied
Representation : (on the papers)

Mr G Hansen on behalf of UnionsWA Incorporated

Ms L Reid and Ms R Carbone on behalf of the Government Sector Labour Relations Division of the Department of Local Government, Industry Regulation and Safety

Case(s) referred to in reasons:

Minimum Casual Loading Rate for Specified Awards General Order [2025] WAIRC 00136; (2025) 105 WAIG 419

UnionsWA Incorporated v (not applicable) [2025] WAIRC 00129; (2025) 105 WAIG 411

Reasons for Decision

- 1 On 4 March 2025, the Commission issued a general order on **UnionsWA** Incorporated's application known as the *Minimum Casual Loading Rate for Specified Awards General Order* [2025] WAIRC 00136; (2025) 105 WAIG 419.
- 2 The reasons for making the General Order are set out in *UnionsWA Incorporated v (not applicable)* [2025] WAIRC 00129; (2025) 105 WAIG 411.
- 3 In short, the General Order was made to ensure that all private sector and local government awards provide for a casual loading rate of at least 25% of the ordinary rate for the relevant classification in the award, so that the 25% casual loading rate in s 11 of the *Minimum Conditions of Employment Act 1993* (WA) (**MCE Act**) does not create anomalies in the application of the awards, whereby different classifications are paid different casual loading rates in order to satisfy s 11 of the MCE Act.
- 4 The General Order related only to the private sector and local government awards listed in the General Order's Awards List.
- 5 UnionsWA has since applied for a variation of the General Order to extend its effect and coverage to public sector awards. UnionsWA identified 12 public sector awards that provide for casual employment and contain rates of pay that, when combined with the casual loading specified in the award, would be below what casual employees are entitled to be paid under the MCE Act and a further nine public sector awards that provide for casual employment but do not include a casual loading term.
- 6 The purpose of UnionsWA's application for variation is to ensure that all casual employees subject to a public sector award are not paid less than the applicable rate of pay set out in the relevant award plus a minimum casual loading of 25%.
- 7 There are 48 public sector awards which would be the subject of the General Order if the variation is permitted.
- 8 The Commission gave notice of this application to the Chamber of Commerce and Industry of Western Australia, the Minister for Industrial Relations and to the Executive Director, Government Sector Labor Relations Division of the Department of Local Government and Industry Regulation and Safety (**GSLR**). The Executive Director of GSLR is authorised by Premier's Circular 16 of 2025 to coordinate and manage Western Australian public sector labour relations matters, including the maintenance, management and variation of public sector awards. For all practical purposes, the Executive Director represents the employer parties to the 48 public sector awards affected by this application.
- 9 The Chamber of Commerce and Industry of Western Australia did not participate in the proceedings. GSLR supported the application. It made it clear, though, that GSLR's support for the application should not be taken to imply or infer that the casual loading (either the percentage rate or the dollar value) will be increased or adjusted in bargaining for any industrial agreements.
- 10 Notice of the initial hearing of this application was given in accordance with s 51(BA)(1)(a) and published as required by s 51(BA)(1)(b) in the Industrial Gazette on 26 November 2025 and on the Commission's website.
- 11 UnionsWA and GSLR agreed that the application be determined on the papers.
- 12 In determining the application, the Commission in Court Session has had regard to the grounds set out in UnionsWA's application, the response filed by GSLR on behalf of the employer parties, UnionsWA's further written submissions and GSLR's written submissions.
- 13 We are satisfied that the variation to the general order should be made.
- 14 We broadly adopt our reasons for making the General Order as our reasons for varying the General Order to extend it to public sector awards.
- 15 GSLR and UnionsWA have both noted that there are few, if any, public sector employees who are only covered by a public sector award, rather than a public sector industrial agreement, and that most industrial agreements already contain wages above the applicable public sector award wage rates. Accordingly, varying the General Order is unlikely to increase the casual loading dollar amounts employees covered by industrial agreements are actually paid.
- 16 Nevertheless, it is desirable to make the variation to:
 - (a) ensure anomalies between the public sector awards and private sector awards that cover the same type of professions are removed;
 - (b) ensure that public sector awards are consistent and reflect contemporary community standards concerning fair terms and conditions of employment of casual employees, as reflected in the General Order as it applies to the private sector; and
 - (c) ensure that public sector awards do not state or confer casual rates of pay that are below the statutory minimum rates for casual employees.
- 17 This matter does not concern a public sector decision as defined in s 26(2B), as none of the matters in s 26(2A) are relevant to the decision, the decision not having any identified financial consequences for the State. Therefore, the Commission is not required to take into consideration the matters set out in s 26(2A) of the IR Act: IR Act s 26(2E).
- 18 We are satisfied that varying the General Order is merited on the grounds of fairness and equity, and is consistent with the IR Act's objects in s 26(1).
- 19 We thank the parties for their helpful written submissions and efficient conduct of this matter.
- 20 Subject to the requirements of s 35 of the IR Act, we will issue an order for variation in the terms of the Schedule attached to these reasons, to take effect from the date the order is issued.

SCHEDULE**1.- APPLICATION**

1. This General Order applies to casual employees subject to the awards cited in the attached Awards List A and Awards List B.
2. Where an industrial instrument contains a term provided for in this General Order that is more beneficial to an employee, then the more beneficial term shall apply. Otherwise, where there is a conflict between the terms of an industrial instrument and this General Order, the terms of this General Order shall apply.
3. This General Order shall operate on and from 26 April 2025 in respect of Awards List A and on and from 5 February 2026 in respect of Awards List B and shall continue indefinitely unless later rescinded by the Commission.

2.- DEFINITIONS

4. In this General Order, the term casual loading means the payment made in addition to a casual employee's hourly pay rate in lieu of personal leave and annual leave entitlements.

3.- CASUAL LOADING

5. Where a term in an award cited in the attached Awards List A or Awards List B provides for a casual loading lower than 25 per cent, then a minimum casual loading of 25 per cent shall instead apply.
6. Where a casual employee is covered by an award cited in the attached Awards List A and Awards List B that provides for casual employment but does not include a casual loading term, then a casual loading of 25 per cent shall apply.

AWARDS LIST A

1. Aboriginal Communities and Organisations Western Australian Interim Award 2011
2. Aboriginal Medical Service Employees' Award
3. Aerated Water and Cordial Manufacturing Industry Award 1975
4. Aged and Disabled Persons Hostels Award, 1987
5. Air Conditioning and Refrigeration Industry (Construction and Servicing) Award No. 10 of 1979
6. Ambulance Service Employees' Award, 1969
7. Animal Welfare Industry Award
8. Artworkers Award
9. Bag, Sack and Textile Award
10. Bakers' (Country) Award No. 18 of 1977
11. Bakers' (Metropolitan) Award No. 13 of 1987
12. Bespoke Bootmakers' and Repairers' Award No. 4 of 1946
13. Brick Manufacturing Award 1979
14. Brushmakers' Award No. 30 of 1959
15. Building and Engineering Trades (Nickel Mining and Processing) Award, 1968
16. Building Trades and Labourers (Construction) Award
17. Building Trades and Labourers (General) Award
18. Case and Box Makers' Award, 1952
19. Child Care (Lady Gowrie Child Centre) Award
20. Child Care (Out of School Care - Playleaders) Award
21. Child Care (Subsidised Centres) Award
22. Children's Services (Private) Award 2006
23. Children's Services Consent Award 1984
24. Cleaners and Caretakers (Car and Caravan Parks) Award 1975
25. Cleaners and Caretakers Award, 1969
26. Clerks' (Hotels, Motels and Clubs) Award 1979
27. Contract Cleaners Award, 1986
28. Crisis Assistance, Supported Housing Industry - Western Australian Interim Award 2011
29. Dairy Factory Workers' Award 1982
30. Deckhands (Passenger Ferries, Launches and Barges) Award
31. Dental Technicians' and Attendant/Receptionists' Award, 1982
32. Draughtsmen's, Tracers', Planners' and Technical Officers' Award 1979
33. Dried Vine Fruits Industry Award, 1951
34. Drum Reclaiming Award
35. Dry Cleaning and Laundry Award 1979
36. Earth Moving and Construction Award

37. Egg Processing Award 1978
38. Electrical Contracting Industry Award R 22 of 1978
39. Electrical Trades (Security Alarms Industry) Award, 1980
40. Electronics Industry Award No. A 22 of 1985
41. Engine Drivers' (Building and Steel Construction) Award No. 20 of 1973
42. Engine Drivers' (General) Award
43. Engine Drivers' (Gold Mining) Consolidated Award, 1979
44. Engine Drivers' (Nickel Mining) Award 1968
45. Engine Drivers' Minerals Production (Salt) Industry Award, 1970
46. Family Day Care Co-Ordinators' and Assistants' Award, 1985
47. Farm Employees' Award 1985
48. Food Industry (Food Manufacturing or Processing) Award
49. Fruit and Produce Market Employees Award No. 50 of 1955
50. Fruit Growing and Fruit Packing Industry Award
51. Funeral Directors' Assistants' Award No. 18 of 1962
52. Furniture Trades Industry Award
53. Gate, Fence and Frames Manufacturing Award
54. Hair and Beauty Industry (WA) Award
55. Health Attendants Award, 1979
56. Horticultural (Nursery) Industry Award No. 30 of 1980
57. Hospital Salaried Officers (Dental Therapists) Award, 1980
58. Industrial Spraypainting and Sandblasting Award
59. Iron Ore Production & Processing (Locomotive Drivers Rio Tinto Railway) Award 2006
60. Iron Ore Production & Processing (Locomotive Drivers) Award 2006
61. Landscape Gardening Industry Award
62. Laundry Workers' Award, 1981
63. Licensed Establishments (Retail and Wholesale) Award 1979
64. Local Government Officers' (Western Australia) Award 2021
65. Marine Stores Award
66. Masters, Mates and Engineers Passenger Ferries Award
67. Mineral Sands Industry Award 1991
68. Miscellaneous Workers' (Activ Foundation) Award
69. Monumental Masonry Industry Award, 1989
70. Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection) Industry Award No. 29 of 1980
71. Municipal Employees (Western Australia) Award 2021
72. Musicians' General (State) Award 1985
73. Nurses' (Aboriginal Medical Services) Award No. A 23 of 1987
74. Nurses (Child Care Centres) Award 1984
75. Nurses' (Day Care Centres) Award
76. Nurses' (Independent Schools) Award
77. Optical Mechanics' Award, 1971
78. Particle Board Employees' Award, 1964
79. Particle Board Industry Award No. 10 of 1978
80. Pastrycooks' Award No. 24 of 1981
81. Pest Control Industry Award
82. Photographic Industry Award, 1980
83. Pipe, Tile and Pottery Manufacturing Industry Award
84. Plaster, Plasterglass and Cement Workers' Award No. A 29 of 1989
85. Plywood and Veneer Workers Award
86. Plywood and Veneer Workers' Award, 1952
87. Poultry Breeding Farm & Hatchery Workers' Award 1976
88. Printing Award

89. Prospector and AvonLink on Train Customer Service Officers Award
90. Quarry Workers' Award, 1969
91. Radio and Television Employees' Award
92. Retail Pharmacists' Award 2004
93. Rock Lobster and Prawn Processing Award 1978
94. Rope and Twine Workers' Award
95. Saddlers and Leatherworkers' Award
96. Saw Servicing Establishments Award No. 17 of 1977
97. Security Officers' Award
98. Sheet Metal Workers' Award No. 10 of 1973
99. Show Grounds Maintenance Worker's Award
100. Soap and Allied Products Manufacturing Award
101. Social and Community Services (Western Australia) Interim Award 2011
102. Social Trainers and Assistant Supervisors' (Activ Foundation) Award
103. Soft Furnishings Award
104. Teachers' Aides' (Independent Schools) Award 1988
105. Thermal Insulation Contracting Industry Award
106. Timber Workers Award No. 36 of 1950
107. Timber Yard Workers Award No. 11 of 1951
108. Training Assistants' and Community Support Staff (Cerebral Palsy Association) Award 1987
109. Transport Workers (General) Award No. 10 of 1961
110. Transport Workers (Mobile Food Vendors) Award 1987
111. Transport Workers' (Passenger Vehicles) Award
112. Transport Workers' (North West Passenger Vehicles) Award, 1988
113. Vehicle Builders' Award 1971
114. Watchmakers' and Jewellers' Award, 1970
115. Western Australian Professional Engineers (General Industries) Award 2004
116. Wine Industry (WA) Award 2005
117. Wool, Hide and Skin Store Employees' Award No. 8 of 1966

AWARDS LIST B

1. Arts and Culture Trust - Theatrical Employees Award
2. Auxiliary Staff Residential Colleges (Government) Award 2021
3. Building Trades (Government) Award 1968
4. Children's Services (Government) Award
5. Civil Service Association Western Australia Police Auxiliary Officers' Award 2013
6. Cleaners and Caretakers (Government) Award 1975
7. Community Welfare Department Hostels Award 1983
8. Contract Cleaners' (Ministry of Education) Award, 1990
9. Cultural Centre Award 1987
10. Dampier Port Authority Port Officers Award 1989
11. Department of Education (Residential College Supervisors) Award 2005
12. Department of Education (School Support Officers) Award
13. Electorate Officers Award 1986
14. Engineering Trades (Government) Award, 1967 Award Nos. 29, 30 and 31 of 1961 and 3 of 1962
15. Enrolled Nurses and Nursing Assistants (Government) Award
16. Fire Brigade Employees (Workshops) Award 1983
17. Fire Brigade Employees' Award, 1990, No. A 28 of 1989
18. Gardeners (Government) 1986 Award No. 16 of 1983
19. Government Officers (Insurance Commission of Western Australia) Award 1987
20. Government Officers (Social Trainers) Award 1988,
21. Government Officers Salaries, Allowances and Conditions Award 1989,
22. Health Workers - Community and Child Health Services Award, 1980
23. Hospital Workers (Government) Award No. 21 of 1966

24. Juvenile Custodial Officers' Award
25. Mental Health Nurses' Consolidated Award 1981 No. 13 of 1947
26. Parliamentary Employees Award 1989
27. Port Hedland Port Authority Port Control Officers Award 1982.
28. Psychiatric Nurses' (Public Hospitals) Award 1973
29. Public Service Award 1992
30. Public Transport Authority (Transwa) Award 2006
31. Public Transport Authority Rail Car Drivers (Transperth Train Operations) Award 2006
32. Quadriplegic Centre Award
33. Railway Employees' Award No. 18 of 1969
34. Rangers Consolidated Award 2000
35. Recreation Camps (Department for Sport and Recreation) Award
36. Storemen (Government) Consolidated Award 1979
37. Teachers (Public Sector Primary and Secondary Education) Award 1993
38. Teachers (Public Sector Technical and Further Education) Award 1993
39. Teachers' Aides' Award, 1979
40. Theatrical Employees Entertainment, Sporting and Amusement Facilities (Western Australian Government) Award 1987
41. Transport Workers (Government) Award, 1952
42. WA Government Health Services Engineering and Building Services Award 2004
43. WA Health - HSU Award 2006
44. WA Health CSA Dental Technicians (Dental Health Services) Award 2016
45. WA Public Hospitals (Doctors in Training) Award 2011
46. WA Public Hospitals (Senior Medical Practitioners) Award 2011
47. Ward Assistants (Mental Health Services) Award 1966
48. Zoological Gardens Employees Award 1969

2026 WAIRC 00077

**VARIATION OF MINIMUM CASUAL LOADING RATE FOR SPECIFIED AWARDS GENERAL ORDER 2025
WAIRC 00136**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNIONSWA INCORPORATED

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT**CORAM**

COMMISSION IN COURT SESSION

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T EMMANUEL

COMMISSIONER T B WALKINGTON

DATE

WEDNESDAY, 11 FEBRUARY 2026

FILE NO.

CICS 13 OF 2025

CITATION NO.

2026 WAIRC 00077

Result

General Order varied

Representation

(on the papers)

Applicant

Mr G Hansen on behalf of UnionsWA Incorporated

Section 29B party

Ms J Broderick, Ms L Reid and Ms R Carbone on behalf of the Government Sector Labour Relations Division of the Department of Local Government, Industry Regulation and Safety

Order

HAVING heard on the papers from Mr G Hansen on behalf of UnionsWA Incorporated and Ms J Broderick, Ms L Reid and Ms R Carbone on behalf of the Government Sector Labour Relations Division of the Department of Local Government, Industry

Regulation and Safety, the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA) hereby orders –

THAT the General Order in CICS 7 of 2024: **Minimum Casual Loading Rate for Specified Awards General Order** [2025] WAIRC 00136; (2025) 105 WAIG 419 be varied by replacing the Schedule with the attached Schedule with effect from the date of this order.

(Sgd.) R COSENTINO,
Senior Commissioner,
By the Commission In Court Session.

[L.S.]

SCHEDULE

1.- APPLICATION

1. This General Order applies to casual employees subject to the awards cited in the attached Awards List A and Awards List B.
2. Where an industrial instrument contains a term provided for in this General Order that is more beneficial to an employee, then the more beneficial term shall apply. Otherwise, where there is a conflict between the terms of an industrial instrument and this General Order, the terms of this General Order shall apply.
3. This General Order shall operate on and from 26 April 2025 in respect of Awards List A and on and from 5 February 2026 in respect of Awards List B and shall continue indefinitely unless later rescinded by the Commission.

2.- DEFINITIONS

4. In this General Order, the term casual loading means the payment made in addition to a casual employee's hourly pay rate in lieu of personal leave and annual leave entitlements.

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5. Where a term in an award cited in the attached Awards List A or Awards List B provides for a casual loading lower than 25 per cent, then a minimum casual loading of 25 per cent shall instead apply.
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46. WA Public Hospitals (Senior Medical Practitioners) Award 2011
47. Ward Assistants (Mental Health Services) Award 1966
48. Zoological Gardens Employees Award 1969

COMMISSION IN COURT SESSION—Unions—Declarations made under Section 71—

2026 WAIRC 00020

APPLICATION FOR A DECLARATION PURSUANT TO SECTION 71 IN ACCORDANCE WITH SECTION 52A(2)

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2026 WAIRC 00020
CORAM	:	CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T KUCERA
HEARD	:	TUESDAY, 14 OCTOBER 2025
DELIVERED	:	FRIDAY, 16 JANUARY 2026
FILE NO.	:	CICS 11 OF 2025
BETWEEN	:	MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES)
		Applicant
		AND
		(NOT APPLICABLE)
		Respondent

Catchwords	:	Industrial Law (WA) – Application pursuant to s 71 of the <i>Industrial Relations Act 1979</i> (WA) for declarations that rules of State organisation and counterpart federal body are taken to be the same – Eligibility for membership – Whether rules are ‘substantially the same’ – Correspondence of offices – Requirement under s 71(4) for actual correspondence of offices and functions – Failure to establish correspondence of offices – Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 7, s 66, s 71, s 71(2), s 71(4), s 71(5), s 71(5)(a), s 71(5)(b)
Result	:	Application dismissed
Representation:		
Applicant	:	Mr T Borgeest of counsel

Case(s) referred to in reasons:

Clarke v Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) [2024] WAIRC 00273; (2024) 104 WAIG 686

Jones v Civil Service Association Inc [2003] WASCA 321; (2004) 84 WAIG 4

Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) v (Not applicable) [2010] WAIRC 00101; (2020) 90 WAIG 133

The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v Not applicable [2025] WAIRC 00215; (2025) 105 WAIG 606

The Construction Forestry Mining and Energy Union of Workers v (Not applicable) [2011] WAIRC 00422; (2011) 91 WAIG 1034

*Reasons for Decision***THE COMMISSION IN COURT SESSION:****The application**

- 1 The matter before the Commission in Court Session is an application by the applicant for declarations under s 71 of the *Industrial Relations Act 1979* (WA) in order to obtain from the Registrar a certificate such that offices under the applicant’s Rules be occupied by those persons who are elected to the corresponding offices in the applicant’s counterpart federal body, the Western Australian Branch of the Media Entertainment and Arts Alliance, an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth). Declarations are sought that the rules relating to qualification of persons for membership and the rules prescribing the offices of the applicant and the federal Branch are taken to be the same.
- 2 There is some history to the present application which is set out in *Clarke v Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)* [2024] WAIRC 00273; (2024) 104 WAIG 686. At [3]-[8] Kenner CC said:
 - [3] The matter has some background. This is set out in the statement of the applicant annexed to the application. From May 2010, the respondent operated under a s 71 certificate issued by the Registrar for a number of years. The effect of this certificate was to relieve the respondent of the need to hold general elections for office bearers of the respondent. Officers elected to office in the MEAA were deemed to hold the corresponding office in the respondent.
 - [4] In or about July 2020, a number of alterations were made to the Rules of the MEAA including its governance structure and consequential abolition of offices. In 2021, as a result of these changes, the Registrar notified the respondent that the changes made to the MEAA Rules meant that the s 71 certificate no longer had effect. Accordingly, the respondent had no duly elected officers to conduct the business of the respondent.
 - [5] As a result, an application was made under s 66 of the *Act* for an order to be issued to establish an Interim Union Council, and to progress any necessary alterations to the respondent’s Rules to enable a new s 71 certificate to be sought: *Kate Ferguson v Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)* (2022) 102 WAIG 194. That order operated until 28 February 2023.
 - [6] Subsequently in December 2022, an application for alteration of the respondent’s Rules was filed. Whilst the Rules alterations application was being considered by the Registrar, due to the impending expiry of the s 66 order made in March 2022, I made a further order extending the original order’s effect until 31 August 2023: *Venning v Media, Entertainment and Arts Alliance of Western Australia (Union of Employees)* (2022) 103 WAIG 467.
 - [7] On 15 May 2023, the Registrar registered the alterations to the Rules of the respondent. Shortly thereafter on 31 August 2023, the extended s 66 order ceased to have effect. By that time, there was no certificate in place under s 71 of the *Act*. The Interim Union Council having ceased to exist, meant there were no officers of the respondent who had authority to make an application under s 71 of the *Act*, for a certificate.
 - [8] Accordingly, the present application has been made. I was also informed that as a result of elections for officer bearers of the MEAA recently conducted, declarations were made by the Australian Electoral Commission in

February 2024, in respect of contested elections. The results of both contested and uncontested elections for positions were declared at a meeting of the Board of the MEAA in early March 2024. As a result of the election, the applicant holds office as the MEAA Western Australian Branch President (Media). The applicant is also a member of the Committee of Management of the Western Australian Branch of the MEAA. The other two members of the Committee of Management are Ms Amy Welsh and Ms Helen Tuckey.

Requirements of the Act

- 3 Relevant provisions of the *Act* to be considered in the present application are ss 52A, 71(2) and 71(4). Those provisions are as follows:

52A. Counterpart federal body

- (1) In this section —
rules, of a branch of a federal organisation, means —
- (a) rules relating to the qualifications of persons for membership; and
 - (b) rules prescribing the offices that exist within the branch.
- (2) A Western Australian branch of a federal organisation is a *counterpart federal body* in relation to a State organisation if the rules of the branch are, or in accordance with section 71(2) or (4) are taken to be, the same as the rules of the State organisation relating to the corresponding subject matter.
- ...
- (7) A State organisation may apply to the Commission in Court Session for a declaration that, for the purposes of subsection (2) or (3), a Western Australian branch of a federal organisation, or a federal organisation, is a counterpart federal body in relation to the State organisation.

71. Rules of State and federal organisations as to membership and offices

- [(1) deleted]*
- (2) The rules of a State organisation and a counterpart federal body described in section 52A(2) are taken to be the same if the rules of the organisation and the body —
- (a) relate to the qualifications of persons for membership; and
 - (b) are, in the opinion of the Commission in Court Session, substantially the same.
- ...
- (4) The rules of a State organisation and a counterpart federal body described in section 52A(2) are taken to be the same if —
- (a) the rules prescribe the offices existing in the body; and
 - (b) for every office in the organisation there is a corresponding office in the body.
- ...

- 4 The Commission in Court Session must consider whether the rules of the Federal branch are taken to be the same for the purposes of ss 71(2) and 71(4) of the *Act*. As these provisions make clear, it is not a requirement of the *Act* that the relevant rules of the State organisation and the counterpart federal body be identical.

Membership rules

- 5 The requirement of s 71(2) of the *Act* is that the Commission in Court Session must form the opinion that the rules of the applicant and the Federal branch in relation to eligibility for membership are ‘substantially the same’. Settled authority of the Full Bench and the Commission in Court Session is to the effect that this means that there must be ‘significant similarity of coverage under the eligibility for membership rules’ of the applicant and the federal Branch. In *The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch v Not applicable* [2025] WAIRC 00215; (2025) 105 WAIG 606, as to s 71(2), the Commission in Court Session observed:

[7] Section 71(2) requires that the eligibility rules of the applicant and the Federal branch be, in the opinion of the Commission in Court Session, substantially the same. There is no requirement under the *Act* for complete alignment. What is required, is that there exists significant similarity of coverage under the eligibility for membership rules of the applicant and the Federal branch: *The Australian Workers’ Union, West Australian Branch, Industrial Union of Workers v (Not applicable)* [2012] WAIRC 01004; (2012) 92 WAIG 1882. Furthermore, in the context of s 71(2), ‘substantial’, means ‘real or of substance as distinct from ephemeral or nominal’ or ‘considerable’ or ‘in the main or essentially’: *Western Australian Police Union of Workers v (Not applicable)* [2018] WAIRC 00725; (2023) 98 WAIG 1111 (citing and applying *Re an application by the Civil Service Association* (1993) 73 WAIG 2931 at [293] and also *Re Bonny* [1986] 2 Qld R 80 at [82]).

- 6 The eligibility for membership rules of both the applicant and the Federal branch are contained in r 4 of the respective rules. Each of the rules are divided into different parts. A summary of the contentions of the applicant in relation to the respective parts of the eligibility for membership rules is contained in the materials annexed to the application and is in the following terms at Attachment 2:

STATEMENT COMPARING ELIGIBILITY RULES

The eligibility rule of the state organisation is rule number 4 in that organisation’s rulebook

The eligibility rule of the federal organisation is rule number 4 in that organisation's rulebook.

In both organisations, the eligibility is divided into parts.

State Rule 4	Federal Rule 4	Note
Part A	Part A	Substantially identical
Part B	Part B	Substantially identical, save that there are some variations in expression at the end of that Part from paragraph (f)
Part C	Part C	Substantially identical
Part D	Part D	Substantially identical
	Part E	The substance of Part E of the federal rule is not reproduced in the state rule
Part E		The substance of Part E of the state rule is not reproduced in the federal rule
Part G	Part F	Part F of the federal rule is substantially identical to Part G of the state rule
	Part G	Part G of the federal rule is not reproduced in the state rule
	Part H	Part H of the federal rule is not reproduced in the state rule
	Part I	Part H of the federal rule is not reproduced in the state rule

- 7 It was submitted by the applicant that despite there being some minor differences in some of the different parts of the eligibility for membership rules, the conclusion is open that the rules are substantially the same.
- 8 Part A of both rules are virtually identical, and it refers broadly to employees engaged in the occupation of performers of various types.
- 9 Part B of both membership rules cover persons employed in or in connection with various entertainment, hospitality and other similar types of entertainment venues. There are some specific inclusions and exclusions in the Federal branch rule in relation to specific enterprises which are not relevant to Western Australia. In other respects, Part B of both sets of rules are largely identical.
- 10 Part C deals with occupations in general terms, of journalists and other media employees. They are broadly the same. The exception in the Federal branch rules is the inclusion of journalists and photographers employed in the public service of the Commonwealth or a State, which is not included in the applicant's rules.
- 11 As to Part D, this part of the rules of the applicant and the Federal branch deal with eligibility for membership by reference to the industry rule in r 3 Part C in both sets of rules. They are expressed in identical terms.
- 12 Part E of the Federal branch rules provides that independent contractors are eligible for membership if they are performing work that would make them eligible for membership as employees. There is no corresponding part in the applicant's membership rule. The applicant submitted however that this inclusion in the Federal branch rule is one of longstanding, and reflects a historical feature of organisations registered under federal industrial legislation.
- 13 Part E of the applicant's membership rule corresponds with Part G of the Federal branch rule. Whilst the Federal branch Part G is expressed in broader terms than Part E of the applicant's rule, it was submitted that the categories of musician performers, set out in Part E of the applicant's rule, are sufficiently referred to in Part G in the Federal branch rule with its reference to 'musical performances'. This is accepted.
- 14 As to Part G of the applicant's rule, which is a generic mechanical provision, it is in the same terms as Part F of the Federal branch rule.
- 15 Parts H and I of the Federal branch rule relate to persons ineligible for membership in enterprises outside of Western Australia. It also refers to an acknowledgement that as a result of an order of the Australian Industrial Relations Commission made in 1997, some persons who are eligible for membership of the Federal branch are also eligible for membership of another federally registered organisation. Neither of these parts are material.
- 16 From a consideration of the eligibility for membership rules of both the applicant and the Federal branch, it is clear that for the purposes of s 71(2) of the *Act*, the rules are substantially the same.

Offices

- 17 In the s 71 certificate proceedings before the Full Bench in 2010, consideration was given to the offices of both the applicant as its rules then were, compared to the rules of the federal Branch, as they then were: *Media, Entertainment and Arts Alliance of Western Australia (Union of Employees) v (Not applicable)* [2010] WAIRC 00101; (2020) 90 WAIG 133. At that time, the rules of the applicant and the Federal branch were different to the present form. Both sets of rules provided for a structure of

separately identified offices of President, Vice President and Secretary, with identified functions and powers for each office. Rule 19 dealing with the Council, in the rules of both the applicant and the Federal branch, were materially different to that outlined below. At that time, the Council rule in both the applicant and the Federal branch, simply specified the composition of the Council as the President, the three Vice-Presidents, the Secretary and delegates from the sections.

- 18 As to the current application and the rules as they now are, the applicant filed written submissions in support of the application, and further supplementary submissions in respect of the offices issue, at the invitation of the Commission in Court Session. Those supplementary submissions dealt with the general issue of the terms of s 71(4) of the *Act*, the meaning of 'office' in s 7(1) of the *Act*, and consideration of the relevant offices in the Federal branch and the applicant. A submission was made that the offices of the members of the Council of the applicant and the Federal branch are broadly the same.
- 19 In particular, the applicant focused on the correspondence between the offices of Senior President of the applicant as set out in r 25AA and the Branch President of the Federal branch, in its r 26. It was submitted that putting aside matters of compliance with obligations under the *Act* as provided for in the office of Senior President of the applicant, in other respects, the rules as to the two offices should be regarded by the Commission in Court Session as the same.
- 20 As a preface to our reasons to follow, it is pertinent to note that under both the rules of the applicant and the Federal branch, the Council of both organisations is the supreme governing body. The Council is constituted in r 19 of both the applicant's rules and the rules of the Federal branch. The terms of these rules now provide in r 19(c) respectively, somewhat unusually, that the composition of the Council comprises one of two alternatives. The first, in r 19(c)(1), is a President, who under the applicant's rules is designated Senior President, three Vice-Presidents and delegates from sections of the applicant, as determined by the rules of the federal MEAA. The number of delegates may be determined by the federal Council to be zero.
- 21 The second alternative, specified in r 19(c)(2), is a President for each section of the applicant and the Federal branch that has more than 100 financial members. Again, in the applicant, one shall be designated Senior President. Next is a Vice-President of each section that has more than 500 financial members, and then follows delegates determined on the same basis as the option in r 19(c)(1).
- 22 In the case of r 19(c)(1)(ii) of both sets of rules, there is no separately identifiable rule for the offices of Vice President and Branch Vice President, with specified functions and powers, as was the case before the Full Bench in the 2010 proceedings. As to r 19(c)(2)(i) of both sets of rules, there is no separately identifiable rule for the offices of section President or Branch section President with specified functions and powers. As to r 19(c)(2)(ii) of each of the rules, there is no separately identifiable rule dealing with the office of section Vice President or Branch section Vice-President, with specified functions and powers. The office of Secretary in both the applicant and the Federal branch, seems to have been replaced by the employed position of Regional Director.
- 23 This creates difficulties. As is made clear in *Jones v Civil Service Association Inc* [2003] WASCA 321; (2004) 84 WAIG 4, in order to determine correspondence between offices in a federal body and a State organisation for the purposes of s 71(4) of the *Act*, there needs to be an examination of the functions and powers of each office, having regard to the similarity or otherwise, of the content of the rules of the respective organisations. In this case, given the terms of r 19 of the applicant and the federal Branch, there is little doubt that the members of the Councils of each, are 'officers' holding 'office' in their respective organisations, having regard to r 25 of the federal Branch rules, r 5(f) of the applicant's rules, and the definition of 'office' in s 7 of the *Act*, to the extent that those are elected offices.
- 24 However, given that there is nothing other than titles referred to in the respective rules, other than for the Senior President of the applicant and the Branch President of the Federal branch, then the examination required by *Jones* becomes problematic. The purpose of the task before the Commission in Court Session is to examine the rules themselves, to ascertain, from their content, the degree to which there is correspondence between the respective offices, in terms of the functions and powers of the offices. Section 71(4) of the *Act* is predicated on there being actual, rather than theoretical, correspondence of offices between a State organisation and a federal body. This is because of the effect of s 71(5) of the *Act*. The effect of this provision, and a rule alteration made under s 71(5)(a), is to relieve a State organisation of the need to hold a separate election to that of its counterpart federal body, on the basis that those elected to an office in the counterpart federal body, will be deemed to be also elected to the corresponding office in the State organisation. Importantly, by s 71(5)(b), it is *all offices* in the State organisation that are required to be, and are filled, in accordance with these provisions of the *Act*.
- 25 The applicant was unable to point to other rules of both the applicant and the Federal branch, by which such an examination could be conducted, in terms of clear statements of functions and powers of the relevant offices, to enable the required comparison to be undertaken. Furthermore, it is not permissible to resort to the implication of terms into union rules, as an aid in ascertaining correspondence between offices established under them. It is only the express terms of the rules of the applicant and the Federal branch that can be considered, for the purposes of ss 71(2) and 71(4) of the *Act*: *The Construction Forestry Mining and Energy Union of Workers v (Not applicable)* [2011] WAIRC 00422; (2011) 91 WAIG 1034 at [39].
- 26 The effect of the above means that the comparison required by s 71(4) of the *Act* cannot be undertaken.
- 27 As to the Council, the detailed powers and functions of the Council of the applicant are set out in r 20. Notably, there is no corresponding rule in the Federal branch rules, other than the statement that the Council is responsible for the general conduct and control of the Branch, within the powers and decisions of the Federal Council and the Board in r 19(b), along with some provisions regarding the calling and conduct of meetings and the appointment of a Regional Director in rr 19(d)-(i).
- 28 Further to the matters dealt with above, the terms of r 19(c) of the applicant's rules, obliges the Council to consult with the federal Council, in order to determine the composition of the Council of the applicant, according to the two options set out. Importantly, there is no obligation on the Council of the applicant to agree with the federal Council as to which option is to be selected, as to the composition of the Council. The only obligation is to consult. It is therefore quite conceivable that the applicant and the Federal branch may have differently constituted Councils. The possibility of this is contemplated in the applicant's supplementary submissions, which are considered further below.

- 29 As to the correspondence between the only two separately identifiable offices that remain in the rules of the applicant and the Federal branch, which set out functions and powers, that being the Senior President in r 25AA of the applicant's rules, and the office of Branch President of the Federal branch in r 26 of the Federal branch rules, this matter was addressed in some detail in the applicant's supplementary written submissions. Annexed to the applicant's supplementary written submissions was a comparative table setting out the functions and powers of the office of Senior President of the applicant and the office of Branch President of the Federal branch. That comparison is in the following terms:

ANNEXURE

State rule 25AA**Federal rule 26**

The Senior President shall:

The Branch President shall:-

(a) Be the senior officer of the branch and preside at all meetings of the branch and superintend the discussion of all business tabled for consideration.

(a) Be the senior officer of the branch and preside at all meetings of the branch and superintend the discussion of all business tabled for consideration.

(b) Be the registered Officer of the Association for the purposes of the Industrial Relations Act (WA)

(c) Be empowered to act on behalf of the Association

(d) Be the Officer to sue and be sued on behalf of the Association

(e) Be empowered on behalf of the Association to lay any information or take proceedings to recover any penalty under any Act of Parliament by the provisions of which the Association or any authorised person may take proceedings.

(f) In any proceedings or matter to which it is necessary that some other person shall exercise the power to sue on behalf of the Association, such person shall be deemed to be so authorised on production of a letter to that effect signed by the Senior President and bearing the Seal of the Association.

(g) Have the right to move motions, to vote and speak at Council. He or she shall have a deliberative vote.

(b) Have a deliberative vote.

(h) Be an ex officio member of all sections, branches, committees and sub-committees formed within the Association to advise it on matters concerning members or other Association matters and have the right to move and second motions, speak and vote at all meetings whether Council, Section, Committee or Sub-Committee or Special or General Meetings of members. The Senior President may delegate this power, except the right to vote, to any member of the Council to represent the President at any such meeting except at a meeting of the Council.

(c) Be an ex-officio member of all sections, sub-branches, committees and sub-committees formed within the branch to advise the Association on matters concerning members or other Association matters and have the right to move and second motions, speak and vote at all meetings whether Council, Section, Committee or Sub-Committee or Special or General Meetings of members. The President may delegate this power, except the right to vote, to any member of the Branch Council to represent the President at any such meeting except at a meeting of the Branch Council.

(i) Sign the Minutes of the proceedings of all meetings of the Association.

(d) Sign the Minutes of the proceedings of all meetings of the branch.

(j) Sign cheques in conjunction with a President or Vice-President, as the case may be.

(k) Where practicable, the Senior President shall be consulted where urgent matters of substance arise between Council meetings which require an urgent decision. Any decisions so taken shall be reported to the Council at the earliest opportunity.

(e) Where practicable, the Branch President shall be consulted by the Regional Director where urgent matters of substance arise between Branch Council meetings which require an urgent decision by the Regional Director. Any decisions so taken shall be reported to the Branch Council at the earliest opportunity by the Branch President or Regional Director.

(l) The Senior President shall observe and cause to be observed all the rules, policies and decisions of the Association.

(f) The Branch President shall observe and cause to be observed all the rules, policies and decisions of the Association.

(m) The Senior President shall comply with the provisions of the Industrial Relations Act 1979.

(n) The Senior President shall ensure the Association keeps and maintains accounting records as required by the Industrial Relations Act 1979.

(o) The Senior President shall act honestly at all times and exercise a reasonable degree of care and diligence at all times in the performance of the functions of the office.

(p) Where the Senior President is not in the chair, one of the Presidents or Vice Presidents, as the case may be, shall take the chair and exercise all the powers of the Senior President.

-
- 30 From the above, and based on the supplementary submissions of the applicant, it can be seen that substantively, the powers and duties of the Branch President of the Federal branch are largely the same as those found in the office of Senior President of the applicant. There are some powers set out in the rule of the Senior President, that are not material for the purposes of comparison, such as those dealing with compliance obligations under the *Act*, and those regarding the duties of officers of incorporated associations generally.
- 31 To the extent therefore, that the Federal branch is constituted by a Branch President, exercising the option set out in r 19(c)(1) of the Federal branch rules, then it can be reasonably concluded that there is a sufficient degree of similarity between the functions and powers of the Senior President of the applicant and the Branch President of the Federal branch, to conclude that the requirement of s 71(4) of the *Act* is satisfied, as to these offices.
- 32 The more problematic issue however, is, as referred to in the applicant's supplementary submissions, the circumstance arising where the Federal branch may exercise the option in r 19(c)(2) of the Federal branch Rules, in which case, the Branch Council will not include as an elected officer, a Branch President. This is the senior officer of the Federal branch, with corresponding powers and duties to the Senior President of the applicant, whether constituted under either r19 (c)(1) or (2) of the applicant's Rules.
- 33 The difficulty that arises in the present circumstances is that in the case of a determination by the Federal Council of the MEAA that the Federal branch will have the composition set out under r 19(c)(2) of its rules, there will be no election for the position of Branch President, as the senior officer of the Federal branch, as it will not be an office constituting the federal Branch Council. It is also clear from the terms of r 19(c)(1)(i) of the applicant's rules, that the office of Senior President is occupied quite differently to the office of Senior President occupied under r 19(c)(2)(i). In the former, the person occupying the office must be directly elected to office by the members of the applicant at a biennial election. In the case of the latter, the person occupying the office of Senior President does so by being designated from those elected as section Presidents. So much so is confirmed by r 25 of the applicant's rules, although in par (i) the reference should be '19(c)(1)(i)' and in par (ii) the reference should be '19(c)(2)(i)'. Also, it appears that the reference to 'rule 25A' should be to 'rule 25AA'.
- 34 What follows from this is that where the above circumstances exist, and there is no election of a Branch President in the Federal branch biennial election, because the Federal branch Council will be constituted under option r 19(c)(2) of its rules, then, if the applicant elects the composition of the Council in r 19(c)(1), as it is entitled to do, the office of Senior President of the applicant, as the senior member of the applicant's Council, cannot be filled in the manner contemplated by s 71(5) of the *Act* and r 18 of the applicant's rules. This is because, there will be no person in the Federal branch, holding the corresponding office for the purposes of ss 71(5) and 71(5A) of the *Act*. In such a circumstance, the elected office of President, designated as Senior President, could only be filled by a State election.
- 35 The answer to this difficulty is not found in a comparison between the functions and powers of the office of Senior President of the applicant, and those of ordinary Council members of the Federal branch, based on an implication of powers, as submitted by the applicant in its supplementary submissions. This is for the reasons explained above at [25]. Nor can reliance be placed on the general powers of members of the Federal Branch Council, for the purposes of attempting to establish correspondence, because this does not involve considering the functions and powers of each existing, comparable office, in both the applicant and the Federal branch. The applicant's attempt to do so, respectfully, only highlights the difficulties created by the operation of r 19(c) of the rules of both the applicant and the Federal Branch, having regard to the requirements of s 71 of the *Act*.

Conclusion

- 36 For the foregoing reasons, whilst the conclusion can be reached that the requirement of s 71(2) of the *Act* as to correspondence of the rules as to eligibility for membership between the applicant and the Federal branch is satisfied, we cannot be satisfied that the requirements of s 71(4) of the *Act* are met. Accordingly, the application must be dismissed.
-

2026 WAIRC 00027

APPLICATION FOR A DECLARATION PURSUANT TO SECTION 71 IN ACCORDANCE WITH SECTION 52A(2)

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES)	
	-v-	RESPONDENT
	(NOT APPLICABLE)	
CORAM	COMMISSION IN COURT SESSION CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T KUCERA	
DATE	WEDNESDAY, 21 JANUARY 2026	
FILE NO/S	CICS 11 OF 2025	
CITATION NO.	2026 WAIRC 00027	

Result	Application dismissed
Representation Applicant	Mr T Borgeest of counsel

Order

THIS matter having come on for hearing before the Commission in Court Session on 14 October 2025, and having heard Mr T Borgeest of counsel on behalf of the applicant, the Commission in Court Session, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner,
By the Commission in Court Session.

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2026 WAIRC 00058

PARTIES	CITY OF STIRLING OUTSIDE WORKFORCE AGREEMENT 2025	APPLICANT
	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CITY OF STIRLING	
	-v-	FIRST RESPONDENT
	THE LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)	
	WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES (WASU)	SECOND RESPONDENT
	ELECTRICAL TRADES UNION WA	
		THIRD RESPONDENT
CORAM	SENIOR COMMISSIONER R COSENTINO	
DATE	MONDAY, 2 FEBRUARY 2026	
FILE NO/S	APPL 5 OF 2026	
CITATION NO.	2026 WAIRC 00058	

Result	Agreement varied
Representation Applicant	City of Stirling

First Respondent	The Local Government, Racing and Cemeteries Employees Union (WA)
Second Respondent	Western Australian Municipal, Administrative, Clerical and Services Union (WASU)
Third Respondent	Electrical Trades Union WA

Order

WHEREAS on 12 January 2026, the City of Stirling filed an application seeking to vary the *City of Stirling Outside Workforce Agreement 2025* pursuant to Regulation 57 of the *Industrial Relations Commission Regulations 2005* (WA);

AND WHEREAS the application sought to amend the rates listed in the first table in Annexure 1 of the Agreement;

AND WHEREAS the grounds for the application were that the Agreement as registered contained the incorrect rates table, as a result of a genuine error or oversight;

AND WHEREAS the application complies with Regulation 55 and Regulation 57 of the Regulations;

AND WHEREAS all parties to the Agreement consent to this application for the variation of an industrial agreement being determined on the papers;

AND WHEREAS all the parties to the Agreement consent to its variation in accordance with the City of Stirling's application;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) hereby orders:

THAT the *City of Stirling Outside Workforce Agreement 2025* be varied by substituting the attached Annexure 1- Minimum Rate of Pay for the existing Annexure 1.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

INDUSTRIAL MAGISTRATE—Claims before—

2026 WAIRC 00021

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2026 WAIRC 00021
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : ON THE PAPERS
DELIVERED : FRIDAY, 16 JANUARY 2026
FILE NO. : M 15 OF 2025
BETWEEN : CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION

CLAIMANT

AND

JETWAVE MARINE SERVICES PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – FAIR WORK – quantum of underpayment under industrial instrument – pecuniary penalty assessment under *Fair Work Act 2009* (Cth) – pre-judgment interest – contravention of enterprise agreement

Legislation : *Fair Work Act 2009* (Cth)
Industrial Magistrate's Court (General Jurisdiction) Regulations 2005 (WA)
Civil Judgments Enforcement Act 2004 (WA)
Civil Judgments Enforcement Regulations 2005 (WA)

Instrument : *Jetwave Marine and Maritime Union North West Inshore Agreement (2022)*

Cases referred to in reasons: : *Construction, Forestry and Maritime Employees Union v Jetwave Marine Services Pty Ltd* [2025] WAIRC 00699; (2025) WAIG 2201
APG Aus No 3 Pty Ltd v Quasar Resources Pty Ltd [2022] WASC 123
Batchelor v Burke [1981] HCA 30; (1981) 148 CLR 448
Australian Building and Construction Commissioner v Pattinson [2022] HCA 13; (2022) 274 CLR 450
Fair Work Ombudsman v NoBrace Centre Pty Ltd [2019] FCCA 2970

Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2) [2017] FCA 557
Heal v Sydney Flames Basketball Pty Ltd (No 2) [2024] FCA 794
Fair Work Ombudsman v Priority Matters Pty Ltd (No 5) [2020] FCCA 901
Patrick Stevedores Holdings Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union (No 4) [2021] FCA 1481
Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union [2019] FCAFC 69
Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2) [2018] FCA 480
Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2) [2018] FCA 1211; (2018) 70 AILR 102-975
Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd [2025] FCA 208
Australian Building and Construction Commissioner v Powell (No 2) [2019] FCA 972
Auimatagi v Australian Building and Construction Commissioner [2018] FCAFC 191

Result : Quantum determined; penalty imposed

Representation:

Claimant : Mr K. Sneddon (of counsel)
 Respondent : Mr M. Diamond (of counsel)

REASONS FOR DECISION

Introduction

- 1 On 15 August 2025 the Industrial Magistrates Court (**IMC** or, **the Court**) published *Construction, Forestry and Maritime Employees Union v Jetwave Marine Services Pty Ltd* [2025] WAIRC 699; (2025) WAIG 2201 (**Liability Decision**) regarding the preferred construction of cl 10.6 of the *Jetwave Marine and Maritime Union North West Inshore Agreement 2022 (the Agreement)*.
- 2 In the Liability Decision, the Court found that Jetwave Marine Services Pty Ltd (**Jetwave**), breached cl 10.6 of the Agreement in failing to pay Leon Goldsword (**Mr Goldsword**) the whole of the *relevant Day Rate* for working on an off-duty day.¹
- 3 The Liability Decision also found that, having breached cl 10.6 of the Agreement, Jetwave failed to comply with s 50 of the *Fair Work Act 2009* (Cth) (**FWA**). Further, by failing to fully pay the affected worker the under cl 10.6, Jetwave also contravened s 323 of the FWA.²
- 4 A consequential issue to the underpayment was how superannuation contributions are calculated with respect to cl 29.2 of the Agreement in light of the Liability Decision.
- 5 These are the reasons with respect to the quantum of the underpayment, including superannuation and pre-judgment interest, and the imposition of a civil penalty.

Quantum

- 6 The Court directed that it would hear further from the parties regarding:
 - (a) final orders in terms of the amount sought by the Construction, Forestry and Maritime Employees Union (**claimant**) on behalf of Mr Goldsword, relevant to cl 10.6 of the Agreement and pre-judgment interest on any amount; and
 - (b) programming orders in respect of the imposition of a civil penalty and the issue identified with respect to superannuation.
- 7 Following the Liability Decision, Jetwave acknowledged the Claim and accepted the claimant's figures calculating the underpayment to Mr Goldsword.
- 8 To this end, Jetwave accepts that Mr Goldsword worked on seven off-duty days and was only paid around half of the amounts he was owed under cl 10.6 and Schedule 2 of the Agreement.
- 9 I accept this joint position and find that this resulted in an underpayment of \$2,938.02 to Mr Goldsword. Pursuant to s 545(3) of the FWA, I find Jetwave was required to pay this amount under cl 10.6 of the Agreement.

Pre-Judgment Interest

- 10 The claimant applied for pre-judgment interest under s 547(2) of the FWA. On application, the Court must include an amount of interest on orders made under s 545(3) 'unless good cause is shown to the contrary'. Jetwave did not dispute this and I accept no cause is shown that denies an order for pre-judgment interest to be issued.
- 11 The claimant submitted that, in calculating the amount of pre-judgment interest to be issued, the Court should have regard to the Federal Court's general practice note by Allsop CJ (as he was then) dated 18 September 2017 (**Practice Note**).
- 12 At the time of the Liability Decision, the latest interest rate applicable was 7.85%. The claimant submits that this results in \$230.63. I do not accept this for the following reasons.
- 13 Pre-judgment interest in the IMC is awarded pursuant to regulation 12 of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) (**IMC Regulations**). Sub-regulation (1) states that the Court may order a party to pay

interest 'from the date when the cause of case arose to the date when the order is made'³ and at the rate prescribed by s 8(1)(a) of the *Civil Judgments Enforcement Act 2004* (WA) (CJEA).⁴

- 14 Regulation 4 of the *Civil Judgments Enforcement Regulations 2005* (WA) prescribes an interest rate of 6% per annum.
- 15 Further, regulation 12(2) of the IMC Regulations states:
- When the court orders a party to pay the total of the amounts that another party was entitled to be paid on different dates, the court may order interest to be paid on the total and if it does so it may calculate the interest as the court thinks fit.
- 16 Subject to s 547(2), the Court has a discretion to award interest at such a rate it thinks fit on the whole or any part of the judgment.
- 17 In exercising this discretion, the Court should consider that 'interest is awarded to compensate the plaintiff for the detriment that he has suffered by being kept out of his money, and not to punish the defendant for having been dilatory in settling the plaintiff's claim.'⁵
- 18 For this reason, I would calculate interest from the last contravening date up to the date on which the Liability Decision issued.
- 19 There appears to be three approaches the Court could take. The first is the approach taken by the claimant which is to calculate the interest by applying the interest rate as at the date of judgment to the ordered amount. I am not minded to adopt this approach since it does not calculate interest from the last date the cause of action arose to the date the Liability Decision was issued.
- 20 The second, and the ordinary approach the Court takes, is pursuant to regulation 12(1) of the IMC Regulations. This involves working out the daily rate by multiplying the judgment amount with the CJEA rate and dividing that by 365. An application of this approach is found in the table below.

Days	CJEA Interest Rate	Amount	Daily Rate	Total
602	6%	\$2,938.02	\$0.483	\$290.74

- 21 The third approach is the application of the Practice Note. In summary, the Federal Court has, pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth) and s 547(2) of the FWA, discretion to refer to the rates agreed upon by the Discount and Interest Rate Harmonisation Committee (**DIRH Committee**). Interest is calculated with regard to the rate 4% above the cash rate published by the Reserve Bank of Australia before the commencement of each of the six-monthly periods between 1 January to 30 June, and 1 July to 1 December in a given year.⁶ Like the above approach, the 'court must take into account the period between the day the relevant cause of action arose and the day the order is made'.⁷ Applying the Practice Note and DIRH Committee rates results in the table below.

Starting Date	Ending Date	Days	Interest Rate	Daily Interest	Subtotal
23/12/2023	31/12/2023	9	8.10%	\$0.6520	\$5.87
1/01/2024	30/06/2024	182	8.35%	\$0.6703	\$121.99
1/07/2024	31/12/2024	184	8.35%	\$0.6703	\$123.33
1/01/2025	30/06/2025	181	8.35%	\$0.6721	\$121.65
1/07/2025	15/08/2025	46	7.85%	\$0.6319	\$29.07
Total					\$401.91

- 22 As the claimant submits, the Practice Note 'provides guidance' regarding interest up to judgment. But it does not, in and of itself, have application to this Court. Further, unless the claimant otherwise shows that a different approach better compensates the 'detriment' the affected worker has suffered from being kept out of their money, there is no reason to depart from the statutory interest rate under the CJEA.
- 23 Thus, notwithstanding Jetwave's acceptance of the claimant's approach, I would apply the statutory 6% per annum interest rate and calculate it from 23 December 2023 to the date the Liability Decision was issued on 15 August 2025 resulting in \$290.74. I believe this to be a balanced approach, noting that this amount is higher than the amount originally sought, yet lower than the total provided by the DIRH Committee rates.

Superannuation

- 24 Clause 29.2 of the Agreement says that superannuation contributions for casual and full-time employees will be calculated on the employee's 'gross earnings for actual hours worked.'
- 25 At [63]-[65] of the Liability Decision, I gave the parties a further opportunity to be heard regarding whether cl 29.2 means Mr Goldsword's superannuation contributions are calculated with reference to the hours he worked on an off-duty day, or the amount he should have earned on that off-duty day.
- 26 Based on the principles of construction I summarised at [17] of the Liability Decision, I accept the claimant's submission that superannuation is payable on the amount earned on those off-duty days, not the 'hours per se'.⁸
- 27 Jetwave accepted this position and the claimant's calculations. Notwithstanding the claimant's approach to interest, there is no reason not to give effect to this joint position and I will make an order Jetwave pay to a superannuation fund for the benefit of Mr Goldsword the amount of \$348.55 plus interest on this amount of \$34.49, totalling \$383.04.

Parties' Submissions on Penalty

- 28 The parties also referred to the law for an appropriate penalty for contraventions in their submissions. These principles are well-settled, and I do not intend to recite them. Schedule I to these reasons sets out a summary of those principles.

Claimant

29 In summary, the claimant submits that:

- (a) the purpose of a civil penalty is ‘primarily if not wholly, that of promoting the public interest in compliance with the laws that have been contravened’;⁹
- (b) this purpose was confirmed in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 (*Pattinson*);
- (c) a penalty is warranted considering that Jetwave did not admit the claim; and
- (d) of the maximum penalty, the appropriate amount would be at the lower end of the scale.

Respondent

30 Jetwave submits that the appropriate penalty in this case should be at the lowest end of the scale. It provides the following submissions in support of this:

- (a) the contraventions subject to a penalty relate only to a single employee;
- (b) there is no evidence that the respondent has previously engaged in like contravening conduct;
- (c) the respondent is not a large, well-resourced, and sophisticated employer and does not have a human resources department;
- (d) notwithstanding its size, the respondent attempts to ensure that it complies with the Agreement.
- (e) the contraventions were a result of a misinterpretation of the provisions of the Agreement and the respondent did not deliberately contravene it;
- (f) the contravention is ‘a “one-off” result of inadvertence’ rather than ‘the latest instance of the contravenor’s pursuit of a strategy of deliberate recalcitrance’.¹⁰

Course of Conduct

31 The claimant submitted that 15% of the maximum penalty is appropriate for each contravention.

32 Jetwave refers to identifying each separate contravention and considering whether each contravention should be dealt with independently or with some degree of aggregation for contraventions arising out of the course of conduct, referring to s 557 of the FWA. Thereafter, consideration may be given to a further adjustment to ensure there is no double punishment, and the penalty is appropriate for the contravening conduct.

33 The effect of s 557 of the FWA is that if the same person commits two or more contraventions of the provisions in subsection (2), then they can be taken to constitute a single contravention if it arose out of the same course of conduct. Section 50 and s 323 are included in s 557(2).

34 Section 557 does not preclude operation of common law course of conduct principles.¹¹ In *Fair Work Ombudsman v Priority Matters Pty Ltd (No 5)* [2020] FCCA 901, Driver J explained at [27]:

In addition to the statutory course of conduct provision, it is open to the Court to consider the application of common law course of conduct principles where the contraventions contain common elements or can be said to overlap with each other. The courts have confirmed a broad discretion in approach to ensuring that penalties applied are appropriate to the conduct in a particular case. Commonly this is achieved by grouping contraventions together for the purpose of determining penalty, although other approaches are available. It may be appropriate for the Court to group contraventions where, if they were treated separately, this would potentially penalise a respondent twice for the same or substantially similar conduct. (footnotes omitted)

35 I am satisfied that Jetwave’s contraventions of s 50 and s 323 each constitute a contravention of a civil penalty provision, which arose from the respondent’s failure to pay Mr Goldsword the correct day rate pursuant to cl 10.6 of the Agreement. However, within each of the contraventions the failure to pay the correct day rate on more than one day constitutes a course of conduct to which s 557 applies.

36 That is, for the purposes of s 557 of the FWA and the imposition of an appropriate penalty, notwithstanding Jetwave failed to pay the appropriate day rate on seven off-duty days, there is a single contravention of s 50 of the FWA and a single contravention of s 323 of the FWA.

Penalty

37 The maximum penalty with respect to a contravention of s 50 and s 323 of the FWA by the respondent is 300 penalty units, given the respondent is a body corporate. Save for one date in December 2022, the applicable penalty unit at the time was \$313. That is, on one date in December 2022 where the appropriate day rate was not paid, the applicable penalty unit was \$222.

38 Where a contravention spans two or more penalty periods, the Court will generally apply the higher penalty unit for the purpose of determining the maximum penalty, but, when assessing the penalty, take into account whether the contravening conduct had occurred during a period or periods in which the value of the penalty unit was lower.¹²

39 Therefore, the theoretical maximum is \$93,900 for each contravention, albeit the Court notes the December 2022 date which results in a theoretical maximum of \$66,600.

The Nature, Extent and Circumstances of the Conduct

40 The Court relied on and accepted a statement of agreed facts lodged by the parties on 30 May 2025.

41 In essence, Mr Goldsword worked on seven off-duty days between December 2022 and 2023 for which he was only paid at 50% of the correct day rate specified in Schedule 2 of the Agreement.

42 While operating under this erroneous construction, Jetwave did not pay Mr Goldsword in full for those seven dates.

43 The claimant did not provide any evidence of extent of the impact that Jetwave's misinterpretation of cl 10.6 on its business, or employees subject to the Agreement. Further, there is no evidence that in not making the payments to Mr Goldsword, Jetwave obtained or sought to obtain a financial benefit.

Deliberateness of the Contravention

44 The respondent submitted that it did not deliberately contravene the Agreement and instead, it arose out of a misinterpretation of its provisions.

45 No further evidence or submissions was provided as to whether the construction of cl 10.6 was 'far from certain' or whether the respondent had 'taken the odds' in contravening s 50 and s 323 of the FWA.¹³ That is, there was no evidence that, prior to being served with the claim, Jetwave should have been on notice or have had a heightened awareness of the risk of implementing an erroneous construction of the Agreement by either having the issue put to them, or by having found to have previously contravened the Agreement.¹⁴

46 On the other hand, where a contravention of a civil penalty provision has arisen from the respondent's honest and reasonable, but erroneous, construction of an industrial instrument, the Court may exercise its discretion to decline imposing or limit the amount of any penalty.¹⁵

47 Unlike in *Hail Creek*, there is no evidence that this issue was put to Jetwave prior to lodging the claim. Thus, it is unclear whether Jetwave should have been on alert that its remuneration to full-time employees on off-duty days was in contravention of the Agreement.

Loss or Damage

48 The sum of the contravention, including superannuation and pre-judgment interest, is \$3,611.80. There is no evidence before the Court as to the financial distress or loss this underpayment has caused the affected worker.

49 For this reason, I regard the underpayment to be a modest amount and consider this to be a neutral factor in the determination of a penalty.

Prior Contraventions, Corrective Action, Cooperation and Contrition

50 There is no evidence before the Court that the respondent has previously contravened the FWA.

51 Notwithstanding that Jetwave contested the claim, they have cooperated with the claimant in the conduct of these proceedings, including requests for consent orders which have allowed the Court to determine this and the Liability Decision on the papers.

52 The respondent did not dispute the Liability Decision. It has accepted the claimant's calculations of the underpayment including superannuation. Notwithstanding my findings above regarding pre-judgment interest, Jetwave will pay those amounts to Mr Goldsword if it has not done so already.

53 The respondent has also apologised to Mr Goldsword for the underpayment, as well as to the claimant and the Court for contravening the Agreement and FWA. To this end the respondent relies on their written submissions.¹⁶ While Jetwave initially contested cl 10.6 of the Agreement, I accept that this apology is relevant in considering the respondent's contrition and, in light of their cooperation, may be a relevant factor towards the likelihood of future contraventions.

Size of the Respondent and Involvement of Senior Management

54 Jetwave submits it is not a large, well-resourced or sophisticated employer with a human resource department. Jetwave also says that it 'does try to ensure that it pays in accordance with its obligations under the Agreement.'¹⁷

55 Ultimately, there was no evidence before the Court about the size of the respondent, including but not limited to its number of employees and how many of those are covered by the Agreement; Jetwave's available resources such as its gross or net revenue in previous financial years or current assets; the number of its clients; or any other evidence from which the Court could infer that the imposition of a maximum penalty would not result in financial hardship for the respondent.

56 Regardless of its size, the respondent has an obligation to comply with its corporate responsibilities under the law, including but not limited to fulfilling employees' entitlements, and is expected to have sufficient structures in place to ensure compliance with the FWA and the Agreement.

Deterrence

57 The claimant says the purpose of a civil penalty is to promote the public interest in compliance with laws which have been contravened. In *Pattinson*, the High Court said that deterring further contraventions of the FWA promotes the public interest in ensuring compliance with the Act.¹⁸

58 As stated in *Pattinson*, the Court's 'real task under s 546' is 'fixing the penalty which it considers fairly and reasonably to be appropriate to protect the public interest from future contraventions of the Act'¹⁹ where 'the maximum penalty is intended by the Act to be imposed in respect of a contravention warranting the strongest deterrence within the prescribed cap'.²⁰ To this end, I have had regard to the above factors which may be relevant to the assessment as to whether the maximum level of deterrence is appropriate to this case.

59 In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2018] FCA 1211; (2018) 70 AILR 102-975 (also referred to in *Pattinson* at [26]), Tracey J stated at [20]:

[T]he maximum penalty may be appropriate for a person who has repeatedly contravened the same or similar legislative provisions despite having been penalised regularly over a period of time for such misconduct. The gravity of the

offending, in such cases, is to be assessed by reference to the nature and the quality of the recidivism rather than by comparison of individual instances of offending: see *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 1462 at [8] (Jessup J). Relevant matters will include the number of contraventions which have occurred over a period, whether the ongoing misconduct is the result of conscious decisions, whether the repeated contravenor has treated the payment of penalties as a cost of doing business and whether any attempt has been made to comply with the law as declared by the Court.

Determination

60 Specific deterrence has a minor, but not no, role to play with respect to Jetwave's contravention. The contravention arose out of a dispute about the interpretation and application of a term of an enterprise agreement which was in place when the proceedings commenced. As noted by their acquiescence following the Liability Decision, the likelihood of a similar contravention occurring in the future is minimal. The breaches themselves also took place over a short period of time (one year), with the last known underpayment being in December 2023.

61 This leaves the issue of general deterrence.

62 Despite the following comments by Feutrill J in *CFMEU v Qube Ports Pty Ltd* [2025] FCA 208 being directed towards specific deterrence, the tenure of these comments is applicable to any employer so as to ensure compliance with industrial laws:

Contraventions are not only the consequence of intentional or deliberate conduct but carelessness, oversight and inadvertence. Part of deterrence involves encouraging employers to implement and maintain systems, policies, procedures and a culture aimed at preventing careless, unintentional or ignorant contraventions of the Act. Therefore, the size and spread of an employer's operation is not a reason for diminishing corporate responsibility for historical contraventions as these may be indicative of systemic or underlying failings in corporate systems, policies, procedures and culture and, therefore, of an ongoing and enhanced risk of future contraventions.

63 Guidance may also be derived from Bromberg J in *Australian Building and Construction Commissioner v Powell (No 2)* [2019] FCA 972 at [28] to [30], referring to *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191 (at [176]):

It is a fundamental principle, at the core of the judicial power to impose a penalty, that the imposition is for the contravention in question. Prior contraventions, even so many and often so serious as the Union may have engaged in in the past, is a factor which may be taken into account in determining the appropriate quantum for the contravention; it cannot be taken to lead to a penalty that is disproportionate to the gravity of the instant contravention. The maximum is for the worst category of cases.

64 His Honour later agreed with the applicant's contention and stated, at [34] and [35]:

[T]here is no general principle that, if a person contravenes a civil penalty provision on a genuine but mistaken view on an arguable question of law, there should be no penalty. Whether or not a penalty should be imposed will always depend on all of the circumstances considered principally by reference to the need for specific and general deterrence.

It is well settled and not in contest that an honest and reasonable belief may be a relevant mitigating or ameliorating factor in determining whether or not a penalty is to be imposed and, if so, the extent of the penalty imposed. (citations omitted)

65 I am not satisfied that this is an occasion where imposing no penalty is appropriate. However, I am satisfied that given all of the factors referred to above, this is a contravention for which a penalty at the lower end of the scale is appropriate.

Penalty to be Imposed

66 Taking all of these factors into account, the penalty aimed to secure compliance by deterring repeat contraventions, if not of this type, then of future different contraventions, is:

- (1) Section 50 of the FWA: \$3,000;
- (2) Section 323 of the FWA: \$3,000.

67 However, in this case, the totality of the penalty must be re-assessed where a further reduction is warranted to account for the fact that while there are two contraventions of the FWA, the contraventions arose because of the misapplication of the same clause of the Agreement. That is, without a reduction, Jetwave would, in essence, be penalised twice for the same conduct.

68 Therefore, a reduction of 33.3% on each contravention is appropriate to ensure an appropriate penalty is imposed having regard to the offending behaviour.

69 The effect of the reduction is that the appropriate penalty imposed for each contravention is \$2,000 with the resultant total penalty imposed being \$4,000.

70 Pursuant to s 546(3)(b) of the FWA the penalty is to be paid to the claimant.

Conclusion and Orders

71 The following orders are made:

1. Subject to any liability to the Commissioner of Taxation under the *Taxation Administration Act 1953* (Cth), and pursuant to s 545(3) of the FWA, the respondent is required to pay to Mr Goldsword the amount of \$2,938.02.
2. Pursuant to s 545(3) of the FWA, the respondent is to pay to a superannuation fund for the benefit of Mr Goldsword the amount of \$383.04.
3. Pursuant to regulation 12 of the IMC Regulations, the respondent is to pay pre-judgment interest on the amount referred to in order 1 at 6% per annum from 21 December 2023 to 15 August 2025 in the amount of \$290.74.

4. Pursuant to s 546(1) of the FWA, where the Court is satisfied that the respondent has contravened a civil penalty provision, the respondent is to pay a pecuniary penalty in the amount of \$4,000.
5. Pursuant to s 546(3)(b) of the FWA, the pecuniary penalty is to be paid to the claimant.

D. SCADDAN

INDUSTRIAL MAGISTRATE

Schedule: Pecuniary Penalty Orders Under the Fair Work Act 2009 (Cth)

Pecuniary Penalty Orders

- [1] The FWA provides that the Court may order a person to pay an appropriate pecuniary penalty if the Court is satisfied that the person has contravened a civil remedy provision: s 546(1) of FWA. The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the FWA: s 546(2) of the FWA. If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the FWA.
- [2] The rate of a penalty unit is set by s 4AA of the *Crimes Act 1914* (Cth): s 12 of the FWA. The relevant rate is that applicable at the date of the contravening conduct:

Date(s) of Contravening Conduct	Penalty Unit
5 December 2022	\$222
Between 1 July 2023 to 21 December 2023	\$313

- [3] The purpose served by penalties was described by Katzmann J in *Grouped Property Services* at [388] in the following terms (omitting citations):

In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose.

- [4] In *Pattinson* [42], the plurality confirmed that civil penalties ‘are not retributive, but rather are protective of the public interest in that they aim to secure compliance by deterring repeat contraventions’. However, ‘insistence upon the deterrent quality of a penalty should be balanced by insistence that it “not be so high as to be oppressive”’: [40], citing *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285.
- [5] In *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following ‘non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty’ which had been set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:
 - (a) The nature and extent of the conduct which led to the breaches.
 - (b) The circumstances in which that conduct took place.
 - (c) The nature and extent of any loss or damage sustained as a result of the breaches.
 - (d) Whether there had been similar previous conduct by the respondent.
 - (e) Whether the breaches were properly distinct or arose out of the one course of conduct.
 - (f) The size of the business enterprise involved.
 - (g) Whether or not the breaches were deliberate.
 - (h) Whether senior management was involved in the breaches.
 - (i) Whether the party committing the breach had exhibited contrition.
 - (j) Whether the party committing the breach had taken corrective action.
 - (k) Whether the party committing the breach had cooperated with the enforcement authorities.
 - (l) The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and
 - (m) The need for specific and general deterrence.

- [6] The list is not ‘a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.’ (Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 (*Australian Ophthalmic Supplies*) [91]).

- [7] Although these factors provide useful guidance, the task of assessing the appropriate penalty is not an exact science: *Commonwealth v Director, Fair Work Building Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 [47]. The Court must ultimately fix a penalty that pays appropriate regard to the contraventions that have occurred: *Pattinson* [19]. ‘[A] court empowered by s 546 to impose an “appropriate” penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions of the Act.’ *Pattinson* [48].

- [8] ‘Multiple contraventions’ may occur because the contravening conduct done by an employer:

- (a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;

- (b) was done once only or was repeated; and
- (c) was done with respect to a single employee or was done with respect to multiple employees.
- [9] The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the FWA. It provides that two or more contraventions of specified civil remedy provisions by an employer are taken to be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a 'course of conduct', the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153; *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 [22] (White J) The section does not apply to cases where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): *Grouped Property Services* [411] (Katzmann J).
- [10] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. *Australian Ophthalmic Supplies* [2008] FCAFC 8 (2008); 165 FCR 560 [47] - [52].
- [11] Section 546(3) of the FWA also provides:
- Payment of penalty
- (3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:
- (a) the Commonwealth; or
- (b) a particular organisation; or
- (c) a particular person.
- [12] In *Milardovic v Vemco Services Pty Ltd (No 2)* [2016] FCA 244 [40] - [44], Mortimer J, in light of *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4; 239 FCR 336, summarised the law: (omitting citations)
- [T]he power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. ... [T]he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons ... in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the [*Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553; 37 FCR 216] ... exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted. (original emphasis)
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- ¹ Liability Decision at [44]-[62].
- ² Liability Decision at [69]-[70].
- ³ IMC Regulations reg 12(1)(a).
- ⁴ IMC Regulations reg 12(1)(b).
- ⁵ *APG Aus No 3 Pty Ltd v Quasar Resources Pty Ltd* [2022] WASC 123 at [8] (Tottle J) referring to *Batchelor v Burke* [1981] HCA 30; (1981) 148 CLR 448, 455.
- ⁶ Practice Note [2.2(a)-(b)]. For example, since the cash rate last published by the Reserve Bank prior to 1 January 2024 is 4.35%, the applicable interest rate for the period 1 January 2024 to 30 June 2024 is 8.35%.
- ⁷ FWA s 547(3).
- ⁸ Claimant's penalty submissions dated 3 October 2025 at [10].
- ⁹ *Fair Work Ombudsman v NoBrace Centre Pty Ltd* [2019] FCCA 2970.
- ¹⁰ *Pattinson* at [46].
- ¹¹ *Patrick Stevedores Holdings Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union (No 4)* [2021] FCA 1481 at [152], referring to *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 69 at [183]-[184].
- ¹² *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 (*Grouped Property Services*) at [396] - [401] (Katzmann J) and also referred to in *Heal v Sydney Flames Basketball Pty Ltd (No 2)* [2024] FCA 794.
- ¹³ *Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2)* [2018] FCA 480 (*Hail Creek*) at [17].
- ¹⁴ *Hail Creek* at [18].
- ¹⁵ *Hail Creek* at [15].
- ¹⁶ Respondent's Outline of Submissions on Penalty dated 23 October 2025 at [3](c)-(d).
- ¹⁷ Respondent's submissions at [13].
- ¹⁸ *Pattinson* at [9].
- ¹⁹ *Pattinson* at [71].
- ²⁰ *Pattinson* at [58].

2026 WAIRC 00064

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2026 WAIRC 00064
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : FRIDAY, 19 DECEMBER 2025
DELIVERED : THURSDAY, 5 FEBRUARY 2026
FILE NO. : M 43 OF 2025
BETWEEN : CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION

CLAIMANT

AND

QUBE PORTS PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – FAIR WORK – Assessment of pecuniary penalties for contraventions of *Fair Work Act 2009* (Cth) – Contravention of an enterprise agreement – Failure to pay overtime in hourly increments for work over 12 hours in any one shift

Legislation : *Fair Work Act 2009* (Cth)
Industrial Relations Act 1979 (WA)
Crimes Act 1914 (Cth)

Instrument : *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2016*
Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2020

Cases referred to in reasons: : *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450
Patrick Stevedores Holdings Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union (No 4) [2021] FCA 1481
Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union [2019] FCAFC 69
Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union [2019] FCAFC 59; (2019) 269 FCR 262
Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2) [2018] FCA 480
Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd [2025] WAIRC 00722; 105 WAIG 2207
Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd [2025] WAIRC 00724; 105 WAIG 2223
Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd [2025] FCA 208
Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd [2023] WAIRC 00976; (2024) 104 WAIG 121
Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd [2024] WAIRC 00220; (2024) 104 WAIG 660
Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd (Industrial Magistrates Court of Western Australia, Magistrate Coleman, 23 November 2023)
Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2) [2017] FCA 557
Heal v Sydney Flames Basketball Pty Ltd (No 2) [2024] FCA 794
Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2) [2018] FCA 1211; (2018) 70 AILR 102-975
Australian Building and Construction Commissioner v Powell (No 2) [2019] FCA 972
Auimatagi v Australian Building and Construction Commissioner [2018] FCAFC 191
APG Aus No 3 Pty Ltd v Quasar Resources Pty Ltd [2022] WASC 123
Batchelor v Burke [1981] HCA 30; (1981) 148 CLR 448

Result : Penalty imposed

Representation:

Claimant : Mr L. Edmonds (of counsel)
 Respondent : Mr J. McLean (of counsel) and with him, Ms A. Rastogi (of counsel)

REASONS FOR DECISION

- 1 On 11 April 2025, the Construction, Forestry and Maritime Employees Union (**CFMEU**, or the **claimant**) lodged an originating claim alleging that Qube Ports Pty Ltd (the **respondent**) contravened cl 7.3, Part B of two enterprise agreements, the *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2016 (EA 2016)* and the *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2020 (EA 2020)* by failing to pay an employee at the Port of Port Hedland, Aroha Panga (**Ms Panga**), overtime rates in hourly increments for work over 12 hours in any one shift (the **Claim**).
- 2 In failing to pay Ms Panga as alleged, the claimant alleges the respondent has contravened s 50 and s 323 of the *Fair Work Act 2009 (Cth) (FWA)*.
- 3 The claimant sought orders for Ms Panga to be paid an amount required to be paid under EA 2016 and EA 2020 of \$15,007.70, interest on the amount and the payment of a civil penalty for the contravention with the civil penalty to be paid to the claimant.
- 4 On 12 June 2025, the respondent partially admitted the Claim and conceded that it had ‘inadvertently failed to pay Ms Panga at overtime rates in hourly increments where she worked over 12 hours.’¹ However, upon undertaking its own review of the amount owed, the respondent said it owed \$16,569.95 (gross) to Ms Panga and has paid the amount owed.
- 5 The respondent denied (for reasons given below) that the remaining orders sought by the claimant were necessary.
- 6 Schedule I of these reasons outlines the provisions of the FWA and principles relevant in determining an appropriate pecuniary penalty (if any) for the respondent’s contraventions.

Agreed Facts

- 7 The parties lodged an agreed statement of facts,² where they agreed:
 - (a) the claimant is a registered organisation under the *Fair Work (Registered Organisations) Act 2009 (Cth)*, an employee organisation as defined in s 12 of the FWA, and an employee organisation to which EA 2016 and EA 2020 applied within the meaning of s 52 of the FWA;
 - (b) the respondent is a ‘constitutional corporation’ within the meaning of that term in s 12 of the FWA, a ‘national system employer’ within the meaning of that term in s 14 of the FWA, and an employer to which EA 2020 and EA 2016 applied within the meaning of s 52 of the FWA; and
 - (c) Ms Panga was employed as a Variable Salary Employee by the respondent at the Port of Port Hedland, is a national system employee covered by EA 2016 and, subsequently, EA 2020, and is a member of the claimant.
- 8 Relevant to the contraventions, the parties also agreed:
 - (a) pursuant to cl 7.3, Part B of EA 2016 and EA 2020, Ms Panga was entitled to be paid overtime rates in hourly increments for work over 12 hours in any one shift. Between 12 April 2019 and 5 August 2024, on those occasions where Ms Panga worked more than 12 hours on a given shift, Ms Panga was paid for the time worked at the overtime rate pursuant to cl 30, Part A of EA 2016 and EA 2020;
 - (b) however, she was entitled to be paid in hourly increments for that overtime, rounded up to the nearest hour;
 - (c) on or around 11 June 2025, the respondent filed a response admitting that it had contravened s 50 and s 323 of the FWA. On review of the claim, the respondent calculated the shortfall owing to Ms Panga to be \$16,569.95, rather than the amount sought by the claimant in the originating claim (which was \$15,007.70); and
 - (d) the respondent subsequently paid Ms Panga the amount of \$16,569.95 (gross).

Other Evidence

- 9 The respondent relied upon a witness statement of Anthony James Stone (**Mr Stone**), signed 23 October 2025, which was tendered into evidence.
- 10 Mr Stone is the respondent’s National Labour and Systems Manager, as part of the respondent’s National Labour Centre (**NLC**). The NLC is responsible for rostering employees across the respondent’s sites in Australia and New Zealand, and he is responsible for managing the NLC team.³
- 11 The respondent uses the Microster Workplace Management System (**Microster**) to allocate shifts to stevedores and to integrate rostering and associated employee wage information into its payroll system.⁴
- 12 Mr Stone’s role involves ensuring that rostering and allocation complies with the terms of the respondent’s various enterprise agreements, including EA 2016 and EA 2020, as well as ensuring Microster is correctly configured with payment rules.⁵
- 13 In addition to stevedoring operations at the Port of Port Hedland, the respondent has stevedoring operations at 19 other ports in Australia, where the employees are covered by port-specific enterprise agreements containing similar terms to EA 2016 and EA 2020.⁶
- 14 Mr Stone explains that in understanding the error made with respect to Ms Panga, he is now aware that, during the relevant period, while Microster was set up to reflect the computation in cl 7.3, Part B of EA 2016 and EA 2020 for employees to be paid overtime rates in hourly increments for work over 12 hours in any one shift, Ms Panga did not receive overtime payments during the relevant period because her employee profile in Microster was not linked to the correct payment rules configuration for the Port of Port Hedland provisions which enabled the system to recognise and round up the payment for any time worked beyond 12 hours to the nearest hour. As a result, the payment rules for her overtime settings were not correctly aligned in

Microster in accordance with cl 7.3.⁷

- 15 Due to the variance in enterprise agreements at the ports operated by the respondent, there are several different ways in which time worked in excess of 12 hours is treated. Mr Stone gives examples of how these differences result in the implementation of distinct payment rule configurations within Microster, enabling the system to recognise and apply the appropriate payment entitlements based on the applicable enterprise agreement at each port.⁸
- 16 Mr Stone says that before the Claim was filed, neither the claimant nor Ms Panga informed the respondent that Ms Panga had not been paid in accordance with cl 7.3, Part B of EA 2016 and EA 2020. No steps were taken by either party to raise or resolve the matter through the Dispute Resolution Procedure outlined at cl 49.1 of EA 2016 and EA 2020. The respondent first became aware of the issue upon receiving the Claim on 22 April 2025.⁹
- 17 Once the respondent became aware of the alleged underpayment, it swiftly initiated an internal investigation to evaluate the Claim and determine whether any remediation was required, and if so, the appropriate amount to be paid.¹⁰
- 18 While the claimant sought an amount of \$15,007.70 to be paid to Ms Panga, Mr Stone conducted an independent calculation of the shortfall. Through this process, the respondent identified that the correct amount owed to Ms Panga was \$16,569.65.¹¹
- 19 Rather than simply accepting the claimant’s calculation, the respondent conducted its own analysis and, upon identifying a greater shortfall than had been claimed, elected to pay the higher, correct amount, thereby going beyond what was sought in the Claim.¹²
- 20 On 12 June 2025, the respondent paid Ms Panga the sum total of \$16,569.95 (gross).¹³
- 21 In terms of corrective action, Mr Stone states the respondent has reviewed and updated the overtime configuration in Microster to reflect the relevant clause in the *Qube Ports Pty Ltd Port of Port Hedland Enterprise Agreement 2024*. This change in Microster was necessary because the new clause now requires payment at the supplementary hourly rate for work exceeding 12 hours, rather than at the overtime rate (as contained in cl 7.3, Part B of EA 2016 and EA 2020).¹⁴
- 22 Mr Stone also states that as part of a broader initiative to improve its rostering systems, the respondent has recently signed a contract with the Microster’s vendor, Tambla WFM, for a dedicated environment, being a ‘SaaS Hosted Solution’. The migration from an on-premises system to a dedicated environment will involve a full review of all current configurations, associated payment rules, and validation of all data into this new solution. A detailed project has been initiated between the respondent and Tambla WFM for the full migration to this new SaaS Hosted Solution to be completed by 30 June 2026.¹⁵
- 23 The respondent accepts that some of its systems and processes need to be improved. It is actively working towards enhancing its processes and systems through automation and the implementation of more rigorous consistency checks.¹⁶
- 24 The respondent is committed to making sure all employees are paid what they are owed, on time and correctly. On behalf of the respondent, Mr Stone apologises to Ms Panga.¹⁷

Submissions

25 Both parties refer to the law in respect of the determination of an appropriate pecuniary penalty for contraventions of the FWA. I do not intend to recite the parties’ references to the applicable law. Schedule I to these reasons sets out a summary of those principles.

Claimant

- 26 In summary, the claimant submits that:
- (a) the Industrial Magistrates Court of Western Australia (**IMC**) is empowered to order a person to pay a pecuniary penalty the Court considers appropriate if the Court is satisfied the person has contravened a civil remedy provision: s 546(1) of the FWA;
 - (b) there are two contraventions of s 50 and two contraventions of s 323 of the FWA, arising from non-compliance with cl 7.3, Part B of each of EA 2016 and EA 2020. These contraventions are contraventions of a civil remedy provision: s 539(2) of the FWA;
 - (c) the applicable rate of the penalty unit is \$313, and the maximum penalty applicable is \$93,900 for each contravention (given the respondent is a corporation);
 - (d) 35% of the maximum current penalty should be awarded for each contravention so as to meet the single objective of deterrence mandated in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 (**Pattinson**), where the contraventions date back to 2019. The contraventions were not a one-off oversight and constitute a long-term systemic failure to properly pay an employee;
 - (e) the respondent has a history of non-compliance; and
 - (f) the respondent is a large, multi-national company, who should be expected to have sufficient resources in place to ensure compliance with the legislation.
- 27 The claimant tabulates the prior claims where the respondent has contravened s 50 (and s 323) of the FWA. The claimant’s table is extracted below.

MATTER	CONTRAVENTION
M 76 of 2022	s. 50 FWA s. 323 FWA

M 91 of 2022	s. 50 FWA s. 323 FWA
M 101 of 2022	s. 50 FWA s. 323 FWA
M 73 of 2023	s. 50 FWA
M 95 of 2023	s. 50 FWA
M 119 of 2023	s. 50 FWA
M 149 of 2023	s. 50 FWA
M 2 of 2024	s. 50 FWA
M 137 of 2024	s. 50 FWA
M 161 of 2024	s. 50 FWA s. 323 FWA

- 28 The claimant submits that anything less than the suggested penalty will go unnoticed for an organisation of the respondent's size and resources.
- 29 A failure to sanction contraventions 'adequately' de facto punishes all those who do the right thing.
- 30 The claimant expanded its submission orally, in response to the respondent's submissions. The claimant says the respondent met its obligation only after the Claim was lodged. It is not mitigatory for the respondent to meet its legal obligation. Similarly, it is not mitigating for the employer to pay an obligation for more than is claimed. Again, the respondent is merely meeting its lawful obligation. These factors may only suggest an absence of aggravating factors.
- 31 Further, the respondent's suggested complicated industrial arrangements are within its control and this should not decrease any penalty. The claimant says this is not a claim suitable for the Dispute Resolution Process under EA 2016 and EA 2020, and this factor should not be taken into account by the Court. From the claimant's perspective, the claimant continues to police the respondent's payroll to ensure the correct payments are being made to the respondent's employees.

Respondent

- 32 The respondent submits that 35% of the maximum penalty for each of the (presumably four) contraventions with a total penalty of \$131,460 is an entirely inappropriate proposal. When regard is had to common law principles of totality and course of conduct are applied, the appropriate penalty is for a nominal amount at the lower end of the range. In summary:
- the circumstances of the contraventions do not warrant the imposition of a greater penalty where the respondent paid Ms Panga for time worked in excess of 12 hours at overtime rates but failed to pay that time in hourly increments (rounded up to the nearest hour);
 - the failure was a result of an inadvertent system configuration error, and one which the respondent was not aware of;
 - neither claimant nor Ms Panga raised the issue of the entitlements with the respondent at any stage prior to the claimant filing the Claim;
 - the respondent not only admitted the contraventions, but identified that the shortfall was more than the amount claimed, and promptly rectified the underpayment; and
 - given the purpose of civil penalties is specific and general deterrence, and having regard to all the relevant circumstances, particularly in a case in which there was no intention to contravene the FWA; the contraventions were a product of a systems error; and the respondent is contrite; a greater penalty is not appropriate.
- 33 The claimant's reliance on other proceedings is misplaced. The number of proceedings is a consequence of the claimant's disaggregate claims concerning the same issue and does not support a submission that the respondent is not committed to its industrial obligations.

The Nature, Extent and Circumstances of the Conduct

- 34 The claimant submits that the respondent is a 'persistent offender' and only a significant penalty might deter the respondent from engaging in the same or similar conduct.
- 35 The respondent submits that the claimant's suggestion that the respondent treats its industrial obligations with disdain is an entirely unfair characterisation of the manner in which the respondent conducts its business.
- 36 The respondent contends that its industrial arrangements are extensive and complex. While the claimant cites a number of proceedings in which the respondent has either admitted to having, or has been found to have, contravened the FWA, the respondent says the passages selectively extracted from decisions are inapposite, and what the claimant fails to mention is that a not insignificant number of those proceedings have centred on contraventions arising out of the same constructional contest or systems error, with the claimant electing to disaggregate its claims to the employee level, presumably so as to increase the total of any civil penalties.
- 37 The respondent submits that it does not seek to diminish the seriousness of other instances of non-compliance, the claimant's decision to pursue claims through separate proceedings, and then to rely on the resulting multiplicity of proceedings to support the imposition of a greater penalty, artificially overstates the extent of the respondent's shortcomings.
- 38 This is not a case where Ms Panga was not paid to work overtime, however, she was paid incorrectly and not in accordance with the same clause that extended over two enterprise agreements. It cannot be said the respondent was trying to escape its obligation to pay employees under cl 7.3, Part B of EA 2016 and EA 2020 where, on Mr Stone's unchallenged evidence, Microster was configured to make the payment but Ms Panga's employee profile in Microster was not linked to the correct payment rules configuration for the Port of Port Hedland provisions.
- 39 Balanced against this, is the respondent being responsible for ensuring its own payroll systems are accurate and the incorrect payment extended over a period of time.
- 40 There is no evidence before the Court suggesting the issue is widespread.

Course of Conduct

- 41 Each of the contraventions are attributable to the same unintended configuration of the respondent's payroll system resulting in the one employee being paid incorrectly according to the same clause in two enterprise agreements. It appears both parties accept that while there were multiple dates upon which the payments were not made, the multiple dates should be aggregated within each of the four contraventions.
- 42 However, the respondent submits the common law course of conduct principles are applicable to the contraventions in the Claim. Where there are multiple contraventions arising from the same act or omission, it is appropriate to approach those contraventions in such a way so as to avoid a situation where the respondent is penalised twice for the same act or omission. Further, once the various considerations have been taken into account, the totality principle is to be applied, where the Court reflects on whether the aggregate of any penalty(s) to be imposed is appropriate.
- 43 Section 557 of the FWA does not otherwise exclude the operation of the common law.¹⁸ In *Patricks*, Lee J referred to comments made by the Full Court in the *Fair Work Ombudsman v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 69 (the *Hutchison Ports Appeal*) at [183] to [184] (per Rangiah J):

As I have said, s 557(1) of the [FWA] was regarded in [*Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62] at [18] as a protection against double punishment. Seen in that context, s 557(3) withholds from a contravener a protection that would otherwise be conferred by s 557(1). However, s 557(3) does not remove the protection against double punishment conferred under the course of conduct principle. The primary judge held that where s 557(1) does not apply because of s 557(3), the course of conduct principle would apply, and I respectfully agree. If s 557(1) does not apply, a court is left with the instruction of s 546(1) to impose a pecuniary penalty that 'the court considers is appropriate'. Where there are multiple contraventions, assessment of an appropriate penalty must take into account whether the factual or legal circumstances overlap to an extent that there is a risk of multiple punishments for what is essentially the same contravention. In other words, the course of conduct principle must be considered.

Section 557(3) of the [FWA], having withheld the absolute protection against more than one penalty conferred by s 557(1), leaves the contravener with the same protection as a person who commits, within a single course of conduct, multiple contraventions of a civil penalty provision not set out in s 557(2). That protection is the course of conduct principle. That does not automatically or necessarily mean that a single penalty must be imposed, but, rather, that the sentencing court is left to decide what penalty is, or penalties are, appropriate.

- 44 Further comments by Lee J in *Patricks*, at [153], are apposite to the Claim:

This is a case that engages the broad discretion to ensure penalties are appropriate to the conduct in a given case and to ensure that the respondents are not penalised twice for the same or substantially similar conduct.

- 45 As is the following reference by Lee J, at [155], to Rangiah J's statement in *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 59; (2019) 269 FCR 262:

The course of conduct principle exists to ensure that where that conduct results in more than one contravention, an offender is not punished more than once for what is effectively the same offending conduct. A finding that multiple contraventions are connected by a single course of conduct raises a question as to what is the appropriate penalty for those contraventions that avoids double punishment, but does not answer that question. *The question is answered by evaluating the conduct and its course and assessing what penalty is, or what penalties are, appropriate for the contraventions.* (emphasis added)

- 46 I am satisfied that while there are four contraventions, a single course of conduct lead to the four contraventions where it arose out of the same conduct at the same port involving the same employee because of the same failure.

47 Accordingly, an appropriate penalty for the four contraventions should avoid ‘double punishment’ for this same conduct.

Deliberate Conduct

- 48 There is no evidence the respondent engaged in deliberate conduct to circumvent industrial laws or to deprive Ms Panga of her entitlements.
- 49 The respondent submits that, as stated by Mr Stone, Microster was set up to reflect the requirement in cl 7.3, Part B of EA 2016 and EA 2020, but as a result of an unintended configuration error, Ms Panga’s profile was not linked to the correct payment rule. Therefore, while Ms Panga was paid the correct overtime rate for time worked beyond 12 hours, the system did not round up that time to the nearest hour as required under EA 2016 and EA 2020. The imposition of a civil penalty would do little to serve the goal of deterrence in this circumstance.
- 50 Unlike in *Construction, Forestry, Mining and Energy Union v Hail Creek Coal Pty Ltd (No 2)* [2018] FCA 480 (*Hail Creek*) there is no *evidence* the respondent should have been on notice or have had a heightened awareness of the risk. Mr Stone’s evidence about the configuration was not challenged and payments, albeit erroneous, were made to Ms Panga.
- 51 Unlike in other claims, there is no *evidence that* the claimant had invoked the dispute resolution process in EA 2016 and EA 2020 and attempted to resolve the underpayment. In that sense, the respondent cannot have been said to have taken the risk that its conduct, if not would, then might, contravene s 50 and s 323 of the FWA.
- 52 In those circumstances, I am not satisfied the respondent engaged in any deliberate conduct in underpaying Ms Panga overtime rates in hourly increments for work over 12 hours.

Similar Previous Conduct of the Respondents

53 In two recent decisions,¹⁹ the Court summarised the claims where a civil penalty was imposed on the respondent for contraventions of s 50 and s 323 of the FWA.

54 The Court adopts the relevant paragraphs as follows:

In [*CFMEU v Qube Ports Pty Ltd* [2025] FCA 208 (*CFMEU v Qube*)], at [68], Feutrill J [in imposing a pecuniary penalty on 18 March 2025] summarises the respondent’s other contraventions of s 50 of the FWA.

The dates a penalty was imposed in relation to those contraventions are:

- (a) 6 December 2023 in *CFMEU v Qube Ports Pty Ltd* [2023] WAIRC 976; (2024) 104 WAIG 121 (M 101 of 2022) (referred to at [68b]) for failing to pay an allowance to one employee at the Port of Dampier;
 - (b) 17 May 2024 in *CFMEU v Qube Ports Pty Ltd* [2024] WAIRC 220; (2024) 104 WAIG 660 (M 149 of 2023) (referred to at [68(c)]) for failing to pay an allowance to one employee at the Port of Tasmania; and
 - (c) 23 November 2023 in *CFMEU v Qube Ports Pty Ltd* (Industrial Magistrates Court of Western Australia, Magistrate Coleman, 23 November 2023) (M 95 of 2023) (referred to at [68(d)]) for failing to train employees to the level required at the Port of Port Hedland.
- 55 Of the tabulated claims referred to by the claimant at [27] above, five of the claims relate to the erroneous construction of the same clause of two enterprise agreements (M 76 and M 91 of 2022, which were consolidated, M 119 of 2023, M 137 of 2024 and M 161 of 2024).
- 56 For these five claims, the Court imposed a pecuniary penalty on 30 August 2024 (M 76 and M 91 of 2022 and M 119 of 2023) and 27 August 2025 (M 137 of 2024 only as no penalty was imposed in M 161 of 2024).
- 57 Pecuniary penalties for contraventions of s 50 of the FWA were imposed on the respondent on 23 November 2023, 6 December 2023, 17 May 2024, 30 August 2024, 18 March 2025 and, more recently, on 27 August 2025.
- 58 While the respondent has previously contravened s 50 and s 323 of the FWA, the conduct did not involve the unintended configuration of Microster where the employee was not paid overtime correctly although was paid overtime for time worked. However, Microster has featured in previous penalty decisions.

Applicable Maxima

59 The maximum penalty with respect to a contravention of s 50 and s 323 of the FWA by the respondent is 300 penalty units, given the respondent is a body corporate.

60 The dates of the contraventions cut across different penalty unit values as follows:²⁰

Date(s) of Contravening Conduct	Penalty Unit
April 2019 - January 2020	\$ 210
July 2020 - July 2022	\$ 222
July 2022 - January 2023	\$ 275
July 2023 - August 2025	\$ 313

61 Where a contravention spans two or more penalty periods, the Court will generally apply the higher penalty unit for the purpose of determining the maximum penalty, but, when assessing the penalty, take into account whether the contravening conduct had occurred during a period or periods in which the value of the penalty unit was lower: *Fair Work Ombudsman v Grouped Property Services Pty Ltd (No 2)* [2017] FCA 557 (*Grouped Property Services*) at [396] - [401] (Katzmann J) and also referred to in *Heal v Sydney Flames Basketball Pty Ltd (No 2)* [2024] FCA 794.

62 The theoretical maximum is \$93,900 for each contravention with the total theoretical maximum being \$375,600.

63 I would reduce any penalty by 5% to account for the date range of the contravening conduct across the penalty unit amounts.

Size of the Respondent and Involvement of Senior Management

64 Comments made by Feutrill J, at [71] and [95], in *CFMEU v Qube* are relevant to the Claim, save that Mr Stone's evidence is that the respondent employs approximately 2,245 employees of which many are covered by one of 19 different enterprise agreements.

65 For the same reason expressed in other penalty decisions involving the same parties, I adopt His Honour's comments.

66 There is no evidence of the involvement of senior management in the contravention.

Cooperation, Contrition and Corrective Action

67 The respondent cooperated in the legal proceedings, admitted the underpayment and paid Ms Panga after completing its own investigation identifying a larger underpayment than that claimed. The parties also prepared a statement of agreed facts.

68 The respondent describes this as representing the 'gold standard' of cooperation.²¹

69 Unlike in *Hail Creek*, and as stated above, there is no evidence the respondent elected to take the risk its conduct would contravene s 50 and s 323 of the FWA and could have mitigated the risk by seeking some other form of dispute resolution.

70 The respondent has apologised for the underpayment.

71 The respondent is improving its rostering systems, which will involve a full review of all current configurations, associated payment rules, and validation of all data into this new solution.

72 I would reduce any penalty by 25% for the cooperation and efforts made to mitigate future risk.

Loss or Damage Suffered

73 Ms Panga's consequential 'loss', being her entitlements, is reasonable. There is no evidence that she otherwise suffered loss or damage, or prejudice. She was paid her full entitlement (more than alleged in the Claim) within eight to nine weeks of the Claim being served.

74 I observe though, that Ms Panga may have received her entitlements sooner had the respondent been aware of the issue before 11 April 2025 when the Claim was lodged with the Court. This would not have deprived the claimant of applying for a civil penalty, but its member may have had the benefit of her entitlements earlier.

Deterrence

75 The claimant calls for a penalty of 35% of the maximum penalty for each contravention.

76 The respondent says, consistent with comments made by the High Court in *Pattinson* at [55], the conduct the subject of the contraventions does not bear a reasonable relationship to the suggested penalty where the conduct arose out of inadvertence and the contraventions were not deliberate.

77 In *Pattinson*, at [71], the majority judgment concluded that a court's 'real task under s 546' is 'fixing the penalty which it considers fairly and reasonably to be appropriate to protect the public interest from future contraventions of the Act' where, at [58], 'the maximum penalty is intended by the Act to be imposed in respect of a contravention warranting the strongest deterrence within the prescribed cap'. To that end, both the circumstances of the contravention(s) and the respondent's circumstances may be relevant to the assessment as to whether the maximum level of deterrence is required. I note that the maximum penalty is not sought by the claimant, but the claimant seeks a significant penalty, and, therefore, consideration of whether a significant penalty is an appropriate penalty is warranted, by reference to guiding cases.

78 In *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (No 2)* [2018] FCA 1211; (2018) 70 AILR 102-975 (also referred to in *Pattinson* at [26]), Tracey J stated:

[T]he maximum penalty may be appropriate for a person who has repeatedly contravened the same or similar legislative provisions despite having been penalised regularly over a period of time for such misconduct. The gravity of the offending, in such cases, is to be assessed by reference to the nature and the quality of the recidivism rather than by comparison of individual instances of offending: see *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2015] FCA 1462 at [8] (Jessup J). Relevant matters will include the number of contraventions which have occurred over a period, whether the ongoing misconduct is the result of conscious decisions, whether the repeated contravenor has treated the payment of penalties as a cost of doing business and whether any attempt has been made to comply with the law as declared by the Court.

The Respondent's Circumstances

79 There is no discernible policy by the respondent to not pay overtime in compliance with cl 7.3, Part B of EA 2016 and EA 2020. To the contrary, the respondent paid overtime to Ms Panga and had configured its payroll system for the payment of cl 7.3, but Ms Panga's profile in Microster was not linked to the correct payment rules configuration for the Port of Port Hedland provisions that enabled the system to recognise and round up the payment for any time worked beyond 12 hours to the nearest hour.

80 At worst this may be a case of carelessness by the respondent.

The Circumstances of the Contraventions

81 There is overlap between the circumstances of the contraventions and the respondent's circumstances.

82 That is, there is no evidence the contravention was an industrial strategy pursued without regard for the law.

- 83 The consequence of considering the above factors is that I am not satisfied in relation to the contravention that a penalty the equivalent of 35% of the maximum penalty 'is reasonably necessary to deter further contraventions of a like kind.'²²

Determination

- 84 There is a role for specific deterrence in this case, although the overall need to ensure compliance with industrial laws more generally is significant.
- 85 The respondent promptly paid Ms Panga the outstanding amount that she was entitled to be paid and has taken further steps to ensure its processes are reliable. However, employees should be confident that they and the claimant do not have to 'police' the respondent's own systems to identify underpayments and contraventions. The respondent's systems are within its control.
- 86 Comments made by Feutrill J, at [94], in *CFMEU v Qube* remain relevant:

Contraventions are not only the consequence of intentional or deliberate conduct but carelessness, oversight and inadvertence. Part of deterrence involves encouraging employers to implement and maintain systems, policies, procedures and a culture aimed at preventing careless, unintentional or ignorant contraventions of the Act. Therefore, the size and spread of an employer's operation is not a reason for diminishing corporate responsibility for historical contraventions as these may be indicative of systemic or underlying failings in corporate systems, policies, procedures and culture and, therefore, of an ongoing and enhanced risk of future contraventions.

- 87 However, while his Honour's comments may have been directed to specific deterrence, the tenure of these comments is applicable to any employer so as to ensure compliance with industrial laws and ensuring employees are fairly and correctly paid.
- 88 Further guidance may be derived from *Australian Building and Construction Commissioner v Powell (No 2)* [2019] FCA 972 at [28] to [30] in which Bromberg J refers to Allsop CJ, Collier and Rangiah JJ in *Auimatagi v Australian Building and Construction Commissioner* [2018] FCAFC 191 (at [176]):

It is a fundamental principle, at the core of the judicial power to impose a penalty, that the imposition is for the contravention in question. Prior contraventions, even so many and often so serious as the Union may have engaged in in the past, is a factor which may be taken into account in determining the appropriate quantum for the contravention; it cannot be taken to lead to a penalty that is disproportionate to the gravity of the instant contravention. The maximum is for the worst category of cases.

- 89 Further, his Honour stated, at [30]:

The well settled principles most recently expressed in [*Parker v Australian Building and Construction Commissioner* [2019] FCAFC 56] call for a structured approach to the imposition of a penalty on a contravener with a history of contraventions, the object of which is to ensure that the contravener does not 'suffer the fate of being sanctioned anew for past contraventions' (at [341]). *First*, the Court must identify the applicable range of penalties for that contravention without regard to the contravener's prior history of contraventions. *Having done that*, the Court should then take into account that history in assessing where, within the applicable range, the penalty should fall. (original emphasis)

- 90 I am satisfied that given all the factors referred to the Claim involves contraventions towards the lower end of the scale.

Penalty to be Imposed

- 91 Taking all of these factors into account, including the percentage reductions referred to, the appropriate penalty aimed to secure compliance by deterring repeat contraventions, if not of this type, then of future different contraventions is as follows:
- (a) Section 50 of the FWA relevant to cl 7.3, Part B of EA 2016 - \$4,000;
 - (b) Section 50 of the FWA relevant to cl 7.3, Part B of EA 2020 - \$4,000;
 - (c) Section 323 of the FWA relevant to cl 7.3, Part B of EA 2016 - \$4,000;
 - (d) Section 323 of the FWA relevant to cl 7.3, Part B of EA 2020 - \$4,000.

- 92 I would reduce the pecuniary penalty to account for totality and to avoid 'double punishment' where the same error gave rise to the same contraventions involving the same employer and employee. The reduction is 40%.

- 93 Therefore, the total of the penalties is \$9,600 where the maximum potential penalty is \$375,600. I do not consider any further reduction to be warranted to account for an imbalance between oppression and deterrence.

- 94 I do not consider that there is anything before the Court which suggests it should award a penalty other than in accordance with that *ordinarily to be exercised by awarding any penalty to the successful applicant*. Accordingly, the payment of the pecuniary penalty should be paid to the claimant.

Pre-Judgment Interest

- 95 The claimant applied for pre-judgment interest under s 547(2) of the FWA. On application, the IMC must include an amount of interest in the sum ordered on an amount that a person *was* required to pay under s 545(3) 'unless good cause is shown to the contrary'.

- 96 The respondent did not oppose the payment of an amount of interest, albeit I note no order is made under s 545(3) of the FWA where the respondent has already paid the amount required to be paid under EA 2016 and EA 2020. However, the use of the word '*was*' suggests that if the amount was outstanding and then paid, this ought not to deny a claimant interest.

- 97 I also note that during the course of the penalty hearing, the parties arrived at an agreed position with respect to an amount of interest to be paid based on the period of time the sum required to be paid was outstanding, being three years. Given the respondent's agreement to pay interest in the amount of \$2,982, the Court considered it might be unnecessary to make an order to that effect. However, upon reflection, it is prudent to do so.

98 Pre-judgment interest in the IMC is awarded pursuant to regulation 12 of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) (**IMC Regulations**). Sub-regulation (1) states that the Court may order a party to pay interest 'from the date when the cause of case arose to the date when the order is made'²³ and at the rate prescribed by s 8(1)(a) of the *Civil Judgments Enforcement Act 2004* (WA) (**CJEA**).²⁴

99 Regulation 4 of the *Civil Judgments Enforcement Regulations 2005* (WA) prescribes an interest rate of 6% per annum.²⁵

100 Further, regulation 12(2) of the IMC Regulations states:

When the court orders a party to pay the total of the amounts that another party was entitled to be paid on different dates, the court may order interest to be paid on the total and if it does so it may calculate the interest as the court thinks fit.

101 Subject to s 547(2), the Court has a discretion to award interest at such a rate it thinks fit on the whole or any part of the judgment.

102 In exercising this discretion, the Court should consider that 'interest is awarded to compensate the plaintiff for the detriment that [she] has suffered by being kept out of [her] money, and not to punish the defendant for having been dilatory in settling the plaintiff's claim.'²⁶

103 I would calculate interest based on the parties' agreed position of three years.

104 The ordinary approach the Court takes is pursuant to regulation 12(1) of the IMC Regulations. This involves working out the daily rate by multiplying the judgment amount with the CJEA rate and dividing that by 365. An application of this approach is found in the table below.

Days	CJEA Interest Rate	Amount	Daily Rate	Total
1095	6%	\$16,569.95	\$2.724	\$2,982

Conclusion

105 Pursuant to s 546(1) of the FWA, where the Court is satisfied that the respondent has contravened a civil penalty provision, the respondent is to pay a pecuniary penalty in the amount of \$9,600.

106 Pursuant to s 546(3)(b) of the FWA, the pecuniary penalty is to be paid to the claimant.

107 Where the respondent has paid to Ms Panga the amount owed under EA 2016 and EA 2020, I am not satisfied there is an amount required to be paid by the employer. Accordingly, I make no order under s 545(3) of the FWA.

108 Pursuant to s 547(2) of the FWA, the respondent pay \$2,982 in pre-judgement interest on the amount that was required to be paid to Ms Panga.

D. SCADDAN

INDUSTRIAL MAGISTRATE

Schedule: Pecuniary Penalty Orders Under the *Fair Work Act 2009* (Cth)

Pecuniary Penalty Orders

[1] The FWA provides that the Court may order a person to pay an appropriate pecuniary penalty if the Court is satisfied that the person has contravened a civil remedy provision: s 546(1) of FWA. The maximum penalty for each contravention by a natural person, expressed as a number of penalty units, set out in a table found in s 539(2) of the FWA: s 546(2) of the FWA. If the contravener is a body corporate, the maximum penalty is five times the maximum number of penalty units proscribed for a natural person: s 546(2) of the FWA.

[2] The purpose served by penalties was described by Katzmann J in *Grouped Property Services* at [388] in the following terms (omitting citations):

In contrast to the criminal law, however, where, in sentencing, retribution and rehabilitation are also relevant, the primary, if not the only, purpose of a civil penalty is to promote the public interest in compliance with the law. This is achieved by imposing penalties that are sufficiently high to deter the wrongdoer from engaging in similar conduct in the future (specific deterrence) and to deter others who might be tempted to contravene (general deterrence). The penalty for each contravention or course of conduct is to be no more and no less than is necessary for that purpose.

[3] In *Pattinson* [42], the plurality confirmed that civil penalties 'are not retributive, but rather are protective of the public interest in that they aim to secure compliance by deterring repeat contraventions'. However, 'insistence upon the deterrent quality of a penalty should be balanced by insistence that it "not be so high as to be oppressive": [40], citing *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285.

[4] In *Kelly v Fitzpatrick* [2007] FCA 1080; 166 IR 14 [14], Tracey J adopted the following 'non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty' which had been set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:

- (a) The nature and extent of the conduct which led to the breaches.
- (b) The circumstances in which that conduct took place.
- (c) The nature and extent of any loss or damage sustained as a result of the breaches.
- (d) Whether there had been similar previous conduct by the respondent.
- (e) Whether the breaches were properly distinct or arose out of the one course of conduct.
- (f) The size of the business enterprise involved.

- (g) Whether or not the breaches were deliberate.
 - (h) Whether senior management was involved in the breaches.
 - (i) Whether the party committing the breach had exhibited contrition.
 - (j) Whether the party committing the breach had taken corrective action.
 - (k) Whether the party committing the breach had cooperated with the enforcement authorities.
 - (l) The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and
 - (m) The need for specific and general deterrence.
- [5] The list is not ‘a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.’ (Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 (*Australian Ophthalmic Supplies*) [91]).
- [6] Although these factors provide useful guidance, the task of assessing the appropriate penalty is not an exact science: *Commonwealth v Director, Fair Work Building Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 [47]. The Court must ultimately fix a penalty that pays appropriate regard to the contraventions that have occurred: *Pattinson* [19]. ‘[A] court empowered by s 546 to impose an “appropriate” penalty must act fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions of the Act.’ *Pattinson* [48].
- [7] ‘Multiple contraventions’ may occur because the contravening conduct done by an employer:
- (a) resulted in a contravention of a single civil penalty provision or resulted in the contravention of multiple civil penalty provisions;
 - (b) was done once only or was repeated; and
 - (c) was done with respect to a single employee or was done with respect to multiple employees.
- [8] The fixing of a pecuniary penalty for multiple contraventions is subject to s 557 of the FWA. It provides that two or more contraventions of specified civil remedy provisions by an employer are taken to be a single contravention if the contraventions arose out of a course of conduct by the employer. Subject to proof of a ‘course of conduct’, the section applies to contravening conduct that results in multiple contraventions of a single civil penalty provision whether by reason of the same conduct done on multiple occasions or conduct done once with respect to multiple employees: *Rocky Holdings Pty Ltd v Fair Work Ombudsman* [2014] FCAFC 62; (2014) 221 FCR 153; *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 [22] (White J) The section does not apply to cases where the contravening conduct results in the contravention of multiple civil penalty provisions (example (a) above): *Grouped Property Services* [411] (Katzmann J).
- [9] The totality of the penalty must be re-assessed in light of the totality of the offending behaviour. If the resulting penalty is disproportionately harsh, it may be necessary to reduce the penalty for individual contraventions. *Australian Ophthalmic Supplies* [2008] FCAFC 8 (2008); 165 FCR 560 [47] - [52].
- [10] Section 546(3) of the FWA also provides:
- Payment of penalty*
- (3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:
 - (a) the Commonwealth; or
 - (b) a particular organisation; or
 - (c) a particular person.
- [11] In *Milardovic v Vemco Services Pty Ltd (No 2)* [2016] FCA 244 [40] - [44], Mortimer J, in light of *Sayed v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 4; 239 FCR 336, summarised the law: (omitting citations)
- [T]he power conveyed by s 546(3) is ordinarily to be exercised by awarding any penalty to the successful applicant. ... [T]he initiating party is normally the proper recipient of the penalty as part of a system of recognising particular interests in certain classes of persons ... in upholding the integrity of awards and agreements the subject of penal proceedings. Where a public official vindicates the law by suing for and obtaining a penalty, it is appropriate that the penalty be paid to the Consolidated Revenue Fund. Otherwise, the general rule remains appropriate, that the penalty is to be paid to the party initiating the proceeding, with the [*Gibbs v The Mayor, Councillors and Citizens of City of Altona* [1992] FCA 553; 37 FCR 216] ... exception that the penalty may be ordered to be paid to the organisation on whose behalf the initiating party has acted. (original emphasis)

¹ Response at [8.a.].

² Exhibit 1 – Statement of Agreed Facts lodged 12 September 2025.

³ Exhibit 2 – Witness Statement of Mr Stone signed on 23 October 2025 at [2] and [6].

⁴ Exhibit 2 at [8].

⁵ Exhibit 2 at [9].

⁶ Exhibit 2 at [27] and [28].

⁷ Exhibit 2 at [13] and [14].

- ⁸ Exhibit 2 at [15].
- ⁹ Exhibit 2 at [16].
- ¹⁰ Exhibit 2 at [18].
- ¹¹ Exhibit 2 at [19].
- ¹² Exhibit 2 at [20].
- ¹³ Exhibit 2 at [21].
- ¹⁴ Exhibit 2 at [22].
- ¹⁵ Exhibit 2 at [24] to [26].
- ¹⁶ Exhibit 2 at [29].
- ¹⁷ Exhibit 2 at [30] to [31].
- ¹⁸ *Patrick Stevedores Holdings Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union (No 4)* [2021] FCA 1481 (*Patricks*) at [152].
- ¹⁹ *CFMEU v Qube Ports Pty Ltd* [2025] WAIRC 722; 105 WAIG 2207; *CFMEU v Qube Ports Pty Ltd* [2025] WAIRC 724; 105 WAIG 2223.
- ²⁰ See s 4AA of the *Crimes Act 1914* (Cth) and s 12 of the FWA.
- ²¹ ts 12.
- ²² *Pattinson* at [9].
- ²³ IMC Regulations reg 12(1)(a).
- ²⁴ IMC Regulations reg 12(1)(b).
- ²⁵ The parties agreed this rate of interest in any event.
- ²⁶ *APG Aus No 3 Pty Ltd v Quasar Resources Pty Ltd* [2022] WASC 123 at [8] (Tottle J) referring to *Batchelor v Burke* [1981] HCA 30; (1981) 148 CLR 448, 455.

2026 WAIRC 00044

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2026 WAIRC 00044

CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN

HEARD : WEDNESDAY, 14 JANUARY 2026

DELIVERED : FRIDAY, 30 JANUARY 2026

FILE NO. : M 121 OF 2025

BETWEEN : DAWEI SHI

CLAIMANT

AND

CHEUNG BROTHERS (WA) PTY LTD ABN: 67 630 344 491

RESPONDENT

CatchWords : INDUSTRIAL LAW – Small claims procedure under the *Fair Work Act 2009* (Cth) – Failure to pay an amount under a modern award – *Restaurant Industry Award 2020* [MA000119] – Whether the claimant was a casual employee – Whether the claimant was on an unpaid work trial – Applicable rate of pay as a chef

Legislation : *Fair Work Act 2009* (Cth)
Industrial Magistrates Court (General Jurisdiction) Regulations 2005 (WA)

Instrument : *Restaurant Industry Award 2020*

Cases referred to in reasons: : *Fair Work Ombudsman v Joys Child Care Ltd* [2019] FCCA 3356
Xie v Yang [2019] SAET 38
Fair Work Ombudsman v Crocmedia Pty Ltd [2015] FCCA 140
Barbour v Memtaz Derbas t/a Derbas Lawyers [2021] FWC 1718

Result : The claim is proven

Representation:

Claimant : In person
 Respondent : Mr K. Cheung (Director) and Ms L. Low (Director)

REASONS FOR DECISION

- 1 On 23 September 2025, Dawei Shi (the **claimant**) lodged an originating claim, electing to apply the small claims procedure pursuant to s 548 of the *Fair Work Act 2009* (Cth) (**FWA**), alleging that Cheung Brothers (WA) Pty Ltd (the **respondent**) failed to pay him \$146.22 which was required to be paid under the *Restaurant Industry Award 2020* [MA000119] (the **Award**) when he worked as a chef for four hours on 17 July 2025 at the Hong Kong Tea Café (the **Claim**).
- 2 The claimant alleges that in failing to pay an amount required to be paid under the Award, the respondent has contravened the FWA. The claimant does not specify the section of the FWA contravened, but it is reasonable to infer in all of the circumstances that it is s 45 of the FWA.
- 3 The respondent denies the Claim.
- 4 The issue in dispute is whether the claimant was employed as a casual chef for four hours on 17 July 2025 or was undertaking a work trial. It is not disputed the claimant worked at the respondent's restaurant, Hong Kong Tea Café, on 17 July 2025.
- 5 Schedule I of these reasons outline the jurisdiction of the practice and procedure of the Industrial Magistrates Court of Western Australia (**IMC**).
- 6 The claimant relied upon his witness statement lodged on 5 January 2026¹ and on his oral evidence. The respondent relied upon the witness statement of Li Hang (Kathleen) Low (**Ms Low**), Manager, Accounts and Operations, lodged on 7 January 2026² and on her oral evidence.
- 7 There are three possible pathways in the Claim, only one of which enables the IMC to make an order under s 545(3) of the FWA.
- 8 On 17 July 2025, *if* the claimant is found to have been:
 - (a) on an *unpaid* work trial, the Claim fails;
 - (b) on a *paid* work trial, the Claim also fails as a small claim under the FWA albeit the claimant may commence a minor case claim in the Magistrates Court of Western Australia (the outcome of which will be for determination in that jurisdiction); or
 - (c) employed by the respondent as a casual employee, the Claim is successful where an amount was required to be paid by the respondent to the claimant under s 548(1A) of the FWA (subject to the application of the Award) and s 545(3) of the FWA applies.
- 9 That is, the only pathway to a successful claim in this case is for the claimant to prove on the balance of probabilities that he was employed by the respondent as a casual employee and the Award applies to and covers his employment by the respondent. In that case, the IMC may then make an order under s 545(3) of the FWA when read with s 548(1A) of the FWA.
- 10 Pursuant to s 548(3) of the FWA, the IMC is not bound by any rules of evidence and procedure and may act:
 - (a) in an informal manner; and
 - (b) without regard to legal forms and technicalities.

Undisputed Facts

- 11 The respondent is an Australian proprietary company limited by shares, registered pursuant to the *Corporations Act 2001* (Cth) and operates the restaurant, Hong Kong Tea Café. The respondent is a *constitutional corporation* within the meaning of that term in s 12 of the FWA and is a *national systems employer* within the meaning of that term in s 14(1)(a) of the FWA.
- 12 Whether the claimant is a casual employee who was employed by the respondent and is a *national systems employee* within the meaning of that term in s 13 of the FWA is one of the principal issues in dispute.
- 13 *If* the claimant is a casual employee who was employed by the respondent as a chef at the Hong Kong Tea Café, I am satisfied that the Award applied to and covered the claimant's employment by the respondent pursuant to cl 4.1 and Schedule A of the Award.
- 14 In 2021, the claimant obtained a Certificate IV in Commercial Cooking from a TAFE in Brisbane. He has been cooking for about seven years.
- 15 On a date a few days prior to 17 July 2025, the claimant answered a post on 'WeChat', an application similar to Facebook or WhatsApp used by predominantly Chinese-speaking people, advertising for a Grill Chef with a telephone number to work between 5.00 pm and 9.00 pm.
- 16 The claimant contacted the telephone number and spoke to '**Kevin**' (the parties accept this was Kevin Cheung, director) on around 15 July 2025. On 16 July 2025, the claimant and Kevin met face to face and Kevin told him to come and work at the Hong Kong Tea Café on 17 July 2025.
- 17 The claimant attended Hong Kong Tea Café on 17 July 2025 at 5.00 pm and worked until 9.00 pm. There were approximately four other people working in the kitchen at the same time, including a Head Chef, one or two other chefs and a kitchen hand.
- 18 At the end of the shift, the Head Chef told the claimant that Kevin would contact him the following day, but no one contacted him.
- 19 The claimant and Kevin exchanged text messages on 18 and 19 July 2025 as follows:³

- The claimant: Hello, boss. Was yesterday's work trial okay?
- The claimant: May I please ask you to return my call? Thank you.
- Kevin Cheung: I am in a meeting. I will call you back shortly.
- The claimant: Haha, boss. If it is not required, just please settle the trial work wages. Thank you.
- The claimant: Hi. I have registered my mobile number as a PayID. Next time you pay me, please send the money to my mobile number...
- The claimant: Boss, this way of doing things is really not appropriate. You also do not reply. Instead, it turns out to be my fault.
- Kevin Cheung: I will arrive at 6 o'clock.
- The claimant: I cannot wait until 6.00 pm. You can arrange for another person for me.
- The claimant: Thank you for talk about my pay. As discussed, Have to pay me 4 hours Trial (25/07/2025 1700-2100) salary.
- Kevin Cheung: I was told you so many times already come and pick up your money is you don't come to pick. And I told you already you have to give me the details you don't give me so you say that is my problem? [sic]

Disputed Facts

- 20 The claimant states that during the face-to-face conversation, Kevin told him he would be paid if he came to work on 17 July 2025 but neither of them mentioned the hourly rate or the total amount that would be paid.
- 21 When he went to the Hong Kong Tea Café at 5.00 pm, other staff gave him information about how to prepare each dish on the plate and where the food was. However, when the order came in, the claimant cooked the order. He said he worked on the grill by himself. He did not speak to Kevin or Ms Low during the shift and they were not present in the kitchen. The claimant said that on 17 July 2025, he cooked the orders as they came in and performed the duties of a Grill Chef.
- 22 The other chefs did not tell him how to cook the food, only how to garnish or decorate the food on the plate.
- 23 The hourly rate claimed by the claimant is \$32.31 but he said that he is paid as a Level 5 casual chef at other restaurants and the pay rate is \$36.66.
- 24 In cross-examination, the claimant said that he is capable of cooking and serving and that he is a Level 5 chef at other restaurants. He said there was nothing special in the preparation of the food at the Hong Kong Tea Café, but he did need to be shown where the food was kept and the garnishing on the plate because it was his first shift at the restaurant.
- 25 The claimant said if his work was unprofessional, then he could be 'let go after one hour'.
- 26 The claimant agreed he was supervised by the Head Chef but only before service commenced whereas when the service started, he did the cooking by himself.
- 27 The claimant said he was a chef and should not have to go begging for payment. He said there were restaurants that paid cash for the first shift and then contract terms were discussed after. He said if the employer wanted information for payment, the employer should let him know what it is.
- 28 Ms Low confirmed Kevin posted recruitment information on WeChat for 'a few positions' at the Hong Kong Tea Café. On 17 July 2025, the claimant was the only person who attended but others attended over four to five days.
- 29 Ms Low said that the claimant came at 5.00 pm for a 'work trial' to see if he could work on the grill while the Head Chef supervised him. While she was at the restaurant, neither she nor Kevin supervised the claimant.
- 30 The Hong Kong Tea Café is open Tuesday to Sunday from 11.00 am to 3.00 pm and 5.00 pm to 9.00 pm.
- 31 While Ms Low agreed the Head Chef said that Kevin would speak to the claimant, she said Kevin had probably forgotten to do so.
- 32 The next thing was the claimant wanting to be paid for working at the restaurant. Ms Low said they had no intention not to make the payment, but they needed to do so properly.
- 33 The Head Chef reported back to her that the claimant could not be classified as a chef, so she wanted to pay him as a Level 1 kitchen hand. Ms Low maintained the claimant was on a work trial and not an employee.
- 34 In cross-examination, Ms Low said that Kevin did not tell her when the claimant provided his bank details, and that Kevin did not reply in time.
- 35 The Head Chef was not called to give evidence about the claimant's level of professionalism because the respondent did not want to pay for him to be away from work. In any event, Ms Low said that the claimant was not suitable for the position, not that he was unprofessional.
- 36 The Head Chef reported to her that the claimant could not handle the work independently.

Findings of Disputed Facts

- 37 The witnesses gave evidence to the best of their ability and were truthful.
- 38 However, Ms Low's evidence was based on what others told her rather than her own observations or direct involvement in any conversation. Consequently, her evidence is given less weight in my assessment and determination.
- 39 The respondent could have called Kevin Cheung to give evidence about his conversations with the claimant, and the Head

Chef to give evidence about the kitchen supervision. It chose not to do so, and there is no reason to doubt the claimant's account of those conversations or the work he performed in the kitchen.

- 40 Accordingly, I find that the claimant attended Hong Kong Tea Café on 17 July 2025 at 5.00 pm in response to a post for the recruitment of chefs and kitchen hands on WeChat posted by Kevin Cheung.
- 41 I also find that the nature of the conversation on 16 July 2025 between the claimant and Kevin Cheung was superficial and lacked any detail but did include Kevin Cheung saying the claimant would be paid for the work he did. This included working as a Grill Chef on 17 July 2025 between 5.00 pm and 9.00 pm. The amount to be paid was not discussed.
- 42 However, I also accept, consistent with the content of the text messages sent by the claimant on 18 and 19 July 2025, there was some understanding between the claimant and Kevin Cheung that the claimant would be assessed during the work on 17 July 2025, albeit I accept the claimant's evidence that Kevin Cheung said the claimant would be paid to do the work. That is, I do not accept that the claimant *and* Kevin Cheung agreed the claimant would work at Hong Kong Tea Café, unpaid, for four hours on 17 July 2025, notwithstanding the claimant was being assessed during the shift.
- 43 I find that other than being given some preliminary information about how to present the food and where food was located in the kitchen, the claimant otherwise cooked any food orders on the grill without supervision from other staff members, including the Head Chef.
- 44 I accept the claimant followed up being paid for the work expecting to be paid 'cash' in a similar manner as he had been paid at other restaurants before determining any future work. To that end, again, the text messages on 18 and 19 July 2025 are consistent with the claimant's oral evidence.
- 45 I find the respondent adopted a similar process for other applicants in response to the same recruitment information on WeChat.

Determination

- 46 There is limited, if any, case law in Australia on unpaid work trials. However, guidance from cases involving *work experience* or *unpaid internships* may assist (see *Fair Work Ombudsman v Joys Child Care Ltd* [2019] FCCA 3356, *Xie v Yang* [2019] SAET 38 and *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140 at [6] to [8]).
- 47 These cases highlight that where the objective reality of the relationship may be one of employment, the description given by one or both parties may be of less, or no, relevance. Further, the fact that a worker may be acquiring skills or experience may also be of limited relevance.
- 48 The FWA specifically recognises one category of unpaid work experience namely 'vocational placement', which is defined in s 12 to mean a placement that is undertaken as a requirement of a legally recognised education or training course and is without remuneration. This type of unpaid work experience does not apply to the Claim.
- 49 The factors identified in *Barbour v Mementaz Derbas t/a Derbas Lawyers* [2021] FWC 1718 at [70] (Deputy President Binet), which distinguish genuine work experience from employment, can also be applied when determining whether a worker is participating in a bona fide unpaid work trial or is in fact performing (casual) employment, including:
- (a) The placement is mainly for the benefit of the person rather than the business.
 - (b) The periods of placement are relatively short.
 - (c) The person is not required to or expected to do productive work.
 - (d) There is no significant commercial gain or value for the business derived out of the work performed by the person.
- 50 To this, the following may also be relevant when assessing whether the worker is undertaking a bona fide work trial:
- (a) the primary reason for the engagement was to assess the person's skills and possible suitability for the work; and
 - (b) the period of arrangement was no longer than necessary to assess the person's skills or possible suitability for the work.
- 51 Additionally, from August 2024, amendments to the FWA are also relevant. Section 15AA of the FWA provides:

Determining the Ordinary Meanings of Employee and Employer

- (1) For the purposes of this Act, whether an individual is an employee of a person within the ordinary meaning of that expression, or whether a person is an employer of an individual within the ordinary meaning of that expression, is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person.
- (2) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person
 - (a) the totality of the relationship between the individual and the person must be considered; and
 - (b) in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.

- 52 Section 15A of the FWA provides:

Meaning of casual employee

General rule

- (1) An employee is a casual employee of an employer only if:

- (a) the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and
- (b) the employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.

Indicia that apply for purposes of general rule

(2) For the purposes of paragraph (1)(a), whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work is to be assessed:

- (a) on the basis of the real substance, practical reality and true nature of the employment relationship; and
- (b) on the basis that a firm advance commitment can be in the form of the contract of employment or, in addition to the terms of that contract, in the form of a mutual understanding or expectation between the employer and employee not rising to the level of a term of that contract (or to a variation of any such term); and
- (c) having regard to, but not limited to, the following considerations (which may indicate the presence, rather than an absence, of such a commitment):
 - (i) whether there is an inability of the employer to elect to offer, or not offer, work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice);
 - (ii) whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;
 - (iii) whether there are full - time employees or part - time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee;
 - (iv) whether there is a regular pattern of work for the employee.

(3) To avoid doubt:

- (a) for the purposes of paragraph (2)(b), a mutual understanding or expectation may be inferred from conduct of the employer and employee after entering into the contract of employment or from how the contract is performed; and
- (b) the considerations referred to in paragraph (2)(c) must all be considered but no single consideration is determinative and not all considerations necessarily need to be satisfied for an employee to be considered as other than a casual employee; and
- (c) a pattern of work is regular for the purposes of subparagraph (2)(c)(iv) even if it is not absolutely uniform and includes some fluctuation or variation over time (including for reasonable absences such as for illness, injury or recreation).

53 The exceptions to the general rule in s 15A(4) of the FWA do not apply to the claimant.

54 In the claimant's case, there are factors which weigh in favour of the claimant being on a *paid* work trial at the Hong Kong Tea Café and there are factors which weigh in favour of the claimant being a casual employee.

55 The factors that weigh in favour of the claimant being on a paid work trial include the period being short in duration, that is, one shift at Hong Kong Tea Café, and one shift *may* be no more than is necessary to assess a person's suitability and skill to be a chef. In addition, there appears to be some understanding by the claimant that he would be assessed by the respondent during the shift on 17 July 2025.

56 The factors that weigh against the claimant being on a paid work trial and being employed by the respondent as a casual employee on 17 July 2025 include:

- (a) the claimant responded to a post for the recruitment of a Grill Chef between the hours of 5.00 pm and 9.00 pm. The recruitment did not otherwise indicate a work trial or interview process;
- (b) the conversation between the claimant and Kevin Cheung was superficial where Kevin Cheung told the claimant to come to the Hong Kong Tea Café the next day between 5.00 pm and 9.00 pm. There was some reference to the claimant being assessed during this time;
- (c) the purported assessment went for the whole of the shift during the restaurant's opening hours; and
- (d) the respondent undertook limited supervision of the claimant's work during the purported assessment period; that is beyond the claimant being given some introductory explanations by the Head Chef about the plating up of the food and where food was stored, the claimant otherwise cooked on the grill the orders as required independently. He did so in conjunction with other chefs in the kitchen.

57 In those circumstances, I do not accept the *primary* reason for the claimant's engagement was to assess his skills and possible suitability for the work. There was no apparent benefit to the claimant in carrying out the work, beyond his expectation that he would be paid, and, on his evidence, any future shift hours were convenient where he was undertaking other studies. On the other hand, the respondent obtained the services of another chef for the evening cooking orders on the grill consistent with its post on WeChat to recruit a chef who could do so. In that sense, the respondent obtained value from the claimant's work.

58 Of some concern is that the respondent appears to have repeated this practice with other prospective applicants sourced through the same online recruiting platform.

- 59 Accordingly, when considered objectively and having regard to the real substance and practical reality of the claimant's engagement, I am not satisfied that the claimant was engaged by the respondent to work at the Hong Kong Tea Café on a *paid work trial*. I arrive at this finding notwithstanding the short duration of the shift and the claimant's text message to Kevin Cheung asking how he went on the work trial.
- 60 In my assessment, the real substance and practical reality of the claimant's engagement by the respondent was that he worked as a Grill Chef at the Hong Kong Tea Café on 17 July 2025 between 5.00 pm and 9.00 pm. While the respondent may have observed his suitability and skills during that shift, such observation was merely ancillary to the claimant's performance of actual work. Further, the text message the following day from the claimant to Kevin Cheung suggested the possibility of further work, subject to agreement between the parties. The nature of the work undertaken by the claimant was consistent with the duties performed by other kitchen staff and aligned with the type of work ordinarily carried out in a restaurant on a casual basis. It was consistent with the post on WeChat where the respondent sought to recruit someone to perform the work.
- 61 Finally, the work performed by the claimant on 17 July 2025 falls within the scope of the Award and is work ordinarily undertaken by casual employees, including chefs or cooks.
- 62 I find that on 17 July 2025 from 5.00 pm to 9.00 pm the claimant was employed by the respondent pursuant to an oral contract as a casual chef to work at the respondent's restaurant, Hong Kong Tea Café.
- 63 That is, I find the claimant has proven the third pathway that he was employed by the respondent as a casual employee.

Payment

- 64 Where the respondent employed the claimant as a casual chef, it was required to pay him in accordance with the Award.
- 65 Clause 11.4 of the Award provides:
- An employer must pay a casual employee at the end of each engagement unless the employer and the employee have agreed that the pay period of the employee is either weekly or fortnightly.
- 66 I note the claimant's evidence that he was paid as a Level 5 cook/chef at other restaurants. However, the Claim sought payment of \$32.31 per hour, which is consistent with the casual hourly rate applicable in July 2025 under the classifications in Schedule A of the Award for a Cook Grade 1 (A.3.4) working on a weekday (see table B.1.3, Level 2 in Schedule B of the Award). Accordingly, where this is the hourly amount sought and it is consistent with the Award, I will not seek to vary the amount based on what the claimant may be eligible for at some other restaurant.
- 67 I find the claimant in working four hours on 17 July 2025 should have been paid \$129.24 by the respondent in accordance with cl 11.1 and cl 11.4 of the Award.
- 68 I find that in failing to do so, the respondent breached s 45 of the FWA by contravening a term of the Award. A breach of s 45 of the FWA is a breach of a civil remedy provision.

Pre-judgment Interest

- 69 The claimant also applies for interest on any judgment amount. Pursuant to s 547(2) of the FWA, on application, the IMC must include an amount of interest on orders made under s 545(3) 'unless good cause is shown to the contrary'. I accept no cause is shown that denies an order for pre-judgment interest to be made.
- 70 Pre-judgment interest in the IMC is awarded pursuant to regulation 12 of the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005 (WA) (IMC Regulations)*. Sub-regulation (1) states that the IMC may order a party to pay interest 'from the date when the cause of case arose to the date when the order is made'⁴ and at the rate prescribed by s 8(1)(a) of the *Civil Judgments Enforcement Act 2004 (WA)*.⁵
- 71 Regulation 4 of the *Civil Judgments Enforcement Regulations 2005 (WA)* prescribes an interest rate of 6% per annum.
- 72 Further, regulation 12(2) of the IMC Regulations states:
- When the court orders a party to pay the total of the amounts that another party was entitled to be paid on different dates, the court may order interest to be paid on the total and if it does so it may calculate the interest as the court thinks fit.
- 73 Subject to s 547(2) of the FWA, the IMC has a discretion to award interest at such a rate it thinks fit on the whole or any part of the judgment.⁶
- 74 Accordingly, I will apply the statutory 6% per annum interest rate and calculate it from 17 July 2025 to the date of the issuance of these reasons on 30 January 2026 resulting in interest in the amount of \$4.21.

Outcome and Orders

- 75 Pursuant to s 548(1A) of the FWA, I am satisfied the amount the respondent is required to pay to the claimant is an amount under the Award, being a fair work instrument. This amount is \$129.24.
- 76 Accordingly, pursuant to s 545(3) of the FWA, where the respondent is required to pay \$129.24 under the Award and in failing to do so the respondent has contravened a civil remedy provision, I order the respondent pay to the claimant the amount of \$129.24.
- 77 Pursuant to s 547(2) of the FWA and reg 12 of the IMC Regulations the respondent is to pay to the claimant interest on the judgment amount of \$4.21.
- 78 The total amount payable to the claimant by the respondent is \$133.45.

D. SCADDAN

INDUSTRIAL MAGISTRATE

SCHEDULE I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court of Western Australia Under the

Fair Work Act 2009 (Cth)

Jurisdiction

- [1] An employee, an employee organization or an inspector may apply to an eligible State or Territory court for orders regarding a contravention of the civil penalty provisions identified in s 539(2) of the FWA.
- [2] The IMC, being a court constituted by an industrial magistrate, is an ‘eligible State or Territory court’: FWA s 12 (see definitions of ‘eligible State or Territory court’ and ‘magistrates court’); *Industrial Relations Act 1979* (WA) s 81, s 81B.
- [3] The application to the IMC must be made within six years after the day on which the contravention of the civil penalty provision occurred: FWA s 544.
- [4] The civil penalty provisions identified in s 539 of the FWA include contravening a term of a modern award: FWA s 45.
- [5] In respect of an election to deal with a claim using the small claims procedure in s 548 of the FWA, the employee applies for an order which relates to an amount in s 548(1A) and indicates he or she wants the small claim procedure to apply to the proceedings [by complying with the procedure prescribed].
- [6] The amount referred to in s 548(1)(b) and s 548(1A)(a) of the FWA refers to:
- [A]n amount that an employer was required to pay to ... an employee:
- (i) under [FWA] or a fair work instrument; or
- (ii) because of a safety net contractual entitlement; or
- (iii) because of an entitlement of the employee arising under subsection 542(1) [of the FWA].
- [7] Section 12 of the FWA defines ‘fair work instrument’ to, relevantly, mean at (a) a modern award.
- [8] An obligation upon an ‘employer’ is an obligation upon a ‘national system employer’ and that term, relevantly, is defined to include ‘a corporation to which paragraph 51(xx) of the Constitution applies’: FWA s 12, s 14, s 42, s 47. A NES entitlement of an employee is an entitlement of an ‘employee’ who is a ‘national system employee’ and that term, relevantly, is defined to include ‘an individual so far as he or she is employed ... by a national system employer’: FWA s 13, s 42, s 47.

Contravention

- [9] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for ‘an employer to pay [to an employee] an amount ... that the employer was required to pay’ under the modern award (emphasis added): FWA s 545(3)(a).
- [10] The civil penalty provisions identified in s 539 of the FWA includes the Core provisions set out in pt 2 - 1 of the FWA: FWA s 45, s 539.
- [11] Where the IMC is satisfied that there has been a contravention of a civil penalty provision, the court may make orders for:
- An employer to pay to an employee an amount that the employer was required to pay under the FWA: FWA s 545(3).
- [12] In contrast to the powers of the Federal Court and the Federal Circuit and Family Court of Australia, an eligible State or Territory court has no power to order payment by an entity other than the employer of amounts that the employer was required to pay under the FWA. For example, the IMC has no power to order that the director of an employer company make payments of amounts payable under the FWA: *Mildren v Gabbusch* [2014] SAIRC 15

Burden and Standard of Proof

- [13] In an application under the FWA, the party making an allegation to enforce a legal right or to relieve the party of a legal obligation carries the burden of proving the allegation. The standard of proof required to discharge the burden is proof ‘on the balance of probabilities’. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:
- It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not.
- [14] In the context of an allegation of the breach of a civil penalty provision of the FWA it is also relevant to recall the observation of Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336:
- The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences [362].
- [15] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

Practice and Procedure of the Industrial Magistrates Court of Western Australia

- [16] Subject to the provisions of the FWA, the procedure of the IMC relevant to claims under the FWA is contained in the IMC Regulations. Notably, reg 35(4) of the IMC Regulations provides the court is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit, which for a claim electing the small claims procedure is consistent with s 548(3) of the FWA.
- [17] In *Sammut v AVM Holdings Pty Ltd [No 2]* [2012] WASC 27, Commissioner Sleight examined a similarly worded provision

regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation

The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence [40]. (citations omitted)

¹ Exhibit 1.

² Exhibit 2.

³ Exhibit 2, text messages annexed to the witness statement.

⁴ IMC Regulations reg 12(1)(a).

⁵ IMC Regulations reg 12(1)(b).

⁶ I note that pursuant to s 51A of the *Federal Court of Australia Act 1976* (Cth) and s 547(2) of the FWA, the Federal Court and the Federal Circuit and Family Court of Australia has a discretion as to how interest is calculated. The Federal Court's general practice note by Allsop CJ (as he was then) dated 18 September 2017 describes how interest is calculated in the federal jurisdiction with reference to the Discount and Interest Rate Harmonisation Committee, but this has no application in the IMC. Interest is calculated with regard to the rate 4% above the cash rate published by the Reserve Bank of Australia before the commencement of each of the six-monthly periods between 1 January to 30 June, and 1 July to 1 December in a given year.

2026 WAIRC 00031

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2026 WAIRC 00031
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : WEDNESDAY, 29 OCTOBER 2025, THURSDAY, 30 OCTOBER 2025, FRIDAY, 31 OCTOBER 2025
DELIVERED : FRIDAY, 23 JANUARY 2026
FILE NO. : M 17 OF 2024
BETWEEN : DELIA GAVRIL

CLAIMANT

AND

STATE OF WESTERN AUSTRALIA

RESPONDENT

CatchWords : INDUSTRIAL LAW – *Industrial Relations Act 1979* – Allegation of damaging action taken by employer – Whether the complaints relied upon are ‘employment-related inquiries or complaints’ – Meaning of ‘complaint’ – Whether the employer took damaging action against the employee – The reasons taken by the employer – Whether the employee suffered loss or injury

Legislation : *Industrial Relations Act 1979* (WA)
Industrial Magistrate’s Court (General Jurisdiction) Regulations 2005 (WA)
Public Sector Management Act 1994 (WA)

Case(s) referred to in reasons: : *Alam v National Australia Bank Limited* [2021] FCAFC 178; (2021) 288 FCR 301
Ermel v Duluxgroup (Australia) Pty Ltd (No 2) [2015] FCA 17; (2015) 67 AILR 102-332
Hughes v East Metropolitan Health Service [2024] WAIRC 00982; (2024) 104 WAIG 2560
Khiani v Australian Bureau of Statistics [2011] FCAFC 109; (2011) 63 AILR 101-446
Shea v TRUenergy Services Pty Ltd (No 6) [2014] FCA 271; (2014) 242 IR 1
Short v Ambulance Victoria [2015] FCAFC 55; (2015) 249 IR 217
Bogunovich v Bayside Western Australia Pty Ltd (1999) 79 WAIG 8
Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 129 IR 270
Capewell v Cadbury Schweppes Australia Ltd (1998) 78 WAIG 299
AWI Administration Services Pty Ltd v Birnie [2001] WAIRC 04015; (2001) 81 WAIG 2849

Lynam v Lataga Pty Ltd [2001] WAIRC 02420; (2001) 81 WAIG 986

Stephens v Australian Postal Corporation [2014] FCA 732

Gilmore v Cecil Bros (1996) 76 WAIG 4434

Miller v Minister of Pensions [1947] 2 All ER 372

Sammut v AVM Holdings Pty Ltd (No 2) [2012] WASC 27

Result : The claim is dismissed

Representation:

Claimant : Self-represented

Respondent : Mr J. Carroll (of counsel)

REASONS FOR DECISION

Background

- 1 Delia Gavril (**Ms Gavril**) was employed on a series of fixed term contracts by the State of Western Australia pursuant to s 64(1)(b) of the *Public Sector Management Act 1994* (WA) (**PSMA**) at the Department of Education (the **Department**) located at the Department's offices at 151 Royal Street, East Perth.
- 2 The fixed term contracts were maximum term contracts of employment as follows:
 - (1) The first fixed term contract commenced on 21 February 2022 and ceased on 20 April 2022 as a level 2 public service officer in the position of Fixed Assets Officer (**First Contract**);
 - (2) The second fixed term contract commenced on 13 June 2022 and ceased on 30 December 2022 as a level 3 public service officer in the position of Payroll Officer (**Second Contract**);
 - (3) The third fixed term contract commenced on 1 January 2023 and ceased on 3 March 2023 as a level 3 public service officer in the position of Tax Support Officer (**Third Contract**); and
 - (4) The fourth fixed term contract commenced on 4 March 2023 and ceased on 27 October 2023 as a level 3 public service officer in the position of Tax Support Officer (**Fourth Contract**). This contract was an extension of the Third Contract.
- 3 The Second to Fourth Contracts are relevant to these proceedings.

The Claim

- 4 On 23 February 2024, Ms Gavril lodged a claim against the Department under s 97A(1) of the *Industrial Relations Act 1979* WA (**IR Act**), alleging that the respondent, being the Department, took damaging action against her and sought orders that the Department reinstate her to her former position as a Tax Support Officer; pay compensation for alleged injuries and losses suffered; and pay pecuniary penalties payable to her (the **Claim**).
- 5 Section 97A(1) of the IR Act is a civil penalty provision for the purposes of s 83E of the IR Act.
- 6 The Claim was commenced following Ms Gavril discontinuing a claim, M 138 of 2023, against the Department. M 138 of 2023 was commenced in November 2023, whereupon the Department applied for orders to strike out the claim and for Ms Gavril to file and serve a new statement of claim. Rather than striking out the claim, the Industrial Magistrates Court (**IMC** or **Court**) made orders requiring Ms Gavril to amend her statement of claim. Instead of doing so, Ms Gavril discontinued M 138 of 2023 and commenced this Claim, which is generally a restatement of M 138 of 2023.
- 7 Following a series of interlocutory applications and an appeal to the Full Bench of the Western Australian Industrial Relations Commission, an amended statement of claim was lodged in March 2025 (**Amended Claim**).
- 8 On 4 June 2025, by consent of the parties, the respondent was changed to the State of Western Australia.

The Complaints or Employment-Related Inquiries Relied Upon

- 9 For the remainder of these reasons the relevant communications relied upon by Ms Gavril will be referred to as a 'complaint', but this should not be taken to mean that the communication is, in fact, an employment-related inquiry or complaint, unless a finding is made to that effect.
- 10 Ms Gavril asserts that she made complaints or employment-related inquiries on the following dates:
 - (1) 3 July 2022, when she raised concerns with Training Coordinator, Lee Wheeler (**Mr Wheeler**), regarding his alleged discriminatory and bullying behaviour during training classes including:
 - (a) ignoring her questions;
 - (b) refusing to provide assistance when she requested it; and
 - (c) making derogatory comments about her to other training support officers (**First Complaint**);
 - (2) 1 August 2022, when she made a 'formal complaint' reporting alleged bullying behaviour during a work-related interaction with Supervisor, Anja Tjandra (**Ms Tjandra**), to her Manager, Salvatore (Sam) Mastrolembo (**Mr Mastrolembo**), and formally requesting a reassignment to a different supervisor due to ongoing bullying and difficulties during workplace interactions (**Second Complaint**);
 - (3) 5 and 10 May 2023, when she made complaints to Team Leader, Cheryl Jones (**Ms Jones**), and Manager, Fiona Anning (**Ms Anning**), about work files being deleted or modified from a shared 'S' drive (**Third and Fourth Complaints**);

- (4) 12 May 2023, when she made a work-related inquiry to Ms Anning for an investigation into the purported deletion of work files (**Fifth Complaint**);
- (5) 9 June 2023, when she made work-related inquiries to Ms Jones about working from home; workload; work location and her job status, raising concerns about the reassignment to Accounts Processing (**Sixth Complaint**);
- (6) 20 June 2023, when she made a complaint to Mr Mastrolemba about a previous payroll inquiry about the payment of taxation on leave loading and cost of living payment (**Seventh Complaint**);
- (7) 26 June 2023, when she asked Ms Anning for the reasoning behind the decision to reassign her to Accounts Processing until the end of the contract period (**Eighth Complaint**); and
- (8) 3 July 2023, when she inquired with Union Representative, Bill Barnard (**Mr Barnard**), about the procedure to file a formal workplace complaint (**Ninth Complaint**).

(collectively referred to as the '**Complaints**').

The Damaging Actions Alleged

- 11 Ms Gavril alleges the respondent, via Mr Mastrolemba, took two damaging actions against her:
 - (1) the first damaging action occurred on 5 September 2022, when Mr Mastrolemba removed her from a 'meaningful' role as a Payroll Officer and reassigned her to a 'menial, unskilled position' as a COVID-19 Inquiries Officer under the 'pretext of a temporary four-week reassignment'. Ms Gavril says this reassignment was unlawfully extended to four months without consultation or a fair procedure; and
 - (2) the second damaging action occurred on 31 August 2022, when she was required to interview for the Payroll Officer role.
- (First and Second Alleged Damaging Actions)**
- 12 Ms Gavril says that the First and Second Alleged Damaging Actions were taken for the reason, or reasons that include, the cumulative effect of the First and Second Complaints.
 - 13 Ms Gavril says the First and Second Alleged Damaging Actions stripped her of professional responsibilities and career development opportunities, directly obstructed her ability to progress in her career, and were clear retaliatory actions following her formal workplace complaints.
 - 14 Ms Gavril alleges the respondent, via Ms Anning, took damaging action against her by failing to adopt a formal and fair procedure in demoting her to a lower-level position against her will where she was denied proper training, and left her without career advancement opportunities compared to her previous role as a Tax Support Officer (**Third Damaging Action**).
 - 15 Ms Gavril claims that the Third Damaging Action was taken for the reason or for reasons that include the Third, Fourth and Fifth Complaints about her work files being deleted or modified and also for making an inquiry for an investigation about this.
 - 16 Ms Gavril alleges the respondent, via Ms Anning, also took damaging action against her on 26 June 2023 by denying her contract extension (**Fourth Damaging Action**).
 - 17 Ms Gavril claims that the Fourth Damaging Action was taken for the reason, or for reasons that include, the cumulative effect of the Sixth Complaint, inquiring about her workload and job status; the Seventh Complaint, when she lodged a formal complaint regarding issues with her taxes; and the Eighth Complaint, when she made a work-related inquiry seeking an explanation for her removal from the Tax Support Officer role.
 - 18 Ms Gavril alleges the respondent, via Ms Anning, took damaging action against her on 4 July 2023 by emailing her an abusive, unreasonable, and unjustified performance review, despite no prior discussions and training deficiencies (**Fifth Damaging Action**).
 - 19 Ms Gavril claims that the Fifth Damaging Action was taken for the reason or for reasons that include the Ninth Complaint about how to formally file a complaint.

Orders Sought

- 20 Ms Gavril seeks the following orders pursuant to s 97B(a) and s 97B(b) of the IR Act:
 - (1) reinstatement in her former position as a Tax Support officer or other position within the Department on conditions at least as favourable as the conditions on which she was employed immediately before she claimed workers compensation. The reinstatement should be effective from 27 October 2023, being the last date of the Fourth Contract, with any related consequential orders for continuity of entitlements and compensation (including long service leave, annual leave, superannuation, personal leave etc.) Further, the reinstatement should be as a permanent employee without a probationary period;
 - (2) compensation for economic loss, including lost earnings and career stagnation; and
 - (3) compensation for non-economic loss, including severe distress, reputational damage, and psychological harm.
- 21 Ms Gavril also seeks the imposition of a civil pecuniary penalty under s 83E of IR Act, paid to her, due to the serious contraventions and alleged damaging actions taken against her.
- 22 Ms Gavril also sought any additional relief deemed just and necessary by the Court.

The Response

- 23 The respondent denies many of the facts comprising the Amended Claim.
- 24 In respect of each of the Complaints and the First to Fifth Alleged Damaging Actions, the respondent denies:

- (a) or does not admit the Complaints are ‘employment-related inquiries or complaints’ Ms Gavril was able to make;
- (b) or does not admit the First to Fifth Alleged Damaging Actions constitute damaging action within the meaning of s 97(a) of the IR Act;
- (c) any action was taken for the reasons alleged by Ms Gavril; and
- (d) Ms Gavril is entitled to the relief sought or any relief at all.

25 The respondent seeks an order Ms Gavril pay the costs of the proceedings, including legal costs.

26 The respondent also objected to contents of the Amended Claim and to parts of Ms Gavril’s evidence on the basis that the contents or the evidence was not relevant to the Amended Claim.

Issues for Determination

27 The principal issues for determination in respect of each of the Complaints and the First to Fifth Alleged Damaging Actions are:

- (1) do any of the Complaints relied upon by Ms Gavril amount to ‘employment-related inquiries or complaints’ under s 97A(1) of the IR Act?
- (2) do any of the First to Fifth Alleged Damaging Actions constitute ‘damaging action’ as that term is defined under s 97(a) of the IR Act?
- (3) if the Complaints amount to ‘employment-related inquiries or complaints’ and the First to Fifth Alleged Damaging Actions constitute ‘damaging action’, did the respondent do so for the reason, or reasons that include, that Ms Gavril made the Complaints (in some cases individually and in other cases, cumulatively)? That is, is there a causal link between the First to Fifth Alleged Damaging Actions and the Complaints?

28 There are factual issues in dispute, including:

- (1) When the decision-makers knew of the Complaints, if at all?
- (2) Whether contracts of employment could be extended?
- (3) Whether promises were made for the extension of contracts of employment?
- (4) The surrounding circumstances of certain decisions.

Legislative Framework

29 Section 97A of the IR Act provides:

97A. Damaging action because of inquiry or complaint

- (1) An employer must not take damaging action against an employee for the reason, or for reasons that include, that the employee is able to make an employment-related inquiry or complaint to the employer or another person.
- (2) In any proceedings for a contravention of subsection (1), if it is proved that an employer took the damaging action against the employee, it is for the employer to prove that the employer did not do so because the employee made the inquiry or complaint or proposed to make the inquiry or complaint.
- (3) A contravention of subsection (1) is not an offence but that subsection is a civil penalty provision for the purposes of section 83E.

30 Section 97 of the IR Act defines certain terms, and, relevant to the Alleged Damaging Action, damaging action against an employee in paragraph (a) means:

- (i) dismissing the employee; or
- (ii) altering the employee’s position to the employee’s disadvantage; or
- (iii) refusing to promote or transfer the employee; or
- (iv) otherwise injuring the employee in relation to the employee’s employment with the employer or another person; or
- (v) threatening to do anything referred to in subparagraphs (i) to (iv).

31 Section 97A of the IR Act is modelled on the general protections provisions under the *Fair Work Act 2009* (Cth) (FWA) (and its predecessor legislation). Therefore, Federal case law may assist in the proper construction and application of s 97A.¹

32 The Full Court of the Federal Court of Australia in *Alam v National Australia Bank Limited* [2021] FCAFC 178; (2021) 288 FCR 301 (*Alam*) at [14] provides a helpful summary of the application of the analogous sections of the FWA, s 361 and s 340, and the relationship between these sections:

- (a) in order to attract the application of s 361, an applicant should allege with sufficient particularity both the action said to constitute ‘adverse action’ and the particular reason or particular intent with which it is said the action was taken: *Short v Ambulance Victoria* [2015] FCAFC 55; (2015) 249 IR 217 (Dowsett, Bromberg and Murphy JJ) at [55];
- (b) the party making the allegation that adverse action was taken ‘because’ of a particular circumstance must establish the existence of that circumstance as an objective fact: *Tattsbet Ltd v Morrow* [2015] FCAFC 63; (2015) 233 FCR 46 at [119]. That is, it is for the applicant to establish all the elements of the alleged contravention other than the reasons of the respondent for taking the adverse action: *Australian Building and Construction Commissioner v Hall* [2018] FCAFC 83; (2018) 261 FCR 347 (*ABCC v Hall*) at [100];
- (c) an employer takes adverse action in contravention of s 340 if a proscribed reason is a ‘substantial and operative’

reason for the action or if the reasons for the action include the proscribed reason: [*Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 248 CLR 500 (*Bendigo v Barclay*)] at [104] (Gummow and Hayne JJ);

- (d) the discharge of the s 361 onus requires proof on the balance of probabilities and usually requires decision-makers to give direct evidence of their reasons for taking the adverse action: *Bendigo v Barclay* at [43]-[44];
- (e) the determination of why an employer took adverse action against an employee requires an inquiry into the actual reason or reasons of the employer and is to be made in the light of all the circumstances established in the proceeding: *Bendigo v Barclay* at [41], [45] (French CJ and Crennan J); at [101] (Gummow and Hayne JJ); *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41, (2014) 253 CLR 243 (*CFMEU v BHP Coal*) at [7] (French CJ and Kiefel J); *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* [2015] FCAFC 157, (2015) 238 FCR 273 (*CFMEU v Anglo Coal*) at [27]; *ABCC v Hall* at [19];
- (f) while the evidence of the decision-maker as to the reasons for the taking of the adverse action may, if accepted by the Court, satisfy the s 361 onus, such evidence is not a necessary pre-condition: *CFMEU v BHP Coal* at [192]; *Australian Red Cross Society v Queensland Nurses' Union of Employees* [2019] FCAFC 215, 273 FCR 332 at [72];
- (g) the Court's rejection of the evidence of the decision-maker as to the reasons for the adverse action will ordinarily be 'a weighty consideration and often a determinative consideration' in the determination of whether the reason alleged by the applicant was a substantial and operative reason for the action (*Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204; (2020) 302 IR 400 [*Cummins South Pacific*] at [116]), but such a rejection does not relieve the Court from considering all the evidence probative of whether the reason asserted by the applicant has been negated: [*Cummins South Pacific* at [116]]; [*CFMEU v Anglo Coal*] at [27]; *Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333, (2011) 193 FCR 526 at [272]. When there is evidence of a broad range of facts and circumstances, which are not dependent on acceptance of the decision-maker's evidence about his or her asserted reason for the dismissal, such evidence must be taken into account in assessing whether the reasons asserted by an applicant were a substantial and operative reason for the action; [*Cummins South Pacific*] at [113]; *TechnologyOne Ltd v Roohizadegan* [2021] FCAFC 137 at [105]-[106];
- (h) even if the reasons advanced by a respondent as the actual reasons for the decision are accepted, the absence of evidence that there were no additional reasons or that the actual reasons did not include the alleged proscribed reasons, may result in a failure to rebut the presumption: *National Territory Education Union v Royal Melbourne Institute of Technology* [2013] FCA 451, (2013) 234 IR 139 at [20]; *PIA Mortgage Services Pty Ltd v King* [2020] FCAFC 15, (2020) 274 FCR 225 at [154] (Snaden J);
- (i) the decision-maker's knowledge of the circumstance asserted by an applicant to be the reason for the adverse action, and even its consideration, does not require a finding that the action was taken because of that circumstance: *Bendigo v Barclay* at [62]; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* [2012] FCA 1218 at [80] (Jessup J); *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271, (2014) 242 IR 1 at [777]. Nor does the fact that the adverse action has some association with a matter supporting a proscribed reason: *CFMEU v BHP Coal* at [20], [87]-[88]; *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* [2015] FCAFC 76, (2015) 231 FCR 150 [*Endeavour Coal*] at [32], [47]-[48] (Jessup J); and
- (j) adverse action taken against a person because of conduct resulting from the exercise of workplace rights may not offend the s 340(1) prohibition: *CFMEU v BHP Coal; Endeavour Coal* at [52] (Perram J)

33 As stated in *Hughes*, at [214]:

There is importance in the employee specifying with a degree of precision the *reason alleged* for the damaging action, notwithstanding the Court is not a court of pleadings where parties often represent themselves. In *Monash Health v Singh* [2023] FCAFC 166, the Federal Court, at [57], summarised principles about the degree of precision by an employee to identify the 'action' taken for a 'particular reason' to invoke the reversal of the onus under s 361 of the FWA. In my view, the following principles are apposite to s 97A of the IR Act (there may be others):

- the informality of the Court does not alter the fact that the proceedings are penal in nature where, in part, an employee seeks the imposition of a pecuniary penalty;
- allegations of contravention of s 97A are inherently serious and, as a matter of fairness, such a claim should be 'pleaded' with sufficient precision for an employer to know the case against it. Section 97A does not involve a 'broad inquiry as to whether the [employee] has been subjected to a procedurally or substantively unfair outcome' (*Ermel v Duluxgroup (Australia) Pty Ltd (No 2)* [2015] FCA 17 at [48]) where the 'crucial issue' is the causal relationship between the alleged damaging action and the reasons or reasons that include why the alleged damaging action was taken;
- this means *the reason* or *the reasons* (relevant to the employment-related inquiry or complaint) for the alleged damaging action must be specified in the claim by the employee;
- however, what comprises the reason or reasons alleged may be identified from the filed originating claim and/or supporting statement of claim supplemented by, for example, further and better particulars, written submissions, witness statement by the employee.

(original emphasis)

- 34 Having regard to the Amended Claim, the type of damaging action Ms Gavril says the respondent took against her in each case is under s 97(a)(ii) of the IR Act, altering her position to her disadvantage. There is possible reference to s 97(a)(iv) of the IR Act, otherwise injuring her in relation to her employment. However, that is by no means clear.
- 35 Relevant to the Amended Claim, Ms Gavril bears the onus of proving on the balance of probabilities that:
- (1) each of the Complaints she said she made or raised were ‘employment-related inquiries or complaints’ she was able to make; and
 - (2) the First to Fifth Alleged Damaging Actions taken by the respondent was ‘damaging action’ within the meaning of s 97(a) of the IR Act.
- 36 If Ms Gavril proves each of the Complaints she said, made or raised were ‘employment-related inquiries or complaints’ she was able to make and the First to Fifth Alleged Damaging Actions were ‘damaging action’ taken by the respondent against her, it is for the respondent to prove on the balance of probabilities that it did not do so for the reason, or for reasons that include, the fact that Ms Gavril made the Complaints.
- 37 A claim for damaging action does not entitle Ms Gavril to ‘a broad inquiry as to whether [she] has been subjected to a procedurally or substantively unfair outcome’.²
- 38 Further, as stated by the Full Court of the Federal Court of Australia in *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109; (2011) 63 AILR 101-446 at [31]:³
- A general protections application is not intended to provide an opportunity for the appellant to raise whatever issues she wishes to about the validity of the steps taken before her dismissal. The crucial issue in such an application is the causal relationship between adverse action and one or more of the factors mentioned in the various provisions of Pt 3-1. The issue is whether the person who has taken the adverse action has done so because the person against whom the adverse action has been taken has one or more of the relevant characteristics or has done one or more of the relevant acts.
- 39 To that end, the following, while referred to in the Amended Claim and in Ms Gavril’s evidence, is not relevant to the Amended Claim or the issues to be determined by the Court as part of its determination under s 97A of the IR Act:
- (a) whether Ms Gavril was, in fact, bullied by Mr Wheeler during training in early July 2022;
 - (b) whether Ms Gavril was, in fact, bullied by a supervisor on 1 August 2022;
 - (c) the validity of the selection process undertaken by the Department for the Payroll Officer pool interviews and merit-selection in August 2022;
 - (d) being informed by a staff member that she failed the job interview and being provided feedback following the interview;
 - (e) whether Ms Gavril, in fact, did or did not successfully complete tasks in the Tax Support Officer role or whether, in fact, she did or did not initiate streamline processes or made improvements;
 - (f) the sufficiency or insufficiency of training undertaken or whether Ms Gavril ought to have received more or different training;
 - (g) the alleged cause of any decline in Ms Gavril’s mental health, if, in fact, it did decline; and
 - (h) the validity of any performance management program implemented by the Department.
- 40 The Court will also not undertake an investigation into whether work files were deleted from the Department’s ‘S’ drive.
- 41 Ms Gavril made submissions to the Court referring to many cases, which the respondent says do not stand for the proposition relied upon by Ms Gavril, contain the incorrect citation or do not exist. The respondent says the Court should proceed with caution before accepting Ms Gavril’s submissions or the cases she relies upon.
- 42 The respondent outlined examples of the errors in Ms Gavril’s case references. I do not intend to traverse the cases referred to by Ms Gavril where the reference to these cases contain obvious errors and do not assist the Court.
- 43 While Ms Gavril represented herself in the proceedings, she is required to ensure the accuracy of any submission she makes to the Court, which includes referring the Court to any point of law or case she relies upon.
- 44 In her closing written submissions, Ms Gavril seeks to expand the Amended Claim and adduce further evidence. By way of example, Ms Gavril made reference to the Seventh Complaint being a breach of ‘the Australian Privacy Principle 6 under the *Privacy Act 1988* (Cth)’ and the Seventh Complaint ‘offends the duty of trust and confidence recognised in [reference to a High Court case given]’. Ms Gavril also referred to the ‘escalating nature’ of the Complaints and the respondent’s reckless continuation of damaging action against her.
- 45 Further, she repeatedly referred to being allegedly denied procedural fairness by the respondent and others, uses the documents tendered into evidence to ‘objectively prove her skill and integrity’ and professes there was ‘continuing victimisation’ of her. This suggests, contrary to her assertions otherwise, Ms Gavril wants to re-litigate issues in the workplace and the Amended Claim is a vehicle for this.
- 46 The Amended Claim sets out the Complaints and the alleged damaging action. This is the case the respondent is required to meet. It is not open to Ms Gavril to change tack or introduce new ‘claims’ midway through the hearing or in closing submissions, which at best conflate the issues, or at worst mislead the Court.
- 47 These proceedings are, for the most part, dependent upon the findings of fact made by the Court having regard to the evidence the Court finds credible and reliable. Hyperbolic statements and erroneous submissions made by Ms Gavril do not assist the Court in this task.

Evidence

- 48 Ms Gavril's evidence included her witness statement signed on 31 July 2025 with 46 annexures⁴ (**Gavril Statement**)⁵ and her oral evidence. Numerous documents were also tendered into evidence.
- 49 The respondent's evidence included:
- (a) Witness statement of Salvatore Mastrolembo signed on 28 August 2025 with annexures SM1 to SM8 (**Mastrolembo Statement**)⁶ and his oral evidence;
 - (b) Witness statement of Cheryl Jones signed on 29 August 2025 with annexures CJ1 to CJ7 (**Jones Statement**)⁷ and her oral evidence; and
 - (c) Witness statement of Fiona Anning signed on 29 August 2025 with annexures FA1 to FA19 (**Anning Statement**)⁸ and her oral evidence.
- 50 Mr Mastrolembo has been the Operations Manager, Payroll since 2008. He is responsible for the operations of payroll for the Department and manages approximately 100 staff. He reports to Manager, Payroll Services who then reports to the Director of Business and Customer Services (**BCS**).⁹
- 51 His first interaction with Ms Gavril was in June 2022 when an initially unidentified person, later identified as Ms Gavril, inquired about a vacant position in Payroll.¹⁰ Mr Mastrolembo later offered Ms Gavril the Second Contract.
- 52 Ms Jones has been Accounts Processing and Taxation Team Leader since March 2025. Prior to this she was the Taxation Team Leader since 2018. She is responsible for overseeing accounts processing and taxation, including accounts payable; accounts receivable; Goods and Services Tax; Fringe Benefit Tax; Pay As You Go and other functions. She reports to Manager, Finance Services, Ms Anning.¹¹
- 53 Her first dealing with Ms Gavril was in January 2023 when Ms Gavril commenced as a level 3 Tax Support Officer. Ms Jones offered Ms Gavril the Third and Fourth Contracts.
- 54 Ms Anning currently holds the position of Manager, Finance Services. She is responsible for leading and managing the finance services team for the Department. She reports to the Director, BCS.¹²
- 55 Ms Anning first interacted with Ms Gavril in May 2022 when she was employed as a level 2, Fixed Assets Officer on the First Contract. She had further interactions with Ms Gavril following Ms Gavril's appointments under the Second, Third and Fourth Contracts.¹³

Undisputed Facts

- 56 There are some facts which are not in dispute between the parties. Alternatively, there is uncontroverted evidence I consider to be reliable, and it is unnecessary to traverse that evidence in detail. Where possible I will discuss the evidence based on the issues raised rather than merely recite the witness's evidence.
- 57 Ms Gavril was first employed pursuant to the First Contract, where she acknowledged there was no obligation on either party to enter into any further employment arrangement.¹⁴
- 58 Ms Gavril was appointed from the level 2 Accounts Processing pool following an advertisement and selection process.
- 59 The First Contract was extended in HRMIS, the Department's payroll system, to 30 June 2022. No written contract was provided for that extension.¹⁵
- 60 On 10 June 2022, Ms Gavril signed the Second Contract.¹⁶
- 61 In signing the Second Contract, Ms Gavril acknowledged the position was for a fixed term with no obligation on either party, including the respondent or the Department, to enter into any other further employment arrangement.
- 62 On 1 July 2022, Ms Gavril emailed Mr Mastrolembo about a conversation he purportedly had with another staff member regarding the training she was undertaking. Ms Gavril reassured Mr Mastrolembo that she was not having an issue with the training, and she was dealing with 'issues [she was] facing in a different way'. She expressly told Mr Mastrolembo that she preferred not to discuss any issues with him at this stage.¹⁷
- 63 Shortly after, Mr Mastrolembo emailed Ms Gavril inviting her to come and see him at any time if there was anything that was concerning or upsetting her.¹⁸
- 64 Ms Gavril did not do so.

First Complaint

- 65 On 3 July 2022, Ms Gavril sent an email to Mr Wheeler as follows:¹⁹

Hello Lee,

I decided to use the way of writing as I can express my thought and feeling's [sic] better in this way. After our brief discussion on Friday before, lunch time, when you asked me if I still struggle, I realized that you have the impression that I am struggling with the content of the training. I wanted to let you know that this is not the case at all, contrary I quite enjoy this and I find it very interesting. The only thing I am struggling is the level of noise in the class when we have to work, as for me is quite debilitating and slows me down in my work.

Also, I would like to let you know how sad and left out I felt when you did not want to repeat what you have showed the class while I was at the bathroom during the break time, on Wednesday. You have done this in the past for everyone missing out information or even waiting for people to come in the class, even though they were late for the class in the morning, so they can hear what you have to say but you did not do it for [me], even though I asked. This is making me feel very nervous and stressed when I am coming to the class or if I have to ask for help or questions. There were many

occasions when you were checking with everyone individually, if they are doing ok while doing practice but you did not ask me at all.

Hope you consider my concerns and I look forward to continue [sic] the training with you for this role!

Second Complaint

- 66 On 1 August 2022, Ms Gavril sent Mr Mastrolembo an email requesting to meet with him. Mr Mastrolembo met with Ms Gavril where she made the Second Complaint informing him of alleged behaviours by a supervisor, Ms Tjandra, which Ms Gavril describes in the Amended Claim as ‘bullying’ and ‘inappropriate managerial conduct’. Ms Gavril requested to be moved to another team and be supervised by another supervisor.²⁰
- 67 Mr Mastrolembo made enquiries with Ms Tjandra about the issue raised by Ms Gavril. He decided to move Ms Gavril to the other team, although this was not because he considered there had been any inappropriate behaviour by Ms Tjandra, but he thought there might be a ‘clash of personalities’ and this would accommodate Ms Gavril’s request.²¹
- 68 On 1 August 2022 at 7.14 pm, an email was sent from a generic central services email address by the Department advising of a short delay in the shortlisting process for the Payroll Officer pool selection process. Queries were to be directed to Mr Mastrolembo as a contact person.²²
- 69 On 5 August 2022, Ms Gavril emailed Mr Mastrolembo asking what this email meant. It was coincidence that it happened to be sent on the same day as Ms Gavril met with Mr Mastrolembo.²³
- 70 On or around 31 August 2022, Ms Gavril interviewed for the Payroll Officer pool.²⁴ She was an unsuccessful applicant for the pool position.
- 71 In or around November 2022, the Department advertised to fill a fixed term vacancy for the position of level 3 Tax Support Officer. The position was advertised on the Jobs WA website, and the position was open to both internal and external applicants.²⁵
- 72 In or around 28 November 2022, Ms Gavril made enquiries with Ms Jones about the level 3 Tax Support Officer position. Ms Jones emailed Ms Gavril informing her that the position ‘should be advertised today, for a period of two months with possible extension’.²⁶
- 73 Ms Gavril was the successful applicant for the position and signed the Third Contract. Ms Gavril signed the Third Contract where she acknowledged that this contract was fixed term for two months with ‘possible extension’.²⁷ However, the Third Contract also acknowledged that following the expiration of ‘this fixed term contract there is no obligation on either party to enter into any further employment arrangement’.²⁸
- 74 At some point, prior to 4 March 2023, Ms Anning became aware that Ms Jones had extended the Third Contract without her approval. Ms Jones did not have delegated authority to extend the Third Contract, although Ms Anning accepted that had approval been obtained, she would have extended the Third Contract.²⁹
- 75 The Third Contract was extended to 27 October 2023, becoming the Fourth Contract.³⁰ The reason for the extension was to cover the substantive position holder’s ongoing secondment in another position.³¹ This was the only term of the Third Contract that was varied.

Third Complaint

- 76 On 5 May 2023, Ms Jones was working from home.
- 77 At 12.52 pm, in response to an email from Ms Jones (that was also sent to another colleague, Steven Morriss (**Mr Morriss**)) asking how Ms Gavril and Mr Morriss were going today, what Ms Gavril was working on and informing Ms Gavril that she was going to email her some tasks soon, Ms Gavril replied, making the Third Complaint, in an email as follows:³²
- Hi Cheryl,
- For now I am saving all my work on the desktop as the other day something very strange happened to my computer and all the work I have done disappeared. I called Sudhakar to have a look and he could see that it was some application running in the background that was deleting the work.
- So from now on I will need to save everything on my desktop.
- 78 At 1.35 pm, Ms Jones emailed Ms Gavril requesting Ms Gavril to email Ms Jones what she was working on today. She also informed Ms Gavril that she was waiting on a response to the email Ms Jones had sent Ms Gavril about saving reports in the correct folder. Ms Jones said she was accessing the ‘S’ drive without any problems and asked Ms Gavril where she was saving her work.³³
- 79 At 2.06 pm, Ms Gavril emailed Ms Jones stating that she was saving her work to her desktop as she was advised to do, and that Ms Jones could contact ‘Sudhakar’ to confirm that had happened.³⁴
- 80 On 8 May 2023, there was a series of emails between Ms Jones and Ms Gavril in which Ms Jones tells Ms Gavril that ‘Sudhakar’ did not tell Ms Gavril to save to her desktop, Ms Gavril tells Ms Jones that she is stressed about the situation and she is being accused of lying, and Ms Jones tells Ms Gavril not to disturb ‘Sudhakar’ and explains how to ‘save as’ documents. Ms Gavril continues to dispute what has happened and informs Ms Jones that it is beneficial for work to be saved to her desktop.³⁵
- 81 In the meantime, Ms Jones informed Mr Morriss that she is concerned about the loss of files from the ‘S’ drive, and Ms Gavril needs to report issues to him or Ms Jones.³⁶
- 82 Ms Jones then requests Mr Morriss to see what the issue is with Ms Gavril’s computer. On 8 May 2023 at 11.36 am, Mr Morriss reported back to Ms Jones that Ms Gavril did not appear to understand the ‘save as’ function and was saving work

to two different locations on the computer and that she had lost information from two to three hours work by not saving correctly. He further reported Ms Gavril was unable to accept that her method was inefficient and risked losing information in the future.³⁷

- 83 Shortly after, Ms Jones requested advice from Mr Morriss on how to deal with the situation, and Mr Morriss reported that he felt bad about 'Sudhakar' being used as 'IT support'.³⁸

Fourth Complaint

- 84 The Fourth Complaint was sent by email on 10 May 2023 from Ms Gavril to Ms Jones at 2.30 pm in response to Ms Jones allocating work to Ms Gavril. Ms Gavril says she has been experiencing major issues with her work disappearing from the 'S' drive and explains what actions she took as well as interactions with ICT.
- 85 On 9 or 10 May 2023, Ms Jones spoke with Ms Anning. Ms Anning suggested moving Ms Gavril into Accounts Processing and on 10 May 2023, Ms Jones relayed this information to Mr Morriss stating, 'so we can work on finalising the return for 2023'.³⁹
- 86 On or around 12 May 2023, Ms Gavril requested to meet with Ms Anning. Ms Anning made handwritten notes of the meeting which she later typed up.⁴⁰
- 87 During this meeting, Ms Anning asked Ms Gavril to explain how she saved documents to the computer; asked how she was doing more generally; and about the possibility of moving to Accounts Processing.⁴¹

Fifth Complaint

- 88 The Fifth Complaint occurred during the 12 May 2023 meeting, where Ms Gavril says she asked Ms Anning to conduct an investigation into the alleged deleting of her work files.⁴²
- 89 Following this meeting, Ms Anning sent an email to Ms Gavril and others informing them that from 15 May 2023, Ms Gavril would relocate to be near another staff member so that Ms Gavril could train in Accounts Processing.⁴³
- 90 On 26 May 2023, Ms Gavril emailed Ms Anning requesting training in other areas because Accounts Processing was 'a bit quiet'. In summary, Ms Anning responded that it was best for Ms Gavril to return to 'Tax' because other teams were not able to train her, if Accounts Processing needed her again, she could return, and there might be training available in the new year.⁴⁴
- 91 The reality was that Ms Gavril remained seated in Accounts Processing but assisted with some of the tax logbook work provided by Ms Jones.⁴⁵

Sixth Complaint

- 92 On 9 June 2023, in response to a request by Ms Jones to update her on the work Ms Gavril was working on, Ms Gavril summarised the task she had completed and also stated:⁴⁶

I would like to mention here that I stopped working for Taxation since 15 June 2024 [sic], as per your discussions with Fiona to train and help in [Accounts Processing], then I was sick for a few days.

Also, Fiona told me that she has discussed with you today to ask you to allow me to stay in [Accounts Processing] as they need help as they are short of staff.

I would really appreciate to have clear instructions [sic] in what is expected from me in terms of what days I work in [Accounts Processing] and what days I work in Taxation as it can become stressful for me not knowing this.

Also, is it possible please, to make arrangements for me to work from home one day per week as everybody else? [sic]

- 93 This email prompted Ms Anning and Ms Jones to speak with Ms Gavril in person. Ms Gavril walked away from them and sent an email on the same day at 11.26 am informing Ms Anning and Ms Jones to only communicate with her by email.⁴⁷
- 94 After receiving this email, Ms Anning went to see Ms Gavril and arranged for her to be conveyed to hospital.⁴⁸
- 95 On 12 June 2023, following enquires made by Ms Anning, Ms Gavril responded that she was unfit for work until 20 June 2023.⁴⁹
- 96 On 19 June 2023, Ms Anning made enquiries with Ms Gavril about her return to work.⁵⁰

Seventh Complaint

- 97 On 20 June 2023, Ms Gavril returned to work and Ms Anning requested a meeting with her and a support person. Mr Barnard attended the meeting as a support person and witness. In the meeting, Ms Anning informed Ms Gavril of some of the performance issues reported to her. Ms Anning also informed Ms Gavril that she would remain in Accounts Processing until 30 June 2023 and the Department would honour the Fourth Contract (in a level 3 position) with meaningful work, but the Department would not extend her contract beyond the expiry date of the Fourth Contract.⁵¹
- 98 Ms Gavril asked if she could work from home and Ms Anning declined her request based on the issues identified during the meeting. Ms Anning said that if things changed, the situation could be revisited. During the meeting, Ms Gavril indicated that Ms Jones had 'promised her a contract extension to December 2023'. Ms Anning checked with Ms Jones as to whether any such 'promise' had been made.
- 99 After the meeting at 2.14 pm, Ms Anning sent an email to Ms Gavril summarising the points raised stating the key dot points from the meeting:⁵²
- Cheryl advises me there is currently not enough work to do in the tax role and the current team has it covered. [Fringe benefits tax] is over for another year.
 - From my observations I do not feel it is in your best interests to return to the tax team.

- Your current contract is to 27/10/23.
- At this point, after this date your contract is unable to be extended any further.
- You will remain in [Accounts Processing] until at least 30 June 2023. I will honour your contract and provided [sic] meaningful work to do.
- If requested, I can organise further one on one training with [Accounts Processing]. You will confirm if this is required after you have thought about it.

100 On 20 June 2023, Ms Gavril says she escalated her previous enquiry made in February 2023 to Payroll Services where she says she overpaid taxation on annual leave loading and cost of living payment.⁵³

101 On 21 June 2023, Ms Gavril sent an email to Ms Anning saying she had a headache and would not be attending work. Ms Gavril returned to work on 22 June 2023.

102 Related to her enquiry about the alleged overpaid taxes, on 22 June 2023, Ms Gavril sent an email to a manager in Payroll Services, copied to Mr Mastrolembo, requesting clarification and an explanation for the calculation. She also states:⁵⁴

On Tuesday evening, Fiona Anning, my Finance manager, approached me about this issue telling me that Sam Mastrolembo has forwarded my email to her and I explained to her as well about this situation and she told me that you are aware of this glitch.

103 On 26 June 2023, Ms Gavril sent an email to Ms Anning advising that she did not agree with the suggestion of moving her to the Accounts Processing team beyond 30 June 2023 and that she wanted to remain in the Tax team. She also referred to her own recollections of the meeting.⁵⁵

104 This email prompted some further email conversations, where Ms Anning acknowledged Ms Gavril's email and informed Ms Gavril that she would not be returning to the Tax team before the end of the Fourth Contract, she would be given meaningful work to do in Finance Services or the wider BCS until the expiry date, and that the Fourth Contract would not be extended.⁵⁶

Eighth Complaint

105 Ms Gavril further responded requesting she be informed why the Fourth Contract would not be extended.⁵⁷

106 On 26 June 2023 at 4.57 pm, Ms Anning emailed Ms Gavril and stated:⁵⁸

Your current contract was to 4/3/23 and then extended to 27/10/23.

The merit process was for a period to 4/3/23 with possible extension. Given an extension has already been granted another process would be required should we have a vacancy in the tax support officer role.

Any other vacancies require a process under current RSA Guidelines. Depending on what happens with our current staffing will depend on whether there are any vacancies and how we fill them. I have explained our current finance services review and that we are not filling any roles permanently in our structure to allow flexibility in creating new roles. This is planned to be completed by December 23 pending other priorities.

I have been very honest with you about this and I am hoping you take this opportunity to be applying for roles prior to your end of contract. I don't want there to be any expectation of a role within [Finance Services] and encourage you to be applying for other roles to secure yourself a contract of employment. I hope you are able to gain permanent employment but unfortunately for the foreseeable future that won't be with us.

107 On 28 June 2023, a staff member from Payroll Services responded to Ms Gavril advising that the issue about the alleged overpayment of taxation had been investigated with her managers, Ms Anning and Ms Jones, which had been contacted so Payroll Services could understand the context in which the issue had been raised.⁵⁹

108 On 30 June 2023, Ms Gavril did not attend work and did not inform anyone to say that she was not attending work. Ms Gavril informed Ms Anning that she had sent an email, although Ms Anning did not receive any email from Ms Gavril.⁶⁰

Ninth Complaint

109 On 3 July 2023, Ms Gavril sent an email to Mr Barnard requesting him to advise her of the procedure of lodging a complaint, namely, for an email address and person to address the complaint towards.⁶¹ Mr Barnard responded to Ms Gavril copying Labour Relations into the email by mistake.⁶²

110 On 4 July 2023, Ms Anning sent an email to Ms Gavril, noting Ms Gavril's request for communication by email. Ms Anning observes some of the issues with respect to the quality of Ms Gavril's work and attaches a Performance Development Plan for the remainder of Ms Gavril's time in Accounts Processing.⁶³

Facts in Dispute

Assessment of the Evidence

111 In her oral evidence, Ms Gavril was defensive and evasive at times where she seemed to anticipate the effect her evidence might have on her case. Ms Gavril was more prone to changing her evidence as a result and often gave self-serving evidence. Ms Gavril was selective in her evidence, and it did not, at times, accord with the more objective evidence contained in contemporaneous records, such as emails. The effect of this is that Ms Gavril's evidence was less reliable in determining the facts in dispute.

112 The respondent's witnesses did not change their evidence and were not self-serving, albeit from time to time they also tried to anticipate what might lay ahead. However, the respondent's witness evidence was consistent with contemporaneous records and, therefore, was more reliable in determining the facts in dispute. Where conflicts arose between witness accounts, I have

generally given greater weight to evidence supported by contemporaneous records, as a more reliable basis for determining disputed facts.

Was Mr Mastrolembo Aware of the First Complaint?

113 On Ms Gavril's evidence, the first and only email sent by her to Mr Mastrolembo alluding to some unknown issue in training was on 1 July 2022. Mr Mastrolembo followed up this email with an offer to discuss the issue, which, on the evidence, was not taken up by Ms Gavril. To the extent Mr Mastrolembo had any notion of what Ms Gavril may be referring to, this was from a conversation with another staff member, which prompted Ms Gavril to reassure Mr Mastrolembo that there was no issue.

114 The next email regarding the First Complaint was the email sent to Mr Wheeler on 3 July 2022. There is no evidence that Mr Mastrolembo was aware of this email or its contents.

115 Following the First Complaint, the next relevant communication with Mr Mastrolembo was on 1 August 2022.

116 I find that Mr Mastrolembo was not aware of the First Complaint.

Was an Extension to the Second Contract Possible?

117 Permeating through the Amended Claim is Ms Gavril's grievance that she would have either had further contract extensions or been engaged as a permanent public servant, notwithstanding the only alleged damaging action of this character is the Fourth Alleged Damaging Action. In the Amended Claim, Ms Gavril refers to the respondent failing to appoint her to a pool position following an interview, which was communicated to her on 19 September 2022. This communication is not part of the Amended Claim and forms no aspect of any alleged damaging action.

118 For the following reasons, there was no possible extension to the Second Contract.

119 On 3 June 2022, following a meeting with Ms Gavril on the same day, Mr Mastrolembo informed her in an email that her start date was 13 June 2022 with a six-month contract and a 'recruitment process being finalised during this time'.⁶⁴

120 Ms Gavril acknowledged the position was a six-month contract.⁶⁵

121 Ms Gavril signed the Second Contract on 10 June 2022 which expressly stated it was fixed term contract with an end date of 30 December 2022. Further, Ms Gavril acknowledged that following the expiration of the Second Fixed Term Contract there was no obligation on either party to enter into any further employment arrangement.⁶⁶

122 Mr Mastrolembo's evidence is that while he was able to 'tap' applicants for a six-month fixed term contract without a merit-selection process, there was no possibility of this occurring again (consistent with his email dated 3 June 2022). Further, all permanent vacant Payroll Officer positions were required to be advertised separately and required merit selection. Mr Mastrolembo's evidence was that any extension to the Second Contract required a merit selection process to the Payroll Officer pool, which was advertised and Ms Gavril applied for. She was not successful.⁶⁷ I accept Mr Mastrolembo's evidence.

123 Therefore, there was no possibility of an extension to the Second Contract. Ms Gavril was required to apply to the Payroll Officer pool for any future position and undertake the merit-selection process.

Did Ms Jones 'Promise' an Extension to the Third Fixed Term Contract?

124 Ms Gavril states that during a performance development plan meeting with Ms Jones on 4 May 2023, she asked about the Third Contract. Ms Gavril states Ms Jones told her that 'she can **promise** me at least an extension of my contract until December 2023 then will see further depending on what Tips⁶⁸ is doing in her acting role'. (emphasis added)⁶⁹

125 In cross-examination, Ms Gavril gave inconsistent evidence regarding the words she says Ms Jones used. Ms Gavril said Ms Jones 'promised', then she said there were no words of 'promise' and she did not quote the words verbatim thinking the use of the word 'promise' did not matter.⁷⁰ When confronted, and agreeing, with the proposition that the substantive position holder's future situation was not known in May 2023 (that is, the substantive position holder was acting in another position until 27 October 2023),⁷¹ Ms Gavril double-downed on the purported promise of an extension to the end of December 2023 she says was made by Ms Jones, saying that she would instead get 'priority' to get permanency.⁷²

126 Ms Jones denies making any 'promise' of an extension to December 2023. Ms Jones says that Ms Gavril continually asked about being made a permanent employee to which Ms Jones responded that the level 3 Tax Support Officer position was not vacant and if it became vacant, she would need to apply for the vacant position.⁷³

127 Further, Ms Jones said she did not recall her exact words to Ms Gavril, but they would have been along the lines of 'if the substantive occupant of the position was extended to December, then Ms Gavril may also be extended based on performance'.⁷⁴

128 The documents relied upon by Ms Gavril do not wholly support her evidence. Ms Jones signed the performance development plan on 28 April 2023. Ms Gavril counter-signed the performance development plan on 16 May 2023.⁷⁵ There is no communication about any promise of an extension on or around those times.

129 I find that Ms Jones did not make any 'promise' for an extension of the Third Contract on 4 May 2023. Firstly, Ms Jones did not know what the substantive position holder's future situation was, and, therefore, was in no position to 'promise' anything past 27 October 2023. Second, Ms Gavril's evidence was inconsistent in relation to the words allegedly used by Ms Jones. Third, given the relative importance of permanency or an extension to Ms Gavril, it is likely she would have committed that position to writing. Four, it is more likely the conversation was as stated by Ms Jones, which was consistent with what was known at the time.

What was the Content of the Conversation with Ms Anning on 12 May 2023?

130 Ms Gavril states that on 12 May 2023 when she met with Ms Anning regarding the alleged deletion of files from her work computer, Ms Anning made the following comments to her:

- (a) in dismissing Ms Gavril's concerns that someone may be deleting her work files and suggesting that anxiety may be clouding Ms Gavril's judgment:⁷⁶

What do they know?

- (b) when asked about how she was getting along with the Payroll staff:⁷⁷

I want to see if you have the same problems as you have here.

- (c) after Ms Gavril 'briefly explained the issues [she] had with [Mr Mastrolembo] regarding the leave loading and difficulties with [her] team leader:⁷⁸

Young people catch on faster than older people. That is why payroll prefers younger people.

- (d) after Ms Gavril asked Ms Anning for an investigation into her work being deleted, Ms Anning allegedly told Ms Gavril to look for another job as it 'is [an] employee market out there.'⁷⁹

131 Ms Gavril refers to her 'contemporaneous notes' in support.⁸⁰ Ms Gavril's purported contemporaneous note is, in fact, not contemporaneous but is an email to herself dated 26 June 2023. There are inaccuracies in this email as it relates to the meeting with Ms Anning, including the date of the meeting which she records as 15 May 2023.

132 Ms Anning states that on around 12 May 2023 she made handwritten notes during a meeting with Ms Gavril, which she typed up shortly after the meeting.⁸¹

133 Based on her handwritten notes and recollection of the content of the meeting, Ms Anning says that the meeting was requested by Ms Gavril and concerned the alleged deletion of work files from her computer. During the meeting, Ms Anning asked Ms Gavril to explain how she saved her work, and following this meeting she formed the view that Ms Gavril was saving the work incorrectly.⁸²

134 Ms Anning also asked Ms Gavril about how she was doing generally and discussed with her a move to Accounts Processing. Ms Anning explains her reasons for making this suggestion. Ms Anning stated Ms Gavril said she was applying for other roles and Ms Anning supported her in doing so, because there was no guarantee of an extension of the Fourth Contract where the substantive position holder's future situation was unknown.⁸³

135 After making enquiries with the ICT department, Ms Anning 'closed out' her conversation with Ms Gavril informing her that she could assist with additional training for document control and saving her work. Ms Gavril rebuffed her suggestion.⁸⁴

136 Following this meeting, on 15 May 2023, Ms Anning emailed Ms Gavril, Mr Morriss and Ms Jones informing them of Ms Gavril's move to Accounts Processing and the reasons for the move.⁸⁵

137 I do not accept Ms Gavril's evidence about the comments she says were made by Ms Anning on 12 May 2023. As already stated, Ms Gavril's evidence is not wholly reliable and she often recreated information to support her case, even where it was contrary to objective evidence.

138 Ms Anning's evidence is supported by handwritten notes made by her on 12 May 2023, typed up one or two days later and consistent with an email sent on 15 May 2023 to Ms Gavril and others.

139 Therefore, I accept the content of the conversation between Ms Anning and Ms Gavril is as recorded in the handwritten note made by Ms Anning on 12 May 2023 as explained in her evidence.

The Circumstances of Ms Jones Purporting to Terminate the Fourth Contract

140 On or around 15 June 2023, Ms Jones admitted to drafting an email to Ms Gavril purporting to terminate the Fourth Contract. This email was recalled by Ms Jones before Ms Gavril received it and the circumstances of the email was not known to Ms Gavril until after legal proceedings were commenced.

141 In the Jones Statement, Ms Jones admitted she 'jumped the gun' in purporting to terminate the Fourth Contract. Her reasons for doing so, included that she was concerned Ms Gavril would return to the Tax team and Ms Gavril was unable to perform the requirements of the position, the relationship between Ms Gavril and Ms Jones' team was 'untenable', and she was frustrated with the time taken to get advice from Labour Relations.⁸⁶

142 Ms Jones erroneously thought she could rely on the provisions in the 'Award' to terminate Ms Gavril's employment.⁸⁷ However, Ms Jones stated she did not have a role in deciding not to offer Ms Gavril any further contracts of employment after the expiry of the Fourth Contract.⁸⁸

143 In response to the email drafted by Ms Jones, on 15 June 2023, Ms Anning sought advice from Labour Relations.⁸⁹

144 The recalling of the email by Ms Jones was in response to Ms Anning's direction after advice from Labour Relations.⁹⁰

145 Leading up to Ms Jones's purported termination of the Fourth Contract, on 15 June 2023, Ms Jones sent an email to Ms Anning and Alison Skeen, Director of Business and Customer Services (**Ms Skeen**), informing them of the circumstances leading to the Fourth Contract. Consistent with the Jones Statement, Ms Jones says:⁹¹

The reason I submitted a Movement Advice in HRMIS to extend Delia was because the substantive occupant of the Tax Support Officer position (Tips) was extended for acting in the Financial Reporting branch to 27 October 2023 and being close to the end of the FBT year it was not practical to readvertise the position.

146 Ms Jones then goes into detail about why she says Ms Gavril is not suitable for the Tax Support Officer position. Ms Jones makes no reference to any *complaints* made by Ms Gavril but details the *factors* she says makes Ms Gavril unsuitable to the Tax Support Officer position by providing examples from the workplace.⁹²

147 Ms Jones informs Ms Anning and Ms Skeen of her intention to give Ms Gavril written notice that her last day as a Tax Support Officer will be 20 July 2023.⁹³

- 148 On 15 June 2023, Ms Anning emails Ms Jones remonstrating with her for failing to follow her direction in purporting to terminate the Fourth Contract. Ms Anning informs Ms Jones that she is obtaining further advice.⁹⁴
- 149 On 19 June 2023, Ms Jones admits to ‘jumping the gun’ and refers to their conversation on 9 June 2023, when it appears there was a discussion on reducing the term of the Fourth Contract.⁹⁵
- 150 On the same day, Ms Anning sent a draft email to Ms Skeen for Ms Jones and thereafter sent the (approved) draft email to Ms Jones.⁹⁶
- 151 In this email, Ms Anning again counsels Ms Jones on purporting to terminate the Fourth Contract, outlines the advice she obtained from Labour Relations and provides a plan for managing the situation.
- 152 Ms Anning acknowledges the Department is required to ‘honour’ the Fourth Contract, however, she also acknowledges that it is no longer in Ms Gavril’s or Ms Jones’s interests for her to ‘return to the tax team’ (based on the issues raised by Ms Jones). Ms Anning says she can provide Ms Gavril with meaningful work in Accounts Payable and Finance Services and will undertake performance management as required. Ms Anning advises she intends to speak with Ms Gavril on 20 June 2023 with Mr Barnard present and states ‘this conversation will be predicated on there is not enough work to do in tax and she is no longer required’.⁹⁷
- 153 On 20 June 2023 at 2.30 pm, Ms Jones sent an email to Ms Anning stating she accepts the advice sent and makes reference to reducing the term of the Fourth Contract. She also refers to Ms Gavril’s ‘erratic behaviour’ and the impact her behaviour is having on the Tax team.⁹⁸
- 154 On 23 June 2023, Ms Gavril responds by email to Ms Anning’s email summation of the meeting on 20 June 2023. Ms Gavril disagrees with Ms Anning; however, she refers to Ms Anning discussing personality issues amongst the team and Ms Jones being concerned about Ms Gavril’s work performance.
- 155 Ms Gavril was not dismissed, and the Fourth Contract was not terminated. It is apparent from Ms Jones’s emails to Ms Anning that she was frustrated with the process and with Ms Gavril’s behaviour. Ms Anning was concerned about getting it right and was firm with Ms Jones for failing to follow Ms Anning’s instructions. Ms Anning then had to find a solution to what had now become a difficult situation.
- 156 There are two issues arising from the email correspondence:
- (1) Ms Anning obtaining advice from Labour Relations; and
 - (2) the conversation on 20 June 2023 being predicated on there not being enough work in tax.
- 157 In relation to the first issue, there was nothing untoward in Ms Anning obtaining advice from Labour Relations. It was entirely reasonable and appropriate that she do so where she was faced with having been informed by Ms Jones of the issues she was having with Ms Gavril. It was then up to Ms Anning to implement or not implement the advice provided by Labour Relations.
- 158 In relation to the second issue, while it may appear that Ms Anning was not entirely honest with Ms Gavril regarding the reason for the conversation on 20 June 2023, I do not accept that she was dishonest or deceived Ms Gavril.
- 159 In the draft email to Ms Skeen, Ms Anning informs Ms Skeen:⁹⁹
- I would like to discuss with Delia about performance here otherwise she thinks everything is ok???? I think someone needs to be honest with Delia here to? [sic] But not to CJ? not sure if that is best.
- 160 It is apparent Ms Anning is aware of potential performance issues with Ms Gavril, and she wants to find a way to discuss these issues with her. Ms Anning also had an interaction with Ms Gavril on 9 June 2023 where following an approach to Ms Gavril, Ms Gavril went to hospital. Against this background, it appears Ms Anning wanted to ‘soften the blow’ that Ms Gavril not returning to the Tax team was more about Ms Gavril’s behaviour and performance than it was about the amount of work to be carried out. Which is not to say this was not also a reason. It might have been preferable for Ms Anning to be ‘brutally’ honest with Ms Gavril, but the evidence does not suggest this would have yielded any better outcome.
- 161 However, it is apparent from Ms Gavril’s email response on 23 June 2023 that Ms Anning did raise performance and personality issues with Ms Gavril at the meeting on 20 June 2023 and was met with strident denials.
- 162 What is also apparent from the email communications from Ms Anning is that Ms Anning does not refer to Ms Gavril making complaints but refers to various *issues* and how these *issues* are to be addressed.
- 163 Finally, in her emails to Ms Jones, Ms Anning does not refer to any decision not to extend the Fourth Contract beyond 27 October 2023 and limits her discussions with Ms Jones on how Ms Anning is going to manage the situation during the term of the Fourth Contract. This indicates that Ms Anning came to her own view about whether the Fourth Contract could be extended.
- The Circumstances of the Seventh Complaint*
- 164 On 17 March 2023, Ms Gavril asked to escalate her inquiry about the amount of taxation withheld for annual leave loading and the cost-of-living payment. This was following an email sent on the same day from a staff member informing Ms Gavril that Payroll Services did not detail tax calculations.¹⁰⁰
- 165 On 20 March 2023, Ms Gavril received an email from a Team Leader at Payroll Services confirming that the taxation had been calculated correctly. Ms Gavril was informed that if she provided information to Payroll Services about what she thought she should be paid, they would investigate further.¹⁰¹
- 166 Three months later, on 20 June 2023 at 3.03 pm, Ms Gavril responded to this email, copied to Mr Mastrolemba, as follows:¹⁰²
- Hello,
- Sorry for the late reply but I was busy with the year end in [fringe benefits tax].

As I worked my self in payroll and also was advised by managerial staff, I know that an employee can request an audit if there are unclear calculations related to the payroll.

As I mentioned in my initial email when I first opened this case, all I am concerned is that, I have paid too much taxes for leave loading and also for the cost of living payments.

I have discussed the Cost of living taxes with a few managers and I realized that I have paid the same amount of taxes as a level 6 or 7 has paid.

For this reason I am asking to have an audit forth is taxes I have paid in these 2 occasions as I believe there might be a glitch in the system that lead to this overpayments.

Please advise.

167 Mr Mastrolembo responded in an email to Ms Gavril that her query had been answered but he asked her to let him know what amount of tax she says she should have been paid.¹⁰³ This email was sent on 20 June 2023 at 3.13 pm and was the first email copied to Ms Anning on this issue.

168 On 21 and 22 June 2023 there were further emails between Ms Gavril and a Team Leader at Payroll Services with further explanations given to Ms Gavril.¹⁰⁴ On 22 June 2023, a Manager of Payroll Services said that they would discuss with Ms Anning and respond directly to Ms Gavril.¹⁰⁵

Were the Complaints ‘Employment-Related Inquiries or Complaints’ Ms Gavril was Able to Make?

169 The ability to make an ‘employment-related inquiry or complaint’ must be underpinned by an entitlement the source of which would include a contract of employment, award or legislation.¹⁰⁶

170 For the reasons expressed in *Hughes* above, it is useful to consider analogous sections of the FWA and associated federal cases in determining what constitutes an ‘employment-related inquiry or complaint’ for the purposes of s 97A of the IR Act.

171 Section 341(1)(c)(ii) of the FWA provides that a person has a *workplace right* if the person *is able to make a complaint or inquiry: if the person is an employee – in relation to his or her employment.*

172 What might constitute a ‘complaint’ in s 341(1)(c) of the FWA was discussed in *Alam* at [59], where the Full Bench of the Federal Court of Australia stated:

In the context of s 341(1)(c), the term ‘complaint’ connotes an expression of discontent which seeks consideration, redress or relief from the matter about which the complainant is aggrieved: [*Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204 (*Cummins South Pacific*)] at [13]. A complaint is more than a mere request for assistance and should state a particular grievance or finding of fault: [*Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271] at [579]-[581]; *Cummins South Pacific* at [13] per Dodds-Streton J. Her Honour continued, at [626]-[627], by saying that it is unnecessary for the employee to identify expressly the communication as a complaint or grievance, or to use any particular form of words. Instead, what is required is a communication which, whatever its precise form, is reasonably understood in context as an expression of grievance and which seeks, whether or expressly or implicitly, that the recipient at least take notice of, and consider, it. The characterisation of a communication as a complaint is to be determined as a matter of substance, and not of form.

The First Complaint

173 Ms Gavril submits the First Complaint was an employment-related complaint because she was making a complaint to Mr Wheeler about ‘bullying behaviour during training’. She says the First Complaint was made ‘in relation to employment’.

174 The respondent does not admit the First Complaint.

175 The character of the First Complaint is not one of a complaint or employment-related inquiry. In the First Complaint, Ms Gavril refers to a brief discussion on Friday where Mr Wheeler asked her if she was struggling with the training. Ms Gavril says the only thing she is struggling with is the level of noise in the class. She expresses her sadness and feelings of being left out if she misses something in class and says Mr Wheeler has repeated things in class for the benefit of others. She further says she feels nervous and stressed at times if she has to ask for something to be repeated. However, relevantly she closes by saying ‘[h]ope you consider my concerns and I look forward to continue [sic] the training with you for this role.’

176 Bearing in mind that only two days prior, Ms Gavril expressly disavowed to Mr Mastrolembo that she was having any issues with training, and to the extent she purported to have issues (which she did not specify to him in the email) she was dealing with these unspecified issues in her own way.

177 To the extent Mr Mastrolembo knew of any issue with respect to the training, this information came from another staff member, and it was limited to Ms Gavril telling her (the other staff member) about feeling as if she was being ignored.

178 The First Complaint is about Ms Gavril’s feelings and raising her concerns with Mr Wheeler about having to ask for additional assistance. It does not reasonably rise to the level that would constitute a complaint, let alone a complaint about ‘bullying behaviour during training’.

179 Further, the First Complaint was not conveyed to Mr Mastrolembo, who was the person Ms Gavril alleges took the First and Second Alleged Damaging Actions against her as a consequence of the First and the Second Complaints.

180 There is no other evidence the First Complaint was brought to Mr Mastrolembo’s attention. The only other information was given at the end of the training course where Mr Mastrolembo received some verbal feedback from Mr Wheeler that Ms Gavril required more instruction than the other participants.

181 Simply put, on the evidence, the First Complaint could not have bearing on the First and Second Alleged Damaging Actions. It had no bearing because Mr Mastrolembo had limited information about it, he was expressly told by Ms Gavril that she had no

issues with the training and was dealing with (unknown) issues in her own way, and when invited to come and speak with Mr Mastrolemba about whatever these issues might be, she did not do so.

The Second Complaint

- 182 Ms Gavril submits the Second Complaint was an employment-related complaint because she was making a complaint to Mr Mastrolemba about ‘bullying behaviour’ by Ms Tjandra, her supervisor. She says the Second Complaint was made ‘in relation to employment’.
- 183 Mr Mastrolemba had scant memory of the Second Complaint, but his recollection extended to Ms Gavril having issues with Ms Tjandra and not liking being ‘told off’ in a public space.
- 184 As already stated, Mr Mastrolemba agreed to move Ms Gavril to another team to be supervised by another supervisor.
- 185 Without determining the substance of the Second Complaint, a concern of the type raised by Ms Gavril may constitute an employment-related complaint that she is able to make, where she has raised a grievance in respect of which she has sought Mr Mastrolemba’s assistance.

The Third Complaint

- 186 Ms Gavril submits the Third Complaint was an employment-related complaint because she was making a complaint about the ability to perform her duties and maintain the integrity of records under legislation.
- 187 The respondent denies the Third Complaint is an employment-related inquiry or complaint Ms Gavril is able to make.
- 188 The character of the Third Complaint is not one of a complaint or employment-related inquiry. Ms Gavril responds to a request for information by Ms Jones where Ms Jones asks Ms Gavril what she is working on today. Ms Jones is working from home. At best, Ms Gavril is passing on information to Ms Jones and informing Ms Jones what she is intending to do about her work allegedly disappearing. She does not ask Ms Jones for assistance.
- 189 Ms Jones follows up with Ms Gavril asking her for a response about saving reports in the correct folder, she informs Ms Gavril that she is accessing the ‘S’ drive without any problems and asks Ms Gavril where she is saving her work.
- 190 Ms Gavril informs Ms Jones that she is saving her work to the desktop and challenges Ms Jones to speak to ‘Sudhakar’ to ‘confirm with him that this happened’.
- 191 On 8 May 2023, Ms Jones sends an email to Ms Gavril informing her that she contacted Sudhakar who Ms Jones says informed her of something different to what Ms Gavril wrote in her email.
- 192 Thereafter, it is Ms Gavril who makes accusations against Ms Jones. Ms Jones responds by informing Ms Gavril to speak with Mr Morriss if there are any IT issues and explains the ‘save as’ function for saving work to files. She informs Ms Gavril that if Ms Gavril saves work to her desktop, Ms Jones and Mr Morriss will not have access to the work.
- 193 Ms Gavril continues to challenge Ms Jones, informing her about the merits of saving work to her desktop and that it is unnecessary for Ms Jones and Mr Morriss to access Ms Gavril’s work.
- 194 Contrary to Ms Gavril’s characterisation of the Third Complaint (being the email dated 5 May 2023 to Ms Jones), the purported concern was raised only in response to a question by Ms Jones about what Ms Gavril was working on. It did no more than inform Ms Jones of something ‘very strange’ happening on her computer and to her work, following which Ms Jones made a suggestion to remedy the saving of work. The email conversation between Ms Jones and Ms Gavril on 5 May 2023 was largely benign in its content and of a type, objectively speaking, that might be seen in an office.
- 195 It was not until 8 May 2023 when Ms Jones challenged Ms Gavril’s version of events that Ms Gavril descends into making accusations against Ms Jones. However, none of these emails form the basis of the Complaints alleged in the Amended Claim.
- 196 From 8 May 2023, Ms Jones then takes steps to follow up and understand what Ms Gavril said in the First Complaint, including asking other staff members to obtain further information. Upon receiving this information, Ms Jones informs Ms Gavril to save her work regularly to the ‘S’ drive rather than to her desktop.
- 197 There is neither a complaint nor an employment-related inquiry in the Third Complaint. Ms Gavril admitted as much in cross-examination. Further, the Third Complaint contains no request for assistance, even though a mere request for assistance may not necessarily constitute an employment-related inquiry in any event.¹⁰⁷

Fourth Complaint

- 198 For the same reason as the Third Complaint, Ms Gavril submits the Fourth Complaint was an employment-related complaint because she was making a complaint about the ability to perform her duties and maintain the integrity of records under legislation.
- 199 For similar reasons to the Third Complaint, the respondent denies the Fourth Complaint is a complaint or employment-related inquiry Ms Gavril is able to make.
- 200 The character of the Fourth Complaint is not one of a complaint or employment-related inquiry. Similar to the Third Complaint, Ms Gavril responds to an email from Ms Jones where Ms Jones informs her that Ms Anning would like Ms Gavril to train in ‘AP’ (Accounts Processing) for a ‘couple of hours today and tomorrow’. Ms Jones also asks Ms Gavril to let her know what else she is working on.
- 201 Ms Gavril responds that she is training between 1.00 pm and 2.00 pm on 10 May 2023, and she will continue to work according to a plan previously discussed with Ms Jones, namely working on acquisitions and disposals.
- 202 Ms Jones follows up with Ms Gavril to let her know when Ms Gavril has completed the acquisitions and disposals so it can be reviewed by Ms Jones. She also requests Ms Gavril to assess business percentages for three vehicles and to let her know when this is completed so ‘Easyfbt’ can be updated.

- 203 The Fourth Complaint was sent by email to Ms Jones at 2.30 pm, after the prior emails referred to, where Ms Gavril says '[t]oday I have been dealing with major issues regarding my work disappearing from the S drive'. Ms Gavril explains what happened and what she did and an interaction with ICT. To the extent the Fourth Complaint contains a request, the first request was made to ICT to 'further investigate' whether someone was deleting files by accident and the second request was made to Ms Jones to '[p]lease advise'.
- 204 Similar to in *Alam*, at [62], the Fourth Complaint did no more than inform Ms Jones of concerns regarding her work disappearing from the 'S' drive. Thereafter, she asks Ms Jones to 'please advise'. At its highest, the words 'please advise' may be a mere request for assistance, but it is not more than that.

Fifth Complaint

- 205 For the same reason as the Third and Fourth Complaints, Ms Gavril says her 'work-related inquiry' for an investigation into the deletion of her files to Ms Anning was an employment-related inquiry because it was about work file deletion and the inappropriate managerial conduct by Ms Jones in not 'addressing this serious issue'.
- 206 Without determining the substance of the Fifth Complaint, a concern of the type raised by Ms Gavril may constitute an employment-related complaint that she is able to make, where she has raised a grievance in respect of which, on the case most favourable to Ms Gavril, she has sought Ms Anning's assistance.

Sixth Complaint

- 207 Without determining the substance of the 9 June 2023 email, a request to work from home, raising concerns about work load, job status and working within Accounts Processing, of the type raised by Ms Gavril, may constitute an employment-related complaint that she is able to make, where she requests 'clear instructions' on what is expected of her. However, it is by no means certain that the Sixth Complaint rises to the requisite level of the kind properly characterised as an employment-related inquiry or complaint. It is merely that in respect of the Sixth Complaint, Ms Gavril is afforded the benefit of the doubt that it might be.

Seventh Complaint

- 208 Ms Gavril submits the Seventh Complaint is an employment-related complaint because it addressed pay entitlements.
- 209 Without determining the substance of the Seventh Complaint, an inquiry about taxation or pay entitlements may constitute an employment-related complaint Ms Gavril is able to make.

Eighth Complaint

- 210 Without determining the substance of the Eighth Complaint, an inquiry about why certain action was taken by a manager may constitute an employment-related complaint Ms Gavril is able to make.

Ninth Complaint

- 211 Ms Gavril submits the Ninth Complaint is an employment-related complaint because it inquired with Mr Barnard, a union representative, about the procedure to file a formal workplace complaint.
- 212 An inquiry of this nature cannot be reasonably be characterised as raising a grievance or complaint of the kind contemplated in s 97A of the IR Act.
- 213 It merely requests of a third party the process for lodging a complaint.
- 214 Further, and similar to the First Complaint, the Ninth Complaint was never brought to Ms Anning's attention until the commencement of litigation. Mr Barnard accidentally copied 'Labour Relations' into a later email on 3 July 2023, however, there is no evidence this email was ever brought to the attention of Ms Anning on 3 or 4 July 2023.
- 215 Simply put, on the evidence, the Ninth Complaint could not have had any bearing on the Fifth Alleged Damaging Action. It could not have had any bearing because Ms Anning did not know of its existence at the time the Fifth Alleged Damaging Action was alleged to have been taken.

Summary of Outcomes on the Character of the Concerns

- 216 Having regard to the above findings, the First Complaint, the Third Complaint, the Fourth Complaint and the Ninth Complaint do not constitute complaints or employment-related inquiries capable of giving rise to consideration of any alleged damaging action.
- 217 The Second Complaint; Fifth Complaint; Sixth Complaint; Seventh Complaint and the Eighth Complaint may constitute complaints or employment-related inquiries capable of giving rise to alleged damaging action.

Did the First to Fifth Alleged Damaging Actions Constitute Damaging Action Within the Meaning of s 97 of the IR Act?

- 218 Notwithstanding my findings in relation to the Complaints, if I am wrong about the character of all of the Complaints, I will consider all of the Complaints as being capable of giving rise to a complaint or employment-related inquiry Ms Gavril is able to make.

First and Second Alleged Damaging Actions

- 219 I infer from Ms Gavril's description in the First and Second Alleged Damaging Actions that she relies upon the category of damaging action in s 97(a)(ii) of the IR Act, which is consistent with her written submissions. Her description of the First and Second Damaging Actions as having '[s]tripped [her] of her professional responsibilities and career development opportunities' and '[d]irectly obstructed her ability to progress her career' indicates that she asserts these actions altered her position to her disadvantage in accordance with s 97(a)(ii).
- 220 On or around 5 September 2022, Ms Gavril was moved into a rotational payroll position in the COVID Team for initially four

- weeks, but this position was extended to the remainder of the Second Contract.
- 221 Beyond Ms Gavril's assertion that being assigned to the COVID Team hampered her future prospects, there is no evidence that, in fact, it did.
- 222 Ms Gavril sought to change the ambit of the Amended Claim to assert that the extension of the assignment in the COVID Team was 'unlawful'. The respondent objected to this extension where Ms Gavril expressly relied upon the decision to move her to the COVID Team on 5 September 2022 as the damaging action, she says the respondent took.
- 223 Irrespective of whether the Amended Claim is confined to the decision made on 5 September 2022 or includes the later decision made to extend Ms Gavril's assignment within the COVID Team, the outcome is the same.
- 224 That is, Ms Gavril's assertion, both with respect to the initial assignment decision on 5 September 2022 and to the later decision to extend the assignment, is problematic because her position was not *altered*. That is, she was contracted to work as a Payroll Officer within Payroll Services. The duties included those in accordance with the Job Description Form and 'other duties as directed which are within the limits of the employee's skill, competence and training, including work which is incidental or peripheral to the employee's main tasks or functions.'¹⁰⁸
- 225 Mr Mastrolembo rotated other staff through the same position. That Mr Mastrolembo thereafter formed the view Ms Gavril's skill set was more suited to the easier and more repetitive work undertaken in the COVID Team was consistent with the terms of the Second Contract she signed on 10 June 2022.¹⁰⁹
- 226 Ms Gavril's subjective view, without more, that in some way the respondent, via Mr Mastrolembo, was responsible for ensuring she could capitalise on the 'knowledge gathered in the training time'¹¹⁰ in order to *advance* her payroll experience is misguided.
- 227 Ms Gavril was employed subject to the terms of the Second Contract, which ended on 30 December 2022, where both parties acknowledged there was no obligation for further employment arrangements.
- 228 Ms Gavril was directed to undertake work as a Payroll Officer in the COVID Team consistent with the terms of the Second Contract.
- 229 In that context, there was no disadvantage, only Ms Gavril's apparent disgruntlement with the arrangement.
- 230 I also note Ms Jones interviewed Ms Gavril for a level 3 Tax Support Officer position in the Taxation Team and Ms Gavril was selected for a position on or around 15 December 2022 (that is, before the expiry of the Second Contract). It can reasonably be inferred that Ms Gavril experienced no disadvantage, notwithstanding the easy and repetitive nature of the work in the COVID Team, as she was selected for another position at the same level within the Department while doing this work.
- 231 There is no evidence that Ms Gavril applied for any other position, where the easier, more repetitive work in the COVID Team, affected her application. The position she interviewed for (the subject of the following paragraphs) was on 31 August 2022 before the assignment to the COVID Team.
- 232 Ms Gavril was appointed by Mr Mastrolembo to the Payroll Officer position using his limited 'tap' power on a fixed term six-month contract. Mr Mastrolembo informed Ms Gavril that she would need to comply with the recruitment process for the Payroll Officer pool which was being finalised.¹¹¹
- 233 Ms Gavril applied for the Payroll Officer pool as advertised.¹¹²
- 234 Ms Gavril was never 'forced' to re-interview for the Payroll Officer role because:
- (1) she was never interviewed for a Payroll Officer position in the first place but 'tapped' by Mr Mastrolembo for a fixed term six-month contract; and
 - (2) as discussed with Mr Mastrolembo, to continue in the Payroll Officer role beyond 31 December 2022 she would need to be merit-selected, which included the requirement to interview for a pool position. That is, the Second Contract could not be extended on the same basis as the 'tapped' position.
- 235 Accordingly, the First and Second Alleged Damaging Actions do not amount to damaging action as that term is defined in s 97(a) of the IR Act.
- Third Alleged Damaging Action**
- 236 I infer from Ms Gavril's description in the Third Alleged Damaging Action that she relies upon the category of damaging action in s 97(a)(ii) of the IR Act, which is consistent with her written submissions. Her description that Ms Anning failed to adopt a 'formal and fair procedure in demoting her to a lower-level position against her will where she was denied proper training and left her without career advancement opportunities'¹¹³ indicates that she asserts these actions altered her position to her disadvantage in accordance with s 97(a)(ii).
- 237 The gravamen of the Third Alleged Damaging Action is that Ms Gavril asserts she was 'demoted' from Tax Support Officer to Accounts Processing by Ms Anning.
- 238 Similar to the First Alleged Damaging Action, beyond Ms Gavril's assertion that being moved to Accounts Processing left her without career advancement, there is no evidence that, in fact, it did.
- 239 Further, the move to Accounts Processing did not alter her level of employment under the terms of the Fourth Contract. That is, Ms Gavril remained a level 3 Tax Support Officer while located and working in Accounts Processing. Therefore, there was no *demotion*.
- 240 Again, similar to the First Alleged Damaging Action, Ms Gavril's assertion that she was demoted by being moved to Accounts Processing, is problematic because her position was not *altered*. That is, she was contracted to work as a Tax Support Officer within Finance Services. The duties included those in accordance with the Job Description Form and 'other duties as directed

which are within the limits of the employee's skill, competence and training, including work which is incidental or peripheral to the employee's main tasks or functions.'¹¹⁴

- 241 Accounts Processing was within Finance Services and came within Ms Anning's management. Ms Anning was Ms Gavril's manager after Ms Jones.
- 242 The substantive position holder had assisted in Accounts Processing.
- 243 Ms Gavril was employed subject to the terms of the Fourth Contract, which ended on 27 October 2023, and there was no future possibility of extending the Fourth Contract. Any future contract required the position to be advertised, and for her to be merit selected as part of that process.
- 244 Ms Gavril was directed to undertake work as a Tax Support Officer in Accounts Processing consistent with the terms of the Fourth Contract.
- 245 In that context, again, there was no disadvantage, only Ms Gavril's apparent disgruntlement with the arrangement.
- 246 The Third Damaging Action does not amount to damaging action as that term is defined in s 97(a) of the IR Act.

Fourth Alleged Damaging Action

- 247 I infer from Ms Gavril's description in the Fourth Alleged Damaging Action that she relies upon the category of damaging action in s 97(a)(ii) of the IR Act, which is consistent with her written submissions. Ms Gavril's submission is that the cumulative effect of the Sixth, Seventh and Eighth Complaints was that Ms Anning refused her a contract extension. Ms Gavril says she was assured, at least, a contract extension to the end of December 2023 by Ms Jones and possible permanency.
- 248 Having regard to the findings of fact made, Ms Jones never promised Ms Gavril an extension to the Fourth Contract; nor had anyone, particularly Ms Jones and Ms Anning, indicated that Ms Gavril would possibly be made permanent.
- 249 Further, pursuant to s 64(4) of the PSMA, a person appointed on a fixed term contract cannot apply for permanent appointment, unless the relevant vacancy has first been advertised as a public sector notice in accordance with the Commissioner's instructions or in a daily newspaper circulating throughout the State.
- 250 Accordingly, Ms Anning and Ms Jones were not in a position to promise anything. Further, at the meeting on 20 June 2023, it was unknown whether the substantive position holder for the level 3 Tax Support Officer position was returning to her substantive position.
- 251 A further difficulty for Ms Gavril is that the found facts demonstrate Ms Anning informed Ms Gavril that the Fourth Contract would not be extended past its expiry date at the meeting on 20 June 2023, also attended by Mr Barnard as a witness. Therefore, Ms Gavril's follow up email on 26 June 2023 requesting an explanation for not extending the Fourth Contract (the Eighth Complaint) could not have had any bearing on Ms Anning's decision not to extend the Fourth Contract because the decision had already been made six days prior.
- 252 Similarly, Ms Gavril's assertion that the Seventh Complaint was a factor in Ms Anning's decision not to extend the Fourth Contract cannot be accepted, where Ms Anning had a meeting with Ms Gavril on 20 June 2023 and followed up the meeting with a summary of the topics discussed in an email sent at 2.14 pm.¹¹⁵
- 253 Ms Gavril sent an email response to Payroll Services, on 20 June 2023 at 3.03 pm, copied to Mr Mastrolembo, which was in response to an email request dated 20 March 2023.
- 254 Ms Gavril sent an email on 22 June 2023 to Payroll Services in which she referred to Ms Anning approaching her on 'Tuesday evening', about the same issue. The 'Tuesday' referred to in the email must have been 20 June 2023, and in referring to 'evening', the approach by Ms Anning must have been after the decision not to extend the Fourth Contract.
- 255 This is consistent with the email sent by Ms Gavril on 20 June 2023 at 3.03 pm and the email sent by Mr Mastrolembo on 20 June 2023 at 3.13 pm, copied to Ms Anning, which were both after the email sent by Ms Anning at 2.14 pm summarising the meeting on the same day, where Ms Anning told Ms Gavril that the Fourth Contract would not be extended.
- 256 Therefore, the Seventh Complaint could not have had any bearing on the decision not to extend the Fourth Contract of Employment.
- 257 This then leaves the Sixth Complaint.
- 258 However, reliance on the Sixth Complaint is also problematic where there was no obligation to extend the Fourth Contract. There was no promise to extend the Fourth Contract and s 64 of the PSMA did not enable any offer of permanent employment unless the position was advertised. The level 3 Tax Support Officer position was advertised in February 2024, but Ms Gavril did not apply.
- 259 Therefore, the Fourth Alleged Damaging Action, could not, and did not, involve any alteration of any current or future position. Further, there is no evidence of any disadvantage suffered by Ms Gavril beyond her subjective assertion that she did. On the evidence, there was no guarantee of future employment either within Financial Services, BCS, or the Department. Ms Gavril was free to apply for any advertised position.
- 260 The Fourth Alleged Damaging Action does not amount to damaging action as that term is defined in s 97(a) of the IR Act.

Fifth Alleged Damaging Action

- 261 I infer from Ms Gavril's description in the Fifth Alleged Damaging Action that she relies upon the category of damaging action in s 97(a)(ii) of the IR Act, which is consistent with her written submissions. Her submissions also refer to being injured in her employment. Her description of the Fifth Damaging Action as Ms Anning issuing a performance plan without proper or due process does not readily indicate what actions she says altered her position to her disadvantage in accordance with s 97(a)(ii) or how she was injured in her employment in accordance with s 97(a)(iv) of the IR Act.

- 262 Beyond Ms Gavril's subjective assertion that she suffered a disadvantage or was injured in her employment, there is no evidence that, in fact, she did. Her position was not altered by the Performance Development Plan since, on the evidence, she did not suffer any disadvantage because she was to be performance managed. Further, there is no evidence of any injury suffered as a result of the implementation of the Performance Development Plan.
- 263 The reality is that Ms Gavril took umbrage to the instigation of the Performance Development Plan, but managerial action is not necessarily damaging action (unless it alters the employee's position to their disadvantage, and there is no evidence it did in Ms Gavril's case), irrespective of Ms Gavril describing it as being implemented without 'proper or due process'.
- 264 The Fifth Alleged Damaging Action does not amount to damaging action as that term is defined in s 97(a)(ii) or s 97(a)(iv) of the IR Act.
- 265 Further, the Ninth Complaint was never conveyed to Ms Anning, who was the person Ms Gavril alleged took the Fifth Alleged Damaging Action against her because of the Ninth Complaint. The Ninth Complaint was made to Mr Barnard who copied in 'Labour Relations' by mistake, but there was no evidence of who, if anyone, read this email or what they did with it. What the evidence does demonstrate is that Ms Anning was not aware of the Ninth Complaint until well after the commencement of legal proceedings when she was then requested to provide a witness statement.

Reasons

- 266 However, if I am wrong about the First to Fifth Alleged Damaging Actions not constituting damaging action within the meaning of s 97(a)(ii) or s 97(a)(iv), I will also consider whether the First to Fifth Alleged Damaging Actions were taken because Ms Gavril made employment-related inquiries or complaints (which I did not find).
- 267 As observed in *Hughes* at [210], the intention of s 97A is to prohibit employers from discriminating against an employee where an employee makes, or proposes to make, a complaint about their employment conditions.¹¹⁶ The explanation for s 97A of the IR Act aligns with the FWA provisions (along with the cases referred to therein):

Section 97A(2) provides for a reverse onus of proof in damaging action proceedings. If it is proved that an employer took damaging action, it is for the employer to prove that they did not take the action because the employee made (or proposed to make) an inquiry or complaint. The purpose of the reverse onus is to cast upon the employer the onus of proving that which lies peculiarly within their own knowledge. The reverse onus does not relieve an employee from proving, on the balance of probabilities, each ingredient of the alleged contravention. It simply enables the employee's allegation to stand as sufficient proof of the fact unless the employer proves otherwise.¹¹⁷

- 268 It is useful to again set out relevant paragraphs of *Short v Ambulance Victoria* [2015] FCAFC 55; (2015) 249 IR 217, at [54] to [56], where that decision appears to have underpinned the above explanation for s 97A of the IR Act and how it is intended to operate:

When an employee alleges that an employer has taken action against him or her because the employee exercised a workplace right s 361 casts the onus on the employer to 'prove otherwise'. Under s 360, while there may be multiple reasons for an employer to have taken the adverse action, the employer takes action for a prohibited reason if the reasons for the action include that reason. The rationale for the presumption was explained by Mason J in *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605 at 617 per Mason J as being to throw on to the employer the onus of proving that which lies peculiarly within its own knowledge (cited with approval in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 at [50] (French CJ and Crennan JJ)).

Where adverse action is taken by one person against another, the task of a court in a proceeding alleging contravention of s 340 or s 351 is to determine why the person took the adverse action and to ask whether it was for a prohibited reason or reasons which included a prohibited reason (*Barclay* at [5], [44] per French CJ and Crennan J). The question is whether a prohibited reason was a 'substantial and operative' reason for the respondent's action (*Barclay* at [104] per Gummow and Hayne JJ, see also [59] per French CJ and Crennan J). The relevant inquiry is therefore into the 'particular reason' of the decision-maker for taking action (*Barclay* at [42] per French CJ and Crennan J, [102] per Gummow and Hayne JJ), which is a determination of fact to be made by the court taking account of all the facts and circumstances of the case and available inferences (*Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 88 ALJR 980 at [7] per French CJ and Kiefel J, *Barclay* at [45] per French CJ and Crennan J, [79] per Gummow and Hayne JJ).

To displace the presumption created by s 361 in light of the effect of s 360, the respondent must prove that its conduct was not motivated in whole or in part by the prohibited reason alleged. A failure to displace the presumption enables the allegation by an applicant of adverse action for a prohibited reason to stand as sufficient proof of that fact: *Davids Distribution Pty Ltd v National Union of Workers* (1991) 91 FCR 463 at [109] per Wilcox and Cooper JJ.

The Reason or Reasons Alleged by Ms Gavril for the Taking of the First to Fifth Alleged Damaging Actions

- 269 As alleged by Ms Gavril, the reason, or reasons that include, the respondent taking the First to Fifth Alleged Damaging Actions was that she was able to, and did, make a series of employment-related complaints or inquiries as specified the Amended Claim, being the First Complaint to the Ninth Complaint.

First and Second Alleged Damaging Actions

- 270 Ms Gavril claims the First and Second Alleged Damaging Actions were the result of each of the First and Second Complaints and/or the cumulative effect of both.
- 271 There does not appear to be any dispute that Mr Mastrolembro was the decision-maker alleged by Ms Gavril to have taken the First and Second Alleged Damaging Actions, and, while the respondent does not agree that any damaging action was taken, the respondent does not suggest any other decision-maker was involved in the reasons alleged for the First and Second Alleged Damaging Actions.

Mr Mastrolembo's Reasons

- 272 Having regard to the findings of fact, Mr Mastrolembo had scant knowledge of the First Complaint. It was limited to a conversation with another staff member who informed him that Ms Gavril was feeling ignored by Mr Wheeler in training. Mr Mastrolembo told the staff member to encourage Ms Gavril to come and speak directly to him.
- 273 Ms Gavril did not do so and instead sent an email to Mr Mastrolembo informing him that there was no issue with training and that she was dealing with something else in her own way.
- 274 There is no other evidence of Mr Mastrolembo having any knowledge of the First Complaint.
- 275 Thus, the First and Second Alleged Damaging Actions could not have been for the reason or for a reason that included the First Complaint. It is illogical to suggest that someone takes damaging action for a reason or a reason that includes something they have no, or not real, knowledge of.
- 276 Mr Mastrolembo explained the appointment process for the Payroll Officer pool and Ms Gavril's appointment on a 'tapped up' basis for a six-month fixed term contract (the Second Contract). Mr Mastrolembo explained to Ms Gavril at the outset that she would need to apply to the Payroll Officer pool to be merit selected for any further contract.
- 277 Further, Ms Gavril could not be made permanent without a formal merit-selection process.
- 278 Ms Gavril applied for a position in the Payroll Officer pool and was interviewed around 31 August 2022, where she was an unsuccessful applicant.
- 279 Mr Mastrolembo assigned Ms Gavril to the COVID Team on 5 September 2022 consistent with other payroll officers rotating through those same duties. Mr Mastrolembo decided to retain Ms Gavril in the COVID Team because:
- (a) Ms Gavril was unsuccessful in being merit selected for any further position in the Payroll Officer role;
 - (b) the operational teams would be less disrupted where Ms Gavril would leave at the end of the Second Contract on 31 December 2022, and they would otherwise have to train another officer; and
 - (c) the duties were more repetitive and easier, and he thought if Ms Gavril performed this work continually, she would pick up the skill and make less errors.
- 280 In cross-examination, Mr Mastrolembo said it made sense to him operationally for Ms Gavril to rotate into and remain in the COVID Team as this team did many of the same duties as was done in the Payroll Section, albeit the tasks were 'easier' but the volume of work was greater.
- 281 Mr Mastrolembo denied planning to transfer Ms Gavril to the COVID Team from the commencement of the Second Contract. Mr Mastrolembo said there were issues of concern regarding Ms Gavril's performance where she was not grasping certain concepts or retaining information, albeit she was trying hard but just not performing.
- 282 He also denied that the decision to move Ms Gavril to the COVID Team was solely operational, rather, that it was also for her development as specified in the Mastrolembo Statement.
- 283 Mr Mastrolembo also denied that was any other intention for retaining in her in the COVID Team other than what he explained in the Mastrolembo Statement.¹¹⁸
- 284 The content of the Mastrolembo Statement was consistent with his oral evidence in cross-examination and documents tendered by both parties. Mr Mastrolembo's evidence was truthful and credible, and I am satisfied his evidence in respect of his reasons for rotating and retaining Ms Gavril in the COVID Team was credible and reliable.
- 285 For the following reasons I am satisfied that *if* the respondent took the First and Second Alleged Damaging Actions, then the reason or reasons for doing so was not because Ms Gavril made the First Complaint or the Second Complaint or a combination of the two.
- 286 There is simply no evidence that demonstrates the reason or reasons that include Mr Mastrolembo assigning Ms Gavril to the COVID Team or retaining in her in that team had anything to do with the Second Complaint.
- 287 Therefore, the First and Second Complaints had no bearing in any way on the reason Mr Mastrolembo assigned and retained Ms Gavril in the COVID Team, which was primarily an operational decision consistent with the terms of the Second Contract but would also enable Ms Gavril to improve her work performance.
- 288 Further, the First and Second Complaints had no bearing on Ms Gavril being interviewed for the Payroll Officer pool, which was entirely of her own choosing if she wanted to be considered for an employment contract after the expiry of the Second Contract. Mr Mastrolembo made it clear to Ms Gavril that while he 'tapped' her for the Second Contract, any future extension or any other contract required her to be merit selected for the Payroll Officer pool. Ms Gavril applied for the Payroll Officer pool but was unsuccessful.
- 289 I am satisfied and I find that, if the First and Second Alleged Damaging Actions were taken, the respondent has discharged its onus set out in s 97A(2) of the IR Act, and I am satisfied the First and Second Complaints made by Ms Gavril were not a substantive and operative reason, or included as a substantive or operative reason, for the decisions made by Mr Mastrolembo.

Third Alleged Damaging Action

- 290 Ms Gavril claims the Third Alleged Damaging Action was because of (or for reason of or for reasons that included) the Third, Fourth and Fifth Complaints and/or the cumulative effect of those complaints.
- 291 There does not appear to be any dispute that Ms Anning was the decision-maker alleged by Ms Gavril to have taken the Third Alleged Damaging Action, and, while the respondent does not agree that any damaging action was taken, the respondent does not suggest any other decision-maker was involved in the decisions making the Third Alleged Damaging Action.

Ms Anning's Reasons

- 292 In the Anning Statement, Ms Anning said the reason or reasons for transferring Ms Gavril to Accounts Processing was to allow Ms Anning time to investigate what was happening with Ms Gavril's computer, to provide Ms Gavril with an opportunity to learn new skills for future opportunities and to assist the Accounts Processing team for the end of the financial year.
- 293 In addition, Ms Jones had raised with her concerns about Ms Gavril's performance, which included Ms Gavril refusing to speak with Ms Jones; difficulty in understanding tasks; being evasive when asked for updates on what work she was doing; the accuracy of her work; poor record keeping; saving her work to the incorrect folders; and the deterioration in the working relationship between Ms Gavril, Ms Jones and Mr Morriss.¹¹⁹ Ms Jones raised concerns with Mr Morriss and Ms Anning the risk of loss of work product, which, in her oral evidence, she said was of concern given the time of year and the pressure to finalise fringe benefit taxation.
- 294 In cross-examination, Ms Anning maintained the concern raised by Ms Jones and Mr Morriss was Ms Gavril's ability to save documents and the risk of work or information being lost because it had not been saved. The Tax team had lost confidence in Ms Gavril being able to do her job. Ms Anning denied it was the *raising* of the issue of work being allegedly deleted from Ms Gavril's work computer that caused her to transfer Ms Gavril to the Accounts Processing team.
- 295 Ms Anning maintained that she made inquiries about Ms Gavril's work computer when she spoke to Mr Morriss; Ms Jones; Sudhakar and made enquiries with ICT; and she observed Ms Gavril's actions in saving work during the meeting on 12 May 2023.
- 296 Ms Anning also explained that future vacancies may arise in Accounts Processing and that this was the best opportunity for Ms Gavril to obtain a future contract with the Department. Transferring Ms Gavril to Accounts Processing would expose her to new skills, and she may obtain assistance from another staff member. In addition, Ms Gavril was required to undertake work as part of any contract of employment with the Department.
- 297 The content of the Anning Statement was consistent with her oral evidence in cross-examination and documents tendered by both parties. Ms Anning's evidence was truthful and credible, and I am satisfied her evidence in respect of her reasons for why she moved Ms Gavril to assist in Accounts Processing was credible and reliable.
- 298 For the following reasons I am satisfied that *if* the respondent took the Third Alleged Damaging Action, then the reason or reasons for doing so was not because Ms Gavril made the Third, Fourth or Fifth Complaints or any combination of the three.
- 299 The handwritten note made by Ms Anning during the meeting on 12 May 2023 is consistent with her reasons. The content of Ms Anning's email dated 15 May 2023 is also consistent with her reasons.
- 300 Neither of these documents include Ms Anning making any reference to the Third, Fourth or Fifth Complaints or to any complaint at all.
- 301 To the contrary, Ms Anning refers to the *issues* raised by Ms Jones and Ms Gavril and attempts to find a solution that addresses the concerns raised by Ms Jones while providing Ms Gavril with work within her capabilities and to assist with future opportunities. This was significant because as the found facts establish, there was no certainty associated with Ms Gavril being offered a future contract in Financial Services and she could not lawfully be offered permanent appointment without a permanent position being advertised, applying for it and being merit selected for the position.
- 302 Notwithstanding it was never part of the Amended Claim, there is no evidence that Ms Anning's reasons for transferring Ms Gavril to Accounts Processing was a 'sham' designed to cover up any 'real' or 'other' reasons.
- 303 I am satisfied and I find that, if the Third Alleged Damaging Action was taken, the respondent has discharged its onus set out in s 97A(2) of the IR Act, and I am satisfied the Third, Fourth and Fifth Complaints made by Ms Gavril were not a substantive and operative reason or included as a substantive or operative reason for Ms Anning's decision.

Fourth Alleged Damaging Action

- 304 Ms Gavril claims the Fourth Alleged Damaging Action was for the reason or for reasons that include she made the Sixth, Seventh and Eighth Complaints and/or the cumulative effect of those complaints.
- 305 Again, there does not appear to be any dispute that Ms Anning was the decision-maker alleged by Ms Gavril to have taken the Fourth Alleged Damaging Action, and, while the respondent does not agree that any damaging action was taken, the respondent does not suggest any other decision-maker was involved in the decisions making the Fourth Alleged Damaging Action.

Ms Anning's Reasons

- 306 Having regard to the findings of fact, the Seventh Complaint could not have had any bearing on Ms Anning's reasons for not extending the Fourth Contract because the decision to not extend the Fourth Contract was made prior to the Seventh Complaint.
- 307 Similarly, the Eighth Complaint could not have had any bearing on Ms Anning's reasons for not extending the Fourth Contract because the decision to not extend the Fourth Contract was also made prior to the Eighth Complaint.
- 308 However, even if I am wrong about the Seventh and Eighth Complaints, the issue is whether the Sixth and Seventh Complaints, singularly or cumulatively, was the reason or was a reason that included why the Fourth Contract was not extended.
- 309 In the Anning Statement, Ms Anning's reasons for not extending the Fourth Contract was that Ms Gavril's Third Contract had already been extended by Ms Jones, albeit Ms Jones had no authority to do so. Therefore, if another extension to the Tax Support Officer role was offered, depending on the substantive position holder's future situation, it would be advertised and a merit-selection process undertaken. Ms Anning also had concerns about Ms Gavril's performance having regard to the issues

raised by Ms Jones, Ms Palmer and Mr Morriss.

- 310 Notably in Ms Jones's email to Ms Anning dated 15 June 2023, Ms Jones does not refer to any issue arising because Ms Gavril made a request to her on 9 June 2023 about working from home and queried her work load or the like.¹²⁰ Ms Jones's concern was Ms Gavril's general behaviour and work performance.
- 311 In cross-examination, Ms Anning maintained she could not further extend the Fourth Contract and there were no permanent roles before 27 October 2023. Ms Anning did not know the substantive position holder's future situation and in June 2023 was not in a position to further extend any contract or offer permanency. Nothing that occurred leading up to the meeting with Ms Gavril on 20 June 2023 changed that.
- 312 In addition, Ms Anning had concerns about Ms Gavril's work performance and behaviour which she sought to address during the meeting on 20 June 2023. During the meeting on 20 June 2023 Ms Gavril asked to work from home but Ms Anning denied this request because of the work performances she identified, although she did not completely close the door on it being considered in the future.
- 313 The content of the Anning Statement was consistent with her oral evidence in cross-examination and documents tendered by both parties. Ms Anning's evidence was truthful and credible, and I am satisfied her evidence in respect of her reasons for why she did not further extend the Fourth Contract was credible and reliable.
- 314 For the following reasons I am satisfied that *if* the respondent took the Fourth Alleged Damaging Action, then the reason or reasons for doing so was not because Ms Gavril made the Sixth or Seventh Complaints or any combination of the two.
- 315 The email by Ms Anning dated 20 June 2023 sent after the meeting with Ms Gavril and Mr Barnard is consistent with her reasons. It is also consistent with what Ms Anning knew at the time; that is, the future situation of the substantive position holder was unknown. Ms Anning did not create false expectations for Ms Gavril where the future could not be guaranteed.
- 316 Ms Anning made no reference to the Sixth or Seventh Complaints or to any complaint at all in any associated document. Similarly, Ms Jones, who provided Ms Anning with information about Ms Gavril, made no reference to the Sixth Complaint, save that Ms Jones referred to her and Ms Anning approaching Ms Gavril on 9 June 2023 to discuss the 'clear instructions' Ms Gavril requested. Ms Gavril sent an email telling Ms Anning and Ms Jones she was stressed by their approach and told them to only communicate with her by email.
- 317 That Ms Anning also had concerns about Ms Gavril's performance does not mean she did not further extend the Fourth Contract for any improper reason. It was open to her to hold this view. Her reasons for not extending the Fourth Contract are not impugned because she held this view.
- 318 Again, notwithstanding it was never part of the Amended Claim, there is no evidence that Ms Anning's reasons for not extending the Fourth Contract or 'giving' Ms Gavril a permanent public office position, which as a matter of law she could not do, was a 'sham' designed to cover up any 'real' or 'other' reasons.
- 319 This includes obtaining advice from Labour Relations and managing Ms Jones's erroneous attempt to terminate the Fourth Contract (which was never conveyed to Ms Gavril) and having a less 'brutal' conversation with Ms Gavril on 20 June 2023 about her work performance and the personality issues in the Tax team.
- 320 I am satisfied and I find that, if the Fourth Alleged Damaging Action was taken, the respondent has discharged its onus set out in s 97A(2) of the IR Act, and I am satisfied the Sixth, Seventh and Eighth Complaints made by Ms Gavril were not a substantive and operative reason, or included as a substantive or operative reason, for Ms Anning's decision.

Fifth Alleged Damaging Action

- 321 Ms Gavril claims the Fifth Alleged Damaging Action was for the reason or for reasons that include the making of the Ninth Complaint.
- 322 Having regard to the findings of fact, Ms Anning was not aware of the Ninth Complaint when she was alleged to have taken the Fifth Alleged Damaging Action against Ms Gavril.
- 323 Like the First Complaint and the First and Second Alleged Damaging Actions, the Fifth Alleged Damaging Action could not have been for the reason or for reasons that include making the Ninth Complaint. Again, it is illogical to suggest that someone takes damaging action for a reason they have no knowledge of.
- 324 There is simply no evidence that demonstrates that the reason or reasons for Ms Anning's decision to performance manage Ms Gavril during the Fourth Contract had anything to do with the Ninth Complaint, which was made to Mr Barnard, who erroneously copied it to Labour Relations.
- 325 Further, there is no evidence that Labour Relations or Mr Barnard forwarded the Ninth Complaint or spoke to Ms Anning about the Ninth Complaint, either before the decision was made by her to performance manage Ms Gavril or at all.
- 326 However, for the avoidance of any doubt, had it been necessary to find, the credible and reliable evidence does not demonstrate that Ms Anning's decision to performance manage Ms Gavril was because Ms Gavril made the Complaints. To the contrary, Ms Anning identified issues with Ms Gavril's work performance, albeit it was primarily based on information provided by Ms Jones. Ms Anning knew the Fourth Contract did not expire until 27 October 2023 and she wanted to give Ms Gavril meaningful work to do, but also the Department was paying for work to be done. It was not viable for Ms Gavril to do no work for the remainder of the Fourth Contract or to only do work that she wanted to do.
- 327 I am satisfied and I find that, if the Fifth Alleged Damaging Action was taken, the respondent has discharged its onus set out in s 97A(2) of the IR Act, and I am satisfied the Ninth Complaint made by Ms Gavril was not a substantive and operative reason or included as a substantive or operative reason for Ms Anning's decision.

Injury and Loss

- 328 Again, notwithstanding the substantive findings I have made with respect to the Amended Claim, I will also consider the relief sought by Ms Gavril *if* she was successful.
- 329 Pursuant to s 97B(2) of the IR Act, if the Court determines that an employer has contravened s 97A(1) the Court may order the employer to:
- (a) if the employee was dismissed from employment, to reinstate the employee: s 97B(2)(a) of the IR Act;
 - (b) if the employee was refused employment, to employ the employee: s 97B(2)(b) of the IR Act; or
 - (c) pay to the employee compensation for *any* loss or injury suffered as a result of the contravention: s 97B(2)(c) of the IR Act.
- 330 The Court may make these orders in addition to imposing a penalty under s 83E of the IR Act.
- 331 Pursuant to s 97B(5) of the IR Act, the Court must not make the order if the employee has applied under another provision of this Act or any other written law for relief in relation to the same damaging action unless the proceedings for that relief have been withdrawn or failed for want of jurisdiction. Additionally, an employee is not entitled to compensation for the same damaging action under both s 97B(2)(c) and another provision of the IR Act or any other written law. That is, if an employee seeks compensation under s 23A(6) of the IR Act for unfair dismissal, the Court cannot make an order for compensation if the respondent also made a damaging action by dismissing the employee.
- 332 Ms Gavril seeks an order to be reinstated to her former role as a level 3, Tax Support Officer or to an equivalent position within the Department at a *permanent* level, with full continuity of service and no probation period.
- 333 Alternatively, or in addition to reinstatement, Ms Gavril seeks economic loss for lost earnings and career stagnation, and non-economic loss for severe distress, reputational damage and psychological harm as a result of the First to Fifth Alleged Damaging Actions.
- 334 Similar issues were raised in *Hughes*, and I repeat the comments made in that case below.
- 335 The terms ‘loss’ and ‘injury’ are not defined in s 7 or Part 6B of the IR Act. Further, unlike s 23A(8) of the IR Act, the amount of compensation the Court may order is uncapped. However, s 23A(6) of the IR Act expresses the order for payment of compensation in similar terms to that expressed in s 97B(2)(c) of the IR Act.
- 336 In *Bogunovich v Bayside Western Australia Pty Ltd* (1999) 79 WAIG 8 (*Bogunovich*), Sharkey P outlines principles applicable to assessing compensation for loss or injury caused by an unfair dismissal. Where the definition of damaging action includes dismissing an employee and s 97A is within the same legislation as s 23A, it is, in my view, rational, sensible and consistent to apply similar principles to assessing compensation for loss or injury (including the meaning thereof) under s 97B(2)(c) of the IR Act.
- 337 Adapting some of the principles in *Bogunovich* at 8:
- (1) the Court is required to make a finding as to the loss or the injury which the employee suffered as a result of the damaging action taken (or contravention);
 - (2) the employee is required to establish their loss or injury on the balance of probabilities. If there is no loss or injury established, then no compensation will be ordered;
 - (3) the Court is then required to compensate the employee to the fullest extent in respect of the loss or injury;
 - (4) there must be a causal link between the loss or injury claimed and the particular damaging action; and
 - (5) the decision and amount of compensation is not arbitrary and must occur having regard to applicable legal principles.
- 338 Other applicable principles, as adapted, include that the purpose of compensation (under s 23A but also referable to s 97B(2)(c)) is to compensate an employee for losses caused, not to punish the employer or to confer a windfall on the employee. This means that compensation ‘must be in respect of a lawful entitlement and/or as compensation for a demonstrated loss or injury’ as a result of the contravention,¹²¹ and compensation is not compensation if it does not, as much as possible, put the person who suffered the loss or injury back into the position which, but for the loss or injury, the person would have been in.¹²²
- 339 ‘Loss’ is a wide concept that includes, but is not limited to, ‘actual loss of salary or wage, loss of benefits or other amounts which would have been earned, paid to or received by’ the affected employee but for the contravention.¹²³ ‘Loss’ may also include future loss. ‘Injury’ is also a wide concept, incorporating ‘all manner of wrongs’ and includes, for example, humiliation; injury to feelings; loss of reputation; nervous shock and ‘being treated with callousness’.¹²⁴ For compensation to be awarded for injury, the injury must ‘fall outside the limits which can be taken to have normally been associated with’ the damaging action. This requires evidence that the employee has suffered ‘loss of dignity, anxiety, humiliation, stress or nervous shock’.¹²⁵ There will be an element of distress in most ‘dismissal cases’ (and by extension to cases involving allegations of damaging action).¹²⁶

Reinstatement

- 340 Ms Gavril was never dismissed from employment by the Department or the respondent. The Amended Claim was never litigated on the basis she had been dismissed from or by the Department or the respondent. On this basis alone, reinstatement does not fall to be considered.
- 341 Further, Ms Gavril was not refused employment by the Department or the respondent. Ms Gavril was employed on a series of fixed term contracts with no obligation on the respondent to provide future or further employment.¹²⁷ The Fourth Contract expired on 27 October 2023. Ms Gavril could apply for future vacancies and be merit selected for those vacancies.

342 The Department was required to comply with s 64 of the PSMA for a permanent appointment to the public service. While it was not fully litigated in this case, my provisional view is that the purpose of reinstatement in s 97B(2)(a) of the IR Act is not an alternative vehicle to permanency in the public service or to circumvent other written laws.

Loss

343 Ms Gavril does not detail what, if any, future loss she suffered or might have suffered, beyond stating she has ‘lost earnings’ and suffered ‘career stagnation’. She submits that the Court should order all remuneration and superannuation she would have been ‘expected’ to have earned had her employment continued until she could reasonably be expected to secure a comparable permanent level 3 government position, which she estimates to be 18 months.

344 Ms Gavril also submits that she has lost an opportunity to obtain permanency in the public sector and so she should be compensated for the distress, humiliation and reputational harm, as well as the ongoing emotional impact, including stress and depression, caused by ‘these work events’.

345 While not entirely on point, in *Stephens v Australian Postal Corporation* [2014] FCA 732 (*Stephens*), Flick J discussed the onus of proof in relation to the ‘refusal to employ’ a claimant in the context of s 340(1) and s 351(1) of the FWA. At [21], His Honour identified questions about what the phrase means and which party has the onus:

[A] refusal to employ a person to a position which is in fact vacant – in which case, it may be the prospective employee who has the onus of proving that a position is vacant; or

[A] failure to employ a person upon an application being made, whether or not a position has been advertised as being vacant and (perhaps) even where there is known to be no vacant position – in which case, s 361 would transfer the onus to the employer to explain the reason why the application was unsuccessful.

346 Ultimately, his Honour concluded it better to confine attention to the facts of relevance, given the number of factual circumstances that may arise on the issue.¹²⁸

347 The fact of relevance in relation to the Amended Claim is that Ms Gavril did not apply for the level 3 Tax Support Officer position when it was advertised in February 2024. There is no evidence of her applying for any position and that she missed out on the position because of the First to Fifth Alleged Damaging Actions or the Complaints.

348 Further, the findings of fact establish that upon the conclusion of the Fourth Contract, the Department was not required to retain, extend or give her future employment. Ms Gavril was free to apply for vacancies and be appointed to those vacancies. There is no evidence she did and there is no evidence of what, if any, vacancies she may have been eligible to apply for.

349 The Amended Claim as it relates to the alleged Second Damaging Action occurred on 31 August 2022, when Ms Gavril alleges that she *was required to interview* for the Payroll Officer role. The Amended Claim was never advanced on the basis that she was unsuccessful for the Payroll Officer role because she made the First and Second Complaints, rather, Ms Gavril generally refers to the interview process being unfair to her. As already explained, the Court’s role in determining the Amended Claim is not to revisit the interview process and determine whether it was, in fact, unfair in some way to Ms Gavril.

350 Mr Mastrolembo’s reasons unequivocally reject any suggestion of an improper motive behind Ms Gavril’s interview for the Payroll Officer role in August 2022.

351 Mr Mastrolembo’s knowledge of the First and Second Complaints have been discussed, as has his reasons for the alleged Second Damaging Action. During cross-examination, Mr Mastrolembo confirmed that neither Ms Tjandra (the subject of the Second Complaint) nor Mr Wheeler (the subject of the First Complaint) were members of the interview panel for the Payroll Officer role, and he denied that the panel’s composition resulted in an unsuitable outcome.¹²⁹

352 Further, during cross-examination, Mr Mastrolembo confirmed that Ms Gavril was never in the pool for the Payroll Officer role, as she had never been merit selected for the pool. Accordingly, beyond the limited ‘tap’ leading to the Second Contract, and notwithstanding the ongoing Payroll Officer pool positions, Mr Mastrolembo could not further extend the Second Contract or appoint Ms Gavril to the Payroll Officer role without Ms Gavril being merit selected.¹³⁰

353 Therefore, even if vacancies existed in the Payroll Officer pool, Ms Gavril was not eligible for the pool and the respondent cannot be said to have refused to employ her, giving rise to the assessment of any loss.

354 Ms Gavril’s submissions otherwise invite speculation on her purported and subjective amounts of loss, and they do not rise to the level that satisfies the Court on the balance of probabilities that, in fact, she suffered any loss.

Injury

355 Ms Gavril’s evidence is that she was stressed and depressed by ‘these work events’. However, the mere fact that Ms Gavril says she experienced stress and depression, without more, does not satisfy me on the balance of probabilities that the claimant suffered an ‘injury’ as a result of the First to Fifth Alleged Damaging Actions.

356 That is, it may be expected that some degree of ‘distress’ or ‘stress’ or feelings associated with depression may be associated with receiving unexpected or unwanted information. I am not satisfied on the evidence that Ms Gavril’s feelings are outside the limits which would normally be associated with any feelings of disappointment when circumstances are not what she hoped for.

357 I note that ‘injury’ may include injury to pride (or by extension ‘humiliation’).¹³¹ However, evidence of the injury is still required. I am not satisfied, without more, that Ms Gavril’s subjective expression of humiliation or reputational damage is an injury that falls outside the limits which would normally be associated with actions with feelings of disappointment.

358 Otherwise, there is no evidence, beyond Ms Gavril’s assertions, of any effect that the Alleged Damaging Action may have had on her.

359 Therefore, on the basis of the evidence before the Court, I am not satisfied to the requisite standard that Ms Gavril has suffered

any loss or injury as a result of the First to Fifth Alleged Damaging Actions and there is no order for compensation.

- 360 I note the respondent took issue with the Court's jurisdiction to award compensation by way of 'general damages' due to the effect of s 418 and s 421(4) of the *Workers Compensation and Injury Management Act 2023* (WA).
- 361 For the same reasons expressed in *Hughes*, I do not intend to discuss this issue where in adapting the principles in *Bogunovich*, and consistent with s 97B(2)(c) of the IR Act, the Court must first be satisfied that the claimant has suffered any loss or injury as a result of the alleged damaging action. I am reluctant to express a view where the issue was not fully litigated and was a limited issue before the Court.

Conclusion

- 362 I am not satisfied Ms Gavril has proven to the requisite standard that the First, Third, Fourth and Ninth Complaints were employment-related inquiries or complaints she was able to make for purpose of alleging that any damaging action was taken by the respondent. I am satisfied that the Second Complaint and the Fifth to Eighth Complaints may be characterised employment-related inquiries or complaints Ms Gavril was able to make for the purpose of alleging damaging action was taken by the respondent.
- 363 However, I am not satisfied Ms Gavril has proven to the requisite standard that the First to Fifth Alleged Damaging Actions amounted to 'damaging action', within the meaning of that term under s 97(a) of the IR Act, taken by the respondent.
- 364 Alternatively, *if* the First to Fifth Alleged Damaging Actions did constitute damaging action within the meaning of s 97(a) of the IR Act, I am not satisfied that the respondent took the damaging action for the reason or a reason that included, or because, Ms Gavril made the First to Ninth Complaints. That is, I am satisfied the respondent has satisfied its onus on the balance of probabilities.
- 365 Further, *if* Ms Gavril proved the First to Fifth Alleged Damaging Actions, I am not satisfied that she has proven to the requisite standard any loss or injury as a result of the First to Fifth Alleged Damaging Actions and no order for compensation would apply under s 97B(2)(c) of the IR Act.

Orders

- 366 The claimant's claim is dismissed.

D. SCADDAN

INDUSTRIAL MAGISTRATE

SCHEDULE I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court of Western Australia Under the Industrial Relations Act 1979 (WA)

Jurisdiction

- [1] The IMC has jurisdiction to hear and determine an allegation that an employer has taken damaging action against an employee having regard to the combined reading of s 97A(3), s 97B(1), s 83E and s 81A of the IR Act.
- [2] While s 81A of the IR Act does not make express reference to the Court's jurisdiction to hear and determine an allegation that an employer has taken damaging action against an employee, the clear intent of Part 6B of the IR Act is that the IMC hear and determine these claims.
- [3] That is, s 97A(3) of the IR Act provides that a contravention of s 97A(1) is a civil penalty provision for the purposes of s 83E of the IR Act. Section 83E of the IR Act outlines the pecuniary penalties that may be imposed by the IMC if a person contravenes a civil penalty provision. Section 97B of the IR Act provides the orders the IMC may make if the IMC determines that an employer has contravened s 97A(1), including making the orders in addition to imposing a penalty under s 83E of the IR Act.

Burden and Standard of Proof

- [4] Where an employee alleges an employer has taken damaging action against them, the employee carries the burden of proving they made an employment-related inquiry or complaint they were able to make, and the action taken was damaging action (as that term is defined in s 97 of the IR Act). The standard of proof required to discharge the burden is proof 'on the balance of probabilities': s 83E(8) of the IR Act. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:
- It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not,' the burden is discharged, but, if the probabilities are equal, it is not.
- [5] If the employee proves to the requisite standard the elements they are required to prove, the employer must then prove to the same standard, the reasons for, or reasons that include, the damaging action were not because of the employment-related inquiries or complaints made by the employee.
- [6] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

Practice and Procedure of the Industrial Magistrates Court of Western Australia

- [7] Subject to the provisions of the IR Act, the procedure of the IMC relevant to claims under s 97A is contained in the *Industrial Magistrate's Court (General Jurisdiction) Regulations 2005* (WA) (**IMC Regulations**): s 113(3) of the IR Act. Notably, reg 35(4) of the IMC Regulations provides the court is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.

[8] In *Sammut v AVM Holdings Pty Ltd (No 2)* [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation:

The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence [40]. (citations omitted)

¹ *Hughes v East Metropolitan Health Service* [2024] WAIRC 982; (2024) 104 WAIG 2560 (*Hughes*) at [156] to [158].

² *Ermel v Duluxgroup (Australia) Pty Ltd (No 2)* [2015] FCA 17; (2015) 67 AILR 102-332 at [48] referred to in *Hughes* at [82] and [83].

³ Also referred to in *Hughes* at [82] and [83].

⁴ The claimant indexed her annexures using a mixture of numbers of letters and not all were in sequential order. Since there was much duplication of evidence in the parties' statements, I have referred to the respondent's annexures where it was clearer to do so. Where the claimant's annexures are referred to, for clarity, I have used the sequential index numbers rather than the descriptions and labelling used by the claimant.

⁵ Exhibit 1 – Witness Statement of Delia Gavril signed on 31 July 2025 with annexures.

⁶ Exhibit 108 – Witness Statement of Salvatore Mastrolembo signed on 28 August 2025 with annexures.

⁷ Exhibit 109 – Witness Statement of Cheryl Jones signed on 29 August 2025 with annexures.

⁸ Exhibit 110 – Witness Statement of Fiona Anning signed on 29 August 2025 with annexures.

⁹ Exhibit 108 at [2] to [4].

¹⁰ Exhibit 108 at [5] to [7].

¹¹ Exhibit 109 at [2] to [6].

¹² Exhibit 110 at [1] to [4].

¹³ Exhibit 110 at [7] and ongoing.

¹⁴ Exhibit 1 at annexure 1 (February 2022 emails); and Exhibit 110 at FA5.

¹⁵ Exhibit 110 at [12].

¹⁶ Exhibit 1 annexure 5 (letter from Mr Mastrolembo to Ms Gavril dated 9 June 2022); and Exhibit 108 at SM3.

¹⁷ Exhibit 1 at annexure 6 (emails dated 1 July 2022).

¹⁸ Exhibit 1 at annexure 6.

¹⁹ Exhibit 1 at annexure 7 (email dated 3 July 2022).

²⁰ Exhibit 1 at [18] to [20] and annexure 8 (emails between Ms Gavril and Mr Mastrolembo dated 1 August 2022).

²¹ Exhibit 108 [22] to [29].

²² Exhibit 1 at annexure 10.

²³ Exhibit 1 at annexure 10.

²⁴ Exhibit 1 at [30].

²⁵ Exhibit 110 at [16] and Exhibit 1 at annexure 15 (emails dated 28 and 29 November 2022).

²⁶ Exhibit 1 at annexure 14 (email from Ms Jones to Ms Gavril on 28 November 2022).

²⁷ Exhibit 110 at FA7.

²⁸ Exhibit 110 at FA7.

²⁹ Exhibit 110 at [21].

³⁰ Exhibit 110 at [23] to [24] and FA9.

³¹ Exhibit 110 at [22].

³² Exhibit 109 at CJ5.

³³ Exhibit 109 at CJ5.

³⁴ Exhibit 109 at CJ5.

³⁵ Exhibit 109 at CJ5.

³⁶ Exhibit 109 at CJ4.

³⁷ Exhibit 109 at CJ4.

³⁸ Exhibit 109 at CJ4.

³⁹ Exhibit 20 (email from Ms Jones to Mr Morriss dated 10 May 2023 at 6.29 pm).

⁴⁰ Exhibit 110 at FA10 and FA11.

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- ⁴¹ Exhibit 110 at [31] and FA10 and FA11.
- ⁴² Exhibit 1 at [56].
- ⁴³ Exhibit 110 at FA12.
- ⁴⁴ Exhibit 110 at [49] to [51] and Exhibit 1 at annexure 36 (email dated 26 May 2023 from Ms Anning).
- ⁴⁵ Exhibit 110 at [50].
- ⁴⁶ Exhibit 1 at annexure 38 (Email dated 9 June 2023 from Ms Gavril at 9.17 am).
- ⁴⁷ Exhibit 110 at FA14 and Exhibit 1 at [63].
- ⁴⁸ Exhibit 110 at [56] to [59].
- ⁴⁹ Exhibit 110 at [61].
- ⁵⁰ Exhibit 110 at [62].
- ⁵¹ Exhibit 110 at [59], [64] to [67].
- ⁵² Exhibit 110 at FA15 at page 62.
- ⁵³ Exhibit 1 at [69].
- ⁵⁴ Exhibit 1 at annexure 41 (email dated 22 June 2023).
- ⁵⁵ Exhibit 110 at FA15 at pages 60 to 61; and Exhibit 1 at annexure 39 (email dated 26 June 2023 from Ms Gavril to Ms Anning at 12.14 pm).
- ⁵⁶ Exhibit 1 at annexure 39 (email dated 26 June 2023 from Ms Anning to Ms Gavril at 12:29 pm); and Exhibit 110 at FA15.
- ⁵⁷ Exhibit 1 at annexure 39 (email dated 26 June 2023 from Ms Gavril to Ms Anning at 1:22 pm); and Exhibit 110 at FA15.
- ⁵⁸ Exhibit 110 at FA15 at page 57.
- ⁵⁹ Exhibit 1 at annexure 41 (emails dated 22 and 28 June 2023 between Ms Gavril and Payroll Services).
- ⁶⁰ Exhibit 110 at [76].
- ⁶¹ Exhibit 1 at annexure 45 (Email chain between Ms Gavril and Mr Barnard).
- ⁶² Exhibit 1 at annexure 45 (3 July 2023 email from Mr Barnard to Ms Gavril at 4.18 pm).
- ⁶³ Exhibit 1 at annexure 46 (4 July 2023 email from Ms Anning to Ms Gavril at 8.39 am); and Exhibit 110 at FA16.
- ⁶⁴ Exhibit 1 at annexure 4 (email dated 3 June 2022 from Mr Mastrolembro to Ms Gavril at 2:32 pm).
- ⁶⁵ Exhibit 1 at annexure 4 (email dated 3 June 2022 from Ms Gavril to Arif Ahmed at 2.08 pm).
- ⁶⁶ Exhibit 108 at SM3.
- ⁶⁷ Exhibit 108 at [32] to [39] and SM5 to SM8.
- ⁶⁸ 'Tips' is the nickname of the substantive position holder of level 3 Tax Support Officer at the time.
- ⁶⁹ Exhibit 1 at [49].
- ⁷⁰ ts 80 to 81.
- ⁷¹ ts 81 to 82.
- ⁷² ts 87.
- ⁷³ Exhibit 109 at [24].
- ⁷⁴ Exhibit 109 at [25].
- ⁷⁵ Exhibit 109 at CJ3.
- ⁷⁶ Exhibit 1 at [57].
- ⁷⁷ Exhibit 1 at [57].
- ⁷⁸ Exhibit 1 at [58].
- ⁷⁹ Exhibit 1 at [58].
- ⁸⁰ Exhibit 1 at annexure 33 (email dated 26 June 2023 to herself).
- ⁸¹ Exhibit 110 at FA10 and FA11.
- ⁸² Exhibit 110 at [31].
- ⁸³ Exhibit 110 at [32] and [33].
- ⁸⁴ Exhibit 110 at [36] to [38].
- ⁸⁵ Exhibit 110 at FA12.
- ⁸⁶ Exhibit 109 at [44] to [47] and Exhibit 110 at FA19.
- ⁸⁷ Exhibit 109 at [46].

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- ⁸⁸ Exhibit 109 at [48].
- ⁸⁹ Exhibit 105 – email from Ms Anning to Labour Relations dated 15 June 2023.
- ⁹⁰ Exhibit 105 – email from Ms Anning to Ms Jones dated 15 June 2023.
- ⁹¹ Exhibit 110 at FA19 at page 79.
- ⁹² Exhibit 110 at FA19 at pages 89 to 92.
- ⁹³ Exhibit 110 at FA19 at page 79.
- ⁹⁴ Exhibit 110 at FA19 at page 78.
- ⁹⁵ Exhibit 110 at FA19 at page 77.
- ⁹⁶ Exhibit 110 at FA19 at pages 73 to 75.
- ⁹⁷ Exhibit 48 at the email from Ms Anning to Ms Jones dated 19 June 2023.
- ⁹⁸ Exhibit 110 at FA19 at page 72.
- ⁹⁹ Exhibit 110 at FA19 at page 76.
- ¹⁰⁰ Exhibit 110 at FA18.
- ¹⁰¹ Exhibit 110 at FA18.
- ¹⁰² Exhibit 106.
- ¹⁰³ Exhibit 110 at FA18.
- ¹⁰⁴ Exhibit 106.
- ¹⁰⁵ Exhibit 110 at FA18.
- ¹⁰⁶ Applying *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271; (2014) 242 IR 1 (*Shea*) at [625] referred to in the Explanatory Memorandum for the Industrial Relations Legislation Amendment Bill 2021.
- ¹⁰⁷ See *Shea* at [579] to [581].
- ¹⁰⁸ Exhibit 108 at SM3.
- ¹⁰⁹ Exhibit 108 at SM3.
- ¹¹⁰ Exhibit 1 at [32].
- ¹¹¹ Exhibit 108 at [11] and SM2.
- ¹¹² Exhibit 108 at SM5 to SM8.
- ¹¹³ Amended Claim at [23].
- ¹¹⁴ Exhibit 110 at FA7.
- ¹¹⁵ Exhibit 110 at FA15.
- ¹¹⁶ Explanatory Memorandum to the Industrial Relations Legislation Amendment Bill 2021.
- ¹¹⁷ Explanatory Memorandum to the Industrial Relations Legislation Amendment Bill 2021.
- ¹¹⁸ Exhibit 108 at [46] to [49].
- ¹¹⁹ Exhibit 110 at [40] to [41].
- ¹²⁰ Exhibit 110 at FA19 at pages 79 to 80.
- ¹²¹ *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36; (2003) 129 IR 270 at [85].
- ¹²² *Bogunovich* at 8.
- ¹²³ *Capewell v Cadbury Schweppes Australia Ltd* (1998) 78 WAIG 299 (*Capewell*) at 303.
- ¹²⁴ *Capewell* at 303.
- ¹²⁵ *AWI Administration Services Pty Ltd v Birnie* [2001] WAIRC 4015; (2001) 81 WAIG 2849 at [200], 2862.
- ¹²⁶ *Lynam v Lataga Pty Ltd* [2001] WAIRC 2420; (2001) 81 WAIG 986 at [56], 989.
- ¹²⁷ See [345] to [348] for further detail.
- ¹²⁸ *Stephens* at [22].
- ¹²⁹ ts 128.
- ¹³⁰ ts 125.
- ¹³¹ *Gilmore v Cecil Bros* (1996) 76 WAIG 4434 at 4447.
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2026 WAIRC 00016

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2026 WAIRC 00016
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : WEDNESDAY, 17 DECEMBER 2025
DELIVERED : FRIDAY, 16 JANUARY 2026
FILE NO. : M 82 OF 2025
BETWEEN : ESME DARLINGTON-THOMAS

CLAIMANT

AND
 ELGAS LIMITED

FIRST RESPONDENT

AND
 ZR RESOURCES PTY LTD

SECOND RESPONDENT

CatchWords : INDUSTRIAL LAW – Application by a party to strike out claim – Whether there is a real issue of fact or law to be tried – Whether the first respondent is an employer for the purposes of the *Long Service Leave Act 1958* (WA) – Consideration of labour hire arrangement

Legislation : *Long Service Leave Act 1958* (WA)
Industrial Relations Act 1979 (WA)
Industrial Magistrates (General Jurisdiction) Regulations 2005

Case(s) referred to in reasons: : *Anthony v Mineral Resources Ltd* [2024] FWC 414
FP Group Pty Ltd v Tooheys Pty Ltd [2013] FWC FB 9605; (2013) 238 IR 239
Baker Hughes Australia Pty Ltd v Venier [2016] WAIRC 843; (2016) 96 WAIG 1488
Fair Work Ombudsman v Eastern Colour Pty Ltd [2011] FCA 803; (2011) 209 IR 263
Abakir v Cleanaway Operations Pty Ltd [2023] FWC 3448
United Voice WA v The Minister for Health [2011] WAIRC 01065; (2011) 91 WAIG 2337
Fancourt v Mercantile Credits Ltd [1983] HCA 25; (1983) 154 CLR 87
Whitehall Holdings Pty Ltd v Ravi Nominees Pty Ltd (Unreported, WASCA, Library No 9189, 13 December 1991)
Burton v Shire of Bairnsdale [1908] HCA 57; (1908) 7 CLR 76
Shilkin v Taylor [2011] WASCA 255
Miller v Minister of Pensions [1947] 2 All ER 372, 374
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336, 362

Result : The application is and be granted
 The claim against the first respondent is struck out

Representation:

Claimant : Self-represented
 First respondent : Mr R. Malcolm (of counsel) and with him Ms E. Hartley (of counsel)
 Second respondent : No appearance (excused)

REASONS FOR DECISION**Background**

- 1 Esme Darlington-Thomas (**the claimant**) claims an entitlement of an amount allegedly owed in respect of long service leave under the *Long Service Leave Act 1958* (WA) (**the Act**). The claimant claims that Elgas Limited (**the first respondent**) and ZR Resources Pty Ltd (**the second respondent**) are ‘jointly responsible for ensuring the entitlement is paid’ (**the Claim**).
- 2 The claimant describes the first respondent as the ‘host company’ and the second respondent as the ‘Labour Hire Company’. The Claim alleges the claimant began employment at the first respondent on 26 March 2018 via another labour hire company, Programmed, before the second respondent took over the ‘contract’ in October 2023.

- 3 The claimant says her contract was terminated on 8 May 2025.
- 4 The first respondent denies ever employing the claimant and says the claimant was assigned to the first respondent in accordance with a commercial agreement between Zoom Recruitment Pty Ltd (**Zoom**) and the first respondent dated 4 September 2023.
- 5 The first respondent says the claimant's case outline suggests she was constructively dismissed from her employment by the second respondent, which indicates that on her own case, the second respondent was her employer.
- 6 The first respondent denies it employed the claimant and says the claimant is employed, and continues to be employed, by Zoom.
- 7 The second respondent says the first respondent is a client of Zoom and utilises Zoom's services as a labour hire provider.
- 8 The second respondent says the claimant has been employed by Zoom as a casual employee since 4 September 2023 pursuant to a Casual Employment Agreement (**CEA**) and has been assigned by Zoom to the first respondent's premises in Canning Vale to provide accounts receivable services.
- 9 The second respondent says the claimant's engagement ended at the first respondent's premises but the claimant's employment relationship with Zoom did not end and has not ended. The claimant has indicated that she is available for engagements allowing her to work remotely and not on site, and Zoom has indicated that if an assignment comes up consistent with her stipulation, then Zoom can offer her that work.

The First Respondent's Application and Orders Sought

- 10 On 14 November 2025, the first respondent lodged an application seeking, pursuant to reg 5 and reg 7(1)(iv) and (r) of the *Industrial Magistrates Court (General Jurisdiction) Regulations 2005* (WA) (**the IMC Regulations**), the Claim be struck out as it relates to the first respondent because it fails to:
 - (a) disclose a reasonable cause of action within the Industrial Magistrates Court's (**IMC**) jurisdiction; and
 - (b) provide reasonable notice of the case the first respondent is required to meet such that the Claim cannot be responded to.¹

(the Application).

- 11 The first respondent relies upon an affidavit of Samantha Ritter (**Ms Ritter**) sworn on 6 November 2025 in support of the Application (**Ritter Affidavit**).
- 12 The claimant opposes the Application.
- 13 Schedule I of these reasons outlines the jurisdiction, standard of proof, practice, and procedure of the IMC in determining this case.

The First Respondent's Evidence

- 14 Ms Ritter is employed by BOC Limited (**BOC**) as a Human Resources Manager.
- 15 In the Ritter Affidavit, she deposes to the following:
 - (a) BOC is part of the Linde Group and BOC is the company and trading name in Australia;
 - (b) the first respondent is an Australian company that is 100% owned by BOC;
 - (c) her role at BOC sits across all BOC entities, including the first respondent;
 - (d) all of the human resources records for BOC are held in one single SAP system and all payroll records are within one ADP payroll system;
 - (e) a search of the BOC SAP system, including for the first respondent, shows there are no employment records for the claimant. If the claimant was ever an employee of the first respondent or any BOC company there would have been an employment file with her contract, employment records, such as bank details, remuneration reviews and performance evaluations;
 - (f) none of these records exist for the claimant;
 - (g) the BOC payroll team confirm that the claimant has never received wages from the first respondent or any BOC entity;
 - (h) BOC has a Labour Hire Contract with Zoom. Zoom provided the claimant to the first respondent under this contractual agreement. Zoom is not an associated entity of BOC or the first respondent; and
 - (i) a tax invoice from Zoom to the first respondent includes payment for services by the claimant and three other labour hire personnel. A copy of the tax invoice is annexed to the Ritter Affidavit at SR-01.
- 16 The tax invoice at SR-01 shows the claimant's services in administration being charged to the first respondent at the rate of \$51.4196 per hour for 14.5 hours. Other services for three other people are also charged on the same tax invoice.

The Claimant's Evidence

- 17 The claimant claims an amount based on an ordinary hourly rate of \$41.21.
- 18 The claimant responded to the Application and attaches various documents she says demonstrates factual disputes rendering the Application 'unsuitable for summary disposition'.
- 19 The claimant refers to email correspondence in September 2023 between her and the first respondent discussing her performance, duties, hours and workplace issues (**the September 2023 Emails**). She also refers to email correspondence in

June 2025 between her and Zoom discussing the provision of historical payroll and service records from the first respondent for the purpose of [Zoom] calculating long service leave entitlements (**the June 2025 Emails**).

- 20 In the September 2023 Emails, the claimant requests the first respondent for a pay review and explains why. She also informs the first respondent that she ‘will be requesting full time through Zoom’.
- 21 In response, a Regional Manager of the first respondent congratulates the claimant’s performance and advises they are ‘happy to support the process of your pay review’, however, they explain the process for this to occur. The Regional Manager also states, ‘happy to support a full time placement via Zoom, will just need to work out their policies however I don’t think it will be an issue’.
- 22 In the June 2025 Emails, the claimant informs Zoom and the first respondent of her entitlement to long service leave. Relevant to the Claim, she states:

I worked at Elgas continuously from March 2018 to May 2025, initially under one labour hire provider and then through Zoom Recruitment, performing the same duties, at the same site, with the same hours and expectations throughout. I believe this constitutes continuous service for the purpose of long service leave.

- 23 A Payroll Manager at Zoom responds:

We are following up with Elgas for your payroll data from your time with the previous agency, so that we can determine your eligibility and calculate your Long Service Leave if applicable.

The Parties’ Contentions

- 24 The first respondent submits the Claim has no prospect of success because to establish the Claim against the first respondent the Court would need to determine the claimant and the first respondent were employee and employer. The first respondent says it is not the claimant’s employer for the purposes of the Act or at all.
- 25 The commercial relationship between the first respondent and Zoom was not a ‘sham’ where the ‘commercial authenticity’ and ‘commercial practicality’ can be seen in the margin paid over the wages paid by Zoom to the claimant². That is, the first respondent paid by tax invoice an amount of \$51.4196 per hour to Zoom of which Zoom paid the claimant \$41.21 per hour.
- 26 Control over an employee is less relevant in the context of a labour hire arrangement where day to day control is a ‘common feature’ of that arrangement³.
- 27 The first respondent has pleaded that Zoom is the claimant’s employer, and the principle of joint employment is not recognised in Australia. This is consistent with the particulars in the Claim where the claimant refers to the first respondent as the ‘host company’ and the second respondent as the ‘Labour Hire Company’.
- 28 The first respondent has no records, commonly held by employers, demonstrating that it employed the claimant, including any contract of employment.
- 29 The September 2023 Emails and June 2025 Emails do not rise to a level demonstrating an employee and employer relationship between the claimant and the first respondent.
- 30 The claimant submits the cases relied upon by the first respondent made determinations on the employment relationship at the conclusion of hearing all of the evidence, rather than at a preliminary point of the litigation.
- 31 The claimant submits the first respondent had ‘structural control’ or day to day control over her work in the workplace from the time she commenced with a labour hire company and then Zoom took over the contract with the first respondent. The claimant says the second respondent or Zoom functioned as a payroll only.
- 32 The claimant submits the September 2023 Emails and June 2025 Emails are evidence of ‘employment records’ held by the first respondent and there will be other employment records once the discovery process commences.
- 33 The claimant says there are significant factual issues in dispute (requiring discovery and evidence), including the control and direction exercised by the first respondent over her work, her duties and performance and ongoing placement at the first respondent. She refers to the first respondent possibly having documents relevant to her work, training and payroll.
- 34 The claimant submits the Application is premature and the Claim is neither hopeless nor bound to fail. There is a reasonably arguable claim as against the first respondent.

The Act

- 35 The entitlement to long service leave under the Act is set out in s 8(1) of the Act:

An employee is entitled in accordance with, and subject to, the provisions of this Act, to long service leave on ordinary pay in respect of the length of continuous employment calculated under section 6A *with the same employer* [emphasis added].

- 36 Relevant to the Claim, s 8(3) of the Act provides that where an employee has completed between seven and 10 years of continuous employment and the employment is terminated, other than for serious misconduct, the employee is entitled to a proportionate amount of leave on the basis of 8 2/3 weeks for 10 years of continuous employment.
- 37 The effect of s 9(2) and (2A) of the Act is that upon termination of employment where the employee is entitled to take the long service leave under s 8(3), the employer must pay the full amount the employee is entitled to of the leave not taken.
- 38 The obligation to pay the full amount is on the employer in respect of an employee.
- 39 Section 4 of the Act defines *employee* to mean:

(a) ...

(i) a person who is employed by an employer to do work for hire or reward, including as an apprentice; or

(ii) a person whose usual status is that of an employee;

and

(b) includes a casual or seasonal employee[.]

40 Relevant to the Claim, s 4 of the Act defines *employer* to mean:

(a) a person⁴ or public authority as defined in the [*Industrial Relations Act 2009* (WA)];

...

(c) a related body corporate of the employer if the employer is itself a body corporate, where related body corporate of an employer has the meaning given in s 9 of the *Corporations Act 2001* (Cth).

41 Section 6 of the Act defines *continuous employment*, which for the most part deals with paid or unpaid absences from the workplace. Potentially relevant to the Claim is s 6(5) where a casual employee has continuous employment with an employer despite absences from the workplace under the terms of the employment or any other absence after the which the employee has, due to the regular and systemic nature of the employment, a reasonable expectation of returning to work for the employer.

42 Further, under s 6(6), a casual employee has continuous employment with an employer despite being employed by the employer under two or more contracts of employment or is also employed *another person* during the period of employment by the employer.

43 Part II, Division 3 of the Act⁵ deals with the transfer of business from an old employer to a new employer where there is a connection between the old and the new employer, for example, the sale of a business, and the employee (now referred to as a *transferring employee*) is performing the same or substantially the same work for the new employer.

44 The Full Bench of the Western Australian Industrial Relations Commission in *Baker Hughes Australia Pty Ltd v Venier* (2016) WAIRC 843 (*Baker Hughes*) considered the meaning of 'one and the same employer' in s 8(1) of the Act, as it was prior to amendments in the IR Amendment Act.

45 The IR Amendment Act introduced a suite of amendments to the Act, and in doing so also amended the words in s 8(1) from 'one and the same employer' to 'the same employer', consistent with amending the definition of *employer* in s 4 from 'persons, firms, companies and corporations' to 'a person or public authority' or 'a related body corporate'.

46 The IR Amendment Act also amended what constitutes *continuous employment* as it relates to casual or seasonal employment referred to above in s 6(6) of the Act.

47 The Full Bench in *Baker Hughes* found that the words continuous employment with 'one and the same employer' means continuous employment with a single employer⁶.

48 Notwithstanding *Baker Hughes* was a decision prior to the amendment of the words in s 8(1) and the circumstances concerned the prior employment by related body corporates; the reasoning and principles remain relevant to the current proceedings.

49 Further, if anything, the amended definition of *employer* by the IR Amendment Act serves to strengthen the findings in *Baker Hughes* and the deletion of the words 'one and' in s 8(1) does not, in my view, detract from that or in some way now construes *employer* to mean more than one employer or joint employers.

50 This is also consistent with other amendments in the IR Amendment Act as it relates to the transfer of business resulting in the employment by an employee being taken to be a single period of continuous employment and the new employer is taken to be the employee's *sole* employer for the entire period⁷.

51 The clarification of continuous employment for casual or seasonal employees, particularly s 6(6) of the Act, recognises the nuances of casual employment, namely casual employees may be employed as a result of a series of discrete contracts or on a single contract, both of which may satisfy the continuous employment requirement. Additionally, casual or seasonal employees may have other employment but, again, may satisfy the continued employment requirement with a particular employer. In my view, this amendment does not alter the principle founded in *Baker Hughes* or the fundamental requirement in s 8(1) of the Act, as it relates to the entitlement relevant to a single employer.

52 That is, the obligation to pay the full amount for any long service leave entitlement which arises under s 9(2) and s 9(2A) of the Act is with a single employer.

Labour Hire Arrangements

53 The relevant legal principles for labour hire arrangements include⁸ (citations omitted):

- a) The mere existence of an arrangement under which a first company provides labour to a second company does not point to the second company being the employer of the labour so provided;
- b) The interposition of a labour hiring agency between its clients and the workers it hires out to them does not result in an employer-employee relationship between the client and the worker;
- c) A critical consideration in determining whether the formal arrangements represent the reality of the situation is what might be described as the 'commercial authenticity' of those arrangements; and
- d) There is no concept of dual employment known to Australia[n] law whereby both the labour supplier and the client are concurrently employers of the worker in the triangular labour hire arrangement.

54 It has been recognised that a fundamental feature of labour hire arrangements is the high degree of control the hirer has over the performance of work of the hired workers and the ability to integrate the hired worker into the existing work systems⁹.

55 It was further recognised that labour hire arrangements invariably involve the hirer being able to communicate directly to the hired worker instructions concerning the performance of work without the interposition of the labour hire company¹⁰.

- 56 Conceptually, dual employment may not be as definitive as suggested in *Tooheys*. That is, in *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803; (2011) 209 IR 263 (*Eastern Colour*), Collier J referred, at [77], to a Full Bench of the Australian Industrial Relations Commission in *Morgan v Kitchside Nominees Pty Ltd* (2002) 117 IR 152, where the Commissioners considered that ‘no substantial barrier should exist to accepting a joint employment relationship might be found and given effect for the certain purposes under the [Workplace Relations] Act’ (at [75]).
- 57 Notably, one of the issues for determination in *Eastern Colour* was an application to strike out pleadings as they related to the named respondents being jointly and severally liable to make payments of certain entitlements because they were joint employers of the relevant employees.
- 58 Relevant to the Application, Collier J suggested, at [78], there was scope ‘in Australian law for a claim that multiple entities can jointly employ a person. Whether such a claim can be substantiated, either on particular facts or on the law following proper argument at a hearing, is a different question’. In that context, his Honour considered it was premature to find in the interlocutory application that the relevant parts of the claims should be struck out as disclosing no cause of action known to law.
- 59 However, his Honour, at [80], did strike out the same paragraphs because of the absence of material facts in support of the contentions relied upon by the claimants. He did so where there were no facts pleaded which would or could support joint employment, such as joint and several liability in respect of workplace accidents, insurance, workers’ compensation and payroll tax. Similarly, there were no material facts pleaded as to whether the claimants contend an employment contract between the employee and each of the employers separately or all employers or whether each employer had different rights or obligations.

Determination

- 60 The IMC has the power to strike out (or summarily dispose of) a claim on the basis that there is no reasonable prospect of success.¹¹ The IMC’s duties in dealing with cases are set out in reg 5 of the IMC Regulations. Regulation 7 of the IMC Regulations sets out what the IMC may do for the purpose of controlling and managing cases and trials, including, at reg 7(1)(h) ‘order that an issue not be tried’, and at reg 7(1)(r) ‘take any other action or make any other order for the purpose of complying with reg 5’. This would also include striking out part of a claim for the same reasons.
- 61 Therefore, the IMC has the power to make the order sought by the first respondent if it concludes the Claim is so clearly untenable that it could not possibly succeed and, if that circumstance exists, to dismiss the claim so as to deal with the case efficiently, economically and expeditiously and to ensure that the IMC’s resources are used as efficiently as possible.¹²
- 62 The power to order the strike out of the whole a claim is one that should be exercised with great care.¹³
- 63 A party has an obligation to provide particulars of an arguable claim (as the case may be) and to provide a statement of facts which go to show that it is arguable.¹⁴
- 64 Disposal of a claim summarily ‘will never be exercised unless the party’s claim is so obviously untenable that it cannot possibly succeed’.¹⁵
- 65 Notwithstanding the early stage of the Claim, the claimant’s claim as it relates to the first respondent should be struck out for the following reasons:
- the Claim pleads the first and second respondents are ‘jointly responsible’ for payment of any long service leave entitlement under the Act. However, there are no facts pleaded which support a principle of ‘joint responsibility’ or ‘joint employment’ by the first and second respondents. Accepting the first respondent’s evidence, it holds no records commonly associated with establishing an employment relationship between an employer and an employee;
 - the payment of any long service leave entitlement under s 9 of the Act is liable to be paid by *an* employer. Under the Act, the liability of an employer is with a single employer. Therefore, for the claimant to be successful as against the first respondent, she would need to prove on the balance of probabilities the first respondent, and only the first respondent, was her employer;
 - the first respondent’s evidence is that it did not ever employ the claimant. To that end, the first respondent’s records, including the example tax invoice, are consistent with a bona fide commercial labour hire arrangement with a third party, Zoom, who placed the claimant at the first respondent’s premises;
 - the claimant cannot say if there are, in fact, any employment records held by the first respondent and wants to rely upon the disclosure procedure to ‘discover’ records that *may* support her assertion the first respondent, *along with Zoom*, is ‘jointly responsible’ for her claimed entitlement. However, under the Act a single employer is liable for any long service leave entitlement;
 - the September 2023 Emails and June 2025 Emails do not support the claimant being employed by the first respondent. The content of the September 2023 Emails congratulates the claimant on her performance and supports her pay review but also says that it will support a full-time placement *via Zoom*, consistent with the claimant’s placement at the first respondent being by labour hire agreement between the first respondent and Zoom. In congratulating the claimant, the first respondent is not carrying out a performance review, which the first respondent deposes that it does not have in its possession in any event. The content of the June 2025 Emails is the claimant’s demand for payment and Zoom responding to the demand saying it will liaise with the first respondent to find out further information. The principle of *continuous employment* raised in the claimant’s demand is not the same as who is liable for the payment of any long service leave entitlement under the Act;
 - the second respondent has admitted Zoom employed and continues to employ the claimant under a CEA. Where Zoom purchased the business who originally employed the claimant, then Part II, Division 3 of the Act may apply to

the claimant. In that case, if Zoom does not have all the relevant employment records¹⁶, then it is logical it may approach third parties to piece together information to determine what, if any, liability it has, which is indicated in the June 2025 Emails; and

- given the admission made by the second respondent that Zoom employed and continues to employ the claimant and a single employer is liable to pay an amount for long service leave, the disclosure process is highly unlikely to yield any information that would displace the second respondent's admission.

66 The 'structural control' referred to by the claimant is, again, not inconsistent with labour hire arrangements, and, in my view, does not displace the second respondent's admission that Zoom is or was the claimant's employer or the existence of a labour hire agreement between the first respondent and Zoom.

67 That is, I am satisfied the first respondent is, and was, not the claimant's employer where the first respondent had a bona fide commercial labour hire arrangement with Zoom for the claimant's services to the first respondent. In being so satisfied, I am also satisfied the Claim as it relates to the first respondent cannot succeed.

68 I observe that striking out a claimant's claim, or part thereof, particularly where the party is self-represented, is a serious step and should be reserved for a clear case. The Claim as it relates to the first respondent is, in my view, a clear case. It is also a clear case that permitting the claimant to reframe the Claim against the first respondent will not cure the primary issue of the lack of an employment relationship between the claimant and the first respondent under the Act.

69 The Claim has not been entirely struck out and remains against the second respondent, although an amendment to the named party may be necessary. There appears to be further issues between the claimant and the second respondent (or Zoom) regarding whether the claimant continues to be employed by the second respondent (or Zoom) and how continuous employment should be accounted for—as a possible transferring employee under a new employer—for the purpose of determining whether any entitlement to long service leave has crystallised under the Act. However, these are matters for the claimant and the second respondent.

Outcome

70 The first respondent's application to strike out those parts of the Claim as it relates to the first respondent is and be granted.

71 Pursuant to reg 5(2)(a), reg 5(2)(c) and reg 7(1)(r) of the IMC Regulations, the Claim as it relates to the first respondent is struck out.

D. SCADDAN INDUSTRIAL MAGISTRATE

¹ Form 6 & 7 – Application for Orders lodged 14 November 2025.

² *Anthony v Mineral Resources Ltd* [2024] FWC 414 (*Mineral Resources*) at [37] and *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWC 9605; (2013) 238 IR 239 (*Tooheys*) at [22].

³ *Mineral Resources* at [49].

⁴ Section 5 of the *Interpretation Act 1984* defines 'person' to mean, relevantly, a company.

⁵ Inserted as part of the amendments in the *Industrial Relations Legislation Amendment Act 2021 (the IR Amendment Act)*.

⁶ *Baker Hughes* at [90] per Smith A/P (with whom Scott CC agreed).

⁷ Part II, Division 3, s 7H.

⁸ *Abakir v Cleanaway Operations Pty Ltd* [2023] FWC 3448 at [63] (referred to in *Mineral Resources* at [37]).

⁹ *Tooheys* at [29].

¹⁰ *Tooheys* at [29].

¹¹ *United Voice WA v The Minister for Health* [2011] WAIRC 01065; (2011) 91 WAIG 2337.

¹² Regulation 5(2)(a) and (c) of the IMC Regulations.

¹³ *Fancourt v Mercantile Credits Ltd* [1983] HCA 25; (1983) 154 CLR 87.

¹⁴ *Whitehall Holdings Pty Ltd v Ravi Nominees Pty Ltd* (Unreported, WASCA, Library No 9189, 13 December 1991).

¹⁵ *Burton v Shire of Bairnsdale* [1908] HCA 57; (1908) 7 CLR 76, 92 (see also *Shilkin v Taylor* [2011] WASCA 255 [29]).

¹⁶ Noting s 7I of the Act also requires the transfer of employment records for transferring employees.

SCHEDULE I: Jurisdiction, Practice and Procedure of the Industrial Magistrates Court (WA)

Jurisdiction

[1] The IMC has exclusive jurisdiction to hear and determine all questions and disputes in relation to rights and liabilities under the Act, including whether a person is or is not an employee or employer to whom the Act applies, whether an employee is or has become entitled to long service leave, and the ordinary rate of pay of an employee.¹

Burden and Standard of Proof

[2] In an application under the Act, the claimant carries the burden of proving the claim. The standard of proof required to discharge the burden is proof 'on the balance of probabilities'. In *Miller v Minister of Pensions* [1947] 2 All ER 372, 374, Lord Denning explained the standard in the following terms:

It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not,’ the burden is discharged, but, if the probabilities are equal, it is not.

- [3] Where in this decision it is stated that a finding has been made, the finding is made on the balance of probabilities. Where it is stated that a finding has not been made or cannot be made, then no finding can be made on the balance of probabilities.

Practice and Procedure of the Industrial Magistrates Court of Western Australia

- [4] Subject to the provisions of the Act and the IR Act, the procedure of the IMC relevant to claims under the Act is contained in the IMC Regulations. Notably, reg 35(4) of the IMC Regulations provides the Court is not bound by the rules of evidence and may inform itself on any matter and in any manner as it thinks fit.
- [5] In *Sammut v AVM Holdings Pty Ltd [No 2]* [2012] WASC 27, Commissioner Sleight examined a similarly worded provision regulating the conduct of proceedings in the State Administrative Tribunal and made the following observation:

The tribunal is not bound by the rules of evidence and may inform itself in such a manner as it thinks appropriate. This does not mean that the rules of evidence are to be ignored. The more flexible procedure provided for does not justify decisions made without a basis in evidence having probative force. The drawing of an inference without evidence is an error of law. Similarly such error is shown when the tribunal bases its conclusion on its own view of a matter which requires evidence [40]. (citations omitted)

¹ Section 11(1)(a), s 11(1)(b) and s 11(1)(c) of the Act and s 81AA of the *Industrial Relations Act 1979* (WA) (**IR Act**).

2026 WAIRC 00034

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2026 WAIRC 00034
CORAM : INDUSTRIAL MAGISTRATE R. COSENTINO
HEARD : WEDNESDAY, 26 NOVEMBER 2025
DELIVERED : TUESDAY, 27 JANUARY 2026
FILE NO. : M 83 OF 2025
BETWEEN : ZIYU CHEN

CLAIMANT

AND

FLUFFY HORDE PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – *Fair Work Act 2009* (Cth) – small claim – whether claimant was an employee – whether intention to create legally binding contract – application and coverage of the *Miscellaneous Award 2020* – failure to pay hourly rates applicable under award – contravention of s 45 – order for payment under s 545(3)

Legislation : *Fair Work Act 2009* (Cth)
Fair Work Regulations 2009 (Cth)

Instrument : *Miscellaneous Award 2020*

Cases referred to in reasons: : *Bull v Rmbl Bxng Bondi Pty Ltd* [2025] FWC 3069
Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833; (2001) 117 FCR 424
Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8; (2002) 209 CLR 95
EFEX Group Pty Ltd v Bennett [2024] FCAFC 35; (2024) 330 IR 171

Result : Claim upheld

Representation:

Claimant : Self-represented

Respondent : Mr Z. Yang (director)

REASONS FOR DECISION

1 The claimant, Ziyu Chen, is seeking orders that the respondent, Fluffy Horde Pty Ltd (**the Company**), pay her \$9,387.50 plus pre-judgment interest, for the Company’s failure to comply with the *Fair Work Act 2009* (Cth) (**FW Act**).

2 Ms Chen elected for the proceedings to be dealt with under the small claims procedure set out in s 548 of the FW Act.

- 3 It is not in dispute that Ms Chen and the Company had an arrangement where Ms Chen would perform work for the Company and the Company would ‘help’ Ms Chen in various ways in return. It is not in dispute that Ms Chen undertook some duties for the Company. It is not in dispute that the Company provided Ms Chen with accommodation, in return for Ms Chen working for eight hours in any week. It is not in dispute that the Company paid Ms Chen for the time that she worked over and above eight hours a week.
- 4 However, the Company says that Ms Chen was not an employee, but rather, was a ‘volunteer’ who agreed to do work on an informal and flexible basis for the Company for mutual benefit. It says that Ms Chen worked flexibly, to suit her own purposes and in an honorary capacity, without any obligation to render service nor any entitlement to receive wages. The Company’s position is, in effect, that there was no common intention to create a legally enforceable bargain at all.
- 5 The determinative issue is this claim, then, is whether or not the Company employed Ms Chen. More specifically, was there a mutual intention to enter into a legally binding employment contract?

The Industrial Magistrates Court’s Jurisdiction

- 6 Under s 539 and s 540 of the FW Act, an employee may apply to an eligible State or Territory court for orders in relation to a contravention of s 45 of the FW Act, that is, the prohibition against contravening a term of a modern award, if the employee is affected by the contravention. Such application must be made within six years after the day the contravention occurred¹.
- 7 The Industrial Magistrates Court of Western Australia (**IMC** or **Court**) is ‘an eligible State or Territory court’².
- 8 The IMC may order that an employer pay an amount to an employee if the IMC is satisfied the employer was required to pay the amount under the FW Act or a fair work instrument, and the employer has contravened a civil remedy provision by failing to pay the amount³.
- 9 Ms Chen did not specify in her claim which award she alleged applied to her, nor what provisions of the award and FW Act she alleged had been contravened. However, she provided a table of calculations of the alleged underpayments and explained that her calculations were based on a Level 1 classification for the first three months of her employment, and a Level 2 classification thereafter.
- 10 The calculations she used as the casual and penalty rates of pay are those under the *Miscellaneous Award 2020* as they were at the relevant times after 1 July 2024⁴. Accordingly, I have considered the claim on the basis that it is a claim for contravention of the *Miscellaneous Award 2020*.
- 11 The Award is a modern award under the FW Act and is a ‘fair work instrument’. Section 45 prohibits a person from contravening a modern award, and it is a civil penalty provision.
- 12 If Ms Chen is an employee, then she is a person affected by the alleged contraventions of s 45.
- 13 Ms Chen, as the claimant in these proceedings, carries the burden of proving her claim on the balance of probabilities.

Uncontentious Background

- 14 Ms Chen is a university student who came to Australia from China in 2024 to study at Curtin University.
- 15 Mr Yang is the Company’s Chief Executive Officer.
- 16 The Company operates a business of breeding dogs and cats for sale, kennelling, training and grooming dogs, as well as providing shelter and care for rescue animals.
- 17 The Company employed two managers, who the parties referred to as Harry and Monica. The Company also employed other individuals including individuals whose positions were described as ‘pet groomer’ and ‘sales representative.’
- 18 The Company had written employment contracts with at least some of its employees. It produced examples of its written employment contracts with its manager, a sales representative and a pet groomer⁵. The written employment contracts state that ‘[a]ll pay conditions comply with the *Fair Work Act 2009* and the applicable Award’ and that casual employees receive a 25% loading in addition to the specified hourly rate.
- 19 Ms Chen and Mr Yang were acquainted with each other before Ms Chen went to work for the Company at its premises in Southern River. They discussed arrangements for Ms Chen to work for the Company by messages over WeChat, and during at least one telephone call. The WeChat messages were in evidence before the Court, translated from Chinese to English by a Certified Translator⁶.
- 20 The arrangement between the Company and Ms Chen was never reduced to a formal written contract like those referred to in [18] above.
- 21 Ms Chen’s evidence that her first day working for the Company was 1 November 2024 was not challenged, and was corroborated by the WeChat messages between her and Mr Yang⁷.
- 22 While the arrangement was on foot, Ms Chen resided in accommodation provided to her by the Company, and, in the latter period of the arrangement, was given the use of Mr Yang’s car for her personal use.
- 23 On 10 March 2025 Ms Chen was involved in an accident while she was driving Mr Yang’s car, resulting in it being written off. She and Mr Yang entered into a written Settlement Agreement on 22 March 2025 by which Ms Chen agreed to pay Mr Yang \$9,500 in two tranches of payments in respect of the damage to the car⁸. She made these payments on 19 and 23 March 2025⁹.
- 24 Ms Chen also caused some damage to a fence on the Company’s property, for which she agreed to pay \$300 for the repairs.
- 25 The arrangement between Ms Chen and the Company ended on about 29 March 2025 when Ms Chen left of her own accord.
- 26 Ms Chen said that during the period from 1 November 2024 to 29 March 2025 the Company paid her \$7,200 in cash, in total. Initially she was paid \$16 net per hour, and later this was increased to \$20 net per hour. Her evidence in this regard was not

challenged.

The Nature of the Arrangement: Was Ms Chen an Employee?

Legislation and Legal Principles

27 Under s 46 of the FW Act, '[a] modern award does not impose obligations on a person, and a person does not contravene a term of a modern award, unless the modern award applies to the person.' Conversely, a modern award does not give a person an entitlement unless the modern award applies to the person.

28 Section 47 stipulates when a modern award applies to an employee or employer:

47 When a modern award *applies* to an employer, employee, organisation or outworker entity

When a modern award applies to an employee, employer, organisation or outworker entity

- (1) A modern award *applies* to an employee, employer, organisation or outworker entity if:
- the modern award covers the employee, employer, organisation or outworker entity; and
 - the modern award is in operation; and
 - no other provision of this Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.

Note 1: Section 57 provides that a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

Note 2: In a modern award, coverage of an outworker entity must be expressed to relate only to outworker terms: see subsection 143(4).

Modern awards do not apply to high income employees

- (2) However, a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) at a time when the employee is a high income employee.

Modern awards apply to employees in relation to particular employment

- (3) A reference in this Act to a modern award applying to an employee is a reference to the award applying to the employee in relation to particular employment.

29 Section 48 says:

48 When a modern award *covers* an employer, employee, organisation or outworker entity

When a modern award covers an employee, employer, organisation or outworker entity

- (1) A modern award *covers* an employee, employer, organisation or outworker entity if the award is expressed to cover the employee, employer, organisation or outworker entity.

Note: In a modern award, coverage of an outworker entity must be expressed to relate only to outworker terms: see subsection 143(4).

Effect of other provisions of this Act, FWC orders or court orders on coverage

- (2) A modern award also *covers* an employee, employer, organisation or outworker entity if any of the following provides, or has the effect, that the award covers the employee, employer, organisation or outworker entity:

- a provision of this Act or of the Registered Organisations Act;
- an FWC order made under a provision of this Act;
- an order of a court.

- (3) Despite subsections (1) and (2), a modern award does not *cover* an employee, employer, organisation or outworker entity if any of the following provides, or has the effect, that the award does not cover the employee, employer or organisation or outworker entity:

- a provision of this Act;
- an FWC order made under a provision of this Act;
- an order of a court.

Modern awards that have ceased to operate

- (4) Despite subsections (1) and (2), a modern award that has ceased to operate does not *cover* an employee, employer, organisation or outworker entity.

Modern awards cover employees in relation to particular employment

- (5) A reference to a modern award covering an employee is a reference to the award covering the employee in relation to particular employment.

30 In these sections of the FW Act, 'employee' and 'employer' mean 'national system employee' and 'national system employer' respectively¹⁰.

31 The terms 'national system employee' and 'national system employer' are defined in s 13 and s 14(1) of the FW Act:

13 Meaning of *national system employee*

A *national system employee* is an individual so far as he or she is employed, or usually employed, as described in the definition of *national system employer* in section 14, by a national system employer, except on a vocational placement.

Note: Sections 30C and 30M extend the meaning of *national system employee* in relation to a referring State.

14 Meaning of *national system employer*

(1) A *national system employer* is:

- (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
- (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
- (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: Note 1: In this context, *Australia* includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of *Australia* in section 12).

Note 2: Note 2: Sections 30D and 30N extend the meaning of *national system employer* in relation to a referring State.

32 The terms ‘employer’ and ‘employee’ in s 13 and s 14 have their ordinary meaning.

33 There is no doubt that the Company is a constitutional corporation. Therefore, the issue of whether Ms Chen was an employee must be determined according to the ordinary meaning of that term.

34 Section 15AA of the FW Act, from 26 August 2024, sets out the statutory test for when a person is an employee:

15AA Determining the ordinary meanings of *employee* and *employer*

- (1) For the purposes of this Act, whether an individual is an *employee* of a person within the ordinary meaning of that expression, or whether a person is an *employer* of an individual within the ordinary meaning of that expression, is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person.
- (2) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:
 - (a) the totality of the relationship between the individual and the person must be considered; and
 - (b) in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.

Note: This section was enacted as a response to the decisions of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

...

35 The effect of s 15AA was recently described by Deputy President Cross of the Fair Work Commission in *Bull v Rmbl Bxng Bondi Pty Ltd* [2025] FWC 3069 at [43] - [44]:

[43] Consequently, for the purpose of the Act, in determining the issue of whether a person is an employee or independent contractor, the Commission is required to ascertain the real substance, practical reality and true nature of the relationship between the parties. This adopts the approach described in *Hollis*:

It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing ‘the totality of the relationship’ between the parties; it is this which is to be considered.

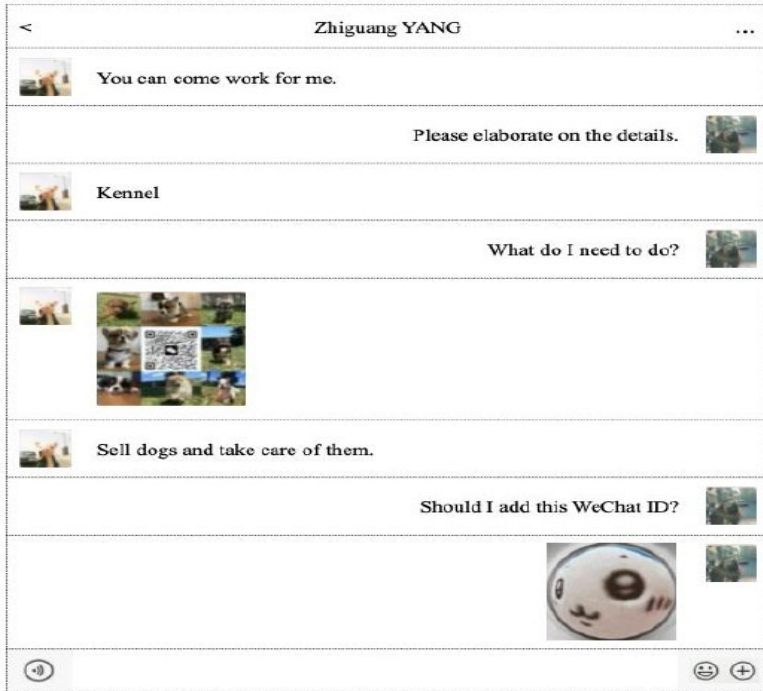
[44] The approach to be taken under s. 15AA adopts the multi-factorial test that was eschewed in *Personnel Contracting*. The multifactorial test was summarised by a Full Bench of the Commission in *Jiang Shen Cai trading as French Accent v Do Rozario* (Jiang Shen), wherein the Full Bench described the focus of the enquiry in *Hollis* as whether

the person carries on a trade or business of his or her own or is working in the business of another, the nature of the work performed and the manner of its performance, and the terms of the contract between the parties. Various indicia may be considered. They include the actual exercise, or the right to exercise, control over the putative employee, whether the worker performs work for others, whether they provide tools and equipment, whether the work can be delegated, whether the worker is remunerated by periodic wages or salary or by reference to completion of tasks, and whether the worker is presented to the world at large as an emanation of the putative employer's business. (citations omitted)

- 36 The test as referred to by the Deputy President is usefully deployed when there is no dispute about whether there was a contractual arrangement, and the question is whether the nature of the contractual arrangement is of an independent contractor or an employee. Here, the issue is whether there was a contractual arrangement at all, that is, whether there was a mutual intention to enter into a legally binding contract.
- 37 The requirement that there be a mutual intention is 'the first element essential to the existence of any contract'¹¹. Work can be performed for a variety of reasons including for work experience, family relationships and charitable purposes, without becoming a legally enforceable arrangement.
- 38 At [4.50] of *Mackens Law of Employment*, the learned authors state (citations omitted):
- ...But there are no prescribed rules (or presumptions) which define classes of case where there will be no intention to create a legal relationship. It is to be viewed objectively, having regard to the words and conduct of the parties.
- It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statement and actions happened...It is not a search for the uncommunicated subjective motives or intentions of the parties.
- In the employment context, if the putative employee is subject to control relating to the work, wages and leave entitlements are paid, superannuation contributions are made, and taxation is deducted, it would be difficult to argue contrary to the objective facts that there is no intention to create a legal relationship. Conversely if a person assists in an honorary capacity without expectation of wages and without any obligation to render any service, this suggests that there is no intention to enter into a legal relationship.
- 39 In law, a valid contract may be formed, or its existence and terms inferred, by informal conduct. The informality of the parties' dealings, and the fact that the arrangement was not reduced to a formal written contract, is not determinative of the absence of a contract¹².
- 40 The leading authority on this point is *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95. The relevant principle was stated by Gaudron, McHugh, Hayne and Callinan JJ in that case, at [24]:
- 'It is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty'. To be a legally enforceable duty there must, of course, be identifiable parties to the arrangement, the terms of the arrangement must be certain, and, unless recorded as a deed, there must generally be real consideration for the agreement. Yet '[t]he circumstances may show that [the parties] did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts'. (citations omitted)
- 41 At [25] the plurality stated that whether there was ever an intention to create contractual relations is not the subject of a prescriptive rule, but rather requires an objective assessment of the status of the alleged parties, the subject matter of the agreement, their relationship to one another and other surrounding circumstances:
- [T]he search for the 'intention to create contractual relations' requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour). The circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of any prescriptive rules. Although the word 'intention' is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties. (citations omitted)
- 42 Post contractual conduct by the parties may be taken into consideration in determining whether a contract was formed: see *EFEX Group Pty Ltd v Bennett*; per Lee J at 189 [58] citing the observations of Murphy JA (with which Pullin and Newnes JJA agreed) in *Fazio v Fazio* [2012] WASCA 72at [193] that:
- ...Such conduct may be considered for the purpose of inferring not only whether a binding agreement had been reached, but also its subject matter and the identification of its necessary terms...

Ms Chen's Evidence

- 43 The first WeChat message between Ms Chen and Mr Yang in evidence is dated 24 October 2024. The English translation is as follows:



44 The following day, 25 October 2024, Ms Chen sent a message to Mr Yang confirming her interest ‘after careful consideration’ in ‘trying my hand in management and promotional work.’ She set out her relevant prior experience and skills. Her message concludes:

I hope to create a warm and welcoming environment for your kennel and to work together with you to achieve greater goals.

Thank you!

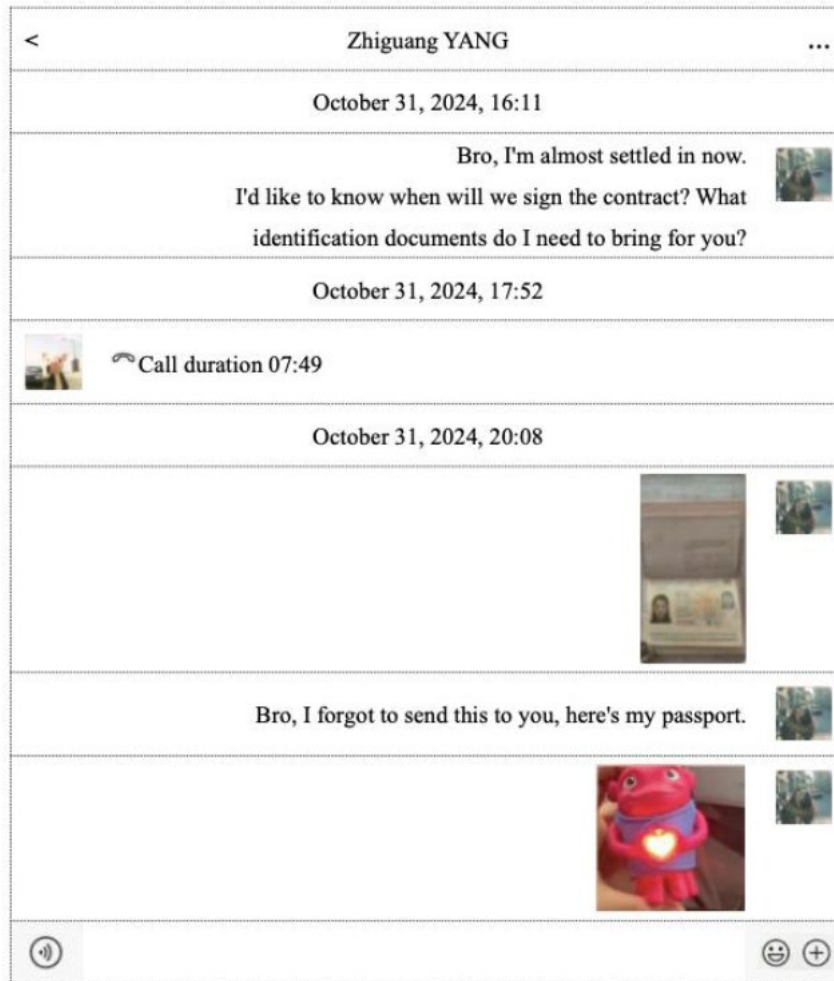
45 A few minutes later, Mr Yang and Ms Chen exchanged messages about the possibility of the Company sponsoring Ms Chen if she studied certain animal care related subjects.

46 In Ms Chen’s further messages to Mr Yang of 25 October 2024, she informed him that she would finish her exams at the end of October, could start work in November, and would vacate her current lease on 30 November.

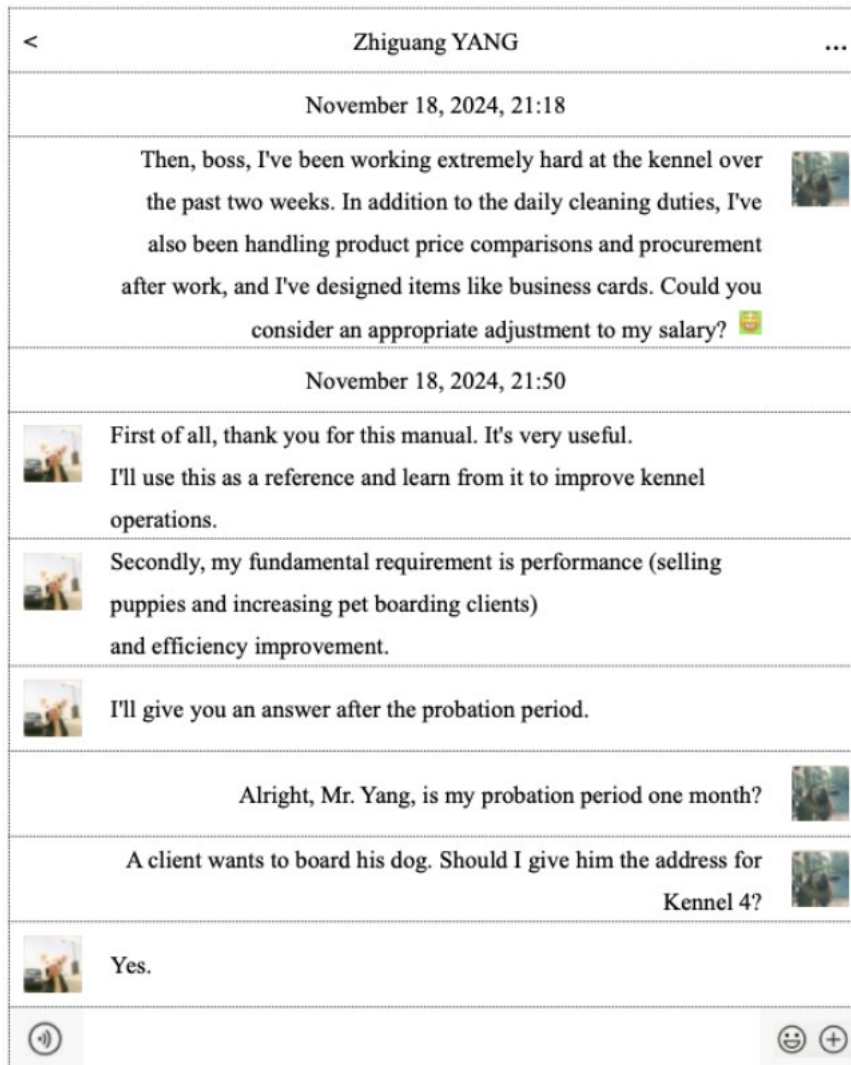
47 Mr Yang responded 🍵 .

48 The next series of messages related to ‘time and expenses’ and a work trial. The key parts are:





- 49 As can be seen from the WeChat records, Mr Yang called Ms Chen on 31 October 2024 following her enquiry about a contract. Ms Chen said that during this call Mr Yang told her that he did not have an employment contract but if she wanted one, she could prepare it herself. She did not know how to do that. No written contract was ever produced.
- 50 Ms Chen's evidence was that her first day at the kennel was 1 November 2024. She was not paid for that day, but was provided with a free meal.
- 51 On 3 November 2024, Harry invited Ms Chen to join the 'Fluffy Employee Group' WeChat group. A sample of messages from the group chat show that it was used for Harry and Monica to communicate with those in the group about the welfare of particular animals, who would be responsible for what tasks and when. A series of 'Job Content' documents which set out a sequence of tasks to be completed during 'Morning Shift: 7am – 2pm', 'Afternoon shift staff for puppies: 9am – 4pm', 'Afternoon shift assistant 9:00am – 4:00pm' and 'Shift arrangement for work for accommodation' were shared on this group chat.
- 52 Ms Chen worked for eight hours each week, without any payment, in return for the provision of accommodation. It was only if she worked more than eight hours per week, that she received any payment.
- 53 She said that how often she worked depended on the availability of other people who also worked at the kennel. When she was given a shift, it was usually for six hours. A weekly timetable or roster was shared by Harry or Monica, via the WeChat group.
- 54 When working, Ms Chen did things like feeding the puppies, changing their water, cleaning out their cages and changing the litter, letting the puppies out of their cages to play, taking photos of the puppies and bringing the puppies back into the cages again. Sometimes she was required to administer medicines. She also greeted customers who came to the kennel to pick up dogs.
- 55 On an unknown date in November 2024, Mr Yang sent Ms Chen a WeChat message. According to the English Translation, the message was asking whether Harry had given Ms Chen 'This week's salary.' Ms Chen confirmed she had received it.¹³ Then on 17 November 2024, Mr Yang asked Ms Chen for her bank account details saying 'I'll pay you the salary.' Ms Chen provided her pay ID. The following day, 18 November 2024, Mr Yang messaged that he would wait for Ms Chen at the kennel and give her cash.¹⁴
- 56 On 18 November 2024, there was the following WeChat exchange:



- 57 On 18 February 2025 Ms Chen was in China on holidays. She was due to return to Perth that day. She messaged Mr Yang to ask if he would lend her his car, as she was about to start back at university, and Curtin was a long distance from the kennel. She indicated that if Mr Yang could not lend the car, Ms Chen would move closer to the campus. Mr Yang agreed to arrange a car for Ms Chen.
- 58 Amongst the WeChat messages Ms Chen provided to the Court are instances where Ms Chen has queried her hours and pay with the managers, Monica and Harry, because payment had been late. These show that the managers required Ms Chen to work at least eight hours per week for her accommodation, that they scheduled shifts based on her availability and the business's requirements and that she was directed to take lunch breaks limited to 30 minutes. Monica's messages refer to 'last week's pay', 'this week's pay', 'salary' and 'weekly salary' to be paid for hours worked.
- 59 The payments Ms Chen received from the Company were calculated on the basis of a flat hourly rate for the number of hours she worked each week.

Mr Yang's Evidence

- 60 Mr Yang emphasised that he had known Ms Chen and had a few conversations with her before raising the prospect of her working at the kennel. He said that what he initially discussed with Ms Chen was that if she was willing to come and help at the kennel, the Company would help her later, in the context of her studying in Australia. However, he was not interested in formally employing her, as she did not have any relevant background, prior experience or qualifications, and was not capable of performing the role the Company required of employees.
- 61 In cross-examination, Mr Yang accepted that he did not expressly state to Ms Chen that she would be working as a volunteer, but he thought that she understood that was the position.
- 62 Mr Yang explained that Ms Chen only worked when it suited her. She did not work on a full-time basis and she was not forced to work for eight hours. He said she only did 'very small jobs' like helping to check on the dogs, making sure the dogs were safe and that the dogs had water. Mr Yang agreed that Ms Chen assisted with the tasks listed in the Job Content documents shared by Harry and Monica in the WeChat group chat, but said that these tasks were not very difficult, and Ms Chen's role was to assist the other employees who were primarily responsible for performing the tasks. He said that she needed to be supervised and guided by qualified and experienced employees in all tasks.

Conclusion About the Arrangement

- 63 Objectively assessed, the communications between Ms Chen and Mr Yang in the lead up to 1 November 2024 indicate an intention to create an employment relationship. That is because the communications:
- (1) Occur in a context where there was no existing relationship between the parties which would explain why Ms Chen would perform work for the Company;
 - (2) are initiated by Mr Yang's statement 'You can come work for me' to which Ms Chen seeks details about what she needs to do¹⁵;
 - (3) involve Ms Chen detailing her relevant qualifications and experience, akin to an application for employment¹⁶;
 - (4) include Mr Yang referring to remuneration 'during the internship period, the hourly wage is 16'¹⁷;
 - (5) include Mr Yang referring to 5% sales commission¹⁸;
 - (6) include Ms Chen asking when she will sign 'the contract'¹⁹.
- 64 I also accept Ms Chen's evidence that after she messaged Mr Yang about signing a contract, she had a telephone discussion with him, in which he invited her to supply a written contract. Ms Chen's evidence in this regard was not challenged. Mr Yang accepted there was a telephone conversation following Ms Chen's message about the contract but gave no alternative version of what was said. A discussion about a contract is strongly indicative of an intention to create legal relations.
- 65 Mr Yang's subjective intention that there not be a formal employment relationship is not relevant to the assessment of whether an employment contract was formed. Nor is it relevant that Mr Yang considered Ms Chen was unqualified to perform particular roles as employee, or that she required supervision.
- 66 The parties' conduct after 1 November 2024 is also consistent with the creation of a casual employment contract. In particular,:
- (a) Ms Chen performed work under the direction of the Company's managers and other employees;
 - (b) Mr Yang made reference to a probationary period. A probationary period would be unnecessary if no legally binding contract existed;
 - (c) Harry and Monica corresponded with Ms Chen about payment of 'wages' and 'salary';
 - (d) Ms Chen was rostered to work and took meal breaks as directed; and
 - (e) Ms Chen was paid for hours worked in excess of eight hours per week, at a flat rate based on the hours she worked.
- 67 On the evidence before me I am comfortably satisfied that an employment relationship was formed.

Did the Miscellaneous Award 2020 apply to the Company and Ms Chen?

- 68 The Award's coverage is set out in cl 4:

4. Coverage

- 4.1 Subject to clauses 4.2, 4.3, 4.4 and 4.5 this award covers employers throughout Australia and their employees in the classifications listed in clause 15—Minimum rates who are not covered by any other modern award.
 - 4.2 The award does not cover managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.
 - 4.3 The award does not cover employees excluded from award coverage by the [FW Act].
 - 4.4 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.
 - 4.5 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.
 - 4.6 This award covers any employer which supplies on-hire employees in classifications set out in clause 12—Classifications and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This subclause operates subject to the exclusions from coverage in this award.
 - 4.7 This award covers employers which provide group training services for apprentices and trainees under this award and those apprentices and trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This subclause operates subject to the exclusions from coverage in this award.
- 69 Neither party identified any other award, modern enterprise award, enterprise instrument, State reference public sector modern award, or State reference public sector transitional award which covered the Company and Ms Chen.
- 70 There is no dispute that Ms Chen was neither a managerial nor a professional employee.
- 71 Ms Chen was not excluded from award coverage by the FW Act.
- 72 The Award's listed classifications in cl 15.1 are Level 1 through to Level 4.
- 73 These classifications are described in cl 12:

12. Classifications

- 12.1 A description of the classifications under this award is set out below.

(a) Level 1

An employee at this level has been employed for a period of less than 3 months and is not carrying out the duties of a level 3 or level 4 employee.

(b) Level 2

An employee at this level has been employed for at least 3 months and is not carrying out the duties of a level 3 or level 4 employee.

(c) Level 3

An employee at this level has a trade qualification or equivalent and is carrying out duties requiring such qualifications.

(d) Level 4

An employee at this level has advanced trade qualifications and is carrying out duties requiring such qualifications or is a sub-professional employee.

74 Mr Yang agreed that if Ms Chen was formally engaged as an employee (which he denied), the Award would apply.

75 I am satisfied that at all times between 1 November 2024 and 31 January 2025, Ms Chen was an employee to whom the Award applied and was entitled to be paid at the Award Level 1 rate of pay. From 1 February 2025 to 29 March 2025 Ms Chen was an employee to whom the Award applied and was entitled to be paid at the Award Level 2 rate of pay.

What Amount was the Company Required to Pay?

76 Ms Chen provided a table setting out her calculations of what she claimed she was entitled to be paid applying the Award Level 1 rate of pay, with casual loading and weekend and public holiday penalties to 31 January 2025 and the Award Level 2 rate of pay with casual loading and weekend penalties from 1 February 2025 to 29 March 2025.²⁰ Her table also showed the amounts she was actually paid in cash. Her calculations are based on shifts of six hours, and the table lists the days each shift was worked.

77 Ms Chen confirmed in her evidence that the dates listed in the table are the dates that she worked.

78 Based on Ms Chen's table, she worked a total of 65 shifts or 390 hours and was entitled to receive \$13,086.42 gross (less applicable tax) but was paid \$7,200.00 net.

79 The total amount Ms Chen claims she was underpaid is \$9,387.50. However, to arrive at this amount, Ms Chen has added a further 148 hours of 'accommodation work.' When asked about what shifts she worked, Ms Chen confirmed that the dates listed in her table were the dates that she worked. The 'accommodation amount' was added to her calculations because of something she was advised by the Fair Work Ombudsman²¹. However, the 'accommodation work' amounts were not itemised by days or hours worked, and there was no evidence that Ms Chen worked any hours other than those listed in the table.

80 If the 'accommodation work' amounts are not included, the underpayment amount is \$5,886.42.

81 Ms Chen's calculation of the Company's underpayment does not make provision for any deduction for the benefit of the accommodation provided to her. When Ms Chen agreed to work for the Company, she also agreed to pay for weekly accommodation by working for the Company for eight hours at the rate of \$16 per hour. In effect, she agreed to pay \$128 per week for accommodation.

82 Section 324(1) of the FW Act provides that an employer may deduct an amount from an amount payable to an employee in accordance with s 323(1) if:

- (a) The deduction is authorised in writing by the employee and is principally for the employee's benefit.

83 Section 324(2) of the FW Act says:

- (2) An authorisation for the purposes of paragraph (1)(a):

- (a) must specify:

- (i) for a single deduction—the amount of the deduction; or
(ii) for multiple or ongoing deductions—whether the deductions are for a specified amount or amounts, or for amounts as varied from time to time; and

- (aa) must include any information prescribed by the regulations; and

- (b) may be withdrawn in writing by the employee at any time.

84 Regulation 2.12A(2) of the *Fair Work Regulations 2009* (Cth) (**FW Regulations**) says:

Multiple or ongoing deductions

- (2) For the purposes of paragraph 324(2)(aa) of the Act, a written authorisation by an employee under subparagraph 324(2)(a)(ii) of the Act for multiple or ongoing deductions must also include the following:

- (a) the purpose of the deductions;

- (b) if the deductions are for a specified amount or amounts—those amounts;

- (c) either:

- (i) the dates on which the deductions are to be made; or

- (ii) the date after which, and the frequency with which, the deductions are to be made;

- (d) the name of the person to whom the amounts of the deductions are to be given.

- 85 In the written WeChat exchanges between Ms Chen and Mr Yang, Harry and Monica, it is apparent that Ms Chen agreed to work eight hours per week for accommodation.²² On 3 November 2024, Mr Yang said in a message that the ‘work for accommodation’ would start ‘next week’ to which Ms Chen replied ‘Okay, bro.’²³
- 86 The written authorisation given by Ms Chen obviously included the purpose of the deduction, being for accommodation, and the deductions were clearly for Ms Chen’s benefit, as she received the accommodation.
- 87 However, some essential information is missing from the written exchanges. They do not specify the date after which, and the frequency with which, the deductions were to be made, as required by the FW Regulations. Nor do the written exchanges specify the name of the person to whom the deductions were to be given, as required by the FW Regulations.
- 88 Had there been evidence of a written authorisation from Ms Chen complying with the FW Act and the FW Regulations, the Company would have been entitled to deduct \$128 per week from any wages due to Ms Chen. Over the period 1 November 2024 to 29 March 2025, a period of 21 weeks, or \$2,688 worth of deductions might have been able to be made.
- 89 Under s 545(3) of the FW Act, the Court *may* order an employer to pay *an amount* to, or on behalf of an employee of the employer if the Court is satisfied that:
- (a) The employer was required to pay *the amount* under this Act or a fair work instrument; and
 - (b) The employer has contravened a civil remedy provision by failing to pay *the amount*.
- (emphasis added)
- 90 Because the Company has not established it was entitled under s 324(1) of the FW Act to make deductions for accommodation, the agreed accommodation cost cannot be brought into account in determining the amount the Company was required to pay to Ms Chen under the Award.
- 91 Therefore, the amount for the purpose of s 545(3) is \$5,886.42 gross.
- 92 The effect of Ms Chen’s evidence is that she was paid \$7,200 as a gross amount, without any tax being withheld. It may be that as a result of my findings that Ms Chen was an employee, the Company will be required to withhold tax on the total amount of \$13,086.42 that was payable to Ms Chen.
- 93 The claimant has also applied for pre-judgment interest. Under s 547 of the FW Act, the Court must include an amount of interest on the sum ordered, unless good cause is shown to the contrary. Ordinarily, I would apply the pre-judgment interest rate of 8.35% in accordance with the Federal Court’s ‘Interest on Judgments’ Practice Note. However, because Ms Chen received the benefit of cash payments without the deduction of income tax, and because she received the benefit of accommodation which, as a result of my orders, she has not paid what she agreed to pay, in this case I would apply a 3% interest rate from the date the employment ended until the date of judgment. On my calculation, the interest payable is \$147.

Orders and Disposition

- 94 For the above reasons, I am satisfied that the Company was required to pay \$5,886.42 less applicable tax to Ms Chen and that the Company contravened s 45 of the FW Act, being a civil penalty provision, by its failure to pay this amount. Accordingly, I will order that the respondent pay to the claimant \$5,886.42 less any tax that is required to be withheld.
- 95 I will also order that, pursuant to s 547 of the FW Act, the respondent is to pay to the claimant interest on the judgment sum at 3% per annum from 29 March 2025 to the date of judgment in the amount of \$147.

R. COSENTINO

INDUSTRIAL MAGISTRATE

¹ FW Act s 544.

² FW Act s 12.

³ FW Act s 545(3).

⁴ The Award cl 11.1(a), cl 15.1 and cl 20.

⁵ Exhibit R1, exhibit R2 and exhibit R3.

⁶ Exhibit C3.

⁷ Exhibit C3.

⁸ Exhibit C4.

⁹ Exhibit C2.

¹⁰ FW Act s 42.

¹¹ Sappideen et al, *Mackens Law of Employment* (9th ed, 2022) (**Mackens Law of Employment**) at [4.50].

¹² *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; (2001) 117 FCR 424 (**Branir**), at [369].

¹³ Exhibit C3, message 15.

¹⁴ Exhibit C3, message 16.

¹⁵ Exhibit C3, message 1.

¹⁶ Exhibit C3, message 2.

¹⁷ Exhibit C3, message 4.

¹⁸ Exhibit C3, message 4.

¹⁹ Exhibit C3, message 6.

²⁰ Exhibit C1.

²¹ Exhibit C1, ts 12.

²² Exhibit C3, messages 10, 13, 14.

²³ Exhibit C3, message 62.

RIGHT OF ENTRY PERMITS—Matters dealt with—

2026 WAIRC 00050

APPLICATION TO ISSUE TROY SMART WITH A RIGHT OF ENTRY PERMIT

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES THE PLUMBERS AND GASFITTERS EMPLOYEES' UNION OF AUSTRALIA, WEST AUSTRALIAN BRANCH, INDUSTRIAL UNION OF WORKERS

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM COMMISSIONER T EMMANUEL

DATE FRIDAY, 30 JANUARY 2026

FILE NO/S ROE 160 OF 2025

CITATION NO. 2026 WAIRC 00050

Result Application discontinued by leave

Representation

Applicant Mr P Coffey (as agent)

Respondent N/A

Intervenor Mr J Carroll (of counsel)

Order

WHEREAS on 20 November 2025 the Registrar of the Western Australian Industrial Relations Commission (**Registrar**) filed a Form 1A application to intervene in these proceedings;

AND WHEREAS the Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers (**PGEU**) did not oppose or seek to be heard about the Registrar's Form 1A application to intervene;

AND WHEREAS the Commission accepted the Registrar's submissions about why leave to intervene should be granted and on 5 December 2025 leave was granted, with reasons to be provided;

AND WHEREAS the Commission's power to grant leave to intervene is set out in s 27(1)(k) of the *Industrial Relations Act 1979* (WA). The principles to apply are well-established and were recently set out in *Aaron Anderton v WorkSafe Commissioner* [2025] WAIRC 00702 at [12], that approach being consistent with the reasoning of the Commission in Court Session in *Western Australian Municipal, Administrative, Clerical and Services Union of Employees; The Construction, Forestry, Mining and Energy Union of Workers; Western Australian Municipal, Clerical and Services Union of Employees -v- (Not Applicable), The Construction, Forestry, Mining and Energy Union of Workers - SECTION 29B PARTY, Local Government, Racing and Cemeteries Employees Union (WA) - INTERVENOR; (Not Applicable), Western Australian Municipal, Administrative, Clerical and Services Union of Employees (SECTION 29B PARTY), Racing and Cemeteries Employees Union (WA) - SECTION 29B PARTY* [2024] WAIRC 00057; (2024) 104 WAIG 165;

AND WHEREAS clearly the Registrar has a sufficient interest to intervene to produce evidence and make submissions about the question of whether application ROE 160 of 2025 has been validly made. Due to her obligations under Division 4 of Part II of the *Industrial Relations Act 1979* (WA), the Registrar is best placed to have access to evidence relevant to the question of whether a person is the secretary of an organisation registered under Division 4 of the *Industrial Relations Act 1979* (WA). She also has a statutory responsibility to ensure applications made to the Commission are made in accordance with the *Industrial Relations Act 1979* (WA). Accordingly, the Commission is satisfied that the Registrar has a sufficient interest in this matter that she should be heard, and for these reasons leave to intervene was granted;

AND WHEREAS at the hearing in this matter on 30 January 2026, the PGEU asked the Commission to discontinue application ROE 160 of 2025;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –
 THAT application ROE 160 of 2025 is discontinued by leave.

[L.S.]

(Sgd.) T EMMANUEL,
 Commissioner.

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2026 WAIRC 00041

APPEAL AGAINST THE DECISION OF COMMISSIONER TO TAKE REMOVAL ACTION ON 3 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRETT MORGAN PALMER

APPLICANT

-v-

COMMISSIONER OF THE WESTERN AUSTRALIAN POLICE

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T B WALKINGTON

COMMISSIONER C TSANG

DATE

FRIDAY, 23 JANUARY 2026

FILE NO/S

APPL 4 OF 2025

CITATION NO.

2026 WAIRC 00041

Result

Application to tender new evidence dismissed

Representation**Appellant**

Mr R French of counsel on behalf of the Appellant (by written submission)

Respondent

Ms A Miller of counsel on behalf of the Respondent (by written submission)

Order

THE Commission, pursuant to the powers conferred on it under the *Police Act 1892* (WA) hereby orders –

THAT the application under s 33R of the *Police Act* filed by the respondent on 19 December 2025 be dismissed.

[L.S.]

(Sgd.) R COSENTINO,
 Senior Commissioner,
 By the Commission.

2026 WAIRC 00038

APPEAL AGAINST THE DECISION OF COMMISSIONER TO TAKE REMOVAL ACTION ON 3 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRETT MORGAN PALMER

APPLICANT

-v-

COMMISSIONER OF THE WESTERN AUSTRALIAN POLICE

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T B WALKINGTON

COMMISSIONER C TSANG

DATE

FRIDAY, 23 JANUARY 2026

FILE NO.

APPL 4 OF 2025

CITATION NO.

2026 WAIRC 00038

Result	Directions issued
Representation	
Appellant	Mr D Weekley on behalf of Mr Brett Morgan Palmer
Respondent	Ms A Miller on behalf of the Commissioner of the Western Australian Police

Direction

The Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

- (1) THAT the time for the appellant to file and serve a written outline of submissions and a list of authorities be extended to 4:00 p.m. on 27 January 2026.
- (2) THAT the time for the respondent to file and serve a written outline of submissions and a list of authorities be extended to 4:00 p.m. on 4 February 2026.
- (3) THAT the parties have liberty to apply.

(Sgd.) R COSENTINO,
Senior Commissioner,
By the Commission.

[L.S.]

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2026 WAIRC 00051

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ANTONIO NICOLA MESSERE

APPLICANT

-v-

SHIRE OF MORAWA WESTERN AUSTRALIA

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE FRIDAY, 30 JANUARY 2026
FILE NO/S U 45 OF 2025
CITATION NO. 2026 WAIRC 00051

Result	Orders issued
Representation	
Applicant	Mr A Messere on his own behalf
Respondent	Mr S Pack (of counsel) on behalf of the Shire of Morawa Western Australia

Order

HAVING heard from Mr A Messere, applicant, and Mr S Pack (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT there is no requirement to file a Form 11 – Notification of Representative Commencing or Ceasing to Act in relation to any counsel appearing for the respondent in these proceedings; and
- (2) THAT the applicant’s application for discovery of documents in category 8 listed in the Annexure dated 1 December 2025 to the applicant’s discovery application be and is hereby dismissed.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2026 WAIRC 00052

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DANIEL ZICCARDI

APPLICANT

-v-

SKILLFORCE RECRUITMENT PTY LTD

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE FRIDAY, 30 JANUARY 2026
FILE NO. B 52 OF 2025
CITATION NO. 2026 WAIRC 00052

Result Application dismissed
Representation
Applicant Mr D Ziccardi
Respondent Mr T Lettenmaier (of counsel)

Order

HAVING heard from Mr D Ziccardi on his own behalf, and Mr T Lettenmaier (of counsel) on behalf of the respondent at the Directions Hearing listed on Friday, 30 January 2026 at 2:00pm, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application B 52 of 2025 be, and by this order is, dismissed.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2026 WAIRC 00053

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2026 WAIRC 00053
CORAM : SENIOR COMMISSIONER R COSENTINO
HEARD : THURSDAY, 29 JANUARY 2026
DELIVERED : FRIDAY, 30 JANUARY 2026
FILE NO. : U 98 OF 2025
BETWEEN : DARRELL CURNOW
Applicant
AND
SHIRE OF COOROW
Respondent

CatchWords : INDUSTRIAL LAW (WA) - Unfair dismissal claim - section 27(1)(a) - Show cause why proceedings ought not to be dismissed - want of prosecution - delay, default and indifference - inability to fairly hear and try claim - justice requires claim be dismissed

Legislation : *Industrial Relations Act 1979* (WA)

Result : Application dismissed

Representation:
Counsel:
Applicant : No appearance
Respondent : Mr A Sinanovic (of counsel) on behalf of the Shire of Coorow
Solicitors:
Respondent : Kennedys

Case(s) referred to in reasons:

Acosta v Daring Holdings Pty Ltd trading as All Bend Engineering [2005] WAIRC 03111; (2005) 85 WAIG 03111

Monaveen Pty Ltd v ABB Service Pty Ltd [2007] WASCA 273

The Hancock Family Memorial Foundation Ltd v Fieldhouse [2005] WASCA 93; (2005) 30 WAR 398

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2013] WAIRC 00754; (2013) 93 WAIG 1431

The Australian Workers' Union West Australian Branch Industrial Union of Workers v Barmingo Pty Ltd Plutonic Project [2000] WAIRC 13162

Rodnan v Gwilliam and Anor [2005] WASCA 209 [42].

Smith v Bank of Western Australia Limited [2010] WASCA 15

Reasons for Decision

- 1 On 29 January 2026 I made orders dismissing this claim pursuant to section 27(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**). These are my reasons for that order.
- 2 Section 27(1)(a) empowers the Commission to dismiss any matter before it at any stage of the proceedings if satisfied that:
 - (i) The matter is trivial; or
 - (ii) That further proceedings are not necessary or desirable in the public interest;
 - (iii) That the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
 - (iv) That for any other reason that the matter or part should be dismissed or the hearing of it discontinued, as the case may be.
- 3 The power to dismiss a matter under s 27(1)(a) is to be exercised sparingly and with caution: *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2013] WAIRC 00754; (2013) 93 WAIG 1431.
- 4 This matter was listed for the applicant to show cause why his claim should not be dismissed pursuant to s 27(1)(a) of the IR Act for want of prosecution or alternatively for failure to comply with the Commission's orders.
- 5 The relevant chronology is as follows:
 - (a) The termination of the applicant's employment took effect on 6 August 2025. The reason for the termination was that the applicant was alleged to have engaged in aggressive and unacceptable behaviour in breach of the Employee Code of Conduct, specifically in his interactions with his supervisor on 23 July 2025.
 - (b) He filed his unfair dismissal application with the Commission on 1 September 2025.
 - (b) The application was listed for a conciliation conference on 9 October 2025. The applicant was granted leave to appear remotely at the conciliation conference.
 - (c) On 24 September 2025, the applicant sought an adjournment of the conciliation conference. He advised my chambers that he was unavailable to attend on 9 October 2025 due to work commitments, having secured alternative employment.
 - (d) The conciliation conference scheduled for 9 October 2025 was vacated and relisted on 23 October 2025.
 - (e) On 6 October 2025, the applicant sought another adjournment of the conciliation conference. On 20 October 2025, the conference scheduled for 23 October 2025 was vacated and relisted for 31 October 2025 to accommodate the applicant's availability.
 - (f) The conciliation conference took place on 31 October 2025 but did not result in resolution of the applicant's claim.
 - (g) On 3 November 2025, my chambers notified the parties that the application was listed for a directions hearing on 27 November 2025. The applicant requested to appear at the directions hearing remotely and this request was granted.
 - (h) On 26 November 2025, the respondent's lawyers wrote to the applicant ahead of the directions hearing asking the applicant how many witnesses he intended to call and how long he anticipated he would need to file witness statements to assist with scheduling the matter and ascertaining how many days would be needed for a final hearing.
 - (i) The applicant responded to the respondent's lawyers on 27 November 2025 to the effect that he was unable to say how many witnesses he would call and that he may have to seek a subpoena for one witness. This response was forwarded to my associate on the same day at 11:33 a.m.
 - (j) The directions hearing was held at 2:15 p.m. on 27 November 2025. The applicant failed to attend the directions hearing either in person or remotely.
 - (k) Orders were made at the directions hearing for the applicant to file outlines of witness evidence and any documents he would rely upon at the final hearing by no later than 5 January 2026. The orders gave the applicant a generous period of time to prepare and file these documents. The orders adjourned the directions hearing to 29 January 2026 and granted the applicant leave to appear at the adjourned directions hearing remotely.
 - (l) Also on 27 November 2025, my chambers sent an email to the applicant attaching the directions made on that day,

the Commission's Fact Sheet about hearings, its Fact Sheet about evidence and Practice Note 9 of 2021 concerning outlines of witness evidence. My chambers also sent the applicant notice of the directions hearing on 29 January 2026 at 10.00am.

- (m) On 29 November 2025, the applicant emailed his thanks to my chambers for the 27 November 2025 emails.
 - (n) Despite having received copies of the directions issued on 27 November 2025, the applicant failed to comply with them. He did not file any outlines of witness evidence or documents he would seek to rely upon at hearing. To date, he has still not done so.
 - (o) On 6 January 2026, the respondent's lawyers wrote to the Commission noting the applicant's default in compliance with the orders and requesting that the matter be listed for a hearing for the applicant to show cause why the claim ought not be dismissed for want of prosecution or for default in compliance with the orders.
 - (p) On 6 January 2026, the Commission emailed the parties indicating that the respondent's lawyer's email would be treated as an application for the dismissal of the proceedings and the applicant was directed to file an affidavit setting out the facts which he relies upon to explain his non-compliance with the orders made on 27 November 2025, by no later than 16 January 2026.
 - (q) The applicant filed a statutory declaration on 16 January 2026. In it, he states that he understood that if there was more evidence he was relying on, he would have to file it in accordance with the orders but all of the evidence he had, he had already provided to the Commission. He concludes in his statutory declaration 'I do apologise for any miss understandings [sic] as I am not a lawyer and have to juggle time to make things work.'
 - (r) On the morning of 29 January 2026, the applicant contacted my chambers to confirm that he intended to attend the hearing that day in person.
 - (s) Despite this, the applicant did not attend the hearing at the time listed of 10.00am. The hearing proceeded in his absence.
 - (t) While the hearing was in progress, the Commission received Mr Curnow's voicemail indicating that he was 'trying to find a place to park.'
 - (u) The applicant arrived at the Commission after the conclusion of the hearing on 29 January 2026.
- 6 It has long been recognised that what is known as want of prosecution in civil courts is a ground for invoking the power to dismiss under s 27(1)(a)(ii) and s 27(1)(a)(iv). The principles that apply are the same principles that apply in the civil courts: *The Australian Workers' Union West Australian Branch Industrial Union of Workers v Barmingo Pty Ltd Plutonic Project* [2000] WAIRC 13162.
- 7 The principles were restated by Newnes JA in *Smith v Bank of Western Australia Limited* [2010] WASCA 15 [78]:

The principles applicable to an application to dismiss an action for want of prosecution were set out in *The Hancock Family Memorial Foundation Ltd v Fieldhouse* [2005] WASCA 93; (2005) 30 WAR 398 [99] - [100] as follows:

The general principles... include consideration of these points:

- (a) whether any default has been intentional and contumelious, for example, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or
- (b) whether there has been inordinate and inexcusable delay on the part of the plaintiff or his or her lawyers, and, if so
- (c) whether such delay:
 - (i) will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action; or
 - (ii) is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

But as with so many areas in the law, it is one thing to identify general principles and another properly to apply them. It should always be borne in mind that the power to dismiss for want of prosecution calls for the exercise of discretion. It is a discretion that must be exercised judicially but is otherwise open. It exists to serve the ends of justice. Caution should therefore be employed so that these general principles are ... not elevated to the level of a 'test' or a 'rule'. They are more appropriately to be seen as guidelines indicating some of the matters to which the court should have regard in exercising the discretion. The court's discretion to dismiss an action for want of prosecution is not fettered by any absolute or inflexible rules. There are however five matters to be considered which will usually be relevant to the court's decision to exercise the discretion:

- the length of the delay;
- the explanation for the delay;
- the hardship to the plaintiff if the action is dismissed and the cause of the action left statute-barred;
- the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay; and
- the conduct of the defendant in the litigation.

Ułowski v Miller [1968] SASR 277, 280; *Dzienciol v Logie Brae Pty Ltd*, unreported, FCt SCt of WA, Library No 980078, 25 February 1998.

- 8 The critical issue is whether allowing the applicant's case to proceed will inflict unnecessary injustice on the respondent: *Smith* per Pullin JA at [18].
- 9 It is the cumulative effect of delay that needs to be considered. That is, the delay from the time of inception of the proceedings to the time the application for dismissal is made. The Commission should not compartmentalise the assessment of prejudice by reference to discrete periods: *Monaveen Pty Ltd v ABB Service Pty Ltd* [2007] WASCA 273 [25], [42] and [61].
- 10 It is the applicant's responsibility to pursue and progress his claim: *Acosta v Daring Holdings Pty Ltd trading as All Bend Engineering* [2005] WAIRC 03111; (2005) 85 WAIG 03111 at [30].
- 11 Expedition is especially desirable in unfair dismissal cases. Ass Chief Commissioner Beech said in *Acosta* [22] – [24]:
- 22 It should be well understood that claims of unfair dismissal should be dealt with promptly. This is largely because reinstatement is the primary remedy under the *Industrial Relations Act, 1979*. The Commission must deal in practical solutions and reinstatement is a more difficult remedy to order when much time has elapsed since the dismissed employee was last in the workplace. Even when, as it is here, reinstatement is not claimed that does not mean that a claim of unfair dismissal can just languish at the applicant's choosing. Reinstatement is the primary remedy prescribed under the Act and the Commission is still obliged to consider it even if it is not sought.
- 23 Claims of unfair dismissal must therefore be dealt with sooner, not later. The Commission has consistently held so on many previous occasions (see *Culverhouse v John Septimus Roe Anglican Community School* (1995) 75 WAIG 1960 where two and a half years passed because the employee elected to first pursue an alternative remedy through the internal Anglican Church processes and was ultimately unsuccessful; *Lewicki and Others v H.B. Brady Co Pty Ltd* (1990) 70 WAIG 4143 where the applicants through their agent contributed to a year and half's delay, leading to an overall delay of three and a half years; *Taylor v S.G.S. Australia Pty Ltd* (1993) 73 WAIG 3483 where Mr Taylor did not lodge his claim until eighteen months after the dismissal; *MacNamara v Robert Geoffrey Baker t/a Bob's Lawn and Garden Service* (1994) 74 WAIG 2387 where the applicant did not request a hearing and eighteen months passed and the application was discontinued by the Commission. A similar conclusion was reached by the Industrial Relations Commission of SA referring to a delay of approximately eleven months between the employee seeking advice and lodging his claim, nine months of which was clearly the responsibility of the employee (*SA Health Commission v Gibbons* (1995) 61 IR 1 at 7). In *Jose v Milne Feeds Pty Ltd* (1996) 76 WAIG 2459 a further delay of ten months was seen as critical and in *Swinden v Vessey Chemicals (WA) Pty Ltd* (1989) 71 WAIG 766 a delay of fifteen months in prosecuting a claim was held to be too long.
- 24 For the employer, too, who is obliged to defend a claim that (usually) is seen by the employer as unfounded, it is important that such claims be dealt with promptly. It can be quite time consuming, and even expensive both in time and money, to defend a claim; all the more reason for it to be dealt with promptly.
- 12 There is no doubt that this matter is progressing at a slow pace and without the speed warranted in unfair dismissal claims. It is now five months since the application was filed and, primarily because of the applicant's failure to comply with the 27 November 2025 orders, it is far from being ready for hearing.
- 13 The slow progress of the claim is due in some part to the applicant's requests to defer the compulsory conciliation conference. His requests for adjournments were ultimately acceded to by the respondent and the Commission. I do not suggest the delays in the conciliation conference taking place are not adequately explained. However, having indulged the applicant's requests to delay the conciliation conference, there was then a heightened responsibility on the applicant to progress his claim expeditiously, if he intended to prosecute it, once conciliation failed to resolve it.
- 14 The applicant did not explain his failure to attend the directions hearing on 27 November 2025 at all. The result of having failed to attend the directions hearing is that the Commission was in a position where it could not list the matter for hearing on that date because it was not known how many witnesses the applicant intended to call or the nature of the evidence he would be relying upon. Had the applicant been in attendance, these things would have been explored with him, and a hearing date could likely have been listed at that time. His failure to attend the directions hearing again slowed the progress of the case.
- 15 The applicant has not adequately explained his failure to comply with the orders of 27 November 2025. His statutory declaration simply says that he was of the understanding that if there was more evidence in light of the evidence already provided, he would file it in compliance with the orders. However, this explanation does not sit easily with the fact that the applicant was provided with clear and comprehensive information concerning the filing of outlines of witness evidence in the form of the Commission's Practice Note and Fact Sheets. For example, the Evidence Fact Sheet says:
- An outline of evidence is a summary of evidence that a witness will give at the hearing. For example, if a party calls three witnesses, there should be three separate documents explaining what evidence each of those witnesses will give. Each outline of evidence should relate to one witness only and should be titled 'Outline of evidence for [witness name],' and it should explain what evidence that witness will give in the witness box at the hearing.
- ...if it is your claim, and you want to give evidence, you should file an outline of evidence for yourself. This outline of evidence should set out what you will say in the witness box, and it should explain any documents that you ask the Commission to consider. Those documents should then be labelled and attached to the outline of evidence. You should file an outline of evidence for every witness you want to call.
- 16 Further, while the statutory declaration refers to 'evidence already provided', the applicant has not at any stage filed any documents which are apparently his evidence relevant to his unfair dismissal claim or the evidence of any other witness. The only document the applicant has filed is his Form 2 - Unfair Dismissal Application. It is scant. It refers to the chronology leading to his dismissal and broadly alleges that the dismissal was unfair, but it does not articulate either:

- (a) his version of the events of 23 July 2025 which relate to the allegations of misconduct which were the reasons for his dismissal; or
- (b) why he says the dismissal is harsh, unjust, or unreasonable other than to say that the leading hand swore first and that he did not have a support person present during disciplinary meetings.
- 17 Prior to the conciliation conference, the applicant emailed to my chambers several images he wanted to refer to at the conciliation conference. These were:
- (a) a photograph of two reticulation risers;
- (b) A screenshot of an undated text message from a co-worker;
- (c) A screenshot of a headline in the Guardian Geraldton;
- (d) A photograph of part of what appears to be a rubbish tip;
- 18 Aside from the photograph in (a), none of the other images appear to have any connection to the events of 23 July 2025.
- 19 In an email to my chambers of 31 October 2025, ahead of the conciliation conference, the applicant set out his reply to four documents which were attached to the respondent's Response, and which concerned performance or conduct issues raised with him prior to July 2025. He re-attached the documents from the Response.
- 20 What this boils down to is that as of 16 January 2026, some five months after the application was filed, the applicant's case was undeveloped, unarticulated, unadvanced and barely progressed. It is still not clear what applicant's case is or what issues need to be decided.
- 21 The applicant has approached his claim as if it is sufficient for him to merely notify the Commission that he is aggrieved by the decision to terminate his employment in the hope that the Commission might conduct some sort of inquisitorial process which might uncover some basis for it being overturned.
- 22 This approach is obviously highly prejudicial to the respondent. It is impossible for the respondent to know the case it has to meet and nothing that has occurred over the last five months has given any glimmer of hope that this position would be remedied or rectified.
- 23 In short, the applicant's conduct of this case has given rise to a substantial risk that it is not possible to have a fair trial of the issues in this action.
- 24 I am required to consider the hardship to the applicant if the action is dismissed. This factor does not outweigh my inclination to dismiss the proceedings for two reasons. First, I am unable to glean anything from the documents and information the applicant has submitted to date that show his claim has any merit. To the contrary, both the application and the applicant's subsequent correspondence indicates his claim is without merit in the face of the matters put in the Response.
- 25 Second, the applicant has obtained alternative employment. This has been the reason he has sought to appear remotely at various steps in these proceedings, his reason for seeking to delay the conciliation conference and is also alluded to as part of his reasons for not complying with the 27 November 2025 orders by his reference to having to 'juggle time to make things work'.
- 26 I acknowledge that the applicant was not heard in relation to the respondent's dismissal application except to the extent that I considered his 16 January 2026 statutory declaration. However, he did have the opportunity to be heard. He was given more than three weeks' notice of the fact of the show cause hearing, the time of the hearing and the place. He had been granted leave to appear remotely. He had ample opportunity to be heard. Section 27(1)(d) of the IR Act enables the Commission to proceed to hear and determine a matter in the absence of any party who has been duly served with notice of the proceedings. The applicant had the opportunity to be heard but forewent it.
- 27 I should make it clear that my reason for dismissing the claim does not have to do with the applicant's non-attendance at the show cause hearing of 29 January 2026. I merely observe that his failure to attend at the allocated time is consistent with the pattern of indifference to his responsibility to prosecute his claim, described in the above paragraphs.
- 28 The general principles discussed in *The Hancock Family Memorial Foundation Ltd v Fieldhouse* [2005] WASCA 93; (2005) 30 WAR 398 [103] indicate that it is necessary to stand back and ask '...what does justice, in all the notions or senses of it that are relevant, require in the circumstances of this case?' This does not involve a simple summary of the results of the evaluation of the five factors discussed above, but whether the assessment of those matters produces the result that justice requires: *Roddan v Gwilliam and Anor* [2005] WASCA 209 [42].
- 29 The circumstances of this case are that the claim has been on foot for five months, and yet is in a primitive state due to a combination of the applicant's failure to attend the directions hearing on 27 November 2025, his failure to comply with orders made on 27 November 2025 and his general indifferent approach to the proceedings. As such, the respondent has been prejudiced, and it is not possible for a fair hearing of the matter to occur. Justice therefore requires that the proceedings be dismissed.
-

2026 WAIRC 00056

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DARRELL CURNOW

APPLICANT

-v-

SHIRE OF COOROW

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

MONDAY, 2 FEBRUARY 2026

FILE NO/S

U 98 OF 2025

CITATION NO.

2026 WAIRC 00056

Result Application dismissed**Representation****Applicant** (no appearance)**Respondent** Mr A Sinanovic (of counsel) on behalf of the Shire of Coorow*Order*

HAVING heard from Mr A Sinanovic (of counsel) on behalf of the respondent and there being no appearance by the applicant, the Commission pursuant to the powers conferred under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) hereby orders –

THAT the application be and is hereby dismissed.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2026 WAIRC 00042

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DEBORAH LACY

APPLICANT

-v-

TOWN OF BASSENDEAN

RESPONDENT**CORAM**

COMMISSIONER C TSANG

DATE

TUESDAY, 27 JANUARY 2026

FILE NO.

U 103 OF 2025

CITATION NO.

2026 WAIRC 00042

Result Application discontinued by leave**Representation****Applicant** Mr R Knox (of counsel)**Respondent** Mr G Scott*Order*

WHEREAS on 12 September 2025 the applicant filed a *Form 2 – Unfair Dismissal Application*, and on 18 September 2025 the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application*;

AND WHEREAS following a conciliation conference listed on 21 October 2025, the matter was listed for a Directions Hearing on 6 November 2025;

AND WHEREAS by Directions ([2025] WAIRC 00910) issued on 6 November 2025 and Notices of Hearing issued on 25 November 2025, the matter was set down for a 3-day hearing on 2, 3 and 4 June 2026;

AND WHEREAS on 21 January 2026 the applicant lodged with the Commission's Registry a *Form 1A – Notice of Discontinuance*;

AND WHEREAS on 22 January 2026 the Commission informed the parties that as the matter had been set down for hearing, regulations 16(1) and 16(5) of the *Industrial Relations Commission Regulations 2005* (WA) provides that the matter may not be discontinued without leave of the Commission, and requested the respondent to confirm whether it consents to the matter being discontinued with leave of the Commission;

AND WHEREAS on 22 January 2026 the respondent confirmed that it consents to the matter being discontinued;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT matter U 103 of 2025 be, and by this order is, discontinued by leave.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

2026 WAIRC 00028

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GLEND A TEEDE

APPLICANT

-v-

SHIRE OF MENZIES

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

WEDNESDAY, 21 JANUARY 2026

FILE NO/S

U 116 OF 2024

CITATION NO.

2026 WAIRC 00028

Result

Orders issued

Representation

Applicant

Glenda Teede

Respondent

Shire of Menzies

Order

THE Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

- (1) THAT the applicant be permitted to use the respondent's Form 2A – Employer Response to Unfair Dismissal Application, filed 2 December 2024, in Supreme Court matter No. CIV 1202 of 2025.
- (2) THAT these proceedings otherwise remain stayed pending determination of Supreme Court matter No CIV 1202 of 2025.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2026 WAIRC 00023

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RODRIGO RUEDA RODRIGUEZ

APPLICANT

-v-

TOWN OF COTTESLOE

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

MONDAY, 19 JANUARY 2026

FILE NO/S

U 89 OF 2025

CITATION NO.

2026 WAIRC 00023

Result	Orders issued
Representation	
Applicant	Mr R Rodriguez
Respondent	Mr A Sinanovic on behalf of the Town of Cottesloe

Order

WHEREAS a conciliation conference was conducted in these proceedings on 28 October 2025, resulting in an agreement for resolution of the matter;

AND WHEREAS despite the matter resolving at conciliation, the applicant has not filed a Notice of Discontinuance nor taken any other step towards finalisation of the proceedings;

AND WHEREAS the matter was listed for a hearing on 19 January 2026 for the applicant to show cause as to why the matter ought not be dismissed for want prosecution pursuant to s 27(1)(a) of the *Industrial Relations Act 1979 (WA)* (**IR Act**);

AND WHEREAS at the hearing on 19 January 2026, the applicant informed the Commission that it remained his intention to complete the agreement reached at the conciliation conference, but that he had not seen any email correspondence for that purpose, possibly due to emails from the Commission and from the respondent being received to a junk email folder;

AND WHEREAS the applicant provided the Commission and the respondent with confirmation of his email address for the purpose of correspondence and agreed to attend to his emails with a view to finalising the settlement agreement and filing a Notice of Discontinuance of these proceedings;

AND WHEREAS the respondent has agreed to resend a Deed of Settlement to the applicant reflecting the terms of the settlement agreement reached, for the applicant's execution;

NOW THEREFORE the Commission, pursuant to the powers conferred under the IR Act, hereby orders –

- (1) THAT the applicant has until 2 February 2026 to file a Notice of Discontinuance of these proceedings; and
- (2) THAT if the applicant fails to file a Notice of Discontinuance pursuant to order 1, the application be dismissed.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

STOP BULLYING/SEXUAL HARASSMENT—

2026 WAIRC 00029

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2026 WAIRC 00029
CORAM	:	SENIOR COMMISSIONER R COSENTINO
HEARD	:	THURSDAY, 22 JANUARY 2026
DELIVERED	:	THURSDAY, 22 JANUARY 2026
FILE NO.	:	S 16 OF 2025
BETWEEN	:	SAMANTHA NICHOLSON Applicant AND DEPARTMENT OF PLANNING LANDS AND HERITAGE, Principal Respondent SANTA CARDENIA Individual Respondent

CatchWords	:	INDUSTRIAL LAW (WA) – stop bullying application – nil prospects of success once applicant resigned from employment - proceedings maintained for collateral purpose – s 27(1)(a) – abuse of process – further proceedings not in public interest – application dismissed
Legislation	:	<i>Industrial Relations Act 1979 (WA)</i> <i>Public Sector Management Act 1994 (WA)</i>
Result	:	Application dismissed
Representation:		

Applicant	:	No appearance
Principal Respondent	:	Mr M McIlwaine on behalf of the Department of Planning Lands and Heritage
Individual Respondent	:	Ms S Cardenia on her own behalf
Solicitors:		
Principal Respondent	:	State Solicitor's office

Case(s) referred to in reasons:

Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd [2009] 239 CLR 75; (2009) HCA 43

Rogers v The Queen [1994] HCA 42; (1994) 181 CLR 251

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia [2013] WAIRC 00754; (2013) 93 WAIG 1431

Reasons for Decision

- 1 The Commission listed this matter, being a stop bullying application, for a hearing requiring the applicant to show cause why her application should not be dismissed under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**), specifically, on the grounds that further proceedings are not necessary or desirably in the public interest, or for any other reason that the matter should be dismissed or the hearing of it discontinued.
- 2 The relevant procedural history is as follows.
- 3 The application was lodged on 2 September 2025.
- 4 A conciliation conference was held on 12 September 2025. The matter was not resolved by conciliation.
- 5 On 30 September 2025, the lawyer acting for the principal respondent, the **Department** of Planning, Lands and Heritage advised the Commission that the Department had commenced a disciplinary process in relation to allegations of misconduct involving the applicant, as outlined in Part 5 of the *Public Sector Management Act 1994* (WA), and that the applicant had been suspended on full pay as part of the process. The Department requested that the proceedings be paused until 31 October 2025 while the statutory disciplinary process proceeds, on the basis that any risk of ongoing bullying (which is denied) is eliminated while the applicant was suspended.
- 6 On 2 October 2025, the applicant agreed to the Department's request to adjourn the proceedings until the end of October.
- 7 Having not heard from either party subsequently, on 5 November 2025, the Commission noted that the matter had been adjourned to 31 October 2025 and enquired whether it was appropriate for a conference to be reconvened.
- 8 On 6 November 2025, the Department's lawyer advised the Commission that the applicant remained suspended on full pay during a disciplinary process, and that it understood the applicant had resigned from her employment with the Department and taken employment with another public sector agency. In those circumstances, the Department was of the view that these proceedings should be discontinued by the applicant.
- 9 The Commission then asked the applicant whether it was her intention to file a notice of discontinuance, and if so, when she would do so.
- 10 In response, on 7 November 2025, the applicant advised that she would discontinue the claim as she would be leaving the Department.
- 11 Following receipt of the applicant's email, on 7 November 2025 the Commission provided the applicant with information on how to discontinue her claim, with a link to the appropriate form for that purpose.
- 12 Ten days went by, and the applicant had not filed a notice of discontinuance. On 18 November 2025, my chambers wrote to the applicant asking her when she anticipated a notice of discontinuance would be filed.
- 13 The applicant responded on 18 November 2025:

'Before I proceed with completing the discontinuation form, I am awaiting the outcome of the investigation currently being conducted by the Department of Planning, Lands and Heritage (DPLH) regarding alleged breaches of discipline.'
- 14 My chambers wrote to the applicant in these terms on 18 November 2025:

'Could you please elaborate on your view that the proceedings should be maintained until the outcome of the investigation has been communicated, in circumstances where the proceedings seek orders relating to a workplace where you are no longer employed?

Please also note that, in the event you are unable to provide a proper explanation, the application will be listed for a hearing to show cause why it should not be permanently stayed or dismissed pursuant to section 27(1)(a) of the *Industrial Relations Act 1979* (WA).'
- 15 The applicant submitted:

'I acknowledge the point raised regarding my impending departure from the Department of Planning, Lands and Heritage (DPLH). However, I respectfully submit that the proceedings should be maintained until the outcome of the investigation has been communicated for the following reasons:

Continuing employment until 28 November 2025: I remain an employee of DPLH until my final day of service. As such, the allegations and disciplinary process are still directly relevant to my employment status and professional standing.

Temporal link to my application: The alleged breaches of discipline were issued to me immediately upon my return from leave, and notably after I had lodged my stop bullying application. This timing suggests the matters are connected, and therefore the proceedings are not redundant but integral to ensuring procedural fairness.

Substantial rebuttal already provided: I have submitted a comprehensive 20-page rebuttal addressing each allegation in detail. Despite this, I have received no communication from DPLH unless initiated by myself. It is important that these matters are finalised to ensure closure and to prevent unresolved allegations from impacting my professional reputation as I transition to a new department.

Fairness and integrity of process: Allowing the proceedings to continue until the investigation outcome is communicated ensures that the process is transparent, fair, and complete. To dismiss or stay the application prematurely would risk undermining both the integrity of the investigation and my right to have the allegations properly addressed.

For these reasons, I respectfully request that the proceedings be maintained until the investigation outcome is formally communicated.'

16 On 19 November 2025, my chambers advised the applicant:

'The Senior Commissioner has had regard to the reasons you provided, and determined that unless a notice of discontinuance is filed by 1 December 2025, the matter ought to be listed for the applicant to show cause why the proceedings should not be dismissed or permanently stayed.'

17 On 23 December 2025, notices were issued of the show cause hearing.

18 On 12 January 2025, the applicant advised my chambers by email that she would not be attending the show cause hearing. She was again invited by my chambers to file a notice of discontinuance, to avoid necessitating a hearing, using the Commission's time and resources, and incurring costs and inconvenience to the other parties.

19 The applicant has not communicated further with the Commission, has not filed a notice of discontinuance, and did not appear at the show cause hearing.

20 The Commission cannot make the stop bullying orders sought in the application unless the Commission is satisfied, first, that a person bullied the worker at work; and second, that there is a risk the person will continue to do so: IR Act s 51BM. Obviously, if the applicant is leaving the employment with the employer, the second criteria cannot be satisfied. Her claim has no prospects of success.

21 It is sufficiently clear to me from the history I have recited, that the applicant has no intention of continuing, progressing or prosecuting this claim and has only maintained it for a collateral purpose. Further, the applicant's failure to file a notice of discontinuance in these circumstances is unreasonable, and has unnecessarily inconvenienced the Commission and the other parties.

22 The applicant's conduct in this regard is an improper and illegitimate use of the Commission's process.

23 In *Rogers v The Queen* [1994] HCA 42; (1994) 181 CLR 251, McHugh J observed at [16]:

Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories:

- (1) the court's procedures are invoked for an illegitimate purpose;
- (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or
- (3) the use of the court's procedures would bring the administration of justice into disrepute.

24 See also *Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] 239 CLR 75; (2009) HCA 43. The applicant's conduct falls into each of these three categories and is an abuse of the Commission's process.

25 Section 27(1)(a) of the IR Act empowers the Commission to dismiss any matter before it at any stage of the proceedings if satisfied that:

- (i) The matter is trivial; or
- (ii) That further proceedings are not necessary or desirable in the public interest;
- (iii) That the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
- (iv) That for any other reason the matter or part should be dismissed

26 The power to dismiss a matter under s 27(1)(a) is to be exercised sparingly and with caution: *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2013] WAIRC 00754; (2013) 93 WAIG 1431. A finding that an applicant has engaged in an abuse of the Commission's process is a circumstance that falls within s 27(1)(a) as a reason for dismissing proceedings, in the public interest. So too is a finding that a claim is without any prospect of success. Both conditions are met in this case.

27 I am satisfied that further proceedings in this matter are not necessary or desirable in the public interest.

28 I dismiss the application under section 27(1)(a) of the IR Act.

2026 WAIRC 00032

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SAMANTHA NICHOLSON

APPLICANT

-v-

DEPARTMENT OF PLANNING LANDS AND HERITAGE, SANTA CARDENIA

RESPONDENTS**CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

FRIDAY, 23 JANUARY 2026

FILE NO/S

S 16 OF 2025

CITATION NO.

2026 WAIRC 00032

Result

Application dismissed

Representation**Applicant**

No appearance

Principal**Respondent**

Mr M McIlwaine on behalf of the Department of Planning Lands and Heritage

Individual**Respondent**

Ms Santa Cardenia on her own behalf

Order

HAVING heard from Mr M McIlwaine (of counsel) on behalf of the principal respondent, Ms S Cardenia, individual respondent, on her own behalf, and there being no appearance on behalf of the applicant, the Commission, pursuant to the powers conferred under s 27(1)(a) of the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

CONFERENCES—Matters referred—

2026 WAIRC 00046

DISPUTE RE UNION MEMBERS ENTITLEMENT TO PAID SICK LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION

: 2026 WAIRC 00046

CORAM: PUBLIC SERVICE ARBITRATOR
COMMISSIONER T B WALKINGTON**HEARD**

: TUESDAY, 18 FEBRUARY 2025

DELIVERED

: FRIDAY, 30 JANUARY 2026

FILE NO.

: PSACR 2 OF 2024

BETWEEN

: WESTERN AUSTRALIAN POLICE UNION OF WORKERS

Applicant

AND

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

Respondent

CatchWords

: Industrial Law (WA) - Public Service Arbitrator - Section 44 Conference - Referral for arbitration - Dispute regarding entitlement to paid sick leave - Whether respondent's decision to cease paid sick leave was industrially fair - Jurisdictional objection - Whether application is in contravention of a no further claims clause - Whether relief sought improves upon conditions contained in an industrial agreement - Resignation after Memorandum of Matters settled - Whether there is an industrial matter for the Arbitrator to

		deal with - Orders sought contravenes no further claims clause - Arbitration against equity, good conscience and substantial merits - Application dismissed
Legislation	:	<i>Police Act 1892</i> (WA) <i>Police Force Regulations 1979</i> (WA) <i>Industrial Relations Act 1979</i> (WA)
Result	:	Application dismissed
Representation:		
Applicant	:	Mr S Farrell (as agent)
Respondent	:	Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort (Management) Ltd [2002] WAIRC 05952; (2002) 82 WAIG 2112

Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award (2008) 181 IR 245

The Registrar v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1990) 70 WAIG 29

Toyota Motor Corporation Australia Ltd v Marmara (2014) 222 FCR 152

Reasons for Decision

- 1 On 4 April 2024, the Western Australian Police Union of Workers (**applicant**) applied to the Public Service Arbitrator (**Arbitrator**) under s 44 of the *Industrial Relations Act 1979* (WA) (**IR Act**) for a compulsory conference. The parties did not reach an agreement. Subsequently, the matter was referred for hearing and determination under s 44(9) of the IR Act.
- 2 The Memorandum of Matters Referred for Hearing and Determination under s 44(9) of the IR Act (**Memorandum of Matters**), dated 23 May 2024, sets out the agreed facts and issues to be determined:
 1. First Class Constable Shane Murray ('**Murray**') is appointed as a police officer under the *Police Act 1892* (WA) and is a member of the Applicant.
 2. Murray has been diagnosed as suffering from post-traumatic stress disorder ('**PTSD**').
 3. On 10 December 2023, Murray commenced sick leave.
 4. Regulation 1304 (1) of the *Police Force Regulations 1979* (WA) states:
 - (1) *Subject to regulations 1308(1) and 1309 and to compliance by the member with regulation 1303, the Commissioner may grant to a member in respect of the member's incapacity leave of absence with pay —*
 - (a) *for up to 168 days in a calendar year; and*
 - (b) *if so recommended by the Manager and subject to any terms or conditions recommended by the Manager, for a further period.*
 5. On 15 February 2024, the Respondent's Superintendent of Health Welfare and Safety Division ('HW&S') wrote to Murray notifying Murray that he would be recommending to the Commissioner of Police that the Respondent cease paying sick leave. Superintendent Cox had formed the view that Murray had not been engaging in and/or reasonably progressing a Return to Work Program. However, prior to making the recommendation, Superintendent Cox invited Murray to provide written submissions relating to the proposed cessation of Murray's sick leave.
 6. On 7 March 2024, the Respondent wrote to Murray advising of his decision to cease the granting of paid sick leave for a period of three (3) months.

The Applicant's Position

7. Murray's illness was exacerbated by work.
8. If Murray had not sustained a work-related illness, he would not have been incapacitated and therefore would not be on sick leave.
9. Murray has engaged with the Respondent during periods of sick leave and has demonstrated sustained and reasonable progression to commence a graduated return to work program supported by medical recommendations.
10. Murray has had less than 168 days off work on sick leave since becoming incapacitated on 10 December 2023.
11. The Respondent has not considered Murray's exceptional circumstances and work-related factors that have attributed to the taking of sick leave in determining whether to continue granting paid sick leave.
12. The Respondent's decision is harsh.

The Respondent's Position

1. 1/C Murray commenced sick leave on 8 December 2023 (part day 6 hours), annual leave on 9 December 2023 (full day) then sick leave from 10 December 2023 to 20 March 2024.

2. On 29 December 2023 1/C Murray met with WA Police Force Psychiatrist Dr Jaworska, where she recommended that 1/C Murray had the capacity to initiate a graduated return to work program.
3. On 23 January 2024 Kate Campbell Corporeal Health emailed Sergeant Gary Simpson OIC Bunbury Police Station advising that 1/C should not commence his Return to Work program at Bunbury Police Station but should work within a reasonable distance of Bunbury to access his supports in Bunbury and Psychologist in Busselton. Kate Campbell looked into alternative options within the Bunbury Police Complex, including Prosecuting (outside of Bunbury Police Station), but there were no vacancies. A/Senior Sergeant Simpson suggested to the Vocational Rehabilitation Unit the Return to Work program taking place at Bunbury Police Station. Kate Campbell and Adam Feeney agreed to seek Dr Jaworska's advice.
4. On 1 February Dr Jaworska advised Adam Feeney Senior Vocational Rehabilitation Consultant of the issues with 1/C Murray working at Bunbury Police Station however she did advise 1/C Murray could perform non-operational duties away from Bunbury Police Station (including in the Bunbury Police complex).
5. On 2 February 2024 Kate Campbell Corporeal Health spoke to 1/C Murray and outlined the conditions to return to work at the Bunbury Police Complex. 1/C Murray advised he was awaiting legal advice for over 4 weeks so was reluctant to return to work until this was received.
6. On 15 February 2024 a meeting between Superintendent Stewart, Bunbury District Office, Kate Campbell Corporeal Health, Adam Feeney Senior Vocational Rehabilitation Consultant and 1/C Murray was held to discuss options for 1/C Murray to return to work to the Bunbury Police Complex.
7. On 15 February 2024 Superintendent Cox provided 1/C Murray with a Notice of Intention to review paid sick leave entitlement due to 1/C Murray not fulfilling the guideline criteria of 'Lack of engagement and sustained, reasonable progression of a Return to Work Programs'. 1/C Murray was invited by close of business 29 February 2024 to submit written submissions relating to the proposed cessation of his sick leave.
8. On 28 February 1/C Murray provided Superintendent Cox a written response relating to the proposed cessation of his sick leave.
9. On 7 March 2024 the Respondent wrote to 1/C Murray advising that after considering the recommendation from Superintendent Cox and 1/C Murray's written submission that 1/C Murray had not met the criteria to continue to be receive paid sick leave. Paid sick leave would cease for a period of 3 months. This was effective from 14 days after the date of the letter (21 March 2024).
10. On 4 April 2024 the Applicant filed PSAC 2 of 2024.
11. The respondent's position is that his decision to revoke paid sick leave for the period 21 March 2024 to 21 June 2024 was fair in all of the circumstances and should not be interfered with by the Public Service Arbitrator. While Police Officers are given the potential of accessing significantly more paid sick leave than ordinary employees, there is a reasonable expectation that officers will engage in programs directed to returning them to work. 1/C Murray failed to do so and, on that basis, revoking the grant of paid sick leave was reasonable and industrially fair.

Issues for referral and determination

12. The following issues are referred for hearing and determination:
 - (a) Was the respondent's decision to revoke the grant of paid sick leave to 1/C Murray on 7 March 2024 (**Decision**) industrially fair?
 - (b) If not:
 - (i) Should the Arbitrator interfere with that decision, and if so, how?
 - (ii) Should the Arbitrator issue any other relief?

The Parties' position on the matters referred

13. The applicant says:
 - (a) The respondent's Decision was industrially unfair; and
 - (b) The arbitrator should quash that decision and make arbitral orders to the following effect:
 - (i) The respondent provide 1/C Murray with paid sick leave from 21 March 2024 until [date of GRTW program commences].
 - (ii) The respondent reinstate any paid leave utilised by 1/C Constable Murray between 20 March 2024 and 22 April 2024.
14. The respondent says:
 - (a) The respondent's Decision was industrially fair; and
 - (b) The proceedings should be dismissed.
- 3 The applicant seeks an order that the decision by the Commissioner of Police, Western Australia Police Force (**respondent**) to cease paid sick leave be varied.
- 4 The respondent opposes the orders sought on the grounds that:
 - (1) The applicant's claim is in contravention of a no further claims clause contained within the *Western Australian Police Force Industrial Agreement 2022 (2022 Agreement)* which binds the applicant;

- (2) the respondent's decision was not industrially unfair in the circumstances; and
- (3) the Arbitrator does not have the power to issue the relief sought.

- 5 After the Memorandum of Matters was settled, the applicant's member resigned from his position with the respondent. The respondent further opposes the orders sought on the grounds that the applicant's member resigned and therefore, there is no longer an 'industrial matter' for the Arbitrator to enquire into and deal with and the Arbitrator no longer has jurisdiction.
- 6 I will first consider the initial objection raised, which is the respondent's objection on the basis that the applicant's claim is a contravention of the no further claims clause contained within the 2022 Agreement.

No Further Claims Clause

- 7 The respondent submits that the fundamental issue arising in these proceedings, is whether it was industrially unfair for the respondent to refuse to grant paid leave for incapacity to the applicant's member under reg 1304 of the *Police Force Regulations 1979* (WA).
- 8 The 2022 Agreement allows discretionary power upon the respondent to grant paid leave for incapacity under clause 39.
- 9 The respondent refers to clause 9 of the 2022 Agreement which states as follows:

NO FURTHER CLAIMS

There shall be no further claims during the term of this Agreement.

- 10 The 2022 Agreement was registered on 22 August 2023 and had a nominal expiry date of 30 June 2024. The applicant's s 44 application, and the subsequent referral of the matter for hearing and determination under s 44(9), was made during the life of the 2022 Agreement.
- 11 The respondent refers the Arbitrator to *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 (*Toyota*) [37], [55]. The respondent submits that a further claim is 'not merely a claim to a right or entitlement', but is 'any attempt to improve upon matters contained in th[e] Agreement', including by the making of 'a proposal by one party to vary the outcome arrived at [by way of an agreement] in a way which advances its interests'.
- 12 The respondent argues the pursuit of a 'claim' under s 44 of the IR Act, can amount to a 'further claim' within the meaning of such a clause: *The Registrar v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1990) 70 WAIG 29 (34).
- 13 The respondent says it is not necessary that a 'claim' be made on behalf of all of the applicant's members, or a class of its members, to engage clause 9 of the 2022 Agreement.
- 14 The respondent contends that undertakings to make no further claims have been historically regarded as 'solemn undertakings' which are 'morally as well as legally binding' *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award* (2008) 181 IR 245 [15] (*Crown Employees*).
- 15 The respondent seeks for the dismissal of the proceedings without the determination of the merits of the application because it would be contrary to:
- (a) equity and good conscience as the parties have agreed that neither party will make further claims during the term of the 2022 Agreement; and
 - (b) the objects of the IR Act as identified in s 6(ac), based upon the statutory assumption that the 2022 Agreement provides for fair terms and conditions for employees covered by the 2022 Agreement. It follows that there is no basis for the Arbitrator to confer a more beneficial term upon a police officer covered by the 2022 Agreement to the detriment of the respondent; and
 - (c) the objects of the IR Act as identified in s 6(ag) because if, after reaching agreement on a fair set of terms and conditions of employment to be contained in an industrial agreement, a party to that agreement could seek arbitration for a more beneficial order. Consequently, there would be insufficient motivation for parties to make industrial agreements. Such agreements would simply be safety nets, and the making of an industrial agreement would not truly settle disputes as to the terms and conditions for employees covered by the industrial agreement for the life of the industrial agreement.
- 16 The applicant's argument is that s 80E(5) of the IR Act clarifies that while an employer retains the power to act on matters within the Arbitrator's jurisdiction, any such actions may be reviewed, altered, or nullified by the Arbitrator when exercising their authority. The applicant contends that they are seeking to have the Arbitrator review, alter or adjust the respondent's decision to cease sick leave payment in the specific circumstances of one of their members.
- 17 The applicant maintains the outcome sought is not a finding or declaration that the respondent breached the 2022 Agreement. The applicant asserts the respondent will retain the discretion to pay or not pay sick leave to the applicant's members. However, a decision by the Arbitrator would provide guidance to the respondent on the factors to consider when exercising their discretionary powers. The applicant's view is that this matter concerns the exercise of discretion and whether the discretion is unfettered or ought to be applied consistent with legal principles in a just manner.
- 18 The applicant argues that a review of the respondent's decision under s 80E of the IR Act, does not have the effect of granting or expanding the sick leave provisions set out in clause 39 of the 2022 Agreement. The applicant submits that the legislative power to review under s 80E of the IR Act, permits the Arbitrator to determine whether the respondent's discretion has been exercised fairly.
- 19 According to the applicant, a review of the respondent's decision is warranted because in their experience, the respondent has not previously ceased paid sick leave for one of the applicant's members prior to 2024, other than in circumstances when a

police officer:

- (a) does not regularly attend medical appointments;
 - (b) does not provide medical certificates or;
 - (c) refuses to engage in a return-to-work program.
- 20 This custom, the applicant argues, is the benchmark by which the respondent's decision to cease paid sick leave is to be properly considered, and the benchmark to determine whether the decision to cease payment was industrially fair or not.
- 21 I consider the issue in contention before me concerns the exercise of the respondent's discretion in determining whether to grant a member of the applicant paid sick leave or not. The issue as set out in the Memorandum of Matters, is whether the determination in the matter concerning the applicant's member was industrially fair.
- 22 The Memorandum of Matters does not seek to alter or vary the text of clause 39 of the 2022 Agreement. However, an arbitrated outcome will have the effect or consequence of modifying the basis on which the respondent may exercise its discretion to grant paid sick leave.
- 23 The applicant submits that an arbitrated outcome would guide the discretion exercised by the respondent.
- 24 An arbitrated outcome involves the creation of rights and in this matter, it would result in prescribing, at least some, of the circumstances that the respondent must consider granting paid sick leave. In effect, the scope of the respondent's discretion is altered and requires the respondent to grant paid sick leave in certain circumstances.
- 25 I consider that the effect of an arbitrated outcome would prescribe that the respondent's discretion ought to be exercised in a specified manner and under certain circumstances. This outcome results in a material variation to the terms of the 2022 Agreement by introducing criteria for the exercise of the discretion afforded to the respondent.
- 26 This is consistent with the observations in *Toyota*, in which a further claim encompasses:
... a proposal made by a party to the Agreement to materially change the terms of and condition of employment set out in the Agreement other than in a manner already provided for by the Agreement. ... [37].
- 27 Having found the applicant's claim seeks to make a further claim which is prohibited by the terms of the 2022 Agreement, I must decide whether the application ought to be dismissed.
- 28 The respondent says that it is contrary to the objects of the IR Act and the public interest, for the Arbitrator to entertain a claim that is pursued in contravention of a no further claims clause. The respondent refers the Arbitrator to *Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort (Management) Ltd*; [2002] WAIRC 05952; (2002) 82 WAIG 2112 (*Burswood Resort*). In this matter, the Commission in Court Session considered the application of the public interest and claims made by a party bound by a no further claims commitment:
However, it is our view that it is desirable and in the public interest to dismiss the Union's application pursuant to s.27(1)(a)(ii) of the Act. In our view it is inherent in the objects of the Act and the entire scheme of the Act that the Commission is to encourage the parties to settle industrial disputes and where such disputes are resolved by amicable agreement by entering into a s.41 industrial agreement, the terms of that agreement should be adhered to. Further it is our view by bringing a claim for an award and seeking arbitration, that action is in breach of Clause 45 of the Casino Agreement. Pursuant to s.83 of the Act where a contravention or failure to comply with a provision of an industrial agreement is proved a penalty can be imposed by the Industrial Magistrate. In *Registrar v Amalgamated Metal Workers' and Shipwrights' Union of Western Australia* (1989) 69 WAIG 29 and (1990) 70 WAIG 3947 the Full Bench upheld appeals by the Registrar (against a decision of the Industrial Magistrate), that there was a case to answer by the Union in respect of a 'no extra claims' clause. In the second appeal the Full Bench remitted the matter to the Industrial Magistrate to fix a penalty [13].
- 29 The applicant contends that it seeks the Arbitrator exercise powers available under s 80E of the IR Act.
- 30 However, s 80E does not provide a basis for the powers of the Arbitrator to be exercised in a manner not consistent with s 26 and s 27 of the IR Act.
- 31 I agree it is not in the public interest to permit a party to seek arbitrated outcomes that effectively improve upon the terms and conditions prescribed by an industrial agreement, which also includes a term that the party agrees to not seek to make such claims during the term of the agreement.
- 32 I find that equity, good conscience and the substantial merits of the case under s 26(1) of the IR Act, means that I ought not permit a party to pursue a claim where that party has made an undertaking to not make further claims under an industrial agreement.
- 33 In addition, similar to *Burswood Resort*, it is in the public interest to dismiss such an application.
- 34 Given my conclusions it is not necessary to consider the further grounds on which the respondent opposes the orders sought, and I will dismiss the application.
-

2026 WAIRC 00047

DISPUTE RE UNION MEMBERS ENTITLEMENT TO PAID SICK LEAVE

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
WESTERN AUSTRALIAN POLICE UNION OF WORKERS

PARTIES**APPLICANT**

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

RESPONDENT**CORAM**

PUBLIC SERVICE ARBITRATOR
COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 30 JANUARY 2026

FILE NO

PSACR 2 OF 2024

CITATION NO.

2026 WAIRC 00047

Result	Application dismissed
Representation	
Applicant	Mr S Farrell (as agent)
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from Mr S Farrell on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT this application be, and by this order is, dismissed.

(Sgd.) T B WALKINGTON,
Commissioner,
Public Service Arbitrator.

[L.S.]

2026 WAIRC 00048

DISPUTE RE CESSATION OF PAID SICK LEAVE FOR UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2026 WAIRC 00048
CORAM	:	PUBLIC SERVICE ARBITRATOR COMMISSIONER T B WALKINGTON
HEARD	:	THURSDAY, 27 FEBRUARY 2025
DELIVERED	:	FRIDAY, 30 JANUARY 2026
FILE NO.	:	PSACR 3 OF 2024
BETWEEN	:	WESTERN AUSTRALIAN POLICE UNION OF WORKERS Applicant AND COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE Respondent

CatchWords	:	Industrial Law (WA) - Public Service Arbitrator - Section 44 Conference - Referral for arbitration - Dispute regarding cessation of paid sick leave - Whether respondent's decision to cease paid sick leave was industrially fair - Jurisdictional objection - Whether application is in contravention of a no further claims clause - Whether relief sought improves upon conditions contained in an industrial agreement - Orders sought contravenes no further claims clause - Arbitration against equity, good conscience and substantial merits - Application dismissed
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Legislation	:	<i>Police Act 1892</i> (WA)
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Police Force Regulations 1979 (WA)

Industrial Relations Act 1979 (WA)

Result : Application dismissed

Representation:

Applicant : Mr S Farrell (as agent)

Respondent : Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort (Management) Ltd [2002] WAIRC 05952; (2002) 82 WAIG 2112

Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award (2008) 181 IR 245

The Registrar v Amalgamated Metal Workers and Shipwrights Union of Western Australia (1990) 70 WAIG 29

Toyota Motor Corporation Australia Ltd v Marmara (2014) 222 FCR 152

Reasons for Decision

- 1 On 17 April 2024, the Western Australian Police Union of Workers (**applicant**) applied to the Public Service Arbitrator (**Arbitrator**) under s 44 of the *Industrial Relations Act 1979 (WA)* (**IR Act**) for a compulsory conference. No agreement was reached between the parties and as such, the matter was referred for hearing and determination under s 44(9) of the IR Act.
- 2 The Memorandum of Matters Referred for Hearing and Determination under s 44(9) of the IR Act (**Memorandum of Matters**), dated 21 June 2024, sets out the agreed facts and issues to be determined:
 1. Detective Sergeant David Chamberlain (**Chamberlain**) is appointed as a non-commissioned police officer under the *Police Act 1892 (WA)* and is a member of the Applicant.
 2. Chamberlain has been diagnosed as suffering from post-traumatic stress disorder (**PTSD**), major depressive disorder, and general anxiety disorder. He also suffers from long COVID.
 3. On 5 October 2022, Chamberlain commenced paid sick leave.
 4. Chamberlain commenced a graduated return to work program on or around 6 February 2023.
 5. On or around 25 April 2023, Chamberlain underwent a medical procedure and was on paid sick leave from that date until 25 February 2024.
 6. Regulation 1304(1) of the *Police Force Regulations 1979 (WA)* states:
 - (1) *Subject to regulations 1308(1) and 1309 and to compliance by the member with regulation 1303, the Commissioner may grant to a member in respect of the member's incapacity leave of absence with pay —*
 - (a) *for up to 168 days in a calendar year; and*
 - (b) *if so recommended by the Manager and subject to any terms or conditions recommended by the Manager, for a further period.*
 7. On 8 January 2024, the Respondent's Superintendent of Health Welfare and Safety Division (**HW&S**) wrote to Chamberlain notifying Chamberlain that he would be recommending to the Commissioner of Police that the Respondent cease payment of sick leave. Prior to making the recommendation, Superintendent Cox invited Chamberlain to provide written submissions relating to the proposed cessation of Chamberlain's paid sick leave.
 8. Chamberlain provided a written response dated 18 January 2024.
 9. In February 2024, the Respondent wrote to Chamberlain advising of his decision to cease the granting of paid sick leave for a period of three (3) months.
 10. On 22 April 2024, the Respondent determined that Chamberlain will not be medically fit to return to duties as a police officer in the short or medium term and so commenced the medical retirement process. The Respondent reinstated Chamberlain's paid sick leave from this date.

The Applicant's Position

11. Chamberlain's illness was exacerbated by work.
12. If Chamberlain had not sustained a work-related illness, he would not have been incapacitated and therefore would not be on sick leave.
13. Chamberlain has engaged with the Respondent during periods of sick leave and has not been medically fit to demonstrate sustained and reasonable progression to commence a graduated return to work program supported by medical recommendations.
14. The Respondent was in possession of advice from medical practitioners at the time it wrote to Chamberlain in January and February 2024 and so was aware that he was unable to participate in a graduated return to work programme.
15. The Respondent has not considered Chamberlain's exceptional circumstances and work-related factors that

have attributed to the taking of sick leave in determining whether to continue granting paid sick leave.

16. The Respondent's decision is harsh.

The Respondent's Position

17. The respondent's position is that in all of the circumstances the decision to refuse to grant further paid sick leave was fair and should not be interfered with by the Public Service Arbitrator.
18. Police Officers are given the potential of accessing significantly more paid sick leave than ordinary employees, the grant of paid sick leave is entirely at the discretion of the respondent.
19. In Chamberlain's case, the respondent granted him access to 141 days of paid sick leave in 2022, 345 days of paid sick leave in 2023 (amounting to a full year excluding authorised leave), and 61 days of paid sick leave in 2024 up to the date that the grant of paid sick leave ceased. Save for the brief period of authorised leave, Chamberlain was granted paid leave continuously from 5 October 2022 until February 2024.
20. Paid sick leave was reinstated on 22 April 2024, meaning that Chamberlain was on unpaid sick leave for the period 25 February to 22 April 2024 (around 8 weeks).
21. On 12 February 2024, Dr Helena Piirto (Occupational Psychiatrist) examined and reported:
- (a) 'Chamberlain presents with a chronic PTSD which is not debilitating or associated with clinically significant independent functional impairment';
 - (b) 'Chamberlain presents with an Adjustment Disorder with Mixed Anxiety and Depressed Mood which is directly related to his range of physical conditions, and associated functional compromise'; and
 - (c) 'If it were not for ... Chamberlain's physical conditions and complaints, I do believe that he would have the capacity to engage in a return-to-work program, initially in a part-time Non-Operational capacity. However, this cannot be independently recommended in view of the ongoing physical complaints. If he was expected to return to work while still addressing his physical health concerns, I believe he would present with heightened anxiety'.
22. Contrary to the applicant's case, the predominant cause of Chamberlain's incapacity to work is non-work related physical health concerns.
23. Paid sick leave is for the purposes of recovering so that one can return to their work.
24. Chamberlain's state of fitness as of February 2024 demonstrated continued uncertainty as to the timing of being able to commence a return to work program with a view of returning to full duties.
25. In assessing the fairness of the decision to refuse to continue to grant paid sick leave from 25 February 2024, it is necessary to have regard to all of the circumstances leading up to that decision from the previous 2 years. In circumstances where the respondent had granted Chamberlain paid sick leave continuously for over 1.5 years and where there was no reasonable certainty as to when Chamberlain might be in a position to commence a return to work program, it was not unfair for the respondent to make the decision to cease granting paid sick leave from 25 February 2024.
26. The Arbitrator should not interfere with the decision.

Issues for referral and determination

27. The following issues are referred for hearing and determination:
- (a) Was the respondent's decision to refuse to continue to grant paid sick leave to Detective Sergeant Chamberlain in February 2024 (**Decision**) industrially fair?
 - (b) If not:
 - (i) Should the Arbitrator interfere with that decision, and if so, how?
 - (ii) Should the Arbitrator issue any other relief?

The Parties' position on the matters referred

28. The applicant says:
- (a) the respondent's Decision was industrially unfair; and
 - (b) the arbitrator should quash that decision and make arbitral orders to the following effect:
 - i. The respondent provide DS Chamberlain with paid sick leave from the date it ceased paying sick leave until 22 April 2024.
 - ii. The respondent reinstate any paid leave utilised by DS Constable Chamberlain between February 2024 and 22 April 2024.
29. The respondent says:
- (a) The respondent's Decision was industrially fair; and
 - (b) The proceedings should be dismissed.

3 The applicant seeks a declaration to vary the decision by the Commissioner of Police, Western Australia Police Force (**respondent**) to cease paid sick leave and an order for the respondent to:

- (1) pay the applicant's member sick leave from 10 February 2024 to 22 April 2024; and

- (2) reinstate any paid leave used by the applicant's member between February 2024 and 22 April 2024.
- 4 The respondent opposes the orders sought on the grounds that:
- (1) The applicant's claim is in contravention of a no further claims clause contained within the *Western Australian Police Force Industrial Agreement 2022 (2022 Agreement)* which binds the applicant;
 - (2) the respondent's decision was not industrially unfair in the circumstances; and
 - (3) the Arbitrator does not have the power to issue the relief sought.
- 5 I will first consider ground one, which is the respondent's objection on the basis that the applicant's claim is a contravention of the no further claims clause contained within the 2022 Agreement.

No Further Claims Clause

- 6 The respondent submits that the fundamental issue arising in these proceedings is whether it was industrially unfair for the respondent to refuse to grant paid leave for incapacity to the applicant's member under reg 1304 of the *Police Force Regulations 1979 (WA)*.
- 7 The 2022 Agreement allows discretionary power upon the respondent to grant paid leave for incapacity under clause 39.
- 8 The respondent refers to clause 9 of the 2022 Agreement which states as follows:
- NO FURTHER CLAIMS
- There shall be no further claims during the term of this Agreement.
- 9 The 2022 Agreement was registered on 22 August 2023 and had a nominal expiry date of 30 June 2024. The applicant's s 44 application, and the subsequent referral of the matter for hearing and determination under s 44(9), was made during the life of the 2022 Agreement.
- 10 The respondent refers the Arbitrator to *Toyota Motor Corporation Australia Ltd v Marmara* (2014) 222 FCR 152 (*Toyota*) [37], [55]. The respondent submits that a further claim is 'not merely a claim to a right or entitlement', but is 'any attempt to improve upon matters contained in th[e] Agreement', including by the making of 'a proposal by one party to vary the outcome arrived at [by way of an agreement] in a way which advances its interests'.
- 11 The respondent argues the pursuit of a 'claim' under s 44 of the IR Act, can amount to a 'further claim' within the meaning of such a clause: *The Registrar v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1990) 70 WAIG 29 (34).
- 12 The respondent submits it is not necessary that a 'claim' be made on behalf of all of the applicant's members, or a class of its members, to engage clause 9 of the 2022 Agreement.
- 13 The respondent contends that undertakings to make no further claims have been historically regarded as 'solemn undertakings' which are 'morally, as well as legally binding' *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award* (2008) 181 IR 245 [15] (*Crown Employees*).
- 14 The respondent seeks for the dismissal of the proceedings without the determination of the merits of the application because it would be contrary to:
- (a) equity and good conscience as the parties have agreed that neither party will make further claims during the term of the 2022 Agreement; and
 - (b) the objects of the IR Act as identified in s 6(ac), based upon the statutory assumption that the 2022 Agreement provides for fair terms and conditions for employees covered by the 2022 Agreement. It follows that there is no basis for the Arbitrator to confer a more beneficial term upon a police officer covered by the 2022 Agreement to the detriment of the respondent; and
 - (c) the objects of the IR Act as identified in s 6(ag) because if, after reaching agreement on a fair set of terms and conditions of employment to be contained in an industrial agreement, a party to that agreement could seek arbitration for a more beneficial order. Consequently, there would be insufficient motivation for parties to make industrial agreements. Such agreements would simply be safety nets, and the making of an industrial agreement would not truly settle disputes as to the terms and conditions for employees covered by the industrial agreement for the life of the industrial agreement.
- 15 The applicant's argument is that s 80E(5) of the IR Act clarifies that while an employer retains the power to act on matters within the Arbitrator's jurisdiction, any such actions may be reviewed, altered, or nullified by the Arbitrator when exercising their authority. The applicant contends that they are seeking to have the Arbitrator review, alter or adjust the respondent's decision to cease sick leave payment in the specific circumstances of one of their members.
- 16 The applicant maintains the outcome sought is not a finding or declaration that the respondent breached the 2022 Agreement. The applicant asserts the respondent will retain the discretion to pay or not pay sick leave to the applicant's members. However, a decision by the Arbitrator would provide guidance to the respondent on the factors to consider when exercising their discretionary powers. The applicant's view is that this matter concerns the exercise of discretion and whether the discretion is unfettered or ought to be applied consistent with legal principles in a just manner.
- 17 The applicant argues that a review of the respondent's decision under s 80E of the IR Act, does not have the effect of granting or expanding the sick leave provisions set out in clause 39 of the 2022 Agreement. The applicant disputes that the legislative power to review under s 80E of the IR Act, permits the Arbitrator to determine whether the respondent's discretion has been exercised fairly.
- 18 According to the applicant, a review of the respondent's decision is warranted because in their experience, the respondent has

not previously ceased paid sick leave for one of the applicant's members prior to 2024, other than in circumstances when a police officer:

- (a) does not regularly attend medical appointments;
- (b) does not provide medical certificates or;
- (c) refuses to engage in a return-to-work program.

- 19 This custom, the applicant argues, is the benchmark by which the respondent's decision to cease paid sick leave is to be properly considered, and the benchmark to determine whether the decision to cease payment was industrially fair or not.
- 20 I consider the issue in contention before me concerns the exercise of the respondent's discretion in determining whether to grant a member of the applicant paid sick leave or not. The issue as set out in the Memorandum of Matters, is whether the determination in the matter concerning the applicant's member was industrially fair.
- 21 The Memorandum of Matters does not seek to alter or vary the text of clause 39 of the 2022 Agreement. However, an arbitrated outcome will have the effect or consequence of modifying the basis on which the respondent may exercise its discretion to grant paid sick leave.
- 22 The applicant submits that an arbitrated outcome would guide the discretion exercised by the respondent.
- 23 An arbitrated outcome involves the creation of rights and in this matter, it would result in prescribing, at least some, of the circumstances that the respondent must consider granting paid sick leave. In effect, the scope of the respondent's discretion is altered and requires the respondent to grant paid sick leave in certain circumstances.
- 24 I consider that the effect of an arbitrated outcome would prescribe that the respondent's discretion ought to be exercised in a specified manner and under certain circumstances. This outcome results in a material variation to the terms of the 2022 Agreement by introducing criteria for the exercise of the discretion afforded to the respondent.
- 25 This is consistent with the observations in *Toyota*, in which a further claim encompasses:
 ... a proposal made by a party to the Agreement to materially change the terms of and condition of employment set out in the Agreement other than in a manner already provided for by the Agreement. ... [37].
- 26 Having found the applicant's claim seeks to make a further claim which is prohibited by the terms of the 2022 Agreement, I must decide whether the application ought to be dismissed.
- 27 The respondent says that it is contrary to the objects of the IR Act and the public interest, for the Arbitrator to entertain a claim that is pursued in contravention of a no further claims clause. The respondent refers the Arbitrator to *Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort (Management) Ltd* [2002] WAIRC 05952; (2002) 82 WAIG 2112 (*Burswood Resort*). In this matter, the Commission in Court Session considered the application of the public interest and claims made by a party bound by a no further claims commitment:
 However, it is our view that it is desirable and in the public interest to dismiss the Union's application pursuant to s.27(1)(a)(ii) of the Act. In our view it is inherent in the objects of the Act and the entire scheme of the Act that the Commission is to encourage the parties to settle industrial disputes and where such disputes are resolved by amicable agreement by entering into a s.41 industrial agreement, the terms of that agreement should be adhered to. Further it is our view by bringing a claim for an award and seeking arbitration, that action is in breach of Clause 45 of the Casino Agreement. Pursuant to s.83 of the Act where a contravention or failure to comply with a provision of an industrial agreement is proved a penalty can be imposed by the Industrial Magistrate. In *Registrar v Amalgamated Metal Workers' and Shipwrights' Union of Western Australia* (1989) 69 WAIG 29 and (1990) 70 WAIG 3947 the Full Bench upheld appeals by the Registrar (against a decision of the Industrial Magistrate), that there was a case to answer by the Union in respect of a 'no extra claims' clause. In the second appeal the Full Bench remitted the matter to the Industrial Magistrate to fix a penalty [13].
- 28 The applicant contends that it seeks the Arbitrator exercise powers available under s 80E of the IR Act.
- 29 However, s 80E does not provide a basis for the powers of the Arbitrator to be exercised in a manner not consistent with s 26 and s 27 of the IR Act.
- 30 I agree it is not in the public interest to permit a party to seek arbitrated outcomes that effectively improve upon the terms and conditions prescribed by an industrial agreement, which also includes a term that the party agrees to not seek to make such claims during the term of the agreement.
- 31 I find that equity, good conscience and the substantial merits of the case under s 26(1) of the IR Act, means that I ought not permit a party to pursue a claim where that party has made an undertaking to not make further claims under an industrial agreement.
- 32 In addition, similar to *Burswood Resort*, it is in the public interest to dismiss such an application.
- 33 Given my conclusions it is not necessary to consider grounds two and three of the respondent's objections.
- 34 Accordingly, I will dismiss the application.
-

2026 WAIRC 00049

DISPUTE RE CESSATION OF PAID SICK LEAVE FOR UNION MEMBERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

APPLICANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

RESPONDENT**CORAM**PUBLIC SERVICE ARBITRATOR
COMMISSIONER T B WALKINGTON**DATE**

FRIDAY, 30 JANUARY 2026

FILE NO

PSACR 3 OF 2024

CITATION NO.

2026 WAIRC 00049

Result	Application dismissed
Representation	
Applicant	Mr S Farrell (as agent)
Respondent	Mr J Carroll (of counsel)

Order

HAVING heard from Mr S Farrell on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT this application be, and by this order is, dismissed.

(Sgd.) T B WALKINGTON,
Commissioner,
Public Service Arbitrator.

[L.S.]

UNIONS—Matters dealt with under Section 66

2026 WAIRC 00025

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

TIM CLARKE

APPLICANT

-v-

MEDIA, ENTERTAINMENT AND ARTS ALLIANCE OF WESTERN AUSTRALIA (UNION OF EMPLOYEES)

RESPONDENT**CORAM**

CHIEF COMMISSIONER S J KENNER

DATE

WEDNESDAY, 21 JANUARY 2026

FILE NO/S

PRES 8 OF 2024

CITATION NO.

2026 WAIRC 00025

Result	Order issued
Representation	
Applicant	Mr T Borgeest of counsel
Respondent	Mr T Borgeest of counsel

Order

AND WHEREAS on 20 January 2026, the respondent requested that the constitution of the Interim Union Council be altered

reflecting changes in the composition of the Branch Council of the Western Australian Branch of the Media, Entertainment and Arts Alliance;

AND WHEREAS having considered the circumstances, the Commission is satisfied that such alterations should be granted;

NOW THEREFORE, the Chief Commissioner, pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* (WA), hereby orders –

THAT order 2 of [2025] WAIRC 00248 issued on 17 April 2025 be deleted and substituted with the following in lieu:

- (2) THAT Helen TUCKEY is designated Senior President for the purposes of rules 25 and 25AA of the respondent's rules.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

PROCEDURAL DIRECTIONS AND ORDERS—

2025 WAIRC 00871

REFERRAL OF A DISPUTE REGARDING THE EMPLOYER'S DECISION TO REFUSE A FLEXIBLE WORKING ARRANGEMENT REQUEST

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JULES JOHN TUSCANO

APPLICANT

-v-

HEALTH SUPPORT SERVICES

RESPONDENT

CORAM

COMMISSIONER T EMMANUEL

DATE

WEDNESDAY, 22 OCTOBER 2025

FILE NO/S

APPL 34 OF 2025

CITATION NO.

2025 WAIRC 00871

Result	Programming orders issued
Representation	
Applicant	On his own behalf
Respondent	Mr D Anderson (of counsel)

Programming orders

HAVING heard from the applicant on his own behalf and Mr D Anderson (of counsel) on behalf of the respondent, in relation to the jurisdictional fact in dispute, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT the parties file a statement of agreed facts and bundle of agreed documents by 4pm on Friday, 31 October 2025;
2. THAT the applicant file any outlines of evidence (except for expert evidence, which may be contained in a witness statement and stand as evidence in chief) and any documents, not being agreed documents, upon which he intends to rely by 4pm on Friday, 14 November 2025;
3. THAT the respondent file any outlines of evidence (except for expert evidence, which may be contained in a witness statement and stand as evidence in chief) and any documents, not being agreed documents, upon which it intends to rely by 4pm on Friday, 28 November 2025;
4. THAT the applicant file an outline of written submissions by 4pm on Friday, 12 December 2025;
5. THAT the respondent file an outline of written submissions by 4pm on Monday, 5 January 2026; and
6. THAT the matter be listed for a short hearing on a date to be fixed.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2026 WAIRC 00070

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SUZANNE STEWART

APPLICANT

-v-

SWAN VALLEY ANGLICAN COMMUNITY SCHOOL

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE FRIDAY, 6 FEBRUARY 2026
FILE NO. B 82 OF 2025
CITATION NO. 2026 WAIRC 00070

Result Direction issued
Representation
Applicant Dr S Stewart
Respondent Mr A Al Asadi (of counsel)

Direction

HAVING heard from Dr S Stewart on her own behalf and Mr A Al Asadi (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT Direction 2 of the Directions ([2026] WAIRC 00060) issued on 2 February 2026 (*Direction 2*) be vacated.
2. THAT in lieu of *Direction 2*, that the parties file **by Friday, 27 February 2026**:
 - (a) An agreed statement that identifies:
 - (i) The agreed facts.
 - (ii) The agreed issues that are to be determined at the Hearing.
 - (iii) The agreed legal principles applicable to the issues at 2(a)(ii) above.
 - (b) A bundle of agreed documents.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

2026 WAIRC 00060

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SUZANNE STEWART

APPLICANT

-v-

SWAN VALLEY ANGLICAN COMMUNITY SCHOOL

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE MONDAY, 2 FEBRUARY 2026
FILE NO. B 82 OF 2025
CITATION NO. 2026 WAIRC 00060

Result Direction issued
Representation
Applicant Dr S Stewart
Respondent Mr A Al Asadi (of counsel)

Direction

HAVING heard from Dr S Stewart on her own behalf and Mr Al Asadi (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT Direction 2 of the Directions ([2025] WAIRC 00948) issued on 28 November 2025 (**Direction 2**) be vacated.
2. THAT in lieu of Direction 2 above, that the parties file **by Friday, 6 February 2026**:
 - (a) An agreed statement that identifies:
 - (i) The agreed facts.
 - (ii) The agreed issues that are to be determined at the Hearing.
 - (iii) The agreed legal principles applicable to the issues at 2(a)(ii) above.
 - (b) A bundle of agreed documents.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2026 WAIRC 00061

DISPUTE RE ENTITLEMENT TO TAKE A REST DAY

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
WESTERN AUSTRALIA POLICE UNION OF WORKERS

PARTIES

APPLICANT

-v-

COMMISSIONER OF POLICE, WESTERN AUSTRALIA POLICE FORCE

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE TUESDAY, 3 FEBRUARY 2026
FILE NO. C 40 OF 2025
CITATION NO. 2026 WAIRC 00061

Result Direction issued
Representation
Applicant Mr S Farrell (as agent)
Respondent Mr J Carroll (of counsel)

Direction

HAVING heard from Mr S Farrell on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the question of whether the Commission has the necessary jurisdiction to conciliate and arbitrate this application, be determined as a preliminary matter.
2. THAT the respondent file and serve any written outline of submissions by no later than 11 February 2026.
3. THAT the applicant file and serve any written outline of submissions by no later than 18 February 2026.
4. THAT the matter be listed for Hearing to determine the preliminary matter on Tuesday, 3 March 2026 at 10:30 am.
5. THAT the parties have liberty to apply at short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2026 WAIRC 00043

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER B 67/2023 GIVEN ON 13 AUGUST 2025

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JESSICA MAUREEN MCCARTHY	APPELLANT
	-v- MY FOODIE BOX LIMITED	
CORAM	FULL BENCH SENIOR COMMISSIONER R COSENTINO COMMISSIONER T EMMANUEL COMMISSIONER C TSANG	RESPONDENT
DATE	WEDNESDAY, 28 JANUARY 2026	
FILE NO/S	FBA 8 OF 2025	
CITATION NO.	2026 WAIRC 00043	

Result	Orders issued
Representation	
Appellant	Ms Maureen Jessica McCarthy
Respondent	(No appearance)

Order

HAVING heard from Ms M McCarthy, appellant, and there being no appearance by the respondent, the Full Bench, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT the name of the respondent be changed to Tarrina Resources Limited previously known as My Foodie Box Limited; and
- (2) THAT the appeal book is deemed to include:
 - (a) the Form 3 – Contractual Benefit Claim in B 67 of 2023 filed on 21 November 2023;
 - (b) the Form 3A Employer Response to Contractual Benefit Claim in B 67 of 2023 filed on 29 January 2024;
 - (c) Transcript of proceedings before Commissioner T Walkington heard on Monday, 30 September 2024; and
 - (d) Transcript of proceedings before Commissioner T Walkington heard on Tuesday, 1 October 2024.

By the Full Bench
(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2025 WAIRC 00435

REFERRAL OF A DECISION TO TAKE DISCIPLINARY ACTION ON 15 JANUARY 2025

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION SEAN DE SOUZA	APPLICANT
	-v- DIRECTOR GENERAL, DEPARTMENT OF EDUCATION	
CORAM	COMMISSIONER T EMMANUEL	RESPONDENT
DATE	WEDNESDAY, 23 JULY 2025	
FILE NO/S	P 1 OF 2025	
CITATION NO.	2025 WAIRC 00435	

Result Programming orders issued
Representation
Applicant Ms G Murray (of counsel)
Respondent Mr J Carroll (of counsel)

Programming orders

HAVING heard from Ms G Murray (of counsel) on behalf of the applicant and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders, by consent –

1. THAT discovery be informal;
2. THAT the parties file a statement of agreed facts and bundle of agreed documents by 4pm on 8 August 2025;
3. THAT the applicant file any outlines of evidence and any documents, not being agreed documents, upon which he intends to rely by 4pm on 29 August 2025;
4. THAT the respondent file any outlines of evidence and any documents, not being agreed documents, upon which he intends to rely by 4pm on 19 September 2025;
5. THAT the applicant file an outline of written submissions by 4pm on 10 October 2025;
6. THAT the respondent file an outline of written submissions by 4pm on 31 October 2025;
7. THAT the matter be listed for a hearing of up to three days on a date to be fixed not before 7 November 2025; and
8. THAT there be liberty to apply.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2025 WAIRC 00232

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 8 NOVEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

PETER VAN SCHOUBROECK

APPELLANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE WEDNESDAY, 9 APRIL 2025
FILE NO. P 5 OF 2025
CITATION NO. 2025 WAIRC 00232

Result Direction issued
Representation
Appellant Mr P van Schoubroeck
Respondent Ms E Negus (of counsel)

Direction

HAVING heard from Mr P van Schoubroeck on his own behalf and Ms E Negus (of counsel) on behalf of the respondent at the Directions Hearing on 8 April 2025, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT if the appellant no longer seeks for the Commission to hear and determine P 5/2025, that he file a *Form IA – Notice of Discontinuance* with the Commission’s Registry to formally discontinue P 5/2025 **by Tuesday, 22 April 2025**.
2. THAT if the appellant seeks for the Commission to hear and determine P 5/2025, that the question of the Commission’s jurisdiction to hear P 5/2025 be determined as a preliminary issue (**jurisdictional issue**).
3. THAT the respondent file written submissions addressing the jurisdictional issue **by Tuesday, 20 May 2025**.
4. THAT the appellant file written submissions addressing the jurisdictional issue (**appellant’s submissions**) **by Tuesday, 3 June 2025**.

5. THAT the respondent file written submissions that are responsive to the appellant's submissions by **Tuesday, 10 June 2025**.
6. THAT subject to further order, the jurisdictional issue be determined on the papers.
7. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) C TSANG,
Commissioner.**2025 WAIRC 00985****REFERRAL OF A DECISION TO TAKE DISCIPLINARY ACTION ON 7 FEBRUARY 2025**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KIM MARIE HALL

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT**CORAM** COMMISSIONER T B WALKINGTON**DATE** FRIDAY, 12 DECEMBER 2025**FILE NO.** P 9 OF 2025**CITATION NO.** 2025 WAIRC 00985**Result** Direction issued**Representation****Applicant** Ms K Hall**Respondent** Ms E Negus (of counsel)*Direction*

HAVING heard from the applicant on her own behalf, and Ms E Negus on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT the applicant file and serve an additional witness outline for Kim Hall and Shane Arnold, any additional documents, outline of submissions and list of authorities upon which they intend to rely by no later than 7 January 2026;
2. THAT the respondent file and serve any witness outlines, documents, outline of submissions and list of authorities upon which they intend to rely by no later than 28 January 2026;
3. THAT the matter be listed for a three-day hearing on a date to be fixed not before 28 January 2026; and
4. THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.**2025 WAIRC 00974****REFERRAL OF A DECISION TO TAKE DISCIPLINARY ACTION ON 7 FEBRUARY 2025**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KIM MARIE HALL

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF CORRECTIVE SERVICES / DEPARTMENT OF JUSTICE

RESPONDENT**CORAM** COMMISSIONER T B WALKINGTON**DATE** WEDNESDAY, 10 DECEMBER 2025**FILE NO/S** P 9 OF 2025**CITATION NO.** 2025 WAIRC 00974

Result Order issued to amend the name of respondent
Representation
Applicant Ms K Hall
Respondent Ms E Negus (of counsel)

Order

HAVING heard from the applicant on her own behalf, and Ms E Negus on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT the name of the respondent be amended to Director General, Department of Justice

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2025 WAIRC 00698

REFERRAL OF A DECISION TO TAKE DISCIPLINARY ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KIM MARIE HALL

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF CORRECTIVE SERVICES / DEPARTMENT OF JUSTICE

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE WEDNESDAY, 13 AUGUST 2025
FILE NO. P 9 OF 2025
CITATION NO. 2025 WAIRC 00698

Result Direction Issued
Representation
Applicant Ms Kim Marie Hall
Respondent Ms Emily Negus (of counsel)

Direction

HAVING heard from the applicant on her own behalf and Ms Negus on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs —

1. THAT the applicant file and serve any outlines of witness evidence and any documents upon which they intend to rely by no later than 3 September 2025;
2. THAT the respondent file and serve any outlines of witness evidence and any documents, upon which they intend to rely by no later than 17 September 2025;
3. THAT the applicant file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 1 October 2025;
4. THAT the respondent file and serve an outline of submissions and any list of authorities upon which they intend to rely by no later than 15 October 2025;
5. THAT the matter be listed for hearing on a date to be fixed;
6. THAT discovery be informal; and
7. THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2025 WAIRC 00463

REFERRAL OF A DECISION TO TAKE DISCIPLINARY ACTION ON 23 MAY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

QUAI-DE AZAM EDOO

APPLICANT

-v-

SOUTH METROPOLITAN HEALTH SERVICES

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE TUESDAY, 5 AUGUST 2025
FILE NO/S P 18 OF 2025
CITATION NO. 2025 WAIRC 00463

Result Programming orders issued
Representation
Applicant On his own behalf
Respondent Mr M Aulfrey (as agent)

Programming orders

HAVING heard from the applicant on his own behalf and Mr M Aulfrey (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT by 4pm on Tuesday, 19 August 2025, the applicant file his response to the respondent's application to dismiss application P 18 of 2025 (**Dismissal Application**), any materials on which he seeks to rely, and written submissions opposing the Dismissal Application;
2. THAT application P 18 of 2025 be listed for a short hearing to determine the Dismissal Application; and
3. THAT the parties have liberty to apply.

(Sgd.) T EMMANUEL,
 Commissioner.

[L.S.]

2025 WAIRC 00798

REFERRAL OF A DECISION TO TAKE DISCIPLINARY ACTION ON 20 JUNE 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RICHARD DETURT

APPLICANT

-v-

CEO, EAST METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE FRIDAY, 19 SEPTEMBER 2025
FILE NO/S P 19 OF 2025
CITATION NO. 2025 WAIRC 00798

Result Programming order issued
Representation
Applicant On his own behalf
Respondent Mr J Carroll (of counsel)

Order

HAVING heard from the applicant on his own behalf and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

1. THAT the applicant file outlines of any evidence and any documents upon which he intends to rely by 3pm on Friday, 10 October 2025;
2. THAT the respondent file outlines of any evidence and any documents upon which it intends to rely by 3pm on Friday, 31 October 2025;
3. THAT the applicant file an outline of written submissions by 3pm on Friday, 14 November 2025;
4. THAT the respondent file an outline of written submissions by 4pm on Friday, 28 November 2025; and
5. THAT the matter be listed for two days of hearing on dates to be fixed.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2025 WAIRC 00855

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 4 JUNE 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

PARTIES

APPLICANT

-v-

COMMISSIONER, MAIN ROADS

RESPONDENT

CORAM COMMISSIONER T KUCERA
DATE TUESDAY, 14 OCTOBER 2025
FILE NO/S P 21 OF 2025
CITATION NO. 2025 WAIRC 00855

Result	Directions issued
Representation	
Applicant	Mr J Finnegan
Respondent	Mr M McIlwaine (of counsel)

Order

WHEREAS the parties requested on Tuesday, 18 September 2025, a one week extension to comply with orders 4 to 8 issued by the Commission in order [2025] WAIRC 00692.

AND WHEREAS the parties requested on Tuesday, 14 October 2025, a one week extension to comply with orders 5 to 8 issued by the Commission in order [2025] WAIRC 00800.

HAVING heard from Mr J Finnegan on behalf of the applicant and Mr M McIlwaine of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders—

1. THAT discovery is to be informal.
2. THAT the parties are to file any statement of agreed facts and bundle of agreed documents by Tuesday, 26 August 2025.
3. THAT by Tuesday, 2 September 2025 the applicant is to file:
 - a. any witness outlines in the manner required by practice note 9 of 2021; and
 - b. any documents which are not agreed documents which the applicant intends to rely on.
4. THAT by Tuesday, 30 September 2025 the respondent is to file:
 - a. any witness outlines in the manner required by practice note 9 of 2021; and
 - b. any documents which are not agreed documents which the respondent intends to rely on.
5. THAT the applicant is to file an outline of written submissions in support of the application by Tuesday, 21 October 2025.
6. THAT the respondent is to file an outline of written submissions in opposition to the application by Tuesday, 4 November 2025.
7. THAT the application is to be listed for a directions hearing not before Tuesday, 4 November 2025.
8. THAT there be liberty to apply on short notice.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

2025 WAIRC 00800

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 4 JUNE 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

COMMISSIONER, MAIN ROADS

RESPONDENT

CORAM COMMISSIONER T KUCERA
DATE FRIDAY, 19 SEPTEMBER 2025
FILE NO/S P 21 OF 2025
CITATION NO. 2025 WAIRC 00800

Result Directions issued
Representation
Applicant Mr J Finnegan
Respondent Mr M McIlwaine (of counsel)

Order

WHEREAS the parties requested on Tuesday, 18 September 2025, a one week extension to comply with orders 4 to 8 issued by the Commission in order [2025] WAIRC 00692.

HAVING heard from Mr J Finnegan on behalf of the applicant and Mr M McIlwaine of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders—

1. THAT discovery is to be informal.
2. THAT the parties are to file any statement of agreed facts and bundle of agreed documents by Tuesday, 26 August 2025.
3. THAT by Tuesday, 2 September 2025 the applicant is to file:
 - a. any witness outlines in the manner required by practice note 9 of 2021; and
 - b. any documents which are not agreed documents which the applicant intends to rely on.
4. THAT by Tuesday, 30 September 2025 the respondent is to file:
 - a. any witness outlines in the manner required by practice note 9 of 2021; and
 - b. any documents which are not agreed documents which the respondent intends to rely on.
5. THAT the applicant is to file an outline of written submissions in support of the application by Tuesday, 14 October 2025.
6. THAT the respondent is to file an outline of written submissions in opposition to the application by Tuesday, 28 October 2025.
7. THAT the application is to be listed for a directions hearing not before Tuesday, 28 October 2025.
8. THAT there be liberty to apply on short notice.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2025 WAIRC 00692

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 4 JUNE 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

COMMISSIONER, MAIN ROADS

RESPONDENT

CORAM COMMISSIONER T KUCERA
DATE TUESDAY, 12 AUGUST 2025
FILE NO/S P 21 OF 2025
CITATION NO. 2025 WAIRC 00692

Result	Directions issued
Representation	
Applicant	Mr J Finnegan
Respondent	Mr M McIlwaine of counsel

Minute of Proposed Order

HAVING heard from Mr J Finnegan on behalf of the applicant and Mr M McIlwaine of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders—

1. THAT discovery is to be informal.
2. THAT the parties are to file any statement of agreed facts and bundle of agreed documents by Tuesday, 26 August 2025.
3. THAT by Tuesday, 2 September 2025 the applicant is to file:
 - a. any witness outlines in the manner required by practice note 9 of 2021; and
 - b. any documents which are not agreed documents which the applicant intends to rely on.
4. THAT by Tuesday, 23 September 2025 the respondent is to file:
 - a. any witness outlines in the manner required by practice note 9 of 2021; and
 - b. any documents which are not agreed documents which the respondent intends to rely on.
5. THAT the applicant is to file an outline of written submissions in support of the application by Tuesday, 7 October 2025.
6. THAT the respondent is to file an outline of written submissions in opposition to the application by Tuesday, 21 October 2025.
7. THAT the application is to be listed for a directions hearing not before Tuesday, 21 October 2025.
8. THAT there be liberty to apply on short notice.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2025 WAIRC 00753

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 7 JULY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RICHARD TITELIUS

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF JUSTICE

RESPONDENT

CORAM COMMISSIONER T KUCERA
DATE MONDAY, 1 SEPTEMBER 2025
FILE NO/S P 25 OF 2025
CITATION NO. 2025 WAIRC 00753

Result	Order issued
Representation	
Applicant	Mr S Alexander of Counsel
Respondent	Mr Carroll of Counsel

Order

HAVING heard from Mr S Alexander (of counsel) on behalf of the applicant and Mr J Carroll (of counsel), on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders by consent—

1. THAT discovery is to be informal.
2. THAT the parties are to file any statement of agreed facts and bundle of agreed documents by Monday, 22 September 2025.
3. THAT by Monday, 13 October 2025, the applicant is to file:

- a. any witness outlines in the manner required by practice note 9 of 2021; and
 - b. any documents which are not agreed documents which he intends to rely on.
4. THAT by Monday, 27 October 2025, the respondent is to file:
- a. any witness outlines in the manner required by practice note 9 of 2021; and
 - b. any documents which are not agreed documents which the respondent intends to rely on.
5. THAT the applicant is to file an outline of written submissions which he intends to make by Monday, 3 November 2025.
6. THAT the respondent is to file an outline of written submissions which the respondent intends to make by Monday, 10 November 2025.
7. THAT the matter is to be listed for a further conciliation conference not before Monday, 10 November 2025.
8. THAT there be liberty to apply.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

2026 WAIRC 00017

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 17 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GRANT ANDREW JACKSON

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF PRIMARY INDUSTRIES AND REGIONAL
DEVELOPMENT

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

THURSDAY, 15 JANUARY 2026

FILE NO.

P 27 OF 2025

CITATION NO.

2026 WAIRC 00017

Result

Directions issued

Representation

Applicant

Mr G A Jackson

Respondent

Ms H Ticehurst (of counsel) on behalf of the Direction General, Department of Primary Industries and Regional Development

Directions

HAVING heard from Mr G A Jackson, Applicant, and Ms H Ticehurst (of counsel) on behalf of the Respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT matters P 27 of 2025, P 33 of 2025, and P 35 of 2025 be listed for hearing concurrently, to be heard and determined together;
- (2) THAT the classification decision which is to be the subject of the Commission's review is the Respondent's decision dated 19 December 2025;
- (3) THAT the requirements of regulation 62D(2)(c) of the *Industrial Relations Commission Regulations 2005* (WA) be dispensed with;
- (4) THAT by 5 February 2026, the applicant is to provide the respondent with copies of any documents which the applicant will seek to rely upon at the final hearing of his matter;
- (5) THAT by 26 February 2026, the respondent is to file an electronic Joint Bundle of Documents which:
 - (a) is indexed, gives each document a unique number, and is paginated;
 - (b) is divided into 4 sections:
 - (i) Section 1 being documents that are common to all applicants in P 27 of 2025, P 33 of 2025 and P 35 of 2025;
 - (ii) Section 2 being documents specific to P 27 of 2025,
 - (iii) Section 3 being documents specific to P 33 of 2025; and
 - (iv) Section 4 being documents specific to P 35 of 2025.

- (c) contains a copy of each document provided by the applicants pursuant to direction 3 of this direction, without unnecessary duplication; and
- (d) contains a copy of each document the respondent will seek to rely upon at the final hearing of the matters, without unnecessary duplication;
- (6) THAT by 5 March 2026, each party is to file a list, identifying by document number the documents in the Joint Bundle of Documents which the party requires be attested to by a witness or the tender of which is otherwise objected to. Any document not so identified may be received into evidence by consent;
- (7) THAT by 19 March 2026, the parties are to file witness statements for any witness/witnesses that the party will call to give evidence. Subject to compliance with this direction, the witness statement may stand as the evidence in chief of the witness, with any further evidence in chief permitted only with the leave of the Commission. Each witness statement must:
 - (a) be dated and signed by the person making it; and
 - (b) if referring to a document, identify the document by the description and the number of the document in the Joint Bundle of Documents filed in accordance with direction 5;
- (8) THAT at the final hearing:
 - (a) each Applicant is to give a brief opening statement outlining the distinct grounds of their application;
 - (b) questioning of the Respondent’s witnesses on common issues is to be conducted by a single representative on behalf of all Applicants. Each Applicant may ask supplemental questions limited to matters specific to their individual grounds; and
 - (c) the final hearing will otherwise follow the process outlined at paragraph 14 of the Western Australian Industrial Relations Commission’s Practice Note 1 of 2025;
- (9) THAT the matter be listed for a final hearing of 1 day’s duration on a date to be fixed having regard to the parties’ available dates.
- (10) THAT the parties have liberty to apply on short notice.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2026 WAIRC 00018

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 17 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LOUISE SMITH

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF PRIMARY INDUSTRIES AND REGIONAL DEVELOPMENT

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO

DATE THURSDAY, 15 JANUARY 2026

FILE NO. P 33 OF 2025

CITATION NO. 2026 WAIRC 00018

Result	Directions issued
Representation	
Applicant	Ms L Smith
Respondent	Ms H Ticehurst (of counsel) on behalf of the Director General, Department of Primary Industries and Regional Development

Directions

HAVING heard from Ms L Smith, Applicant, and Ms H Ticehurst (of counsel) on behalf of the Respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT matters P 27 of 2025, P 33 of 2025, and P 35 of 2025 be listed for hearing concurrently, to be heard and determined together;
- (2) THAT the classification decision which is to be the subject of the Commission’s review is the Respondent’s decision dated 19 December 2025;
- (3) THAT the requirements of regulation 62D(2)(c) of the *Industrial Relations Commission*

- Regulations 2005* (WA) be dispensed with;
- (4) THAT by 5 February 2026, the applicant is to provide the respondent with copies of any documents which the applicant will seek to rely upon at the final hearing of his matter;
 - (5) THAT by 26 February 2026, the respondent is to file an electronic Joint Bundle of Documents which:
 - (a) is indexed, gives each document a unique number, and is paginated;
 - (b) is divided into 4 sections:
 - (i) Section 1 being documents that are common to all applicants in P 27 of 2025, P 33 of 2025 and P 35 of 2025;
 - (ii) Section 2 being documents specific to P 27 of 2025,
 - (iii) Section 3 being documents specific to P 33 of 2025; and
 - (iv) Section 4 being documents specific to P 35 of 2025.
 - (c) contains a copy of each document provided by the applicants pursuant to direction 3 of this direction, without unnecessary duplication; and
 - (d) contains a copy of each document the respondent will seek to rely upon at the final hearing of the matters, without unnecessary duplication;
 - (6) THAT by 5 March 2026, each party is to file a list, identifying by document number the documents in the Joint Bundle of Documents which the party requires be attested to by a witness or the tender of which is otherwise objected to. Any document not so identified may be received into evidence by consent;
 - (7) THAT by 19 March 2026, the parties are to file witness statements for any witness/witnesses that the party will call to give evidence. Subject to compliance with this direction, the witness statement may stand as the evidence in chief of the witness, with any further evidence in chief permitted only with the leave of the Commission. Each witness statement must:
 - (a) be dated and signed by the person making it; and
 - (b) if referring to a document, identify the document by the description and the number of the document in the Joint Bundle of Documents filed in accordance with direction 5;
 - (8) THAT any document required to be filed by these directions may be filed in P 27 of 2025 and any documents filed in P 27 of 2025 shall be available in relation to P 33 of 2025 and P 35 of 2025;
 - (9) THAT at the final hearing:
 - (a) each Applicant is to give a brief opening statement outlining the distinct grounds of their application;
 - (b) questioning of the Respondent's witnesses on common issues is to be conducted by a single representative on behalf of all Applicants. Each Applicant may ask supplemental questions limited to matters specific to their individual grounds; and
 - (c) the final hearing will otherwise follow the process outlined at paragraph 14 of the Western Australian Industrial Relations Commission's Practice Note 1 of 2025;
 - (10) THAT the matter be listed for a final hearing of 1 day's duration on a date to be fixed having regard to the parties' available dates; and
 - (11) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2026 WAIRC 00019

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 17 DECEMBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GRANT ALEXANDER MACDONALD

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF PRIMARY INDUSTRIES AND REGIONAL
DEVELOPMENT**RESPONDENT****CORAM**

SENIOR COMMISSIONER R COSENTINO

DATE

THURSDAY, 15 JANUARY 2026

FILE NO.

P 35 OF 2025

CITATION NO.

2026 WAIRC 00019

Result	Directions issued
Representation	
Applicant	Mr G A MacDonald
Respondent	Ms H Ticehurst (of counsel) on behalf of the Direction General, Department of Primary Industries and Regional Development

Directions

HAVING heard from Mr G A MacDonald, Applicant, and Ms H Ticehurst (of counsel) on behalf of the Respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT matters P 27 of 2025, P 33 of 2025, and P 35 of 2025 be listed for hearing concurrently, to be heard and determined together;
- (2) THAT the classification decision which is to be the subject of the Commission's review is the Respondent's decision dated 19 December 2025;
- (3) THAT the requirements of regulation 62D(2)(c) of the *Industrial Relations Commission Regulations 2005* (WA) be dispensed with;
- (4) THAT by 5 February 2026, the applicant is to provide the respondent with copies of any documents which the applicant will seek to rely upon at the final hearing of his matter;
- (5) THAT by 26 February 2026, the respondent is to file an electronic Joint Bundle of Documents which:
 - (a) is indexed, gives each document a unique number, and is paginated;
 - (b) is divided into 4 sections:
 - (i) Section 1 being documents that are common to all applicants in P 27 of 2025, P 33 of 2025 and P 35 of 2025;
 - (ii) Section 2 being documents specific to P 27 of 2025,
 - (iii) Section 3 being documents specific to P 33 of 2025; and
 - (iv) Section 4 being documents specific to P 35 of 2025.
 - (c) contains a copy of each document provided by the applicants pursuant to direction 3 of this direction, without unnecessary duplication; and
 - (d) contains a copy of each document the respondent will seek to rely upon at the final hearing of the matters, without unnecessary duplication;
- (6) THAT by 5 March 2026, each party is to file a list, identifying by document number the documents in the Joint Bundle of Documents which the party requires be attested to by a witness or the tender of which is otherwise objected to. Any document not so identified may be received into evidence by consent;
- (7) THAT by 19 March 2026, the parties are to file witness statements for any witness/witnesses that the party will call to give evidence. Subject to compliance with this direction, the witness statement may stand as the evidence in chief of the witness, with any further evidence in chief permitted only with the leave of the Commission. Each witness statement must:
 - (a) be dated and signed by the person making it; and
 - (b) if referring to a document, identify the document by the description and the number of the document in the Joint Bundle of Documents filed in accordance with direction 5;
- (8) THAT any document required to be filed by these directions may be filed in P 27 of 2025 and any documents filed in P 27 of 2025 shall be available in relation to P 33 of 2025 and P 35 of 2025;
- (9) THAT at the final hearing:
 - (a) each Applicant is to give a brief opening statement outlining the distinct grounds of their application;
 - (b) questioning of the Respondent's witnesses on common issues is to be conducted by a single representative on behalf of all Applicants. Each Applicant may ask supplemental questions limited to matters specific to their individual grounds; and
 - (c) the final hearing will otherwise follow the process outlined at paragraph 14 of the Western Australian Industrial Relations Commission's Practice Note 1 of 2025;
- (10) THAT the matter be listed for a final hearing of 1 day's duration on a date to be fixed having regard to the parties' available dates; and
- (11) THAT the parties have liberty to apply on short notice.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2025 WAIRC 00977

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 29 AUGUST 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CALLUM MACPHERSON

PARTIES

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE WEDNESDAY, 10 DECEMBER 2025
FILE NO. P 44 OF 2025
CITATION NO. 2025 WAIRC 00977

Result Directions issued
Representation
Applicant Mr J Tebbutt (agent)
Respondent Mr M McIlwaine (of counsel)

Direction

HAVING received proposed directions from Mr J Tebbutt (agent) on behalf of the applicant and Mr M McIlwaine (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT discovery be informal.
2. THAT the matter be listed for a 2-day hearing not before **Friday, 15 May 2026 (Hearing)**.
3. THAT the parties file **by Friday, 20 February 2026**:
 - (a) An agreed statement that identifies:
 - (i) The agreed facts.
 - (ii) The agreed issues that are to be determined at the Hearing.
 - (iii) The agreed legal principles applicable to the issues at 3(a)(ii) above.
 - (b) A bundle of agreed documents.
4. THAT the applicant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 13 March 2026**.
5. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 3 April 2026**.
6. THAT the applicant file an outline of submissions **by Friday, 24 April 2026**.
7. THAT the respondent file an outline of submissions **by Friday, 8 May 2026**.
8. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

2025 WAIRC 00941

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 29 AUGUST 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CALLUM MACPHERSON

PARTIES

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE TUESDAY, 25 NOVEMBER 2025
FILE NO. P 44 OF 2025
CITATION NO. 2025 WAIRC 00941

Result	Order issued
Representation	
Applicant	Mr J Tebbutt (agent)
Respondent	Mr M McIlwaine (of counsel)

Order

Having heard from Mr J Tebbutt (agent) on behalf of the applicant and Mr M McIlwaine (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

THAT within one-business day of the date of this order, and in accordance with s 27(1)(o) of the *Industrial Relations Act 1979* (WA), the respondent is to provide discovery of the Department of Communities' investigation report (Ref: 2024/61702) and the investigation report's 14 attachments.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00976

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 19 SEPTEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
COLLINS OKORO

PARTIES

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES WA

RESPONDENT

CORAM	COMMISSIONER C TSANG
DATE	WEDNESDAY, 10 DECEMBER 2025
FILE NO.	P 45 OF 2025
CITATION NO.	2025 WAIRC 00976

Result	Directions issued
Representation	
Applicant	Mr C Okoro
Respondent	Mr M McIlwaine (of counsel)

Direction

HAVING heard from Mr C Okoro on his own behalf and Mr M McIlwaine (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT discovery be informal.
2. THAT the matter be listed for a 2-day hearing not before **Friday, 22 May 2026 (Hearing)**.
3. THAT the parties file **by Friday, 6 February 2026**:
 - (a) An agreed statement that identifies:
 - (i) The agreed facts.
 - (ii) The agreed issues that are to be determined at the Hearing.
 - (iii) The agreed legal principles applicable to the issues at 3(a)(ii) above.
 - (b) A bundle of agreed documents.
4. THAT the applicant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 20 March 2026**.
5. THAT the respondent file any application regarding the applicant's witness outlines **by Monday, 30 March 2026**, with the application to be heard **on Wednesday, 1 April 2026 at 12pm**.
6. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 10 April 2026**.
7. THAT the applicant file an outline of submissions **by Friday, 1 May 2026**.
8. THAT the respondent file an outline of submissions **by Friday, 15 May 2026**.
9. THAT the parties have liberty to apply at short notice.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00973

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 29 AUGUST 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MARTIN SANDERSON

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE TUESDAY, 9 DECEMBER 2025
FILE NO. P 46 OF 2025
CITATION NO. 2025 WAIRC 00973

Result Directions issued
Representation
Applicant Ms K Sanders (agent)
Respondent Mr M McIlwaine (of counsel)

Direction

HAVING heard from Ms K Sanders (agent) on behalf of the applicant and Mr M McIlwaine (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), and by consent, hereby directs –

1. THAT discovery be informal.
2. THAT the matter be listed for a 2-day hearing not before **Friday, 8 May 2026 (Hearing)**.
3. THAT the parties file **by Friday, 6 February 2026**:
 - (a) An agreed statement that identifies:
 - (i) The agreed facts.
 - (ii) The agreed issues that are to be determined at the Hearing.
 - (iii) The agreed legal principles applicable to the issues at 3(a)(ii) above.
 - (b) A bundle of agreed documents.
4. THAT the applicant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 27 February 2026**.
5. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 20 March 2026**.
6. THAT the applicant file an outline of submissions **by Friday, 10 April 2026**.
7. THAT the respondent file an outline of submissions **by Friday, 1 May 2026**.
8. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

2025 WAIRC 00864

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 29 AUGUST 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE MONDAY, 20 OCTOBER 2025
FILE NO. P 46 OF 2025
CITATION NO. 2025 WAIRC 00864

Result Order issued
Representation
Applicant Ms K Sanders (as agent)
Respondent Mr M McIlwaine (of counsel)

Order

HAVING heard from Ms K Sanders (as agent) on behalf of the applicant, and Mr M McIlwaine (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the name of the applicant to the application ‘The Civil Service Association of Western Australia Incorporated’ be deleted and substituted with ‘Martin Sanderson’.
2. THAT Mr Sanderson have leave to file an amended Form 5, which is to be filed within one business day of the date of this Order.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2026 WAIRC 00073

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 16 SEPTEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SLADJANA NESKOVIC

PARTIES

APPLICANT

-v-

CHIEF EXECUTIVE, CHILD AND ADOLESCENT HEALTH SERVICE

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE FRIDAY, 6 FEBRUARY 2026
FILE NO/S P 48 OF 2025
CITATION NO. 2026 WAIRC 00073

Result Order issued
Representation
Applicant Ms S Neskovic
Respondent Mr J Raja

Order

HAVING heard from Ms S Neskovic on her own behalf and Mr J Raja on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the name of the respondent to the application ‘Chief Executive, Child and Adolescent Health Service’ be deleted and substituted with ‘Child and Adolescent Health Service’.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2026 WAIRC 00071

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 16 SEPTEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SLADJANA NESKOVIC

PARTIES

APPLICANT

-v-

CHIEF EXECUTIVE, CHILD AND ADOLESCENT HEALTH SERVICE

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE FRIDAY, 6 FEBRUARY 2026
FILE NO. P 48 OF 2025
CITATION NO. 2026 WAIRC 00071

Result Direction issued
Representation
Applicant Ms S Neskovic
Respondent Mr J Raja

Direction

HAVING heard from Ms S Neskovic on her own behalf and Mr J Raja on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

Preliminary matter

1. THAT the issue of the decision-maker's authority to make the decision imposing disciplinary action on 16 September 2025, be heard and determined as a preliminary matter (**Preliminary Matter**), on the papers.
2. THAT the respondent file the documents relevant to the Preliminary Matter **by Friday, 13 February 2026**.
3. THAT the applicant file any witness statements and submissions relevant to the Preliminary Matter **by Friday, 20 February 2026**.
4. THAT the respondent file any witness statements and submissions relevant to the Preliminary Matter **by Friday, 27 February 2026**.

Substantive matter

5. THAT the applicant's referral of the decision imposing disciplinary action on 16 September 2025, be listed for a 3-day hearing not before 1-week following the date of Direction 9 below (**Hearing**).
6. THAT by no later than 2-weeks following the date of the Commission determining the Preliminary Matter, the applicant file any outlines of witness evidence that she intends to rely upon at the Hearing.
7. THAT by no later than 2-weeks following the date of Direction 6 above, the respondent file any outlines of witness evidence that they intend to rely upon at the Hearing.
8. THAT by no later than 3-weeks following the date of Direction 7 above, the applicant file an outline of the legal submissions that she intends to rely upon at the Hearing.
9. THAT by no later than 3-weeks following the date of Direction 8 above, the respondent file an outline of the legal submissions that they intend to rely upon at the Hearing.

Liberty to apply

10. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00955

REFERRAL OF A DECISION TO TERMINATE EMPLOYMENT ON 15 SEPTEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JAMES HERBERT

APPLICANT

-v-

DEPARTMENT OF CREATIVE INDUSTRIES, TOURISM AND SPORT

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE MONDAY, 1 DECEMBER 2025
FILE NO. P 50 OF 2025
CITATION NO. 2025 WAIRC 00955

Result Directions issued
Representation
Applicant Mr J Herbert
Respondent Mr D Anderson (of counsel)

Direction

HAVING heard from Mr J Herbert on his own behalf and Mr D Anderson (of counsel) on behalf of the respondent at the Directions Hearing on Friday, 28 November 2025, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*

(WA), hereby directs –

1. THAT the respondent’s jurisdictional objection be listed for hearing **on Thursday, 19 February 2026 at 10:00am (Hearing)**.
2. THAT the parties file **by Friday, 12 December 2025**:
 - (a) An agreed statement that identifies:
 - (i) The issue(s) that the respondent contends are to be determined at the Hearing.
 - (ii) The agreed facts that are relevant to the issue(s) at paragraph 2(a)(i) above.
 - (b) A bundle of agreed documents.
3. THAT the applicant file outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 19 December 2025**.
4. THAT the respondent file outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Friday, 9 January 2026**.
5. THAT the applicant file an outline of submissions **by Friday, 23 January 2026**.
6. THAT the respondent file an outline of submissions **by Friday, 6 February 2026**.
7. THAT the parties are to notify Chambers if they agree for the Hearing to be vacated and for the jurisdictional objection to be determined on the papers **by Friday, 6 February 2026**.
8. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2026 WAIRC 00072

APPLICATION TO REFER BREACH OF PUBLIC SECTOR STANDARDS CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SLADJANA NESKOVIC

APPLICANT

-v-

CHILD AND ADOLESCENT HEALTH SERVICE

RESPONDENT

CORAM

COMMISSIONER C TSANG

DATE

FRIDAY, 6 FEBRUARY 2026

FILE NO.

P 51 OF 2025

CITATION NO.

2026 WAIRC 00072

Result Direction issued

Representation

Applicant Ms S Neskovic

Respondent Mr J Raja

Direction

HAVING heard from Ms S Neskovic on her own behalf and Mr J Raja on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the respondent’s jurisdictional objection (that the Commission does not have jurisdiction to hear and determine the applicant’s *Form 24 – Application to Refer Breach of Public Sector Standards Claim*, for an alleged breach of the Grievance Resolution Standard, because the applicant did not lodge a grievance with the respondent), be heard and determined as a preliminary matter (**Preliminary Matter**), on the papers.
2. THAT the applicant file any witness statements and submissions relevant to the Preliminary Matter **by Friday, 20 February 2026**.
3. THAT the respondent file any witness statements and submissions relevant to the Preliminary Matter **by Friday, 6 March 2026**.
4. THAT the parties have liberty to apply.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2026 WAIRC 00054

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 25 JANUARY 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BREANNA MAREE BOLLIG

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION WESTERN AUSTRALIA

RESPONDENT**CORAM** COMMISSIONER C TSANG**DATE** FRIDAY, 30 JANUARY 2026**FILE NO.** P 66 OF 2025**CITATION NO.** 2026 WAIRC 00054**Result** Direction issued**Representation****Applicant** Ms B M Bollig**Respondent** Ms S Walsh (of counsel)*Direction*

HAVING heard from Ms B M Bollig on her own behalf and Ms S Walsh (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the respondent's jurisdictional objection be heard and determined as a preliminary issue, on the papers.
2. THAT the respondent file an outline of submissions **by Friday, 13 March 2026**.
3. THAT the applicant file an outline of submissions **by Friday, 27 March 2026**.
4. THAT the parties have liberty to apply at short notice.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2026 WAIRC 00024

DISPUTE RE ALLEGED CONTRAVENTION OF THE OWNER-DRIVERS (CONTRACTS AND DISPUTES) ACT 2007

IN THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

SITTING AS

THE ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL

PARTIES

JOONDALUP TRANSPORT PTY LTD

APPLICANT

-v-

ONSITE RENTAL GROUP OPERATIONS PTY LTD

RESPONDENT**CORAM** COMMISSIONER T KUCERA**DATE** MONDAY, 19 JANUARY 2026**FILE NO/S** RFT 1 OF 2025**CITATION NO.** 2026 WAIRC 00024**Result** Order issued**Representation****Applicant** Ms Melissa Gillespie (of counsel)**Respondent** Mr Michael Mistilis (of counsel)

Order

HAVING heard from Ms M Gillespie (of counsel) on behalf of the applicant and Mr M Mistilis (of counsel) on behalf of the respondent, the Road Freight Transport Industry Tribunal, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

1. THAT the respondent is to file any witness statements on the misconduct issue in the manner required by Practice Note 9 of 2021 by Monday 16 February 2026.
2. THAT the applicant is to file any witness statements on the misconduct issue in the manner required by Practice Note 9 of 2021 by Monday 16 March 2026.
3. THAT the parties are to provide discovery of any documents that may be relevant to the proceedings, on an informal and ongoing basis.
4. THAT the matter is to be listed for a further conciliation conference on 19 March 2026.
5. THAT there be liberty to apply.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

2026 WAIRC 00035

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LORRAINE MARY KINGHAM

APPLICANT

-v-

MANDURAH CATHOLIC COLLEGE

PRINCIPAL RESPONDENT

JANINE CONRADIE

INDIVIDUAL RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE FRIDAY, 23 JANUARY 2026
FILE NO. S 1 OF 2026
CITATION NO. 2026 WAIRC 00035

Result	Directions issued
Representation	
Applicant	Lorraine Mary Kingham
Principal Respondent	Mandurah Catholic College
Individual Respondent	Janine Conradie

Direction

THE Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (**IR Act**), hereby directs –

- (1) THAT the principal respondent's jurisdictional objection (that it is a national system employer not subject to the provisions of the IR Act) be listed for hearing and determination on a date not before 12 February 2026.
- (2) THAT the applicant file any witness statements, documentary evidence and submissions relevant to the determination of the jurisdictional objection by 29 January 2026;
- (3) THAT the principal respondent file any witness statements, documentary evidence and submissions relevant to the determination of the jurisdictional objection by 5 February 2026; and
- (4) THAT the parties inform each other of any person for whom a witness statement has been filed, who will be required for cross-examination at the hearing of the jurisdictional objection, by 12 February 2026.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2026 WAIRC 00063

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

REBECCA ANNE NEIL

APPLICANT

-v-

CAMPBELL DAVID JAMES AS TRUSTEE FOR ALLIED SERVICE ENTITY TRUST #1

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE TUESDAY, 3 FEBRUARY 2026
FILE NO. U 46 OF 2025
CITATION NO. 2026 WAIRC 00063

Result Direction issued
Representation
Applicant Mr M Cox (of counsel)
Respondent Ms K Dyball

Direction

HAVING heard from Mr M Cox (of counsel) on behalf of the applicant, and Ms K Dyball on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT Discovery be informal;
2. THAT the parties file a statement of agreed facts by no later than 17 February 2026;
3. THAT the parties file a bundle of agreed documents by no later than 3 March 2026;
4. THAT the applicant file any witness outlines and documents they intend to rely upon by no later than 17 March 2026;
5. THAT the respondent file any witness outlines and documents they intend to rely upon by no later than 14 April 2026;
6. THAT the applicant file any outline of submissions and list of authorities they intend to rely upon by no later than 12 May 2026;
7. THAT the respondent file any outline of submissions and list of authorities they intend to rely upon by no later than 9 June 2026;
8. THAT the matter be listed for a two-day Hearing on a date to be fixed not before 9 June 2026;
9. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
 Commissioner.

[L.S.]

2026 WAIRC 00057

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

RONALD JOHN HINKLEY

APPLICANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE MONDAY, 2 FEBRUARY 2026
FILE NO. U 85 OF 2025
CITATION NO. 2026 WAIRC 00057

Result	Orders and Directions issued
Representation	
Applicant	Mr R Hinkley via zoom
Respondent	Ms M Farrar (of counsel) on behalf of the Department of Communities

Orders and Directions

HAVING heard from Mr R Hinkley, applicant, and Ms M Farrar, of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT the name of the respondent to the proceedings be amended to Director General, Department of Communities; and
- (2) THAT the respondent's application for the dismissal of the proceedings pursuant to s27(1)(a) of the *Act* dated 8 December 2025, be hereby and is hereby dismissed.

AND FURTHER directs –

- (3) THAT the time for the applicant to comply with direction 1 of the directions made on 21 November 2025 ([2025] WAIRC 934) be extended to 3 March 2026;
- (4) THAT the time for the respondent to comply with direction 2 of the directions made on 21 November 2025 be extended to 31 March 2026;
- (5) THAT the application be listed for a hearing of 3 days duration not before 31 March 2026; and
- (6) THAT there be liberty to apply.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Shire of Yilgarn Industrial Agreement 2025 AG 1/2026	02/02/2026	Shire of Yilgarn	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement registered
Western Australia Police Force Auxiliary Officers Industrial Agreement 2024 AG 2/2026	10/02/2026	Western Australia Police Force	WA Police Union of Workers, Civil Service Association of Western Australia Incorporated	Commissioner T B Walkington	Agreement registered

PUBLIC SECTOR INDUSTRIAL MATTERS—Matters dealt with

2026 WAIRC 00036

REFERRAL OF A DECISION TO TERMINATE EMPLOYMENT ON 25 OCTOBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2026 WAIRC 00036
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	TUESDAY, 19 AUGUST 2025
DELIVERED	:	FRIDAY, 23 JANUARY 2026
FILE NO.	:	P 2 OF 2025
BETWEEN	:	ANDRE PEDRO BRENDER-A-BRANDIS
		Applicant
		AND
		DIRECTOR GENERAL, DEPARTMENT OF PREMIER AND CABINET
		Respondent

CatchWords	:	Industrial Law (WA) – Unfair dismissal application – Extension of time – Whether application ought to be accepted outside the prescribed timeframe – Relevant principles applied – Extension of time refused – Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Industrial Relations Commission Regulations 2005</i> (WA) <i>Industrial Relations Legislation Amendment Act 2024</i> (WA)
Result	:	Application for extension of time dismissed
Representation:		
Applicant	:	Mr A P Brender-A-Brandis
Respondent	:	Mr D Anderson (of counsel)

Case(s) referred to in reasons:

Brodie-Hanns v MTV Publishing Ltd (1995) 67 IR 298

Jackamarra v Krakouer [1998] HCA 27; (1998) 195 CLR 516

Malik v Paul Albert, Director General, Department of Education of Western Australia [2004] WASCA 51; (2004) 84 WAIG 283

Reasons for Decision

- 1 On 5 February 2025, Mr André Pedro Brender-A-Brandis (**applicant**) applied to the Western Australian Industrial Relations Commission (**the Commission**), under s 29(1)(c) of the *Industrial Relations Act 1979* (WA) (**the Act**) in relation to the termination of his employment with the Director General, Department of Premier and Cabinet (**respondent**).
- 2 It is not contested that the applicant resigned from his employment on 25 October 2024. The applicant claims he was unfairly dismissed because his resignation was forced as a result of the respondent's conduct. The applicant seeks compensation for loss caused by the termination of his employment.
- 3 The application is made 103 days after the applicant's resignation from employment. Section 29(2)(a) of the Act provides that applications be filed within 28 days of the termination of employment. Therefore, this application is filed 75 days beyond the prescribed time limit.
- 4 Section 29(3) of the Act provides that the Commission may accept a referral that is out of time if the Commission considers it would be unfair not to do so.
- 5 The respondent opposes the granting of an extension of time, because of the length of the delay and the prejudice to the respondent.
- 6 I must decide whether to accept the application made after the prescribed time.
- 7 The principles to be applied by the Commission to determine whether an application ought to be accept 'out of time' are set out by the Industrial Appeal Court in *Malik v Paul Albert, Director General, Department of Education of Western Australia* [2004] WASCA 51; (2004) 84 WAIG 683 (*Malik*). As Heenan J summarised citing Marshall J in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, the principles to be adopted are:
 1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay which makes it equitable to so extend.
 2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
 3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
 4. The mere absence of prejudice is an insufficient basis to grant an extension of time.
 5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
 6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the court's discretion. [74]

Application process history

- 8 On 15 January 2025, the applicant submitted a claim to the Industrial Magistrates Court (**IMC**) for damaging action and unfair dismissal. On 17 January 2025 the IMC requested that he separate the claims to the IMC and unfair dismissal application to the Commission.
- 9 On 27 January 2025, the applicant submitted a *Form 2 - Unfair Dismissal Application* (**Form 2**) to the Commission's Registry.
- 10 On 28 January 2025, the Commission's Registry emailed the applicant about his Form 2:

Dear Mr Brender-A-Brandis,

I refer to the attached *Form 2 – Unfair Dismissal Application* (Form 2) and our telephone conversation this morning.

As discussed, ordinarily a government officer or public service officer would not make an unfair dismissal application via the Form 2 process. This is because there is a dedicated appeal process for government officers and public service officers. As the Public Service Arbitrator has exclusive jurisdiction to deal with industrial matters relating to government officers, you may need to consider potential jurisdictional issues with regard to the *Form 2 – Unfair Dismissal Application*.

The *Form 8B – Notice of Appeal - Government Officers, Public Service Officers* is for use when initiating an appeal before the Public Service Appeal Board. Further information can be found here. I have also attached blank copies of the form for your convenience.

Upcoming Changes to State Employment Laws

As discussed, amendments to the *Industrial Relations Act 1979* (WA) will commence on 31 January 2025. This includes the abolition of the Public Service Arbitrator and the Public Service Appeal Board. More information provided by the Department of Energy, Mines, Industry Regulation and Safety can be found here and in the attached fact sheet.

I confirm the Registry will hold your Form 2 for seven days to allow you the opportunity to seek clarification and/or advice on how to refer your matter to the Commission. By no later than **close of business, 4 February 2025**, please provide your intentions regarding the Form 2.

If you wish to proceed with the Form 2, you will need to contact the Registry on (08) 9420 4444 to organise payment of the \$50.00 filing fee.

If you wish to seek external legal or industrial advice, I have identified organisations below which may be able to assist you.

Circle Green Community Legal

Telephone: (08) 6148 3636

Website: <https://circlegreen.org.au/get-help/>

Law Society of Western Australia

Telephone: (08) 9324 8600

Website: <https://www.lawsocietywa.asn.au/>

Legal Aid WA

Telephone: 1300 650 579

Website: <https://www.legalaid.wa.gov.au/>

Please do not hesitate to contact the Registry by telephone on (08) 9420 4444, or by email to registry@wairc.wa.gov.au, if you have any queries in relation to this email.

- 11 On 4 February 2025, the applicant requested the withdrawal of the Form 2. On 5 February 2025, the applicant filed a *Form 5 - Application to Refer a Public Sector Matter (Form 5)* to the Commission, in relation to a decision to dismiss an employee. The Form 5 was 75 days outside of the 28-day period to apply to the Commission for unfair dismissal. The applicant is a government officer pursuant to s 36AB of the Act, and therefore, would have been covered by the jurisdiction of the Public Service Appeal Board if his application was filed during the 28-day timeframe.
- 12 The respondent submits the applicant was made aware by the Commission's Registry on 28 January 2025, that he had attempted to bring an application for unfair dismissal in the wrong jurisdiction. The respondent contends that the applicant chose to wait for the abolishment of the constituent authorities before bringing an application for unfair dismissal to the Commission on 5 February 2025. Further, the respondent argues that the communication from the Commission's Registry clearly conveyed the need to act with haste to be able to make the application before the Public Service Appeal Board was abolished.

Reasons for delay

Health

- 13 The applicant submits his mental state contributed to the delay because he has sustained adverse public and psychological health impacts including suffering stress, anxiety and sleeping disorders. The applicant says he is mentally exhausted because of the toll of the 18 months of prolonged adverse behaviours directed toward him by the respondent. The applicant says he has been required to take a significant period of leave from work, and that he has been undertaking medical treatment with his General Practitioner, along with psychological treatment. Following his resignation, the applicant says he has undertaken personal recovery for his mental wellbeing including respite.
- 14 The applicant submitted a medical certificate dated 17 December 2024 into evidence, concerning the applicant's treatment for 'severe work-related stress' since 28 November 2023. The certificate states that the medical practitioner had recommended extensive periods of leave as he was unfit for work given the circumstances and presenting symptoms.
- 15 The respondent maintains that the applicant's capacity to complete the steps necessary to make an application to the Commission in the prescribed period, or within a significantly less period, were not impaired. The respondent refers to the applicant's 12-page letter to the respondent dated and signed 23 December 2024, in which the applicant responded to allegations of misconduct. The respondent argues that the capacity required to compose and submit the letter is the same as required to make an application to the Commission. As such, the applicant could have undertaken the task of making an application at that time. However, the applicant waited until 15 January 2025 to lodge a claim to the IMC.
- 16 The respondent contends that during the relevant periods, the applicant actively engaged in his duties and responsibilities as a

Councillor for the City of South Perth, and this diminishes his reasoning that he was not mentally capable of lodging an application at that time. The applicant had approved leave from his responsibilities as a Councillor for the period 23 October 2024 to 30 November 2024. The applicant attended the December meeting of the Council.

- 17 I find the medical certificate does not specifically address the applicant's fitness to initiate nor participate in proceedings concerning his termination from employment. The medical certificate is general in nature and refers to the medical practitioner's recommendation that the applicant take extensive periods of leave as he was unfit for work. I note the medical certificate does not specify the periods of leave. Furthermore, there is no medical evidence for the period between 17 December 2024 and 5 February 2025. In my view, medical evidence submitted by the applicant does not adequately address the applicant's capacity to initiate an application concerning his termination. I am not satisfied the applicant's health presented an impediment to making an application within the prescribed time or a significantly lesser period than what he took.
- 18 On 10 December 2024, the applicant commenced employment with the Rottnest Island Authority (**RIA**) through an arrangement with Hays Recruitment.
- 19 I agree that the applicant certainly had capacity to complete the process for making an application concerning the fairness of his termination to the Commission in December 2024, evidenced by his capacity to compose a lengthy response to the allegations of misconduct.
- 20 In addition, I agree that the applicant's capacity to undertake his duties as a Councillor with the City of South Perth, indicates his health and mental wellbeing did not impede him from undertaking active participation in a variety of tasks.
- 21 I am not satisfied the applicant has a reasonable explanation concerning his health for the delay. This factor weighs against granting leave to extend the prescribed time to file an application.

Overseas holiday

- 22 The applicant gave evidence that the timing of his application was impacted by his overseas holiday between 31 October 2024 and 26 November 2024. The applicant's evidence is the holiday had been planned one year earlier.
- 23 The respondent contends the applicant was not impeded from making an application before he proceeded on his holiday and/or shortly after his return. The respondent argues that despite the applicant's contention the overseas holiday had been planned one year earlier, an application for annual leave had not been made to the employer at the time. The respondent speculates that the applicant had exhausted his accrued paid personal leave and resigned knowing he would shortly leave for his overseas holiday.
- 24 The applicant has not provided any reasons for a planned overseas holiday being a barrier to not being able to lodge his application before he commenced his holiday, during his holiday nor in the period shortly after he returned from overseas.
- 25 This consideration weighs against granting an extension.

Collation of extensive documents

- 26 The applicant says the requirement to collate an extensive amount of material regarding the respondent's damaging actions experienced over 18 months during his employment, contributed to the delay. The applicant claims he commenced the application process during December 2024.
- 27 I note the Form 5 completed by the applicant states that documents in support of an application, may be attached if they are useful to the Commission and the respondent. On the Form 5, the applicant confirmed under the heading 'Document Checklist' that pursuant to the *Industrial Relations Commission Regulations 2005 (WA) (the Regulations)*, he did not require any further documents to be attached. Nevertheless, the applicant attached 359 pages of documents to his application. Under the Regulations, it was not necessary to collate and attach the extensive amount of documentation in support of the application.
- 28 The requirement to make an application within the specified time period under the Act, ought to have been favoured over the collation of documents. I find this consideration weighs against granting an extension.

Steps taken to contest the dismissal

- 29 The applicant's evidence is that he raised his concerns regarding the respondent's decision to transfer him to another role several times over a lengthy period. The applicant submitted a copy of a letter dated 24 April 2024 from his lawyers to the respondent concerning the applicant's claims that he experienced bullying, harassment and victimisation during his employment. The applicant purportedly informed the respondent that he may commence a damaging action claim, and submits the respondent was on notice that he may commence proceedings concerning the respondent's conduct.
- 30 The applicant submitted a copy of a second letter, which was also dated 24 April 2024 from his lawyers to the respondent, concerning an investigation of claims that the applicant may have committed a breach of discipline. The applicant's letter was in response to the respondent's letter dated 21 March 2024, which the applicant also submitted into evidence.
- 31 Furthermore, the applicant wrote to the respondent on 23 December 2024 regarding allegations of misconduct.
- 32 The respondent submits that prior to 5 February 2025, the respondent was not aware of any attempt by the applicant to commence litigation concerning his alleged constructive dismissal, which occurred in October 2024. This is because the applicant had not taken any steps after resigning to inform the respondent he planned to contest the cessation of his employment.
- 33 The applicant's correspondence to the respondent through his lawyers on 24 April 2024, is well before his resignation. The letter does not refer to the applicant considering action should he believe that he must resign. It cannot be said that the correspondence dated 24 April 2024, conveyed to the respondent the possibility of the applicant taking action to contest the fairness of the cessation of his employment on 25 October 2024.
- 34 Similarly, the applicant's letter dated 23 December 2024, was composed some months after the applicant's resignation,

addressing misconduct allegations which do not make any reference to contesting the termination of his employment.

- 35 The applicant gave evidence that he engaged WorkSafe and submitted copies of two improvement notices issued following complaints raised on and after 13 October 2023. One improvement notice concerned the lack of provisions for a physical or psychological risk assessment. The second improvement notice concerned the provision of a safe system of work and procedure to manage and control psychological risk and hazards. The applicant gave evidence that he notified WorkSafe of an injury in November 2024, and a subsequent investigation by WorkSafe resulted in the issuance of the two improvement notices.
- 36 The applicant attested that he also complained to the Human Rights Commission. He recalled that the complaint was made sometime in July 2024, and the complaint was subsequently amended on or after January 2025.
- 37 I find the applicant has not taken any other steps to contest the termination of his employment since his resignation on 25 October 2024. Much of the applicant's evidence concerns events that are prior to the applicant's resignation and cannot be said to be contesting his termination. The applicant's correspondence with the respondent following the notification of his resignation, does not contest his termination, nor does it inform the respondent that he considered his termination to be a constructive dismissal, and that it was unfair, harsh or oppressive. This factor weighs against granting an extension of time.

Fairness to others in similar position as the applicant

- 38 The applicant seeks a remedy of compensation and in his Form 5, he states:

I do not want my job back, as I no longer consider reinstatement as an employee at the Department possible or acceptable.

Based on an employment environment with psychologically unsafe conditions, the damaging actions I had been subject to, and the decision to demote me to Project Manager Grants, I was unable to see a realistic pathway forward whereby I could continue my employment. I no longer consider reinstatement as an employee at the Department possible or acceptable. Please refer to the attached statement for further information.

Rather than reinstatement as an employee as the Department, I am seeking compensation.

- 39 The ability to seek a remedy of compensation for government officers was made available by amendments to the Act under the *Industrial Relations Legislation Amendment Act 2024* (WA). The amendments to the Act took effect from 31 January 2025. Before this date, government officers were not eligible for compensation and the remedy available was limited to reinstatement.
- 40 At the Directions Hearing on 8 May 2025, the parties were requested to address the effect of the legislative changes on the issues in this matter.
- 41 The applicant submits his understanding was that he could make one application concerning all the issues he has with his employment with the respondent to the IMC. The applicant was seeking to access an avenue that would encompass his claims concerning sexual harassment.
- 42 The applicant is only able to attain compensation under the current statutory framework because his application is out of time. Clearly it is unfair for the applicant to access a remedy not available to other persons in a like position who did apply to the Public Service Appeal Board in time and therefore cannot attain compensation.
- 43 This consideration weighs against granting the application leave to be filed outside of the prescribed time limit.
- Prejudice to the respondent**
- 44 The applicant submits that there is no additional prejudice to the respondent given the relatively short period of time that has elapsed.
- 45 The applicant says there is not a significant amount of time which would result in the respondent being unlikely to locate former employees and summons each of them to the proceedings. Further, the applicant says the respondent's own actions and conduct, result in the release of employees from employment with the respondent who are subject to the applicant's grievances.
- 46 As stated earlier in my reasons, the applicant is only able to attain compensation because his application is out of time. This is directly prejudicial to the respondent and weighs against the granting of an extension of time.

Merits of the application

- 47 In *Malik*, a further consideration is whether the applicant's claim is likely to succeed or not. It would not be unfair to refuse to accept an application, if the claim of unfair dismissal is not likely to succeed. For the purposes of deciding whether to accept an application outside of the prescribed time, the assessment of the merit of the claim need only be 'fairly rough and ready': *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516 [9] per Brennan CJ & McHugh J.
- 48 The applicant submits the claim will be successful because the treatment of the respondent left him with no alternative but to resign. The applicant argues that he has considerable evidence concerning the grievances he formally lodged with the respondent. He claims the evidence portrays the respondent's lack of action, flawed investigations and incorrect findings towards these grievances. The applicant says there is evidence that the respondent treated him inappropriately as a response to the grievances he made.
- 49 The respondent says the applicant's claim cannot succeed because he voluntarily resigned and there was no dismissal at the initiative of the employer. That is, the jurisdictional fact of a dismissal being a termination at the initiative of the employee must be found to engage the Commission's jurisdiction.
- 50 The respondent submits that it is not necessary to consider the merits of the application in this matter because the length of the delay and the prejudice to the respondent weigh against granting the extension of time.

51 I consider it is only necessary to conduct an assessment of the merits of the claim where the other factors are in favour of granting an extension. In this matter, I have found that the factors outlined in *Malik* weigh against granting an extension.

52 This factor is neutral.

Conclusion

53 I have found that the length of delay was significant warranting a satisfactory explanation for the delay. I do not consider the explanations of the applicant are satisfactory. There is prejudice to the respondent, and it would be unfair to persons in a similar situation to the applicant if the application was accepted outside of the prescribed timeframe under the Act. The applicant has not demonstrated that he took alternative steps to contest his alleged dismissal.

54 For the reasons above, I decline to accept the application out of time.

2026 WAIRC 00037

REFERRAL OF A DECISION TO TERMINATE EMPLOYMENT ON 25 OCTOBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ANDRÉ PEDRO BRENDER-A-BRANDIS

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF PREMIER AND CABINET

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE FRIDAY, 23 JANUARY 2026

FILE NO/S P 2 OF 2025

CITATION NO. 2026 WAIRC 00037

Result Application for extension of time dismissed

Representation

Applicant Mr A P Brender-A-Brandis

Respondent Mr D Anderson (of counsel)

Order

HAVING heard from the applicant on his own behalf and Mr D Anderson (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders:

THAT this application be and is hereby dismissed

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2025 WAIRC 00279

REFERRAL OF A DECISION TO TERMINATE EMPLOYMENT ON 25 OCTOBER 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ANDRÉ PEDRO BRENDER-A-BRANDIS

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF PREMIER AND CABINET

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE FRIDAY, 9 MAY 2025

FILE NO/S P 2 OF 2025

CITATION NO. 2025 WAIRC 00279

Result Direction issued

Representation

Applicant Mr Andre Pedro Brender-A-Brandis

Respondent Mr David Anderson (of counsel)

Direction

HAVING heard from the applicant on his own behalf and Mr Anderson on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)*, and by consent, hereby directs —

1. THAT the question of whether the Commission ought to accept the application out of time be heard and determined as a preliminary matter;
2. THAT the applicant file and serve any outlines of witness evidence, documents, an outline of submissions and any list of authorities upon which they intend to rely, that are relevant to the determination of the out of time issue, by no later than 22 May 2025;
3. THAT the respondent file and serve any outlines of witness evidence, documents, an outline of submissions and any list of authorities upon which they intend to rely, that are relevant to the determination of the out of time issue, by no later than 12 June 2025;
4. THAT the applicant file and serve any further witness evidence, documents, submissions and authorities in response to the respondent's submissions, by no later than 26 June 2025;
5. THAT the preliminary matter be listed for hearing, for one day, on a date to be determined; and
6. THAT the parties have liberty to apply on short notice.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2025 WAIRC 00837

REFERRAL OF A DECISION TO DISMISS EMPLOYEE 24 JUNE 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRUCE STANTON HILL DIGGINS

APPLICANT

-v-

WA COUNTRY HEALTH SERVICE

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE TUESDAY, 7 OCTOBER 2025
FILE NO/S P 22 OF 2025
CITATION NO. 2025 WAIRC 00837

Result Application discontinued
Representation
Applicant On his own behalf
Respondent Mr A Bleach (as agent)

Order

WHEREAS application P 22 of 2025 is an application to refer a public sector matter in relation to a decision to dismiss an employee for any other reason, other than a decision to terminate the employment of an employee under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014*;

AND WHEREAS Mr Diggins filed an application in application P 22 of 2025 on 8 July 2025;

AND WHEREAS WA Country Health Service filed a response in application P 22 of 2025 on 30 July 2025;

AND WHEREAS a conciliation conference was held in application P 22 of 2025 jointly with application U 73 of 2025 on 12 September 2025;

AND WHEREAS on 3 October 2025, Mr Diggins telephoned the Commission and said he wished to discontinue application P 22 of 2025;

NOW THEREFORE the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979 (WA)*, orders –

THAT application P 22 of 2025 be, and by this order is, discontinued.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2025 WAIRC 00775

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 21 MAY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2025 WAIRC 00775
CORAM : COMMISSIONER C TSANG
HEARD : ON THE PAPERS
DELIVERED : THURSDAY, 11 SEPTEMBER 2025
FILE NO. : P 17 OF 2025
BETWEEN : CHARMAINE MELLOR
 Applicant
 AND
 DIRECTOR GENERAL DEPARTMENT OF ENERGY, MINES, INDUSTRY
 REGULATION AND SAFETY
 Respondent

CatchWords : Whether the Commission has jurisdiction pursuant to s 36AA(2)(b) of the *Industrial Relations Act 1979* (WA) to hear and determine a challenge to the transfer decision and refusal of the Leave Without Pay request
Legislation : *Industrial Relations Act 1979* (WA)
Interpretation Act 1984 (WA)
Public Sector Management Act 1994 (WA)
Result : Jurisdictional objection upheld; Application dismissed
Representation:
Applicant : Ms C Mellor (on her own behalf)
Respondent : Mr J Carroll (of counsel)

Cases referred to in reasons:*Cross v Economic Regulation Authority* [2021] WAIRC 00476*Director General Department of Justice v Civil Service Association of Western Australia Inc* [2005] WASCA 244*Patole v Child & Adolescent Health Service* [2024] WASCA 126*Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers)* (1986) 67 WAIG 466*Reasons for Decision***Background**

1 On 10 June 2025, the applicant (**Ms Mellor**) filed a *Form 5 – Application to Refer Public Sector Matter (Form 5)*, challenging the following decisions on the basis that they relate to the ‘interpretation of a conditions of service provision’ under s 36AA(2)(b) of the *Industrial Relations Act 1979* (WA) (**IR Act**):

On 2 May 2025, the Applicant was notified of a permanent transfer to a new role, despite having been on extended leave, and without prior consultation or procedural fairness. The decision was issued via email without attachment of the job description and followed by inconsistent communications via SMS from differing staff. Attempts to query and resolve the matter internally were dismissed, with the Respondent claiming the decision was already implemented and could not be reversed.

On 16 May 2025, the Applicant submitted a request for Leave Without Pay (**LWOP**), to begin after the exhaustion of paid leave. The request was refused by Acting Commissioner Tim Banfield, without the decision-maker seeking information from the Applicant to enable assessment ‘on the merits’ as required by clause 29 of the Award. The refusal relied on vague claims of ‘impact on the team,’ without identifying how this satisfied the ‘inconvenience’ threshold in clause 29(2)(a).

When the Applicant sought clarification and requested the matter be referred back to the decision-maker, General Manager Fiona Donaldson expressly declined to do so. Her refusal to return the matter for proper determination has effectively cut off the Applicant’s ability to raise a formal grievance, frustrating the operation of clause 65 of the Award and section 29(1)(l) of the [*Public Sector Management Act 1994* (WA) (**PSM Act**)].

2 On 26 June 2025, the respondent filed a *Form 4 – Response (Form 4)*, raising the jurisdictional objection that the matters in Ms Mellor’s Form 5 fail to meet the requirements of s 36AA(2)(b).

3 The matter was listed for a Directions Hearing on 15 July 2025, at which Directions were made for the following issues to be determined as preliminary issues on the papers:

(a) The Commission’s jurisdiction to determine the matters in Ms Mellor’s Form 5.

- (b) Ms Mellor's application for leave of the Commission to accept her Form 5 out of time pursuant to ss 29(2)(b) and 29(3) of the IR Act.

Evidence

4 On 29 July 2025, Ms Mellor filed an affidavit, stating:

- (a) At [18]–[21]:
18. I allege that the actions taken by the respondent amount to a failure to comply with key statutory obligations under the PSM Act, including failure to act fairly, reasonably and with procedural fairness.
 19. The decision to permanently transfer me was made without proper consideration of my skills, qualifications and experience, and without adequate consultation or adherence to fair process. The respondent has failed to apply merit principles and did not provide me with an opportunity to be genuinely heard. This breaches requirements of procedural fairness.
 20. Further, the respondent did not act with the sensitivity or fairness expected under the PSM Act, especially given their knowledge of my medical history and the psychological harm caused by their previous actions. Despite these circumstances, they have failed to provide a safe and healthy work environment, and have continued to make adverse decisions with full awareness of the impact on my wellbeing.
 21. Additionally, the respondent refused to acknowledge the failure to apply the principles required or escalate my formal grievance, contrary to policy and industrial agreements. The process used was fundamentally flawed. Their decision-making contravenes merit principles, general principles of public administration and management, including fairness and integrity. This has left me with no internal avenue to resolve the matter and has reinforced the respondent's failure to comply with their statutory obligations. ...

Late Filing

- (b) The permanent transfer decision was signed by the A/Director General on 2 May 2025. Although the respondent sent an email on 16 April 2025, she was not notified of its existence until 1 May 2025 and only read it on 2 May 2025.
- (c) She promptly sought clarification of the transfer decision from Fiona Donaldson (General Manager People Consulting, Health and Safety) (**Ms Donaldson**). While Ms Donaldson indicated that she would be granted an extension of time in which to respond to the transfer decision, later that day Ms Donaldson emailed to say that the transfer decision had already been finalised and she was expected to present for work on Monday, 5 May 2025.
- (d) Thereafter, she sought to resolve the matter with the respondent directly. She filed the Form 5 shortly after her efforts for internal resolution failed.
- (e) Accordingly, if the transfer decision was finalised on 2 May 2025, the 11-day delay in the filing of the Form 5 is minor, and:
- (i) Was caused by the respondent's lack of compliance with internal processes.
 - (ii) Is not opposed by the respondent.
 - (iii) Has not caused any prejudice to the respondent.
- 5 Ms Mellor attached the following to her affidavit:
- (a) Her employment contract, dated 3 August 2023, appointing her to the permanent full-time position of Executive Officer, Level 5, Consumer Protection Division, reporting to the Executive Director, Consumer Protection subject to the following terms and conditions:
1. Your employment is in accordance with the [PSM Act] and the conditions outlined in this contract of employment.
 2. Your conditions of employment are covered under the *Public Service Award 1992* [(**Award**)], and the *Public Sector CSA Agreement 2022* as amended or replaced.
- (b) The 'Notification of Change – Permanent Transfer' letter dated 2 May 2025:
- I write to you regarding my letter dated 16 April 2025 proposing to transfer you into the Senior Investigator role. I note you were notified of the proposed transfer on 16 April 2025 and were provided an opportunity to respond by 28 April 2025. In the absence of any response, I have made the decision to transfer you into the Senior Investigator role [redacted] within Investigations Branch B, under section 65 of the [PSM Act].
- This transfer is effective 5 May 2025, it is expected you will return to work on this date and report to [redacted].
- You have previously received a copy of the Job Description Form.
- If you have any queries or wish to seek clarification on this matter, please contact [redacted].
- (c) The following emails exchanged with Ms Donaldson on the transfer decision:
- (i) Email from Ms Donaldson, dated 19 February 2025, 10:17am.
 - (ii) Email to Ms Donaldson, acknowledging receipt of the email at [5(c)(i)] above.
 - (iii) Email to Ms Donaldson, dated 2 May 2025, 1:59pm.

- (iv) Email from Ms Donaldson, dated 2 May 2025, 3:36pm.
 - (v) Email to Ms Donaldson, dated 4 May 2025, 6:29pm.
 - (vi) Email from Ms Donaldson, dated 5 May 2025, 7:59am.
 - (vii) Email to Ms Donaldson, dated 5 May 2025, 1:53pm.
 - (viii) Email from Ms Donaldson, dated 5 May 2025, 3:00pm.
 - (ix) Email to Ms Donaldson, dated 6 May 2025, 2:47pm.
 - (x) Email from Ms Donaldson, dated 6 May 2025, 4:17pm.
- (d) The following emails exchanged on the LWOP decision:
- (i) Email from Kenneth Dobson, General Manager Investigations (**Mr Dobson**), dated 21 May 2025, 1:33pm.
 - (ii) Email to Mr Dobson, copied to Ms Donaldson, dated 27 May 2025, 1:41pm.
 - (iii) Email from Ms Donaldson, dated 27 May 2025, 4:09pm.
 - (iv) Email to Ms Donaldson, copied to Mr Dobson, dated 28 May 2025, 3:23pm.

The parties' submissions

6 On 30 July 2025, the respondent filed written submissions, stating:

- (a) Pursuant to s 29(1)(d) of the IR Act, a 'public service officer' has standing to refer a 'decision mentioned in section 36AA(2)(b)' of the IR Act to the Commission.
- (b) Section 36AA(2)(b) of the IR Act provides that the Commission has jurisdiction to enquire into and deal with 'a decision of an employing authority of a public service officer relating to the interpretation of a conditions of service provision.'
- (c) 'Conditions of service provision' is defined in s 36AA(1) of the IR Act to mean 'a provision of the [PSM Act] relating to the conditions of service of public service officers, other than the salaries and allowances of public service officers.'
- (d) For there to be jurisdiction, it is necessary that the decision must 'relate to' the interpretation of a provision of the PSM Act relating to the conditions of service of public service officers, other than salaries and allowances.
- (e) By s 46(1) of the *Interpretation Act 1984* (WA) (*Interpretation Act*), 'a reference in a written law to a written law shall be construed so as to include a reference to any subsidiary legislation made under the written law'. Accordingly, the relevant decision could relate to the interpretation of a provision of the regulations made under the PSM Act.

Transfer decision

- (f) The decision to transfer Ms Mellor was made pursuant to the power to transfer public service officers in s 65 of the PSM Act.
- (g) Given the state of the authorities, it may be accepted that s 65 is a 'conditions of service provision': *Cross v Economic Regulation Authority* [2021] WAIRC 476 (*Cross*) [56]–[64].
- (h) However, there is nothing in the Form 5 to identify the alleged misinterpretation or misconstruction of a conditions of service provision: *Cross* [52].
- (i) The Form 5 and Ms Mellor's affidavit [18]–[21] (at [4(a)] above), indicate that Ms Mellor's grievance is with the manner in which the respondent applied the PSM Act in exercising discretion.

LWOP decision

- (j) The LWOP decision was made pursuant to cl 29 of the Award.
- (k) As the Award is not the PSM Act or subsidiary legislation under the PSM Act, a decision made under the Award does not 'relate to' the interpretation of the PSM Act relating to the conditions of service of public service officers.

7 On 26 August 2025, Ms Mellor filed her written submissions, stating:

- 6. The decisions the subject of this application are:
 - (a) the outcome of my application for [LWOP], made on grounds unrelated to the merits;
 - (b) the blocking and failure of the internal grievance process; and
 - (c) my permanent transfer.
- 7. Each of these decisions involves the incorrect interpretation and application of conditions of service provisions of the PSM Act, including:
 - s 65(1)(a) (transfer of officers based on suitability and qualifications);
 - s 9(b)–(c) (principles of conduct: integrity, respect, sensitivity);
 - s 8(1)(c), (e) (human resource principles: fair treatment, safe and healthy working environment); and
 - s 29(1)(l) (requirement for proper resolution of employee grievances).
- 8. The LWOP refusal was made without seeking relevant information from me and solely by reference to operational needs. That approach is inconsistent with the PSM Act's principles of fairness and sensitivity.

9. The Commission's role is not to re-make management decisions, but to determine whether the employing authority has correctly interpreted and applied the statutory provisions. My case is that it has not.

A. The leave without pay decision

10. The Respondent submits that the LWOP refusal was made under the Award and is therefore outside jurisdiction. I disagree:

- The Award and Agreement do not displace the statutory obligations in the PSM Act. Decisions under the Award must still comply with the conduct and HR principles in the PSM Act.
- The refusal letter shows the decision was made by a delegated authority. The reasons given were operational ('impact on the team') and failed to apply the statutory requirements of fairness and procedural fairness.
- The true issue is not the Award itself, but whether the Respondent complied with its statutory obligations under the PSM Act when making the decision.
- My attempts to pursue a grievance about the decision were blocked, frustrating the PSM Act requirement for grievance resolution and leaving me with no alternative but to approach this Commission.

11. The LWOP decision was made without a merits-based assessment, contrary to s 8 of the PSM Act. It therefore engages a conditions of service provision within the meaning of s 36AA(2)(b) of the IR Act.

B. The transfer decision

12. The Respondent accepts that the transfer was made under s 65 of the PSM Act and that s 65 is a conditions of service provision. They argue, however, that my complaint concerns only the exercise of discretion. That is incorrect.

13. My case is that the decision involved misinterpretation and misapplication of the law:

- 'Suitability' in s 65 was misconstrued because my qualifications and experience were not considered.
- Relevant considerations were disregarded.
- I was denied procedural fairness as I was not consulted and reasons were not properly provided.

14. These errors concern the meaning and requirements of statutory provisions, not simply the exercise of discretion. That falls within s 36AA(2)(b).

15. The Respondent relies on [*Cross*]. In *Cross*, the Commission found no jurisdiction because the applicant's grievance was only about how a discretion was exercised. My case is different: I allege that the decision-maker misunderstood and misapplied the meaning of 'suitability' in s 65, and failed to comply with the HR and conduct principles in ss 8 and 9. That is a matter of statutory interpretation and falls squarely within jurisdiction.

16. At paragraph 5 of the Respondent's submissions, they cite 's 32AA(2)(b)' of the IR Act. That section does not exist. While likely a typographical error, it highlights the careless approach the Respondent has taken toward presenting its case.

17. The Respondent has also repeatedly mis-stated my address in correspondence. This shows poor procedural compliance, and a failure to comply with obligations of fairness and sensitivity under the PSM Act. I have no idea if the Respondent has been sending correspondence to that address.

C. Blocked grievance process

18. The Respondent's failure to allow me access to the grievance process breaches s 29 of the PSM Act.

19. Although I was informed about the grievance procedure, in practice it was blocked by the relevant staff member, contrary to my express requests for escalation.

20. This failure deprived me of procedural rights and constitutes an industrial matter under the IR Act.

3. Timeliness

21. The transfer decision was signed on 2 May 2025. I was notified that day. The internal grievance process continued until at least 6 May 2025. My application was lodged on 10 June 2025.

22. I submit that:

- (a) because the decision-making and grievance process continued until at least 6 May 2025, my application is within the 28-day limit; or
- (b) if the decision is taken as final on 2 May 2025, the delay is only 11 days.

23. Section 29(3) of the IR Act allows the Commission to accept a late referral where it would be unfair not to. Relevant factors might be:

- the short length of the delay;
- my confusion and good faith attempts to resolve the matter internally;
- the fact that I acted promptly once it was clear the grievance process had been blocked;
- absence of prejudice to the Respondent beyond defending the matter; and
- the seriousness and arguable merit of my claim.

24. In any event, the Respondent has conceded it will not oppose an extension. There is therefore no prejudice to them,

while refusal would cause me serious injustice.

- 8 On 28 August 2025, the respondent filed written submissions in reply, stating:
- (a) Ms Mellor's submissions confirm the issue she takes with the identified decisions is one of disagreement as to how the provisions have been applied, rather than an alleged error in construction.
 - (b) Ms Mellor does not identify what the respondent's alleged construction of any provision was, and why that construction was incorrect.
 - (c) Ms Mellor argues there was a 'misinterpretation and misapplication' of the law with respect to the transfer decision but does not identify the alleged misinterpretation or misconstruction. Ms Mellor says the word 'suitability' was misconstrued 'because [her] qualifications and experience were not considered', however, the word 'suitability' or 'suitable' does not appear in s 65 of the PSM Act. Furthermore, a failure to consider a matter does not in and of itself amount to a misconstruction. Ms Mellor's submissions [13], [15], [17] (at [7] above) confirm the issue that she seeks to raise is one of how the provisions of the PSM Act were applied, and not an alleged misconstruction.
 - (d) Ms Mellor argues the LWOP decision was made without a merits-based assessment contrary to s 8 of the PSM Act, however, s 8(a) is directed to 'selection processes' which a LWOP decision is not. Furthermore, Ms Mellor's grievance is not that the respondent misunderstood the PSM Act, it is that she disagrees with the way the PSM Act applied to her circumstances (if the PSM Act applied at all, given the decision complained of was made under the Award).
 - (e) In relation to the 'blocked grievance process', Ms Mellor's submissions confirm that there is no alleged misconstruction but an alleged failure to comply with the PSM Act, and the latter does not establish the former.

Consideration

- 9 Ms Mellor bears the onus of establishing jurisdiction: *Springdale Comfort Pty Ltd v Building Trades Association of Unions of Western Australia (Association of Workers)* (1986) 67 WAIG 466.
- 10 As outlined at [7] above, Ms Mellor describes the three challenged decisions as:
- (a) The transfer decision;
 - (b) The LWOP decision; and
 - (c) The blocked grievance process.
- 11 As outlined at [1] and [5(b) and (d)(i)] above, Ms Mellor's Form 5 was filed on 10 June 2025, in relation to the transfer decision made on 2 May 2025, and the LWOP decision made on 21 May 2025. Ms Mellor attached to her affidavit, as Annexure D, the emails described as 'Grievance email regarding LWOP and procedure (dated 28 May 2025)'. Given the purported dates the decisions at [10] above were made (2 May 2025, 21 May 2025 and 28 May 2025), the relevant version of the IR Act is the version current 31 January 2025–30 June 2025 [PCO 16-10-00], and the relevant version of the PSM Act is the version current 31 January 2025–30 June 2025 [PCO 12-p0-00].
- 12 Ms Mellor contends that each of the respondent's decisions involves the incorrect interpretation and application of conditions of service provisions under the PSM Act, specifically ss 8(1)(c) and (e), 9(b)–(c), 29(1)(l) and 65(1)(a) of the PSM Act:

8. Human resource management principles

- (1) The principles of human resource management that are to be observed in and in relation to the Public Sector are that –
 - ...
 - (c) employees are to be treated fairly and consistently and are not to be subjected to arbitrary or capricious administrative acts; and
 - ...
 - (e) employees are to be provided with safe and healthy working conditions in accordance with the *Work Health and Safety Act 2020*.

9. Principles of conduct by public sector bodies etc.

The principles of conduct that are to be observed by all public sector bodies and employees are that they –

- ...
- (b) are to act with integrity in the performance of official duties and are to be scrupulous in the use of official information, equipment and facilities; and
- (c) are to exercise proper courtesy, consideration and sensitivity in their dealings with members of the public and employees.

29. Functions of CEOs and chief employees

- (1) Subject to this Act and to any other written law relating to his or her department or organisation, the functions of a chief executive officer or chief employee are to manage that department or organisation, and in particular –
 - ...
 - (l) subject to Part 7 and the [IR Act], to resolve or redress the grievances of employees in that department or organisation; and

65. Transferring officers within and between departments etc.

(1) If an employing authority considers it to be in the interests of its department or organisation to do so, that employing authority may transfer at the same level of classification a public service officer other than an executive officer from one office, post or position in that department or organisation to another such office, post or position –

(a) for which that public service officer possesses the requisite qualifications; and

13 Ms Mellor argues that ss 8(1)(c) and (e), 9(b)–(c), 29(1)(l) and 65(1)(a) of the PSM Act require the transfer decision to be made with regard to her ‘suitability’, and all three decisions to be made based on the principles of fair and consistent treatment, safe and healthy working conditions, consideration and sensitivity in dealings, and in resolution or redress of employee grievances.

14 The respondent submits that the Commission lacks jurisdiction under s 36AA(2)(b) of the IR Act, as the challenged decisions do not relate to the interpretation of a conditions of service provision within the meaning of the PSM Act or its subsidiary legislation. A ‘conditions of service provision’ is defined narrowly in s 36AA(1), and the decision needs to ‘relate to’ the interpretation of such a provision for the Commission to have jurisdiction.

Section 36AA of the IR Act

15 Sections 36AA of the IR Act states:

36AA. Industrial matters relating to public sector employment

(1) In this section –

conditions of service provision means a provision of the [PSM Act] relating to the conditions of service of public service officers, other than the salaries and allowances of public service officers.

(2) The industrial matters the Commission has jurisdiction to enquire into and deal with under section 23 include the following –

(a) an industrial matter relating to a government officer, a group of government officers or government officers generally;

(b) a decision of an employing authority of a public service officer relating to the interpretation of a conditions of service provision;

(c) a decision or finding that is an industrial matter under the [PSM Act] section 78 or the *Health Services Act 2016* section 171.

(3) Without limiting subsection (2)(a), the industrial matters relating to government officers mentioned in that subsection include –

(a) a claim relating to the reclassification of an office held by a government officer; and

(b) a claim relating to a decision of an employer to downgrade an office usually held by a government officer that is vacant.

16 The section heading and the chapeau to s 36AA(2) state that the provision concerns the ‘industrial matters relating to public sector employment’ that the Commission has jurisdiction to hear and determine under s 23 of the IR Act. Specifically, the industrial matters relating to the employment of a:

(a) Government officer – defined by s 7(1) of the IR Act as having the meaning given in s 36AB of the IR Act, which includes a public service officer unless excluded by s 36AB(2); or

(b) Public service officer – defined by s 7(1) of the IR Act as having the meaning given in the PSM Act.

17 Sections 23(1)–(2a) of the IR Act state:

23. Jurisdiction of Commission

(1) Subject to this Act, the Commission has cognizance of and authority to enquire into and deal with any industrial matter.

(2) Where by or under any other Act power is conferred on a person or body to appoint officers or employees for the purposes of that Act or to fix or determine the salaries, wages, or other remuneration, or other conditions of employment, of officers or employees appointed for those purposes, or to do both of those things –

(a) the jurisdiction that the Commission would have but for that other Act to hear and determine any matter or dispute relating to the salaries, wages, or other remuneration, or other conditions of employment, of those officers or employees is not affected by that power conferred by or pursuant to that other Act; and

(b) where there is any inconsistency between a decision of the Commission relating to any such matter or dispute and any decision in the exercise or purported exercise of that power conferred by or under that other Act, to the extent of the inconsistency the former prevails and the latter is of no force or effect.

(2a) Notwithstanding subsections (1) and (2), the Commission does not have jurisdiction to enquire into or deal with any matter in respect of which a procedure referred to in section 97(1)(a) of the [PSM Act] is, or may be, prescribed under that Act.

18 It is apparent from the interaction of ss 36AA(2) and 23(1)–(2a) of the IR Act (at [15] and [17] above), that the Commission has limited jurisdiction to hear and determine matters involving public service officers.

- 19 The jurisdiction is further constrained by the narrow scope of s 36AA(2)(b).
- 20 Section 36AA(2)(b) does not allow a public service officer to challenge any decision of an employing authority in the Commission; only a decision involving a conditions of service provision, which is defined in s 36AA(1).
- 21 Furthermore, a public service officer cannot challenge any decision involving a conditions of service provision in the Commission; only a decision 'relating to the interpretation of a conditions of service provision'.
- 22 As established in *Cross* [51]–[53], the Commission's jurisdiction to hear and determine a matter under s 36AA(2)(b) is confined to a dispute over the interpretation of a conditions of service provision; not dissatisfaction with how a discretion under a conditions of service provision was exercised or applied.

Transfer decision

- 23 In her Form 5, Ms Mellor claims the transfer decision was issued via email without attaching the job description and was made while she was on extended leave and without prior consultation or procedural fairness.
- 24 In her affidavit, Ms Mellor says the transfer decision was made without proper consideration of her skills, qualifications and experience, and without adequate consultation or adherence to fair process. She says the respondent failed to apply merit principles and did not provide her with an opportunity to be genuinely heard, in breach of the requirements of procedural fairness. She says the respondent did not act with the sensitivity and fairness expected under the PSM Act, especially given the respondent's knowledge of her medical history.
- 25 In her submissions, Ms Mellor contends the transfer decision involved a misinterpretation and misapplication of s 65 of the PSM Act, because the respondent did not consider her qualifications and experience, disregarded relevant considerations, and denied her procedural fairness as she was not consulted and reasons were not properly provided.
- 26 Ms Mellor contends that in making the transfer decision, the decision-maker misunderstood and misapplied the meaning of 'suitability' in s 65 of the PSM Act and failed to comply with the human resources and conduct principles in ss 8 and 9 of the PSM Act.
- 27 Ms Mellor distinguishes her case from *Cross*, contending that her challenge goes to the statutory interpretation of s 65 of the PSM Act, while Mr Cross' challenge to the decision in *Cross* was only about how a direction was exercised.
- 28 The respondent concedes that the transfer decision, made under s 65 of the PSM Act, may be a 'conditions of service provision' following *Cross* [56]–[64]. However, the respondent contends that Ms Mellor's grievance, as evident from her Form 5 and affidavit, concerns the manner in which the respondent applied the provisions of the PSM Act in exercising the discretion to transfer Ms Mellor; not any misinterpretation or misconstruction of s 65 of the PSM Act.
- 29 The respondent contends in submissions in reply that Ms Mellor does not identify the alleged misinterpretation or misconstruction of s 65 of the PSM Act. The respondent notes that Ms Mellor alleges the respondent did not consider her qualifications and experience and thereby misconstrued the word 'suitability', however, this raises two issues. Firstly, the word 'suitability' or 'suitable' does not appear in s 65. Secondly, a failure to consider a matter does not in and of itself amount to a misconstruction.
- 30 I find that, while the transfer decision was made under s 65 of the PSM Act, which may be a 'conditions of service provision' under s 36AA(1) of the IR Act, Ms Mellor's grievance with the transfer decision does not engage the Commission's jurisdiction under s 36AA(2)(b) because Ms Mellor's grievance is not one 'relating to the interpretation of' s 65(1)(a) of the PSM Act, for the reasons that follow.

Interpretation vs application

- 31 Section 36AA(2)(b)'s reference to 'relating to the interpretation of a conditions of service provision' is fundamental to establishing the Commission's jurisdiction.
- 32 'Interpretation' of a statutory provision involves ascertaining the meaning of the provision, through textual, contextual and purposive analysis: s 19 of the *Interpretation Act*. In contrast, 'application' concerns how a correctly interpreted provision is applied to the facts.
- 33 In s 36AA(2)(b), the phrase 'relating to the interpretation of' involves ascertaining the meaning of the conditions of service provision, in this case, the meaning of s 65(1)(a) of the PSM Act.

Consideration of Ms Mellor's 'suitability'

- 34 Ms Mellor argues the respondent did not consider her 'suitability' when making the transfer decision. As the respondent points out, s 65 does not contain the word 'suitability' or 'suitable'.
- 35 Even applying a generous lens to Ms Mellor's submission that the respondent misconstrued 'suitability' as a reference to the phrase in s 65(1)(a) 'for which that public service officer possesses the requisite qualifications', does not assist Ms Mellor. This is because Ms Mellor does not identify how the respondent misconstrued the meaning of the phrase 'for which that public service officer possesses the requisite qualifications'. Ms Mellor does not articulate what erroneous meaning the respondent ascribed to those words. Absent such articulation, Ms Mellor's complaint remains a complaint about a factual consideration, which goes to application; not statutory interpretation.
- 36 In relation to Ms Mellor's complaint that the respondent made the transfer decision without proper consideration of her skills, qualifications and experience, I find the following:
- (a) Section 65(1)(a) does not refer to 'skills, qualifications and experience', but refers to 'requisite qualifications'.
 - (b) Ms Mellor provided no evidence in support of her complaint that the respondent made the transfer decision without proper consideration of her qualifications.

- (c) Ms Mellor does not contend that she does not have the requisite qualifications for the Senior Investigator role.
- (d) In any event, as outlined at [30] above, to engage the Commission's jurisdiction, Ms Mellor needs to identify a misconstruction of s 65(1)(a).
- (e) I accept the respondent's submission that, even if there was a failure by the respondent to consider a matter (in this case, Ms Mellor's qualifications), this does not, in and of itself, amount to a misconstruction.

37 For the reasons outlined at [36] above, I find that Ms Mellor's complaint that the respondent made the transfer decision without proper consideration of her qualifications reinforces the conclusion that Ms Mellor's grievance relates to the application of s 65(1)(a) and not the interpretation of s 65(1)(a).

Procedural fairness

38 Ms Mellor complains the transfer decision was issued via email without attaching the job description. However, this complaint is unfounded, given the transfer letter dated 2 May 2025 states, 'You have previously received a copy of the Job Description Form', and the Form 4 states: (emphasis added)

By letter dated 16 April 2025 the respondent wrote to the applicant informing her of the outcome of an independent medical examination (IME) and proposing to transfer her to another position under s 65 of the PSM Act so as to limit interactions the applicant would have with two other employees consistent with the recommendation in the IME. **The letter attached the job description form for the proposed position** and the applicant was provided with an opportunity to respond to the proposal by 28 April 2025.

- 39 Ms Mellor complains the transfer decision was made while she was on extended leave and without adequate consultation or procedural fairness. She says the respondent failed to apply merit principles and did not provide her with an opportunity to be genuinely heard. Ms Mellor says the reasons for the transfer decision were not properly provided to her.
- 40 Unlike the LWOP decision (which is discussed further below), Ms Mellor does not articulate what specific PSM Act provision the respondent failed to apply when she says the respondent failed to apply merit principles in making the transfer decision.
- 41 In any event, as outlined at [30] above, to engage the Commission's jurisdiction, Ms Mellor needs to identify a misconstruction of s 65(1)(a) of the PSM Act, and relevantly, s 65(1)(a) makes no reference to 'merit'.
- 42 Ms Mellor complains that in making the transfer decision, 'relevant considerations were disregarded'. If by 'relevant considerations' Ms Mellor is referring to her medical history, including that the transfer decision was made while she was on extended leave, I find that this is a challenge to the application of s 65(1)(a), and not a challenge to s 65(1)(a)'s interpretation.
- 43 Furthermore, and while Ms Mellor needs to identify a misconstruction of s 65(1)(a) to bring the matter within the Commission's jurisdiction, given the chapeau to s 65(1) of the PSM Act, which grants an employing authority with broad discretion to transfer a public service officer when considered by them to be in the interests of its department or organisation to do so, I am not persuaded that Ms Mellor's complaints would substantiate non-compliance with the requirements of s 65(1)(a) in any event.
- 44 This is because, unlike the chapeau to s 65(2), which contains the words 'with the approval of the employing authority of another department or organisation and after consulting the public service officer concerned', s 65(1) does not contain any such words to limit the employing authority's discretion to transfer a public service officer. Unlike s 65(2), s 65(1) does not refer to the employing authority consulting with the public service officer concerned.
- 45 I find that the broad discretionary language in s 65(1) underscores that Ms Mellor's challenges are to the manner in which the discretion in s 65(1) was exercised, such as alleged failures in merit assessment or consultation. They are challenges to the application of the discretion, and not to s 65(1)(a)'s interpretation.

Sections 8 and 9 of the PSM Act

- 46 Ms Mellor contends that by failing to provide her with procedural fairness in the making of the transfer decision, the respondent failed to comply with the human resources and conduct principles in ss 8 and 9 of the PSM Act.
- 47 Whether the principles in ss 8 and 9 of the PSM Act are mandatory in nature arose in the Industrial Appeal Court decision of *Director General Department of Justice v Civil Service Association of Western Australia Inc* [2005] WASCA 244 (*Director General*), involving the appeal of a Full Bench decision, in which the Full Bench declared the Director General's abolition of a particular level 7 position void, and ordered that the candidate who had been selected for the position (Mr Jones), be appointed immediately either to the position or to another commensurate level 7 position.
- 48 Hasluck J summarised appeal grounds 3 and 4 in *Director General* [136]–[138]:
 - 136 This brings me to grounds 3 and 4 of the appeal and the question of whether the principles of administration referred to in ss 7, 8 and 9 of the [PSM Act] are to be characterised as being mandatory in nature.
 - 137 The appellant contended in ground 3 of the appeal that the Full Bench erred in law in finding that the actions of the appellant in not ensuring that Mr Jones was accorded procedural fairness and the actions of his delegate Mr Harvey in not providing this in connection with the appellant's views of Mr Jones and the reference materials obtained in connection with his suitability for appointment were unlawful.
 - 138 Ground 4 contained an assertion that the Full Bench erred in law in finding that s 8 and s 9 of the [PSM Act] and the *Public Sector Code of Ethics* were mandatory in nature. It was said that the provisions in question were merely directory, being guides as to the standard of conduct desired of public sector bodies and employees. Breaches do not give rise to void or voidable acts or decisions and are not then unlawful in nature.
- 49 In relation to appeal grounds 3 and 4, Hasluck J concluded in *Director General* [145] that the principles in ss 8 and 9 of the PSM Act are in the nature of guidelines:

- 145 It follows that, in my view, even if it be assumed that the Arbitrator, and thus the Full Bench, had jurisdiction to deal with the dispute as an industrial matter, the Full Bench erred in law in finding that s 8 and s 9 of the [PSM Act] and related requirements were mandatory in nature and that the conduct attributed to the appellant in grounds 3 and 4 was unlawful. The context and the language of the provisions suggests that the principles being referred to are in the nature of guidelines.
- 50 *Director General* was cited in the Court of Appeal decision of *Patole v Child & Adolescent Health Service* [2024] WASCA 126 (*Patole*).
- 51 Mr Patole argued that the Child & Adolescent Health Service (CAHS) was required to comply with the PSM Act (in particular ss 8(1)(a), (c) and 9(a)), the Public Sector Commission's *Commissioner's Instruction – Employment Standard (Employment Standard)*, and the *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* (WA) (**Regulations**), in making its decision to appoint the second respondent to the position of medical co-director of CAHS' neonatology department. Mr Patole argued that the decision was only authorised *after* compliance with ss 8 and 9 of the PSM Act, the Employment Standard and Regulations, specifically compliance with the procedural fairness provisions, including the bias rule: *Patole* [108].
- 52 Quinlan CJ and Mitchell JA considered ss 7–9 of the PSM Act, the Employment Standard and the Regulations and concluded that on the proper construction of the PSM Act and the *Health Services Act 2016* (WA), the existence of the power to appoint the second respondent as an employee was not conditioned by the rules of procedural fairness, including the bias rule: *Patole* [31]–[41].
- 53 In relation to ss 7–9 of the PSM Act, Quinlan CJ and Mitchell JA said in *Patole* [32]–[33]:
- 32 In [*Director General* [39]], Wheeler and Le Miere JJ, sitting in the Industrial Appeal Court, thought that s 7 - s 9 of the PSM Act appeared to display confusion concerning the function of legislation. Their Honours thought it surprising that s 9 would commence with the principle that employees were to comply with the provisions of legislation.
- 33 However, in our view that apparent confusion is to be resolved by appreciating that s 7 - s 9 of the PSM Act do not establish independent obligations and duties but rather identify principles by which other provisions of the PSM Act operate. So, s 21(1) and s 22A(2) of the PSM Act require the Commissioner to have regard to the principles set out in s 7 - s 9 of the PSM Act in issuing instructions establishing public sector standards. Section 30(c) of the PSM Act provides for chief executive officers and chief employees to comply with the principles set out in s 7 - s 9 in performing their functions. The principles in s 7 - s 9 of the PSM Act are not independent statutory rules establishing duties and obligations but are principles to which the Commissioner must have regard in issuing instructions establishing public sector standards and which regulate the exercise of the functions of chief executive officers and chief employees.
- 54 Pursuant to *Director General* and *Patole*, the principles in ss 7–9 of the PSM Act are not mandatory in nature and do not establish independent obligations and duties; rather, they are principles which the Public Sector Commissioner (PSC) and a chief executive officer or chief employee must have regard to in the performance of their functions under the PSM Act.
- 55 Sections 21A(a), 21(1), 22A(2) and 22C(a) of the PSM Act outline the occasions when the PSC must have regard to the principles in ss 7, 8 and/or 9 of the PSM Act.
- 56 Section 30(c) of the PSM Act outlines the occasions when a chief executive officer or chief employee must have regard to the principles in ss 7–9 of the PSM Act: (emphasis added)

30. Duties of CEOs and chief employees when performing functions

In performing the functions of a chief executive officer or chief employee of a department or organisation, that chief executive officer or chief employee shall –

- (a) endeavour to attain performance objectives agreed with the responsible authority of the department or organisation; and
 - (b) comply with the Commissioner's instructions, public sector standards, codes of ethics and any relevant code of conduct; and
 - (c) comply with the principles set out in **sections 7, 8 and 9**; and
 - (d) comply with any binding award, order or industrial agreement under the [IR Act] or employer-employee agreement under Part VID of the [IR Act].
- 57 As outlined at [56] above, s 30(c) of the PSM Act provides that a chief executive officer or chief employee shall comply with the principles set out in ss 7–9 of the PSM Act in performing the functions of a chief executive officer or chief employee. This would include the performance of their functions under a conditions of service provision, such as under s 65 of the PSM Act.
- 58 However, Ms Mellor's grievance with the transfer decision (and indeed with all three decisions, including the LWOP decision and the blocked grievance process, which are discussed below), is that the decision was made in non-compliance with ss 8 and 9 of the PSM Act.
- 59 Ms Mellor's contention of non-compliance with ss 8 and 9 of the PSM Act reinforces that her complaint regarding each decision relates to the manner in which the provisions of the PSM Act were *applied*, or *not applied*, in her case. Like *Cross* [53], her grievance 'is with the way a statutory power was exercised, not with the [respondent's] understanding of the nature, limits or requirements for exercise of the power.'
- 60 In relation to the transfer decision, Ms Mellor's complaint relates to the respondent's *application* of the discretion under s 65(1) of the PSM Act. As Ms Mellor's complaint relates to *how* the respondent's discretion in s 65(1) of the PSM Act was

exercised, not *what* s 65(1)(a) of the PSM Act means; her complaint does not engage the Commission's jurisdiction: *Cross* [52]–[53].

LWOP decision

- 61 In her Form 5, Ms Mellor claims the LWOP decision was made without the decision-maker seeking information from her to enable an assessment of her request 'on the merits' as required by cl 29 of the Award. She says the respondent's refusal of her request relied on 'impact on the team' without identifying how this satisfied the 'inconvenience' threshold in cl 29(2)(a) of the Award.
- 62 In her submissions, Ms Mellor contends the LWOP decision was made without a merits-based assessment, contrary to s 8 of the PSM Act. She says reasons given for the refusal of her request were operational ('impact on the team') and failed to apply the statutory requirements of fairness and procedural fairness.
- 63 The respondent contends that the LWOP decision was made under cl 29 of the Award, which is not a provision of the PSM Act, nor a provision of the PSM Act's subsidiary legislation. The respondent says, it therefore follows that a decision made under the Award does not 'relate to' the interpretation of a provision of the PSM Act relating to the conditions of service of public service officers.
- 64 The respondent notes in submissions in reply, that Ms Mellor alleges the LWOP decision was made without a merits-based assessment contrary to s 8 of the PSM Act, however, this raises two issues. Firstly, s 8(1)(a) of the PSM Act is directed to 'selection processes', which a LWOP decision is not. Secondly, Ms Mellor's grievance is not that the respondent misunderstood the PSM Act, it is that she disagrees with the way the PSM Act was applied to her circumstances (if it applied at all, given the LWOP decision was made under the Award).
- 65 I find the LWOP decision, made under the Award, does not engage the Commission's jurisdiction under s 36AA(2)(b) of the IR Act, for the following reasons.
- 66 The Award is an industrial instrument, separate from the PSM Act.
- 67 A decision made under the Award does not engage the Commission's jurisdiction under s 36AA(2)(b) unless the decision directly involves construing a PSM Act conditions of service provision.
- 68 Ms Mellor's attempt to overlay the principles under ss 8 and 9 of the PSM Act onto an Award decision, would not alter this; the core decision remains one made under the Award.
- 69 Ms Mellor submits (Submissions [10] at [7] above), that '[d]ecisions under the Award must still comply with the conduct and HR principles in the PSM Act', and that in making the LWOP decision, the respondent failed to comply with its statutory obligations under the PSM Act.
- 70 However, and as outlined at [53]–[54] above, ss 8–9 of the PSM Act are not independent statutory obligations, but are principles which the PSC and a chief executive officer or chief employee must have regard when performing their functions under the PSM Act: *Patole* [33].
- 71 As outlined at [65]–[68] above, the Award and the PSM Act are separate instruments and the LWOP decision was made under the Award and not under the PSM Act. Accordingly, ss 8 and 9 of the PSM Act would not apply to the LWOP decision: *Patole* [33].
- 72 Sections 8 and 9 of the PSM Act would only apply to the LWOP decision if the Award expressly incorporated ss 8 or 9 of the PSM Act, which it does not. Accordingly, it is unnecessary to engage with Ms Mellor's arguments as to whether the LWOP decision was made in accordance with ss 8 and 9 of the PSM Act.
- 73 Even if ss 8 and 9 of the PSM Act were relevant, Ms Mellor's grievance concerns the respondent's compliance with ss 8 and 9 in making the LWOP decision, specifically, the merit-based assessment to be observed in s 8(1)(a) of the PSM Act.
- 74 As the respondent points out, s 8(1)(a) applies to selection processes and not to applications for leave in any event: (emphasis added)

8. Human resource management principles

- (1) The principles of human resource management that are to be observed in and in relation to the Public Sector are that

- (a) all **selection processes** are to be directed towards, and based on, a proper **assessment of merit** and equity; and

- 75 Even if s 8(1)(a) applies to the LWOP decision, Ms Mellor's complaint is one of non-compliance with s 8(1)(a) in the exercise of the LWOP decision. Ms Mellor's grievance is that operational needs were prioritised; her complaint relates to the factual weighting of 'impact on the team'. This is a complaint regarding non-compliance with s 8(1)(a) in the *application* of the LWOP decision; mirroring the issues with the transfer decision.
- 76 As outlined at [66] above, the Award and the PSM Act are separate instruments. Accordingly, it is unnecessary to engage with Ms Mellor's arguments that the LWOP decision was not made in accordance with cl 29 of the Award, because this does not invoke the interpretation of a PSM Act conditions of service provision.
- 77 As Ms Mellor's complaint with the LWOP decision does not relate to the interpretation of a conditions of service provision under the PSM Act, the Commission's jurisdiction under s 36AA(2)(b) is not enlivened.

The blocked grievance process

- 78 In her Form 5, Ms Mellor contends that she requested the LWOP decision be referred back to the decision-maker, but Ms Donaldson refused, which cut off her ability to raise a formal grievance, frustrating the operation of cl 65 of the Award and s

29(1)(l) of the PSM Act.

- 79 In her submissions, Ms Mellor contends that the respondent's failure to allow her access to the grievance process breaches s 29 of the PSM Act. She says that although she was informed about the grievance procedure, in practice, it was blocked by Ms Donaldson, contrary to her express requests for escalation. Ms Mellor contends that this failure deprived her of procedural rights and constitutes an industrial matter under the IR Act.
- 80 The respondent contends in submissions in reply, that Ms Mellor's submissions confirm there is no alleged misconstruction but an alleged failure to comply with s 29 of the PSM Act; and the latter does not establish the former.
- 81 To the extent that the blocked grievance process arises under the Award, I find that it is a decision made under the Award and, like the LWOP decision, does not engage the Commission's jurisdiction under s 36AA(2)(b) of the IR Act.
- 82 Furthermore, I find that Ms Mellor's complaint regarding the blocked grievance process involves alleged non-compliance with s 29(1)(l) of the PSM Act, not misinterpretation of a PSM Act conditions of service provision, such as to invoke the Commission's jurisdiction under s 36AA(2)(b).
- 83 Ms Mellor does not identify any disputed meaning of a PSM Act conditions of service provision but complains of a failure to escalate her grievance. This is an application issue, not an interpretation issue, and does not meet the jurisdictional threshold in s 36AA(2)(b).
- 84 Mirroring the issues with the transfer decision and the LWOP decision, a complaint of mere non-compliance with s 29(1)(l) does not invoke the jurisdiction of s 36AA(2)(b); as the complaint does not 'relate to' the interpretation of a PSM Act conditions of service provision.

Summary

- 85 Having considered the parties' arguments, I am not persuaded that the Commission has jurisdiction to hear and determine Ms Mellor's Form 5 for the following reasons.
- 86 For the matters in Ms Mellor's Form 5 to come within the Commission's jurisdiction, s 36AA(2)(b) of the IR Act requires the referred decisions to relate to the interpretation of a PSM Act conditions of service provision. As outlined at [15]–[21] above, s 36AA(2)(b) is narrowly drafted to confine referable decisions to ones involving the statutory meaning of a conditions of service provision.
- 87 Ms Mellor's challenges, while framed as involving interpretation, fundamentally concern the application of statutory principles to her specific circumstances, such as whether fairness was afforded or merit considered. This is akin to the circumstances in *Cross*, where jurisdiction was not established because Mr Cross' grievances went to the exercise of discretion rather than the interpretation of a conditions of service provision.
- 88 The absence of an articulated challenge to the interpretation of a conditions of service provision, beyond Ms Mellor's dissatisfaction with the outcomes, fails to meet the requirements in s 36AA(2)(b) of the IR Act.
- 89 Ms Mellor's attempts to distinguish *Cross* are unpersuasive, as her case parallels the rejected arguments in *Cross*. Like *Cross*, her complaints involve dissatisfaction with the application of the PSM Act (and in the case of the LWOP decision if not also the blocked grievance process, the application of the Award), and not the interpretation of a conditions of service provision.

Conclusion

- 90 As outlined at [9] above, Ms Mellor bears the onus of establishing jurisdiction.
- 91 For the preceding reasons, Ms Mellor has not discharged the onus of establishing jurisdiction.
- 92 Therefore, the respondent's jurisdictional objection will be upheld and Ms Mellor's application will be dismissed for want of jurisdiction.
- 93 Given the absence of jurisdiction, it is unnecessary to determine whether Ms Mellor should be granted an extension of time in which to file her application under s 29(3) of the IR Act.

2025 WAIRC 00774

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 21 MAY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CHARMAINE MELLOR

APPLICANT

-v-

DIRECTOR GENERAL DEPARTMENT OF ENERGY, MINES, INDUSTRY REGULATION
AND SAFETY

RESPONDENT

CORAM

COMMISSIONER C TSANG

DATE

THURSDAY, 11 SEPTEMBER 2025

FILE NO.

P 17 OF 2025

CITATION NO.

2025 WAIRC 00774

Result Application dismissed
Representation
Applicant Ms C Mellor (on her own behalf)
Respondent Mr J Carroll (of counsel)

Order

HAVING heard from Ms Mellor on her own behalf and Mr Carroll (of counsel) on behalf of the respondent, and reasons for decision having been delivered on 11 September 2025, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application P 17 of 2025 be, and by this order is, dismissed.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00419

REFERAL OF A DECISION TAKEN BY THE EMPLOYER ON 21 MAY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

CHARMAINE MELLOR

APPLICANT

-v-

DIRECTOR GENERAL DEPARTMENT OF ENERGY, MINES, INDUSTRY REGULATION
AND SAFETY

RESPONDENT

CORAM COMMISSIONER C TSANG
DATE TUESDAY, 15 JULY 2025
FILE NO. P 17 OF 2025
CITATION NO. 2025 WAIRC 00419

Result Direction issued
Representation
Applicant Ms C Mellor (on her own behalf)
Respondent Mr J Carroll (of counsel)

Direction

HAVING heard from Ms C Mellor on her own behalf and Mr J Carroll (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), hereby directs –

1. THAT the following issues be determined as preliminary issues on the papers (**preliminary issues**):
 - (a) The issue of the Commission’s jurisdiction.
 - (b) The applicant’s application for leave of the Commission to accept her referral out of time pursuant to ss 29(2)(b) and 29(3) of the *Industrial Relations Act 1979* (WA).
2. THAT the applicant file any evidence addressing the preliminary issues by affidavit made in accordance with s 9 of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) **by Tuesday, 29 July 2025**.
3. THAT the respondent file **by Tuesday, 12 August 2025**:
 - (a) Any evidence addressing the preliminary issues by affidavit made in accordance with s 9 of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA).
 - (b) Legal submissions addressing the preliminary issues.
4. THAT the applicant file legal submissions addressing the preliminary issues **by Tuesday, 26 August 2025**.
5. THAT the respondent file any responsive legal submissions addressing the preliminary issues **by Tuesday, 2 September 2025**.

(Sgd.) C TSANG,
Commissioner.

[L.S.]

2025 WAIRC 00767

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 15 JANUARY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2025 WAIRC 00767
CORAM : COMMISSIONER T EMMANUEL
HEARD : WEDNESDAY, 9 JULY 2025
DELIVERED : TUESDAY, 9 SEPTEMBER 2025
FILE NO. : P 4 OF 2025
BETWEEN : DR KENNETH LEE
 Applicant
 AND
 SOUTH METROPOLITAN HEALTH SERVICE
 Respondent

CatchWords : Dismissal application under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) – Jurisdiction of the Commission – Certain decisions and findings as industrial matters under the *Industrial Relations Act 1979* (WA) – Out of time – Dismissal application upheld

Legislation : *Industrial Relations Act 1979* (WA) ss 23(3)(d), 23(3)(h)(ii), 23A, 27(1)(a), 29(1), 36AA(2)(c)
Health Services Act 2016 (WA) ss 147, 148, 164(1)(a), 171

Result : Application to dismiss upheld
 Substantive application dismissed

Representation:

Applicant : On his own behalf
Respondent : Mr M Aulfrey (as agent)

Case(s) referred to in reasons:*Bellamy v Chairman Public Service Board* (1986) 66 WAIG 1579*Jade Smith v Minister for Corrective Services* [2022] WAIRC 00848; (2023) 103 WAIG 51*Palaloi v Director General, Department of Education* [2025] WASCA 130*The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2013] WAIRC 00754; (2013) 93 WAIG 1431*United Professional Firefighters Union of Western Australia v Department of Fire and Emergency Services* [2023] WAIRC 00399; (2023) 103 WAIG 1470*Western Australian Municipal, Administrative, Clerical and Services Union of Employees & Ors v (Not Applicable)* [2024] WAIRC 01044; (2025) 105 WAIG 45*Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services* [2013] WAIRC 00706; (2013) 93 WAIG 1439*Reasons for Decision*

- 1 In July 2024 Dr Lee was employed as a Senior Registrar in Psychiatry by South Metropolitan Health Service (**Health Service**) on a 0.2 FTE basis on a fixed-term contract from 5 August 2024 until 2 February 2025. In September 2024 Dr Lee was directed not to attend work until further notice.
- 2 Dr Lee says he was suspended from work via an email sent on 15 January 2025. He seeks reinstatement under his employment contract or an apology.
- 3 The Health Service asks the Commission to dismiss application P 4 of 2025 (**Dismissal Application**). Essentially, it says that the Commission does not have jurisdiction, Dr Lee does not have standing, the application is out of time and the Commission cannot make the orders that Dr Lee seeks.

What the Commission must decide

- 4 I must decide whether to dismiss application P 4 of 2025.

Legislation

- 5 Section 27(1)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**) provides:

27. Powers of Commission

- (1) Except as otherwise provided in this Act, the Commission may, in relation to any matter before it –

- (a) at any stage of the proceedings dismiss the matter or any part of it or refrain from further hearing or determining the matter or part if it is satisfied –
- (i) that the matter or part is trivial; or
- (ii) that further proceedings are not necessary or desirable in the public interest; or
- (iii) that the person who referred the matter to the Commission does not have a sufficient interest in the matter; or
- (iv) that for any other reason the matter or part should be dismissed or the hearing of it discontinued, as the case may be;

...

Should the Commission dismiss application P 4 of 2025?

6 This matter was heard at an in person hearing after the parties each had an opportunity to file outlines of any witness evidence, documents and written submissions. Neither party relied on any witness evidence. They each filed a bundle of documents, which became Exhibit R1 and Exhibit A1.

7 I have carefully considered the parties' documents and submissions.

Background

8 The Health Service employed Dr Lee under a fixed-term contract to work one day per week. Early in the employment relationship, for reasons not explained to Dr Lee, it seems the Health Service decided that it did not want Dr Lee to attend work.

9 Dr Lee only worked attended the workplace on one day, 25 July 2024.

10 By letter dated 11 September 2024, the Health Service told Dr Lee:

...you will not be required to present for work until further notice. I direct you not to present for work unless otherwise instructed or authorised by me.

You will be paid in accordance with your contract of employment for the period of your employment. By way of reminder, your employment is for a fixed term and expires on 12th January 2025.

...

Please note these directions are not Disciplinary Action, and should not be interpreted as such.

For the avoidance of doubt, these directions have no scheduled end date and remain in place until further notice or the end of your employment contract, whichever occurs first.

...

Whilst you are not currently required to attend for rostered duty, as you are an employee of Rockingham Peel Group, you are still required to comply with any and all lawful instructions of SMHS in the interim. Failing to comply with a lawful directive may amount to a breach of discipline.

11 It is not in dispute that the letter dated 11 September 2024 mistakenly refers to the end of the fixed-term of employment as 12 January 2025, instead of 2 February 2025. Indeed, Dr Lee wrote to the Health Service on 14 January 2025, pointing out as much. In that email, Dr Lee said:

I request that my contract continue to maintain and extend to its full and due course. In the 'letter of direction' from Kathleen Smith... it erroneously states that my employment is for a fixed term and expires on 12th January 2025. As per the details – verbatim from the contract, the exact end date for the contract is 2nd February 2025.

12 He went on to request a copy of his job description.

13 The Health Service responded to Dr Lee's email on 15 January 2025, addressing the two matters Dr Lee raised in his email. In relation to the end date of the fixed-term contract, the Health Service said:

I confirm I have reviewed your contract of employment and concur that the end date stated in the contract is 2 February 2025. As such I have instructed the Mental Health Administration team to update your contract end date accordingly. As directed by Ms Kathleen Smith, you are not required to present for work until further notice and I direct you not to present for work unless otherwise instructed or authorised by Ms Kathleen Smith.

14 It is not in dispute that:

- a. Dr Lee was employed by the Health Service from 5 August 2024 until 2 February 2025 under a fixed-term contract of employment; and
- b. the Health Service directed Dr Lee to not present for work unless otherwise directed and continued to pay him for the period of his fixed-term contract.

15 It is clear from Dr Lee's Form 5 – Application to Refer Public Sector Matter (**Form 5**) that Dr Lee has referred to the Commission the Health Service's decision dated 15 January 2025, which he says was a decision to suspend him on full pay. Dr Lee is aggrieved that he was not given reasons for the decision and he feels he has been treated unfairly.

The Health Service's case

16 In summary, the Health Service argues:

- a. section 23(3)(d) of the IR Act prevents the Commission from regulating suspension from duty if there is

another provision under another Act, however expressed, for an appeal in a matter of that kind: *Bellamy v Chairman Public Service Board* (1986) 66 WAIG 1579. Section 171 of the *Health Services Act 2016* (WA) (HS Act) provides an avenue for an employee to contest a decision to suspend, but only if it is a suspension on partial pay or without pay;

- b. Dr Lee has no standing to refer this matter to the Commission because:
 - i. section 29(1)(j) of the IR Act gives individuals standing to appeal suspension matters where s 171 of the HS Act names them as industrial matters; and
 - ii. under s 171 of the HS Act, a decision to suspend on full pay is not an industrial matter. Only decisions to suspend on partial pay or without pay may be referred to the Commission as industrial matters. The Health Service denies that Dr Lee was suspended, but argues that if he was suspended, it was not on partial pay or without pay;
- c. even if Dr Lee was suspended, his period of employment was not extended. The contract of employment ended on 2 February 2025. The Commission cannot grant the remedies sought. Dr Lee seeks reinstatement and an apology but the Commission cannot order either remedy. Dr Lee does not say he was unfairly dismissed. The Commission cannot order reinstatement in those circumstances, because of the effect of ss 23A and 23(3)(h)(ii) of the IR Act; and
- d. Dr Lee's referral was made out of time because it is about a decision made on 11 September 2024. To the extent that the Form 5 says Dr Lee appeals a direction from 15 January 2025, that direction is not a 'decision' and is merely a restatement of the Health Service's earlier direction made on 11 September 2024.

- 17 The Health Service argues that the Commission's power to dismiss under s 27(1)(a) of the IR Act is broad and there is no particular level of satisfaction to be achieved by the Commission for the exercise of the power: *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority of Western Australia* [2013] WAIRC 00754; (2013) 93 WAIG 1431 at [27]. In all the circumstances, the Health Service submits that the Commission should uphold its Dismissal Application and dismiss application P 4 of 2025.

Dr Lee's case

- 18 In response to the Health Service's Dismissal Application, essentially Dr Lee criticises the way the Health Service has dealt with him.
- 19 In summary Dr Lee argues:
- a. the matter is not trivial. Unfair dismissal and suspension are serious. He says 'an employee cannot be suspended (forcefully instructed not to work) and then have the Employer claim it is neither a suspension nor a decision' and '[an] employee sent away from contractual employment by their employer must be either Dismissed or Suspended (or injured) – both are decisions. Such detrimental action by an employer must be seen as a dismissal or a decision, not neither';
 - b. the Health Service has acted arbitrarily, has not explained the reasons for its actions and its communication methods have been inappropriate. He argues that the Health Service has potentially breached the industrial agreement and says no reasonable employer would hire someone only to tell them not to come to work;
 - c. he has been denied procedural fairness;
 - d. 'such a matter generally warrants investigation to ensure fair employment practices and adherence to industrial agreements';
 - e. it is in the public interest for public sector employers to follow natural justice principles and industrial agreements. Further, addressing the Health Service's deceptive workplace behaviour is in the public interest;
 - f. the Commission has broad powers and jurisdiction, and he has standing to refer the matter because it relates to being 'suspended unlawfully and unreasonably';
 - g. despite agreeing that he was suspended on full pay, at the hearing Dr Lee argued that his payslip showed that hours were deducted from his accrued annual leave, which he says is evidence of 'less than full pay';
 - h. he is unsure of which subsection of s 171 of the HS Act he relies on and he does not point to any section beyond s 171(1)(a) of the HS Act; and
 - i. his application was not filed late, because it was filed within 28 days of the direction dated 15 January 2025.
- 20 Dr Lee makes various submissions about the meaning of 'decision' and argues that Mr Clive Mulroy's email dated 15 January 2025 amounts to a decision to impose the continued suspension until 2 February 2025.

Consideration

- 21 The principles that the Commission must apply when considering whether to dismiss an application under s 27(1)(a) of the IR Act are well established. Recently, the Industrial Appeal Court in *Palaloi v Director General, Department of Education* [2025] WASCA 130 confirmed at [26] that the approach taken by the Full Bench in relation to s 27(1)(a) was correct, describing the Full Bench's approach at [13]:

The Full Bench said that the power of the Commission to dismiss a matter under s 27 of the Act is a broad power. However, given that a person who brings proceedings before the Commission is entitled to have the jurisdiction invoked, the statutory power to dismiss a matter under s 27(1)(a) of the Act is to be exercised sparingly and only in a clear case... (footnotes omitted)

- 22 This approach is consistent with that taken in many Commission decisions, including in *Jade Smith v Minister for Corrective Services* [2022] WAIRC 00848; (2023) 103 WAIG 51 at [24]. Recently the Commission in Court Session in *Western Australian Municipal, Administrative, Clerical and Services Union of Employees & Ors v (Not Applicable)* [2024] WAIRC 01044; (2025) 105 WAIG 45 set out the principles from [4] – [6]. I respectfully adopt and apply that reasoning in this matter.
- 23 Section 29(1)(j) of the IR Act enables an employee who is aggrieved by certain industrial matters to refer that matter to the Commission.
- 24 Section 36AA(2)(c) of the IR Act provides that the Commission has jurisdiction to enquire into and deal with a decision or finding that is an industrial matter under s 171 of the HS Act.
- 25 Section 171 of the HS Act defines the following as industrial matters for that purpose:

171. Certain decisions and findings are industrial matters for purposes of *Industrial Relations Act 1979*

- (1) Subject to section 118, each of the following is an industrial matter for the purposes of the *Industrial Relations Act 1979* —
- (a) a decision under section 147, 148 or 164(1)(a) to suspend an employee or former employee on partial pay or without pay;
 - (b) a decision under section 150(1), 163(3)(b) or 166(b) to take disciplinary action in relation to an employee or former employee;
 - (c) a decision under section 159(1)(b) or (c) in relation to an employee or former employee;
 - (d) a finding mentioned in section 165(5)(a)(ii) made in relation to an employee or former employee;
 - (e) a decision under section 168(1) to terminate the employment of an employee or former employee;
 - (f) if proceedings have been taken under this Part against an employee or former employee for a suspected breach of discipline arising out of alleged disobedience to, or disregard of, a lawful redeployment direction —
 - (i) a finding mentioned in section 163(3)(a), 165(5)(a)(i) or 166(a) made in relation to the employee or former employee; or
 - (ii) a decision under section 164(1)(a) to suspend the employee or former employee on partial pay or without pay.

Note for this section:

See the *Industrial Relations Act 1979* section 36AA and Part II Division 2AA Subdivision 3 for the jurisdiction of the Commission (as defined in the *Industrial Relations Act 1979* section 7(1)) to hear and determine an industrial matter mentioned in this section.

- (2) In subsection (1) —
- lawful redeployment direction** means a direction which is a lawful order for the purposes of section 161(a) by virtue of section 174A.
- [Section 171 inserted: No. 43 of 2024 s. 141.]

[172, 173. Deleted: No. 43 of 2024 s. 141.]

- 26 It is clear that Dr Lee is aggrieved by the way the Health Service has dealt with him. However, the Commission does not have jurisdiction to enquire into and deal with every employment matter that may arise. For Dr Lee to have standing, there must be an industrial matter as defined by s 171 of the HS Act for him to refer. As I explain below, there is not. Fundamentally, almost all of Dr Lee’s submissions are misconceived or irrelevant.
- 27 In response to the Form 5’s question ‘What are the grounds of your application?’, Dr Lee sets out that he is aggrieved by Mr Mulroy’s direction dated 15 January 2025 suspending him from work on full pay. A fair reading of the Form 5 makes it clear that Dr Lee has referred a decision to suspend him on full pay.
- 28 The Health Service directed Dr Lee not to attend work on 11 September 2024, reiterated that direction on 15 January 2025 and continued to pay him for the duration of his employment contract, until it expired with the passing of time on 2 February 2025. However, that does not necessarily amount to a decision made under ss 147, 148 or 164(1)(a) of the HS Act to suspend Dr Lee.
- 29 On what is before me, I cannot find that a decision was made under ss 147, 148 or 164(1)(a) of the HS Act to suspend Dr Lee. But even if I am wrong about that, it would not make a difference to the outcome in this case. This is because a decision to suspend on full pay is not an industrial matter that may be referred by an individual to the Commission under s 29(1) of the IR Act.
- 30 Dr Lee’s submission that ‘an employee sent away from contractual employment by their employer must be either Dismissed or Suspended’ is misconceived. Suspension under the statute is not the only option available to an employer. In any event, in this case the Health Service directed Dr Lee not to attend work but it still paid Dr Lee his salary. Even if Dr Lee could establish that he was suspended under the HS Act, which I do not accept, any such suspension was on full pay. There is no standing under the IR Act (and HS Act) for an employee to refer a decision to suspend on full pay to the Commission. It is only a decision under ss 147, 148 or 164(1)(a) to suspend on partial pay or no pay that can be referred to the Commission.

- 31 There is no evidence before the Commission that Dr Lee was subject to a disciplinary process or disciplinary action under the HS Act. Further, I am not persuaded by Dr Lee's argument that an issue in relation to the accrual or payment of his annual leave means that Dr Lee was suspended on partial pay. At the directions hearing on 26 March 2025, Dr Lee confirmed that the only matter he is appealing in this application is his suspension on full pay. It is not in dispute that Dr Lee was paid throughout his employment as though he had been working. Dr Lee is not aggrieved about being suspended on partial pay. He is aggrieved that the Health Service directed him to stay away from work, paid him as though he were working, and did not explain the reasons for the Health Service's decision to do so.
- 32 Dr Lee does not rely on any other decision or finding referred to in s 171 of the HS Act. The circumstances of this matter do not provide any other referral avenues available to an individual under s 29 of the IR Act.
- 33 The matter that Dr Lee has referred to the Commission is not an industrial matter under s 171 of the HS Act. Dr Lee does not have standing to refer this matter to the Commission. It follows that the Commission lacks jurisdiction to deal with his application.
- 34 Section 23(3)(d) of the IR Act creates a further difficulty for Dr Lee. As I said in *United Professional Firefighters Union of Western Australia v Department of Fire and Emergency Services* [2023] WAIRC 00399; (2023) 103 WAIG 1470 at [8]:
- In Western Australian Prison Officers' Union of Workers v The Minister for Corrective Services* [2013] WAIRC 00706; (2013) 93 WAIG 1439 (*Sell's case*), Kenner C (as he was then) said at [17]: '[s]ection 23(3)(d) is a clear statement of legislative intention that the Commission shall not exercise its powers in relation to the specified subject matter, if there is "provision, however expressed", for that same subject matter, including a right of appeal, prescribed by other legislation. This provision is clearly intended to prevent matters within the prescribed subject matter, from being dealt with in more than one jurisdiction.'
- 35 The effect of s 23(3)(d) of the IR Act is that the Commission cannot regulate the suspension from duty in employment of an employee in circumstances where a provision of another Act, here the HS Act, already does so and provides for an appeal in a matter of that kind.
- 36 For completeness, I will deal with the Health Service's arguments in relation to the lack of a remedy in this case. Dr Lee seeks reinstatement and an apology. The Commission does not have the power to order either of those remedies in the circumstances. To the extent Dr Lee's submissions focus on unfair dismissal and the Commission's powers under s 23A of the IR Act, those submissions are not relevant. Application P 4 of 2025 is not an application that Dr Lee has been harshly, oppressively or unfairly dismissed. Indeed, in February 2025 Dr Lee discontinued his unfair dismissal application (application U 86 of 2024). In this case, the Commission would not have the power to order the remedies Dr Lee seeks. Further, I accept the Health Service's submission that Mr Mulroy's direction dated 15 January 2025 merely reiterated the direction made on 11 September 2024 by Ms Kathleen Smith that Dr Lee was not to present for work.
- 37 In circumstances where Dr Lee lacks standing to refer application P 4 of 2025, and the Commission lacks jurisdiction to deal with it, I am satisfied that this is a clear case where the power under s 27(1)(a)(ii) and (iv) of the IR Act should be exercised. It is consistent with the Commission's obligation to act according to equity, good conscience and the substantial merits of the case.
- 38 The Dismissal Application is upheld. The Commission will order that application P 4 of 2025 be dismissed.

2025 WAIRC 00768

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 15 JANUARY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DR KENNETH LEE

APPLICANT

-v-

SOUTH METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**

COMMISSIONER T EMMANUEL

DATE

TUESDAY, 9 SEPTEMBER 2025

FILE NO/S

P 4 OF 2025

CITATION NO.

2025 WAIRC 00768

ResultApplication to dismiss upheld
Substantive application dismissed**Representation****Applicant**

On his own behalf

Respondent

Mr M Aulfrey (as agent)

Order

HAVING heard from the applicant on his own behalf, and Mr M Aulfrey (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders –

THAT application P 4 of 2025 be, and by this order is, dismissed.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2025 WAIRC 00679**REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 15 JANUARY 2025**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KENNETH LEE

APPLICANT

-v-

SOUTH METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE THURSDAY, 7 AUGUST 2025
FILE NO/S P 4 OF 2025
CITATION NO. 2025 WAIRC 00679

Result Order issued
Representation
Applicant On his own behalf
Respondent Mr M Aulfrey (as agent)

Order

HAVING heard from Dr K Lee on his own behalf and Mr M Aulfrey (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders by consent –

THAT the name of the applicant be amended to ‘Dr Kenneth Lee’.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2025 WAIRC 00418**REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 15 JANUARY 2025**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KENNETH LEE

APPLICANT

-v-

WA HEALTH - SMHS

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE MONDAY, 14 JULY 2025
FILE NO/S P 4 OF 2025
CITATION NO. 2025 WAIRC 00418

Result Order issued
Representation
Applicant On his own behalf
Respondent Mr M Aulfrey (as agent)

Order

HAVING heard from Dr K Lee on his own behalf and Mr M Aulfrey (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), orders by consent –

THAT the name of the respondent be amended to 'South Metropolitan Health Service'.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2025 WAIRC 00193

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 15 JANUARY 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KENNETH LEE

APPLICANT

-v-

WA HEALTH - SMHS

RESPONDENT**CORAM** COMMISSIONER T EMMANUEL**DATE** THURSDAY, 27 MARCH 2025**FILE NO/S** P 4 OF 2025**CITATION NO.** 2025 WAIRC 00193**Result** Programming orders issued**Representation****Applicant** On his own behalf**Respondent** Mr M Aulfrey (as agent)*Programming orders*

HAVING heard from the applicant on his own behalf and Mr M Aulfrey (as agent) on behalf of the respondent, the Commission, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), orders –

1. THAT by 4pm on Monday, 28 April 2025, the respondent file its application to dismiss application P 4 of 2025 (**Dismissal Application**), outlines of any witness evidence, the documents on which it seeks to rely, and written submissions in support of the Dismissal Application;
2. THAT by 4pm on Monday, 26 May 2025, the applicant file his response to the Dismissal Application, outlines of any witness evidence, the documents on which he seeks to rely, and written submissions opposing the Dismissal Application; and
3. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2026 WAIRC 00045

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 17 OCTOBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

GERARD DANIELLS

APPLICANT

-v-

WESTERN AUSTRALIA POLICE FORCE

RESPONDENT**CORAM** SENIOR COMMISSIONER R COSENTINO**DATE** FRIDAY, 30 JANUARY 2026**FILE NO/S** P 54 OF 2025**CITATION NO.** 2026 WAIRC 00045

Result Application dismissed
Representation
Applicant Mr G Daniells
Respondent Mr M McIlwaine (of counsel) on behalf of the Western Australia Police Force

Order

WHEREAS on 3 November 2025 the applicant lodged this application referring a public sector matter in relation to a purported decision to dismiss him from his employment dated 28 August 2025;

AND WHEREAS the respondent, by its response filed on 21 November 2025, alleges that the applicant was not dismissed, but retired;

AND WHEREAS the Response further demonstrates by annexed correspondence, which the applicant does not contest, that:

- (a) On 15 August 2025, the respondent advised the applicant that it had determined to call on him to retire on the grounds of ill health;
- (b) On 15 August 2025, the respondent invited the applicant to advise it within seven days whether he accepted or rejected the respondent's position and that if the applicant did not agree, he had 28 calendar days in which to provide further submissions or medical evidence for the respondent's consideration and/or request a further medical assessment be arranged.; and
- (c) The applicant sought, and was granted, an extension of time to respond to 29 August 2025 and that he responded on 29 August 2025 accepting the respondent's recommendation that he retire on the grounds of ill health;

AND WHEREAS at a directions hearing held on 16 January 2026, directions were issued for the applicant to show cause why his application should not be dismissed pursuant to s 27(1)(a) of the *Industrial Relations Act 1979* (WA) on grounds, inter alia, that the applicant does not have a sufficient interest in the matter because the Commission lacks jurisdiction because there has not been a decision by the respondent to dismiss the applicant: *Daniells v Western Australia Police Force* [2026] WAIRC 00022;

AND WHEREAS the applicant has not filed any documentary evidence or written submissions in compliance with the directions made on 16 January 2026;

AND WHEREAS the Commission is satisfied based on the uncontentious facts contained in the Response that the applicant was not dismissed, and that the Commission is therefore without jurisdiction in this matter;

NOW THEREFORE the Commission, pursuant to the powers conferred under s 27(1)(a) of the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2026 WAIRC 00022

REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 17 OCTOBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES GERARD DANIELLS

APPLICANT

-v-

WESTERN AUSTRALIA POLICE FORCE

RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO
DATE FRIDAY, 16 JANUARY 2026
FILE NO. P 54 OF 2025
CITATION NO. 2026 WAIRC 00022

Result Directions issued
Representation
Applicant Mr G Daniells
Respondent Mr M McIlwaine on behalf of the Western Australia Police Force

Direction

HAVING heard from Mr G Daniells, Applicant, and Mr M McIlwaine (of counsel) on behalf of the Respondent, the Commission,

pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (IR Act), hereby directs –

- (1) THAT the applicant is required to show cause why his application should not be dismissed pursuant to s 27(1)(a) of the IR Act on the grounds that:
 - (a) further proceedings are not necessary or desirable in the public interest; or
 - (b) that the applicant does not have a sufficient interest in the matter because the Commission lacks jurisdiction because there has not been a decision by the respondent to dismiss the applicant; or
 - (c) there exists other reason for the matter to be dismissed, namely that the Commission does not have jurisdiction.
- (2) THAT the show cause process, that is, the question of whether the application should be dismissed pursuant to s 27(1)(a) of the IR Act, be determined on the papers.
- (3) THAT the applicant file any documentary evidence and written submissions to show cause why his application should not be dismissed by no later than 23 January 2026;
- (4) THAT the respondent may file any documentary evidence and written submissions in response to the applicant's submissions by no later than 30 January 2026.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2025 WAIRC 00983

REFERAL OF A DECISION TAKEN BY THE EMPLOYER ON 11 SEPTEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SALLY CAMPBELL

APPLICANT

-v-

WESTERN AUSTRALIA POLICE FORCE

RESPONDENT

CORAM

COMMISSIONER T KUCERA

DATE

THURDAY, 11 DECEMBER 2025

FILE NO/S

P 41 OF 2025

CITATION NO.

2025 WAIRC 00983

Result	Application Dismissed
Representation	
Applicant	Sally Campbell
Respondent	David Anderson (of counsel)

Order

WHEREAS the applicant filed a *Form 5 – Application to Refer Public Sector Matter* on 18 September 2025 (**application**);

AND WHEREAS the respondent filed a *Form 4 – Response* on 10 October 2025 in which the respondent objected to the Commission dealing with the application, on the ground the Commission did not have the jurisdiction to deal with the claim (**jurisdictional objection**);

AND WHEREAS the Commission on 5 December 2025, convened a directions hearing, to make programming orders for the purpose of determining the jurisdictional objection, (**directions hearing**);

AND WHEREAS the parties, during the directions hearing, consented to the Commission making an order to dismiss the application, without determining the jurisdictional objection;

NOW THEREFORE the Commission, pursuant to the powers conferred by the *Industrial Relations Act 1979* (WA), hereby orders by consent –

THAT the application be dismissed.

(Sgd.) T KUCERA,
Commissioner.

[L.S.]

NOTICES—Union Matters—**2026 WAIRC 00081**

NOTICE

CICS 3 of 2026

NOTICE is given of application CICS 3 of 2026 by the Western Australian Hotels and Hospitality Association Incorporated (Union of Employers) to the Commission in Court Session of the Western Australian Industrial Relations Commission for an alteration to the following registered rules:

- Rule 5 – MEMBERSHIP

The proposed rule alterations are available to be viewed at the Commission's Registry on Level 17, 111 St Georges Terrace Perth WA or alternatively accessed on the Notices page of the Commission's website.

This matter will be listed for hearing before the Commission in Court Session on a date to be fixed.

Any person who satisfies the Commission in Court Session that they have a sufficient interest or desires to object to the application may, having given notice of that objection within the time and in the manner prescribed, appear and be heard in objection to the application.

Pursuant to regulation 77A(3) of the *Industrial Relations Commission Regulations 2005* (WA) a notice of an objection in the approved form (*Form 1A – Multipurpose Form*) must be filed within 21 days of this notice. A *Form 1A – Multipurpose Form* is available on the WAIRC website at www.wairc.wa.gov.au under Applications & Forms.

REGISTRAR

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

6 February 2026
