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CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

FULL BENCH—Appeals against decision of Commission—

2026 WAIRC 00145

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER B 67/2023 GIVEN ON 13 AUGUST
2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2026 WAIRC 00145
CORAM : SENIOR COMMISSIONER R COSENTINO
 COMMISSIONER T EMMANUEL
 COMMISSIONER C TSANG
HEARD : WEDNESDAY, 28 JANUARY 2026
DELIVERED : FRIDAY, 13 MARCH 2026
FILE NO. : FBA 8 OF 2025
BETWEEN : JESSICA MAUREEN MCCARTHY
 Appellant
 AND
 TARRINA RESOURCES LIMITED
 Respondent

CatchWords : INDUSTRIAL LAW (WA) - Denied contractual benefits claim - contract containing variation only in writing clause - Whether contract validly varied - Consideration for reduction in salary - Whether varied agreement sufficiently certain and complete - approach to assessment of evidence of intention to vary - Whether contractual entitlement to payment for overtime or TOIL - Appeal dismissed

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

Result : Appeal dismissed

Representation:
Counsel:
Appellant : Ms J M McCarthy
Respondent : (no appearance)

Case(s) referred to in reasons:

Beatty v Guggenheim Exploration Co (1919) 225 NY 380

Carter JW, *Contract Law in Australia* (7th ed, 2018)

Carter JW, Eldridge J and Peden E, 'Agreed Writing Requirements for Contract Variation' (2020) 36 *Journal of Contract Law* 107

Dorsch v HEAD Oceania Pty Ltd [2024] FCA 162

Doyle v The Roman Catholic Bishop of Bunbury [2022] WAIRC 00799; (2022) 102 WAIG 1533

Elvidge Pty Ltd v BGC Construction Pty Ltd [2006] WASCA 264

GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd [2003] FCA 50; 128 FCR 1

Hill v Forteng Pty Ltd [2019] FCAFC 105; (2019) 138 ACSR 344

Levi Rohan v S&DH Enterprises PTY LTD [2023] WAIRC 00076; (2023) 103 WAIG 174

McCarthy v My Foodie Box Limited [2025] WAIRC 00682; (2025) 105 WAIG 2088

Musumeci v Winadell Pty Ltd (1994) 34 NSWLR 723

NAIS v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 77; 228 CLR 470

Sappideen C, O'Grady P, and Riley J, *Mackens's Law of Employment* (9th ed, 2022)

TWT Property Group Pty Limited v Cenric Group Pty Limited [2020] NSWSC 72

Reasons for Decision

THE FULL BENCH:

- 1 The respondent **company**, Tarrina Resources Limited, previously known as My Foodie Box Limited, is in the business of the production, sale, and delivery of meal kits. In December 2021, the appellant, Jessica McCarthy, was employed by the company as its Director of Product Development and Customer Experience. At relevant times, Ms Mai Hughes was the company's Chief Executive Officer and Mr Bryan Hughes was a company director.
- 2 After her employment was terminated for the reason of redundancy in April 2023, Ms McCarthy commenced proceedings in the Western Australian Industrial Relations **Commission** for denied contractual benefits. She claimed that the company had denied her the following contractual benefits:
 - (a) The difference between 30.4 hours of salary paid and full-time hours salary (7.2 hours of salary per week) for 20 weeks from 14 November 2022 to 4 April 2023, quantified as \$12,307.44 (**Shortfall Claim**);
 - (b) Unpaid Time Off in Lieu (**TOIL**) or overtime for 121.5 overtime hours worked quantified as \$3,441,22 [sic] to \$6,396.63 (**Overtime Claim**);
 - (c) The difference between four weeks' notice of termination under the contract, and two weeks' actually paid quantified as \$6,153.72 (**Notice Claim**);
 - (d) The difference between redundancy pay calculated at the full-time salary rate and the part-time salary rate received (**Redundancy Claim**); and
 - (e) The difference between annual leave pay calculated at the full-time salary rate and the part-time salary rate received quantified as \$2,469.58 (**Annual Leave Claim**).
- 3 Ms McCarthy's claim was heard by Commissioner Walkington. The Commissioner upheld Ms McCarthy's Notice Claim for the sum of \$6,153.72 but dismissed the balance of her claims.
- 4 Aside from the Overtime Claim, the balance of the claims all turned on whether Ms McCarthy's employment contract was effectively varied from full-time to part-time in November 2022. The Commissioner found the contract was varied, and so the Shortfall Claim, Redundancy Claim and Annual Leave Claim all fell away. The Overtime Claim failed because the Commissioner found there was no contractual entitlement to be paid for overtime.
- 5 Ms McCarthy has appealed against the Commissioner's decision on nine grounds.

The Commissioner's Reasons for Decision

- 6 Relevant to this appeal, the Commissioner set out uncontested facts relating to the parties' contractual dealings at [15]–[17] of her **Reasons**: *McCarthy v My Foodie Box Limited* [2025] WAIRC 00682; (2025) 105 WAIG 2088:

15 The Employment Contract states that the position is full time:

Dear Jess

It is with great pleasure That My Foodie Box Pty Ltd trading as My Foodie Box ("The Employer") offers you the position of Director of Product Development and Customer Experience on a full-time basis.

I am delighted to confirm the following details:

1 Position

1.1 You will be appointed to the position of Director of Product Development and Customer Experience, reporting directly to the Managing Director or any other person directed by the Employer from time to time. The Employer may unilaterally change your title, duties, responsibilities, function, role accountability or reporting relationship at any time.

1.2 Your employment will commence on Monday 6 December 2021 and your employment will continue unless terminated in accordance with the terms of this letter of appointment.

1.3 Your employment will be full time.

- 1.4 In addition to the hours set out above, you may also be required to work reasonable additional hours.
- 1.5 The duties of this position are set out in the attached position description. You will be required to perform these duties, and any other duties the employer may assign to you, having regard to your skills, training and experience.
- 16 The Employment Contract neither specifies the number of hours for ‘full time’ nor any number of hours to be regarded as ‘reasonable additional hours’.
- 17 Both parties agree that on 14 November 2022, the applicant and the Chief Executive Officer of the respondent met to discuss the need to reduce business expenditure. At this meeting, the applicant was requested to reduce her hours of work. The respondent says that the applicant agreed to reduce her working hours to four days a week and that her working days were Monday to Thursday. In cross-examination, the applicant confirmed that she had agreed to the reduction in her working hours to four days a week at that meeting.
- 7 At [18], the Commissioner referred to Exhibit R2 which was a letter addressed to Ms McCarthy bearing the date 16 November 2022 (**Variation letter**). At [18], the Commissioner set out the content of the Variation letter in full.
- 8 At [39], the Commissioner noted the respondent’s evidence that it sent the Variation letter to Ms McCarthy using a digital mobile application, and Ms McCarthy’s evidence was that she did not receive the Variation letter. The Commissioner said that she cannot find on the evidence that Ms McCarthy did receive the letter.
- 9 The Commissioner also referred at [20] to Exhibit R3, being Ms McCarthy’s response to a request for confirmation of working hours made by email from the Executive Assistant dated 28 November 2022. At [20]–[21], the Commissioner set out the content of the request and Ms McCarthy’s response in full.
- 10 The Reasons then deal with a further offer for appointment to a position of Chief Marketing Officer and Head of Product Development on 5 December 2022, and the events that followed it, including reference to Ms McCarthy’s evidence that she continued to work full-time on Mondays through to Fridays each week, while working from home on Fridays.
- 11 At [27], the Commissioner referred to the absence of evidence of Ms McCarthy refusing to change her hours of work and salary or protesting the change. However, the Commissioner acknowledged that the absence of evidence of protest, or mere acceptance, is insufficient to show there was a valid variation to the contract.
- 12 The Commissioner continued:
- 28 I find that the applicant understood that the Employment Contract had been varied to a working week of four days because the evidence is that the applicant agreed to this change at the meeting on 14 November 2022.
- 29 In addition, the applicant made claims for time in lieu for hours worked on Fridays during the relevant period. I find the applicant must have considered she had worked additional hours beyond that of her agreed working hours being Monday to Thursday. I find that the applicant agreed for her salary to be reduced because the evidence is that when requested to confirm her hours for payroll purposes, she responded that her working hours were four days per week being Monday to Thursday.
- 30 Furthermore, the applicant declined the respondent’s proposal to return to full-time hours which clearly shows the applicant was working less than full-time hours.
- 13 The Commissioner concluded at [33]:
- 33 I find there was a variation to the Employment Contract made orally. The variation was certain, complete and there was consideration as the change affected both parties’ obligations.
- 14 The next heading in the Reasons is ‘Was the Variation Required to be in Writing?’ As this next heading implicitly accepts, to have concluded that there was a valid variation to the contract, the Commissioner needed to consider whether the variation needed to be in writing. Therefore, what is said at [33] should be understood as the Commissioner concluding that there was an oral agreement to vary the employment contract, rather than a concluded, valid, and binding variation.
- 15 The Commissioner then proceeded to consider the effect of the Employment Contract’s ‘variation only in writing’ clause 27.1 which says:
- 27.1 This letter of appointment may only be varied by written agreement between parties except as otherwise provided for in this letter.
- 16 Dispensing with the issue of whether the employment contract had validly been varied in light of the ‘variation only in writing’ requirement, the Commissioner said:
- 39 I note that the letter of variation to the existing contract confirming the discussion was settled by the respondent on 16 November 2022 and the respondent’s evidence is that it was sent to the applicant using a digital mobile application. The applicant says she did not receive this letter, and I cannot find on the evidence before me that the applicant did receive the letter. However, as set out in *GEC Marconi* above, this written confirmation or agreement is not required to effect a variation to the Employment Contract.
- 40 In addition, the applicant did not merely acquiesce to a decision or direction of the respondent. The evidence is that the applicant expressly agreed and confirmed the change on several occasions.
- 41 Applying *GEC Marconi* I find that, despite clause 27.1 of the Employment Contract, a variation did not require that the change be in writing if both the applicant and respondent agreed to the change and intended for the change to be contractual.

42 I find the Employment Contract was varied and consequently, the applicant's hours of work were reduced to 30.4 hours per week and her salary was reduced commensurately. The applicant's claim for payment equivalent to 7.6 hours per week for 20 weeks between 14 November 2022 and 4 April 2023 is dismissed.

- 17 In dealing with the Overtime Claim, the Commissioner considered the following issues that are relevant to this appeal.
- 18 The first issue, dealt with at [43]–[51], was whether the employment contract's terms conferred an entitlement to payment of overtime as a contractual benefit, including whether the terms of the company's written Policies and Guidelines were incorporated as terms of the contract.
- 19 The Commissioner noted there was no express provision in the employment contract which entitled Ms McCarthy to be paid for overtime worked in excess of her ordinary hours: [45]. The Commissioner referred to clauses 5.3, 6.1 and 6.2 which specified that the remuneration package included payment for all hours worked including overtime.
- 20 The Commissioner found that the plain terms of clause 23.3 precluded a finding that the Policies and Guidelines were incorporated as contractual terms: [48]–[50].
- 21 The Commissioner returned to the Overtime Claim, under the heading 'Unjust Enrichment and Quantum Meruit.' This section of the Reasons deals with the parties' respective submissions and some of the evidence about the hours that Ms McCarthy was working and the duties she was performing.
- 22 The Commissioner considered Ms McCarthy's unjust enrichment/quantum meruit claim, that is, her claim to be paid the value of her services for the time she worked in excess of ordinary hours. The Commissioner referred to the Full Bench decision in *Levi Rohan v S&DH Enterprises PTY LTD* [2023] WAIRC 00076; (2023) 103 WAIG 174, as standing for the principle that a quantum meruit approach may be taken to quantify a remedy for a contractual benefit that has been denied, but it is not in and of itself a basis for a claim of a denied contractual benefit in the absence of an identified contractual entitlement.
- 23 Because Ms McCarthy's contract provided for an 'all-inclusive salary', the Commissioner found that the claim failed to meet the criteria for a contractual benefit claim entitling her to a remedy based on quantum meruit: [90], [94], [99], [100].

Appeal grounds 1, 2 and 3: was the contract validly varied?

- 24 It is convenient to consider grounds 1, 2 and 3 of the appeal together. They all deal with the application of the applicable legal principles in making a finding that a contract has been validly varied, where the contract contains a 'variation only in writing' clause. The three grounds are:
1. **Error in finding contractual variation without written agreement (pars 17–33, 41–42).**
The Commissioner erred in law and fact in finding that the employment contract was validly varied to reduce hours and salary by oral agreement. Clause 27.1 of the contract expressly required written variation. The unsigned "variation" letter of 16 November 2022 (par 18–19) was not provided to me or executed, and no signed acknowledgement was produced.
 2. **Improper reliance on conduct and undocumented conversations (pars 27–33, 39–41).**
The Commissioner gave determinative weight to disputed oral evidence and incidental conduct (e.g. email confirming payroll days, par 21) to conclude there was a valid contractual variation. There is no context to the email that it referred to an agreement to variation, but only working days for that payroll period. This displaced the written contract contrary to authority including *Benge v Bluescope Steel (No.2)* and *GEC Marconi*.
 3. **Mischaracterisation of 5 December 2022 offer (pars 22–25, 29–31).**
The Commissioner erred in treating the 5 December 2022 "Letter of Offer" for the position of CMO and Head of Product Development as supporting an earlier variation of the existing contract. That communication was an offer of a new role with altered responsibilities. Declining a different role is not assent to vary the original contract.
- 25 Paragraphs 31 to 37 and 40 to 41 of Ms McCarthy's written submissions in support of these grounds broadly identify the legal principles derived from the often-cited extracts of Finn J's judgment in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2003] FCA 50; 128 FCR 1 (*GEC Marconi*). These are the principles the Commissioner referred to at [36].
- 26 There is, then, no contentious issue in this appeal as to the applicable legal principles. Ms McCarthy's appeal grounds are about how the principles have been applied in her case.
- 27 Ms McCarthy's submissions in relation to these grounds are extensive and to some extent repetitive. Given the internal repetition in the submissions, we will not reproduce them here. In a nutshell, the effect of her submissions is that the 'variation only in writing' clause was inconsistent with the parties intending that the oral agreement made at the meeting on 14 November 2022 be immediately binding.
- 28 The Commissioner's conclusion that the contract was varied was based on:
- (a) The evidence of an oral agreement between Ms McCarthy and the respondent at a meeting on 14 November 2022: [28], [40];
 - (b) Ms McCarthy's conduct in making claims for TOIL for hours worked on Fridays: [29];
 - (c) Ms McCarthy's conduct in confirming her working hours were Monday to Thursday: [29] [40]; and
 - (d) Ms McCarthy declining a later proposal for a full-time contract: [30].
- 29 Some of Ms McCarthy's submissions proceed on the incorrect premise that the Commissioner relied on the unsigned 16 November 2022 letter to support her finding that there was a variation. The Commissioner did not: [19], [39]. However, the

Commissioner did not deal with Ms McCarthy's contention that the 16 November 2022 letter was evidence that there was no concluded or binding variation either.

- 30 Some of Ms McCarthy's submissions proceed on the incorrect premise that the Commissioner relied on her lack of objection, or acquiescence, to support the findings. The Commissioner expressly refused to treat 'mere acceptance' as showing there was a variation: [27], [40].
- 31 Some of Ms McCarthy's submissions treat the Reasons as finding a variation based on unilateral conduct. That is not the effect of the Reasons either. The Commissioner properly considered the parties' conduct in a search for a mutual intention.
- 32 Ms McCarthy mistakenly characterised the Reasons as having adopted a particular construction of clause 27.1 of the Contract. The meaning of clause 27.1 was not in issue.
- 33 Ms McCarthy refers to an exhibit, Exhibit R3, as being incorrectly described when it was tendered. This is one of the contentions supporting Ground 2 of the Appeal. The Commissioner did not place any reliance on the exhibit label in her Reasons. The Reasons correctly refer to and describe the communication by reference to the parties to it, its date, and its contents: [20]-[21].
- 34 We do not need to deal with Ms McCarthy's submissions insofar as they misstate the effect of the Commissioner's reasoning.
- 35 It is worth emphasising that Ms McCarthy's own evidence was that during a meeting with Ms Hughes and Mr Hughes on 14 November 2022, she was asked to drop one day of work per week to save on costs, that she verbally agreed to do so, and that she agreed to work Monday to Thursday: ts 28–29, ts 50, ts 54.
- 36 It was therefore uncontroversial that there was an oral agreement for Ms McCarthy to reduce her hours from full-time to part-time. It was a mutual agreement. The issue was whether that oral agreement became legally binding on the parties.
- 37 The reason that the law recognises that a 'variation only in writing' clause cannot prevent parties to a contract from agreeing orally to vary it, is based on the principle of contractual autonomy. Parties are free to make a new agreement, and in making a new agreement, the earlier agreement, along with its conditions for variation, can be superseded. This is why Finn J in *GEC Marconi* referred to Cardozo J's famous statement in *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 that 'whenever two [people] contract, no limitation self-imposed can destroy their power to contract again'. See also *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd* [2019] NSWCA 87; 373 ALR 591, [122]; *TWT Property Group Pty Limited v Cenric Group Pty Limited* [2020] NSWSC 72; *GEC Marconi* [219], [220]. A clause of a contract that regulates the process of variation is only mandatory in the sense that either party can insist on compliance with it.
- 38 To find that Ms McCarthy's hours had been effectively contractually varied, the Commissioner needed to consider the mandatory common law rules for contract formation: consideration and an intention to contract on terms that are sufficiently certain and complete.
- 39 In considering these elements, the Commission was obliged to treat the 'variation only in writing' clause as a factor relevant to proof of an intention to contract: *GEC Marconi* [221]. The effect of *GEC Marconi* is not that the existence of the clause can simply be ignored. Rather, it means some attention must be given to what effect the clause should have on the objective fact-finding exercise as to whether the parties intended to depart from it.
- 40 These questions are all to be answered objectively. Post contractual conduct is admissible in answering them: *GEC Marconi* [229].

Was there consideration supporting the formation of a varied contract?

- 41 The Commissioner found that consideration was present because 'the change affected both parties' obligations.': Reasons [33].
- 42 Ms McCarthy submits that the Reasons do not identify any consideration, and that the finding that there was consideration was not open because there was no evidence of any redistribution of her workload, revised role description or challenge to her evidence that her workload had not changed: submissions paragraphs 50, 74, 76.
- 43 Valuable or sufficient consideration may consist 'either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other in respect of the promise.': Sappideen C, O'Grady P, and Riley J, *Macken's Law of Employment* (9th ed, 2022) [4.130] citing *Currie v Misa* (1875) LR 10 Exch 153, 162. While consideration must be valuable, the 'value' need bear no relationship to the promise itself.
- 44 The nature of the consideration required was considered by the Full Federal Court in *Hill v Forteng Pty Ltd* [2019] FCAFC 105; (2019) 138 ACSR 344, in the context of a purported variation to an employment contract. The plaintiff, Mr Hill, contended that no sufficient consideration was given and received for the variation of his employment contract to reduce his salary, without any change in his duties. Mr Hill argued that in the absence of consideration, the variation must be regarded as unilateral.
- 45 At first instance, the primary judge applied the reasoning of Santow J in *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, [746]-[749], to the effect that consideration for the variation of a contract could be found by the conferral of a 'practical benefit'. The primary judge accepted that the company's financial circumstances meant that it was of significant value to Mr Hill and a significant avoidance of detriment to him, to keep employment with Forteng and that this was a sufficient practical benefit.
- 46 Mr Hill alleged that this was an error.
- 47 The Full Federal Court disagreed with Mr Hill. At [22]-[25], it said:

22 The concept of "any benefit, or even any legal possibility of benefit" may be regarded as similar in nature to a "practical benefit" of the kind identified and applied in *Musumeci*, and "real benefit" found by Gummow and Hayne JJ to be lacking in *DPP v Le*. Looked at in this way, what must be found for consideration to render a

contract variation binding is something more than one party to the existing contract simply forgoing an existing contractual right. This can be seen to accord with the accepted “modern” conceptualisation of consideration stated in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at 855 as an “act or forbearance of the one party, or the promise thereof is the price for which the promise is bought”. As it was put in *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424 at 456-457, what is needed on top of the offer capable of acceptance, and the act put forward as consideration for that offer, is the existence of a quid pro quo.

23 The difference between finding, or not finding, such consideration, can turn on subtle variations in the facts. In *Australian Woollen Mills*, the example was given (at 457) of A saying to B “I will pay you £1,000 on your arrival in Sydney”. Without more, there is no binding contract due to the absence of a relationship between the two acts. But if A had earlier told B that it was of vital importance to him (A) that B should come to Sydney, and B objected because it might cause him a financial loss unrelated to anything to do with A, then B’s acceptance of the offer of payment might not only establish the agreement, but also the consideration for it.

24 It follows from the above analysis that, if a benefit can be found accruing to Mr Hill in return for him accepting a lower payment for the performance of substantially the same duties (assuming that to be an accurate characterisation of his ongoing role, which is disputed), then the authority for characterising that as consideration able to give the variation agreement contractual force is more substantial than his arguments suggest. The notion of something akin to practical benefit has stronger support in long-standing authority than just *Musumeci*, without any need to adopt or endorse the detail of Santow J’s reasons. It is, in essence, a fact-finding exercise, albeit requiring legal characterisation.

25 The reasoning in the preceding paragraph means that the real question underpinning this aspect of the appeal is not whether or not *Martech* was or was not correctly distinguished on the facts, nor whether the detail of the reasoning in *Musumeci* is good law. Rather, what matters is whether or not the primary judge’s characterisation of factors as being sufficient to amount to consideration, such that the agreements to vary remuneration were binding, was infected by any error. That is, has Mr Hill demonstrated that his Honour erred in finding that he obtained a sufficient benefit in return for accepting a lower payment; or to use the language accepted since 1884 in *Foakes v Beer*, was there “any benefit, or even any legal possibility of benefit” flowing to him, to amount to consideration?

48 At [37], the Full Federal Court accepted Forteng’s characterisation of a benefit flowing to Mr Hill in the form of continuing his altered employment contract as preferable to the alternative prospect of his employment being terminated on four weeks’ notice. In other words, he accepted the reduced remuneration because it was better than the alternative which he wanted to avoid. This was in circumstances where the perception of a risk of the business failing was ‘neither hypothetical nor speculative’ and the prospect of termination of the employment was ‘on the cards.’

49 At [38], the Full Federal Court said:

38 It needs to be remembered that much of contract consideration, especially for executory contracts, is predictive in nature and entails the giving of promises as to future events, conduct and anticipated outcomes. Sometimes they do not come to pass; but provided what was promised is of some substance, the remedy is not to deny the existence of the contract, but enforcement of the contractual promise given. Provided the benefit gained, or the detriment avoided, will likely have some discernible value to the promisor (as to which courts do not engage in an assessment of the value) and is in the realm of a reasonable prospect rather than being illusory or so speculative as to be worthless at law, there is no requirement of certainty that the benefit promised, or detriment avoided, will ultimately be realised, as opposed to sufficient clarity as to what that benefit or detriment is.

50 This deals with Ms McCarthy’s submissions to the effect that there could be no consideration for the variation of the contract in circumstances where her role or workload had not changed. It is sufficient consideration if the variation provided a practical benefit in the form of job security.

51 However, in Ms McCarthy’s case, there was also sufficient consideration in the form of the practical benefit of not being obliged to attend work on Fridays, unless required to work Fridays as ‘reasonable additional hours.’ Ms McCarthy’s evidence was that her work arrangements did change, as evidenced by her email dated 28 November 2022 confirming her new working days were ‘Mon-Thursday’ and her evidence that she did not attend at the company’s headquarters on Fridays. Although the Reasons are brief on this point, it is obvious that it is this practical benefit that the Commissioner was referring to as the change in obligations which satisfied the requirement that there be consideration.

52 Ms McCarthy’s evidence was that she was nevertheless available to and did perform work on Fridays as well as weekends, supporting customer service and responding to emails for which she claimed TOIL: ts 25, ts 29, ts 32, AB 282. This does not detract from the fact that if her contract had been varied from full-time to four days a week, her obligations had changed from an obligation to work five days a week including Fridays, to an obligation to work four days a week and to only work on Fridays if it was reasonable additional hours. There was, therefore, a proper basis for the Commissioner to find that there was sufficient consideration.

Was the agreement sufficiently precise and complete to be a valid variation?

53 There are three parts to Ms McCarthy’s submissions to the effect that the Commissioner failed to properly consider whether the agreement was sufficiently precise and certain to amount to a valid variation. First, she says that even if there was agreement about a reduction in hours, there was no discussion or agreement about what her salary would be. Second, she says that there was no discussion or agreement about how work would be organised to change a full-time workload to a part-time workload. Third, she says that any agreement was incomplete and uncertain in relation to the particular hours and days she would be working.

- 54 The general principle in relation to the need for certainty and completeness in the formation of a contract is that all the *essential terms* of a contract must have been agreed upon and expressed in language which is not so uncertain as to be incapable of enforcement in a court of law: Carter JW, *Contract Law in Australia* (7th ed, 2018) [4-01]. In an employment contract, remuneration is usually an essential term: Sappideen C, O’Grady P, and Riley J, *Macken’s Law of Employment* (9th ed, 2022) [4.90].
- 55 Relevantly, the Commissioner found that the variation was certain and complete: [33]. She found that Ms McCarthy agreed for her salary to be reduced, based on her response to the 28 November 2022 email: [29]. At [38], the Commissioner said that the evidence shows Ms McCarthy agreed to the company’s proposed change in her hours of work and a corresponding decrease in remuneration on 14 November 2022.
- 56 The original written employment contract said at clauses 1, 5 and 6:
1. **Position**
 - 1.1 You will be appointed to the position of Director of Product Development and Customer Experience, reporting directly to the Managing Director or any other person directed by the Employer from time to time. The Employer may unilaterally change your title, duties, responsibilities, function, role accountability or reporting relationship at any time.
 - 1.2 Your employment will commence on Monday, 6th December 2021 and your employment will continue unless terminated in accordance with the terms of this letter of appointment.
 - 1.3 Your employment will be full time.
 - 1.4 In addition to the hours set out above, you may also be required to work reasonable additional hours.
 - 1.5 The duties of this position are set out in the attached position description. You will be required to perform these duties, and any other duties the employer may assign to you, having regard to your skills, training and experience.

...
 5. **Remuneration**
 - 5.1. You will be paid fortnightly at the rate of \$160,000 per year.
 - 5.2. Your base salary will be reviewed annually and any increase in your base salary is at the discretion of My Foodie Box. Reviews are based upon individual performance, My Foodie Box’s financial performance and economic indicators.
 - 5.3. Your base salary will be deposited on a fortnightly basis, in arrears, into your nominated bank account. Your base salary covers all and any overtime, penalty rates or allowances you may be otherwise entitled to under any industrial instrument.
 - 5.4. In addition to your base salary, My Foodie Box will contribute the minimum level of superannuation as required by law to a superannuation fund of your choice (currently set at 10%). You may elect to contribute, by way of salary sacrifice, such further amounts to your superannuation fund, as agreed between you and My Foodie Box.
 6. **Working hours**
 - 6.1. My Foodie Box is a seven day a week business and you may be required to work during any of these operating hours.
 - 6.2. Your remuneration package includes payment for all hours you work for My Foodie Box. You agree to work at the times reasonably necessary for the requirements of your role, which may vary from time-to-time. As you agree to work the hours reasonably necessary to meet business requirements, rather than only certain specified hours, you agree to your hours of work being averaged over each 12-month period.
- 57 In her evidence to the Commission, Ms McCarthy noted that in around November 2022, she was aware that there were other members of the team that were asked to take reduced pay and some who were being made redundant: ts 28. She referred to the company ‘downsizing’: ts 29. She herself had a discussion with one of her own team members to let them know that pay reductions were something the company was looking at. While she did not give a full account in her examination in chief of the 14 November 2022 meeting with Ms Hughes and Mr Hughes, she characterised what happened in these terms:
- I was told that I was going to be moving down to four days, which I was not happy about. It’s a 20 per cent pay cut leading into my wedding, it was very stressful: ts 28.
- 58 She continued:
- I felt I had to concede because my team was suffering as well. And I wanted to provide that you know, make sure that, you know, it was solidarity in a way...I did keep reiterating “When I come back from my wedding I really need to come back to fulltime”: ts 29.
- 59 It is clear from Ms McCarthy’s own evidence that the discussions she had with Ms Hughes and Mr Hughes on 14 November 2022 were had in the context, known to her, of the business downsizing, job losses and other staff reducing their salaries. Further, her evidence was effectively that she was aware when agreeing to reduce her hours, it would be accompanied by a commensurate, that is, 20 per cent, reduction in her salary.

60 Ms McCarthy submits at paragraph 89 of her submissions that ‘critically, she gave evidence that she did not know what her remuneration would be until she received her next payslip’, referring to ts 29. Her evidence was not that she did not know what her remuneration would be. Rather, it was that she did not receive anything in writing about what it would be, until she received her next payslip:

...I hadn't received any variation or details of what that was going to be or what my actual pay was going to be until I got a payslip...: ts 29 (emphasis added)

61 There was, therefore, a sound evidentiary basis to find that Ms McCarthy had agreed, at the meeting of 14 November 2022, to a reduction in her salary commensurate with the reduction in hours. The agreement might not have identified dollar figures, hourly rates of pay or such. The agreement was not reduced to writing.

62 However, it was sufficiently certain to be reasonably capable of being understood by the parties to the agreement and accordingly, to be implemented and enforced.

63 The second issue raised by Ms McCarthy relates to the lack of express agreement about redistribution of her workload. She points to the fact that the company led no evidence about any change to her duties and workload, and Ms Hughes conceded in cross-examination that there was no correspondence showing how ‘the fifth days’ work’ would be redistributed.

64 Ms McCarthy submits that ‘a reduction in working time necessarily requires a congruent reduction in duties and performance expectations.’ Ms McCarthy cited no authority for this proposition. It does not follow, logically or practically, that a reduction in working time must be accompanied by a reduction in duties, performance expectations or workload. A reduction in workload or a reduction in duties might be a reason for a reduction in hours. There are other possibilities, including that the same workload be performed using different technology, or over a longer period of time, or just more quickly.

65 In any event, terms about duties, workload and how work is to be performed are not necessarily essential terms for a contract of employment. Such terms need not be agreed for the purpose of formation of a valid employment contract and need not be certain. It is not uncommon, for example, for employment contracts to specify only the position title or role, and to contain a clause to the effect that the employee is obliged to perform such duties within the employee’s competence and capacity as directed by the employer. In reality, employees’ duties and responsibilities often change over time in a dynamic way.

66 Indeed, Ms McCarthy’s original employment contract states:

The Employer may unilaterally change your title, duties, responsibilities, function, role accountability or reporting relationship at any time...

67 In short, it was unnecessary for the Commissioner to find that there was an agreement on the reduction in Ms McCarthy’s workload and performance expectations in order to find that there was a valid variation to the contract of employment in relation to hours and salary.

68 Ms McCarthy’s third argument is that the hours of work needed to be specified for the variation to be valid. In support of this argument, she points to:

- (a) The fact that the company varied other employees’ hours of work by written agreements that specified precise weekly part-time hours. This argument can be dealt with briefly. The terms of other employees’ contracts have no relevance to determining whether the agreement between Ms McCarthy and the company was uncertain or incomplete. Those other employees and the company were free to make their own agreements and to include whatever details they chose to include.
- (b) The statutory framework under the *Fair Work Act 2009* (Cth) (**FW Act**) regulates part-time employment by reference to agreed ordinary hours of work. Ms McCarthy refers to s 62 and s 63. They relevantly say:

62 Maximum weekly hours

Maximum weekly hours of work

- (1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
 - (a) for a full-time employee—38 hours; or
 - (b) for an employee who is not a full-time employee—the lesser of:
 - (i) 38 hours; and
 - (ii) the employee’s ordinary hours of work in a week.

Employee may refuse to work unreasonable additional hours

- (2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.

Determining whether additional hours are reasonable

...

63 Modern awards and enterprise agreements may provide for averaging of hours of work

- (1) A modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed:
 - (a) for a full-time employee—38 hours; or
 - (b) for an employee who is not a full-time employee—the lesser of:

- (i) 38 hours; and
- (ii) the employee's ordinary hours of work in a week.

(2) The terms of a modern award or enterprise agreement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1). (original emphasis)

69 Section 20 of the FW Act defines the meaning of 'ordinary hours of work' for award/agreement free employees as:

Agreed ordinary hours of work

(1) The **ordinary hours of work** of an award/agreement free employee are the hours agreed by the employee and his or her national system employer as the employee's ordinary hours of work.

If there is no agreement

(2) If there is no agreement about ordinary hours of work for an award/agreement free employee, the **ordinary hours of work** of the employee in a week are:

- (a) for a full-time employee—38 hours; or
- (b) for an employee who is not a full-time employee—the lesser of:
 - (i) 38 hours; and
 - (ii) the employee's usual weekly hours of work.

If the agreed hours are less than usual weekly hours

(3) If, for an award/agreement free employee who is not a full-time employee, there is an agreement under subsection (1) between the employee and his or her national system employer, but the agreed ordinary hours of work are less than the employee's usual weekly hours of work, the **ordinary hours of work** of the employee in a week are the lesser of:

- (a) 38 hours; and
- (b) the employee's usual weekly hours of work.

Regulations may prescribe usual weekly hours

(4) For an award/agreement free employee who is not a full-time employee and who does not have usual weekly hours of work, the regulations may prescribe, or provide for the determination of, hours that are taken to be the employee's usual weekly hours of work for the purposes of subsections (2) and (3). (original emphasis)

70 There is nothing ss 20, 62 and 63 which suggests ordinary hours of work in a week must be specified. This is consistent with the fact that these sections refer to ordinary hours for full-time award/agreement free employment, where there is no agreement, to be 38 hours. Furthermore, ordinary hours for full-time employment is not required to be expressed by reference to a specified span of hours on particular days.

71 Ms McCarthy submits that there were no identified and agreed hours of work in her case. But it cannot be doubted that the agreement of 14 November 2022 was to reduce hours from five days to four days. If five days represents full-time ordinary hours of 38 hours per week in accordance with the FW Act, then four days represents 0.8 of 38 hours, or 30.4 ordinary hours per week. The parties' agreement to reduce from five days to four days therefore naturally means that the new ordinary hours were 30.4 hours.

72 We would therefore affirm the Commissioner's finding that the variation was certain and complete in the ways necessary for a valid contract to be formed.

The role of post-contractual conduct in ascertaining the existence of a valid contract

73 The Commissioner placed weight on the parties' post contractual conduct in determining whether a valid variation to the contract was formed. This approach is permissible and appropriate: *GEC Marconi* [229]. Ms McCarthy's concern is that in doing so, the Commissioner failed to reconcile certain inconsistencies:

- (a) The fact that the company prepared the 16 November 2022 written letter to document the variation, although it was not provided to her or signed by her.
- (b) The payslips issued to her after 14 November 2022 continued to refer to her employment as full-time.
- (c) She continued to work full-time, necessitating the submission of TOIL claims which were accepted by the company.

74 Ms McCarthy submits:

57 The Reasons do not grapple with the Respondent's own objectively inconsistent conduct in preparing a document seeking the Appellant's written agreement after the alleged concluded oral agreement on 14 November 2022. If that discussion had produced a complete and binding contractual variation, there is no explained basis for why the Respondent would then draft a written variation letter, require the Appellant's signature and attempt to formalise the change. That contemporaneous conduct is objectively inconsistent with an intention to dispense with clause 27.1 or to treat the contract as already varied. The failure to weigh that inconsistency when relying on conduct to infer assent is an evaluative error and a failure to consider a relevant consideration, engaging *House v The King*. It also demonstrates that there was no mutual intention to depart from the agreed requirement that any contractual variation be in writing. In *GEC Marconi*, the Full Court held that where a contract stipulates that variations must be in writing, a party asserting an oral or implied variation bears a heavy evidentiary burden and must establish, with clarity and certainty, that the parties objectively

intended to waive or depart from the agreed written-variation procedure ([213]–[218]). Finn J emphasised that where agreement is said to be inferred from conduct, the absence of direct specification of proposed variations and the absence of explicit written acceptance weigh against any finding that the writing requirement has been displaced ([303]). Evidence that a party continued to draft or approve formal contract amendments, and remained aware of the formal regime for contractual variation, is inconsistent with any understanding that the contract was “as good as amended” and negates any inference of informal variation ([438]). The Respondent’s conduct in this case aligns squarely with that analysis. Far from evidencing a waiver of clause 27.1, the drafting of a written variation letter after the alleged oral agreement is affirmative evidence of continued adherence to the contractual requirement for written variation. The Commissioner’s failure to assess that conduct alongside the Appellant’s conduct rendered the finding of a concluded oral variation legally untenable.

- 75 This is a fair observation. The Commissioner did not ‘grapple’ with the idea that the company’s conduct in producing the 16 November 2022 letter might be indicative of the parties’ intentions in relation to the requirement for a variation to the contract to be in writing. This is probably because it was not raised before the Commissioner. At the hearing, the focus of Ms McCarthy’s submissions about the 16 November 2022 letter was the fact that she did not receive it or sign it. She argued that the company should not be able to rely on it: ts 6, ts 185. She did not make any submissions to the effect of the submission made in this appeal, that the production of the letter was itself conduct relevant to determining the parties’ intention to be bound by a merely oral agreement.
- 76 Because this point was not raised at first instance, we have doubts as to whether it can be raised in this appeal, because of the effect of s 49(4) of the *Industrial Relations Act 1979* (WA) (IR Act): *Doyle v The Roman Catholic Bishop of Bunbury* [2022] WAIRC 00799; (2022) 102 WAIG 1533, [18].
- 77 But in any event, while we accept the fact that the letter was prepared is relevant conduct, it is not decisive. It is simply part of the factual matrix. In this case, we would treat it as a neutral factor. That is because, first, the content of the letter suggests it was prepared as evidence of an agreement that had already been reached, not in order to create an agreement. It describes the change to the employment agreement in the past tense, and by virtue of the discussions held on 14 November 2022:
- As a result of our discussions on 14th November 2022, the following change to your Individual Employment Agreement has been agreed:*
- ...
- The *agreed change*...(emphasis added)
- 78 The part of the letter where a signature is to be placed does not purport to itself constitute an agreement, but to be an ‘acknowledgment’ that the signatory has understood the variation and a declaration that the letter ‘accurately reflects the *variation agreed*’ (emphasis added).
- 79 The letter also says:
- ...please add your signature below and return to Mai at... as *confirmation* of your understanding *and* agreement to this variation to your Individual Employment Agreement (emphasis added).
- 80 A natural reading of the letter is that the signature is confirming both understanding and agreement. It is therefore not purporting to be the formation of an agreement, but rather the confirmation of an agreement already made.
- 81 It may be possible to read this last sentence in the letter disjunctively so that the signature is confirmation of understanding, and also evidence of agreement. However, this reading is a strained one, in light of the references to the agreement in the past tense.
- 82 The content therefore indicates that the letter has been created as a record of an agreement that has already been made.
- 83 The second reason that the letter is a neutral factor is because it appears to have been part of a standardised process that was undertaken in relation to several employees whose terms and conditions of employment had been varied. Exhibit R12 was a bundle of letters also dated 16 November 2022 addressed to several other employees. The letters are in the same format and in substantially the same terms as reproduced above. This suggests the letters were all generated for recording purposes, rather than to create a contract, or a contractual variation. Compliance with a ‘variation only in writing’ clause does not appear to have been in contemplation when generating these proforma type, bulk run of letters.
- 84 Ultimately, while the Commissioner did not provide reasons to ‘reconcile’ the company’s conduct in generating the 16 November 2022 letter with the intention to have made a binding oral agreement, the facts are reconcilable. The omission would not have altered the conclusion that a binding oral agreement came into existence.
- 85 The Reasons do not mention the payslips issued after 14 November 2022. It would appear that no regard was given to them, to the payments made, or to payroll practices at all, as conduct relevant to determining whether a binding agreement had been formed. Contrary to Ms McCarthy’s submissions at [90]–[91] and [102], the Reasons do not disclose that the Commissioner treated the implementation of payroll as corroboration of the discussion of 14 November 2022 constituting an agreement, nor did the Commissioner ‘reason backwards’ from payroll implementation to agreement.
- 86 Ms McCarthy makes something of the fact that the payslips issued after 14 November 2022 reduce her hours and pay but continue to refer to her employment as ‘full-time’. Sometimes she says this should weigh against the company’s case: paragraphs 98, 186. But she also submits, at paragraph 111, that the payroll records are ‘inherently equivocal.’
- 87 We agree with the latter of Ms McCarthy’s submissions. The payroll records do not indicate one way or another whether the parties intended to make a binding oral agreement on 14 November 2022. It follows that there was no error in the Commissioner not having regard to them. We do not agree that the reference in the payslips to ‘full-time’ employment is evidence relevant to discerning the parties’ intentions about the oral agreement.

- 88 In relation to the evidence of Ms McCarthy working in excess of four days a week, and submitting claims for TOIL to the company, the Commissioner treated this fact as relevant post-agreement conduct indicative of Ms McCarthy's intentions to treat the oral agreement made on 14 November 2022 as contractually binding. This is consistent with the general approach that reliance will usually be seen as confirming a conclusion that a non-compliant agreement was intended to be binding: Carter JW, Eldridge J and Peden E, *Agreed Writing Requirements for Contract Variation* (2020) 36 (2) *Journal of Contract Law* 107, 126.
- 89 Ms McCarthy says the evidence of her TOIL claims should have led the Commissioner to the opposite conclusion, that is, that it was evidence that she did not intend to be bound by the oral agreement to reduce her hours. She says:
67. The error is compounded by the finding at Reasons [27] that there was "no evidence" the Appellant protested the change. That finding was not open on the evidence. The Appellant's repeated TOIL submissions for Friday work and additional hours were contemporaneous conduct inconsistent with acceptance of a four-day role or a proportional reduction in salary. Those submissions asserted, through the Respondent's own system, that the Appellant continued to work full-time hours and sought compensation accordingly. Properly characterised, that conduct is consistent with performance under protest while maintaining original contractual rights and is inconsistent with unequivocal assent. The Commissioner failed to consider that competing inference and instead treated the absence of express objection as probative of agreement. That failure to consider relevant evidence, coupled with a misapplication of **Wegener** and **Benge**, discloses error within **House v The King** and warrants the setting aside of the finding of contractual variation.
93. The Appellant continued to work full-time despite the reduction in pay. Her workload remained consistent with full-time employment (Transcript, 30 September 2024, p16). She continued working in good faith while submitting TOIL (Transcript, 30 September 2024, p27) and was continually contacted on Fridays and weekends (Transcript, 30 September 2024, p29). Further, the Respondent accepted that employees could not see TOIL approvals or rejections and received no notification if TOIL was rejected (Transcript, 1 October 2024, p 166). In those circumstances, silence or continued work could not rationally be treated as acceptance. This evidence was inconsistent with any finding that she agreed to a genuine four-day role and reinforced that the reduction was unilateral. Treating continued work in these circumstances as acceptance was contrary to **Benge** and **Wegener**.
94. The Appellant's ongoing submission of TOIL on a weekly basis to the bookkeeper was itself a contemporaneous and continuing objection to any purported reduction in hours or workload. Each TOIL submission objectively asserted that the Appellant was continuing to work hours in excess of any alleged four-day arrangement and was performing work beyond any reduced role. Those submissions were made openly, repeatedly and through the Respondent's prescribed system. They were never rejected, queried or corrected at the time.
- 90 These submissions are illogical and artificial. The question is what this conduct says about the parties' objectively determined intention to make a binding contract; what does the parties' post-agreement conduct say about their intention to be bound by the oral agreement to a reasonable person in the parties' position? There is only one conclusion open. The fact that Ms McCarthy submitted TOIL claims for the work she performed on Fridays, or indeed the work she performed in excess of 30.4 hours in a week, objectively indicates that she accepted her ordinary hours were 30.4 hours per week and that additional hours were overtime. Her conduct in submitting TOIL claims was consistent with treating the agreement to reduce her ordinary hours as binding. It was consistent with the existence of a binding contract to work 30.4 hours a week as ordinary hours.
- 91 We would add that there was other evidence of conduct that was consistent with there being an intention to be bound by the 14 November 2022 agreement, namely:
- Ms McCarthy's email to the Executive Assistant dated 28 November 2022 confirming her 'new working days' were 'Mon-Thursday';
 - Ms McCarthy's unchallenged evidence that she was not attending at the office on Fridays unless 'dragged' back for meetings: ts 29; and worked from home on Fridays in a reactive way if required to respond or if contacted: ts 32;
 - Ms Griffiths' evidence that there were discussions in the team about Ms McCarthy not being at the office on Friday: ts 83;
 - Ms McCarthy's concession in cross-examination that she had told people that it was helpful for her to have Friday off: ts 55; and
 - Emails claiming TOIL expressed in terms such as 'I had to work Friday' indicating such work was not considered by Ms McCarthy to be ordinary hours.

Did the Commissioner apply the correct evidentiary burden on the respondent, in light of the 'variation only in writing' clause?

- 92 At paragraphs 78-79 of her submissions, Ms McCarthy says:
78. The Commissioner also failed to apply the heavy evidentiary burden required by **GEC Marconi**. The Full Court held that where a contract contains an express requirement that any variation be in writing, a party asserting an oral or implied variation bears a heavy evidentiary burden ([217]–[218]). An alleged oral variation may only be recognised where the evidence demonstrates, with clarity and cogency, precisely identified and certain terms, clear mutual assent, a mutual intention to depart from the agreed written-variation procedure, real consideration and conduct that is unequivocal and referable only to the alleged agreement ([236]–[239], [301]–[303], [440]–[441]).
79. The evidentiary features present in **GEC Marconi** were wholly absent in this case. The Commissioner accepted that no written variation was executed, that the Appellant did not receive the 16 November letter at the time and that the alleged agreement depended on recollection of a single undocumented discussion (Reasons [27]–[31]). Despite this, the Commissioner inferred a binding contractual variation from an alleged conversation, unilateral payroll implementation and administrative conduct equally consistent with non-consensual change (Reasons [33], [39]–[41]). That approach collapses the evidentiary threshold articulated in **GEC Marconi**.
- 93 Ms McCarthy's submissions misconceive the relevant test. The parts of **GEC Marconi** which Ms McCarthy relies upon do not stand for the principle that the burden lies on the respondent to prove the variation, nor that the burden is a heavy one. As

McLure JA (Roberts-Smith JA and Buss JA agreeing) said in *Elvidge Pty Ltd v BGC Construction Pty Ltd* [2006] WASCA 264 [35], citing *GEC Marconi*:

The failure to follow the contractual procedure does not prevent a finding of a variation agreement by conduct or otherwise; at most it is a relevant consideration in determining the parties' intention.

- 94 The fact that a 'variation only in writing' clause was previously agreed should be factored into the assessment of the evidence as to whether an agreement, absent writing, is intended to be binding.
- 95 The issue is intention to contract. The clause itself plays an evidentiary role in the enquiry into the issue. The absence of writing will be evidence against an intention to contract. If there is no other evidence, or all else being equal, the Commission must conclude that there is no intention to contract. But if there is other evidence, that evidence can sway the Commission one way or another. The position is akin to a presumption, which can be rebutted by compelling evidence: *GEC Marconi* [221]; *Elvidge Pty Ltd* [35]; Carter JW, Eldridge J and Peden E, *Agreed Writing Requirements for Contract Variation* (2020) 36 *Journal of Contract Law* 107, 120.
- 96 We have already set out the evidence that was before the Commission relevant to an assessment of whether there was a binding agreement in dealing with the issues of consideration, certainty, completeness, and post-contractual conduct. From the above discussion, it can be seen that there was a sound evidentiary basis for the Commissioner to find:
- (a) that there was an oral agreement made on 14 November 2022 to temporarily reduce Ms McCarthy's ordinary hours of work from 38 hours or five days per week to 30.4 hours or four days per week, with a commensurate reduction in salary;
 - (b) there was sufficient consideration for the oral agreement to be a valid and binding contract;
 - (c) the terms agreed on 14 November 2022 were sufficiently certain as to the essential terms; and
 - (d) there was post-contractual conduct which supported a finding that, objectively, the parties intended for the oral agreement to be binding. In particular, Ms McCarthy's TOIL claims for work on Fridays was consistent with there being a concluded and binding agreement, notwithstanding that it had not been reduced to writing.
- 97 In the absence of evidence of the post-contractual conduct consistent with the existence of a binding agreement, the 'variation only in writing' clause would likely have been conclusive as to the issue of intention, that issue falling in favour of there being no intention to vary. However, there was evidence of post-contractual conduct which cannot be ignored. In short, the findings we have referred to in [96(d)] above are a sound basis to find there was an intention to vary.
- 98 For these reasons, we consider that the Commissioner correctly applied the evidentiary burden and we would not disturb the Commissioner's ultimate finding that the contract had been validly varied. We would therefore dismiss grounds 1 to 3 of the appeal.

Ground 4: Dealing with 'credibility concerns'

99 Ground 4 is said to be a failure to give proper weight to credibility concerns. The ground is:

4. Failure to give proper weight to credibility concerns

The appellant raised that the respondent had previously misled the Commission with documentation. Despite credibility being in issue, the Commissioner relied heavily on the respondent's oral and documentary evidence (including unsigned material) without requiring corroboration, resulting in procedural unfairness.

- 100 The facts relied on by the Commissioner in reaching her conclusions were not contentious, although the conclusions to be drawn from those facts were.
- 101 As is evident from Ms McCarthy's written submissions, this ground proceeds on the basis that there were relevant 'disputed factual issues' and 'disputed oral conversations'.
- 102 Ms McCarthy's written submissions do not identify any particular 'disputed factual issues' other than what she describes as 'disputed oral conversations.' The legal effect of the conversation of 14 November 2022 was disputed. However, the key events, and content of what was discussed, was not. The Commissioner was not required to resolve any credibility issue. The Commissioner did not make any findings that involved rejecting Ms McCarthy's evidence, even if the Commissioner did not accept Ms McCarthy's submissions about the conclusions to be drawn from the evidence.
- 103 During the hearing of this appeal, we asked Ms McCarthy to identify what factual matters the Commissioner was required to decide where the credibility of a witness was in issue, or where the evidence was in conflict. She did not identify any.
- 104 This ground fails.

Ground 5: Calculation of remedy for Notice Claim

105 Ground 5 is as follows:

5. Notice period misapplied (pars 52–59).

Clause 15 of the contract entitled the appellant to four weeks' notice. The Commissioner found only two weeks were payable, and calculated this on a part-time basis. The finding is inconsistent with the clear contractual provision and the Commissioner's own acknowledgment at par 55 (AB 7).

106 This ground can only be maintained if any of grounds 1 to 4 are upheld. As they are not, this ground must also fail.

Ground 6: Superannuation

107 Ground 6 is:

6. Failure to include statutory superannuation (pars 52-59)

The order omitted compulsory superannuation contributions under the Superannuation Guarantee (Administration) Act 1992 (Cth) on the notice sum.

- 108 Ms McCarthy made no claim for superannuation in her Form 3 -Contractual Benefit Claim. This was not a matter that was ever raised in the proceedings before the Commissioner. There was no error in the Commissioner not addressing it, and Ms McCarthy cannot raise it on appeal: IR Act s 49(4)(a).

Ground 7: Overtime Claim

- 109 Ground 7 is headed as ‘Error in dismissing TOIL and additional hours claims (pars 43–51, 79-84, 90–94)’. It states:

The Commissioner erred in law in finding the “all-inclusive salary” clause excluded any entitlement to payment for additional hours, without properly considering the interaction with s 64 of the *Fair Work Act 2009* (Cth). The Commission did not adequately assess whether additional hours worked were reasonable or directed, as required by *Dorsch v Head Oceania Pty Ltd*.

- 110 Ms McCarthy does not advance this ground as an alternative to Grounds 1 to 5. In effect, consistent with the way she ran her claims at first instance, she has maintained that she was entitled both to be treated as a full-time employee and to be entitled to be paid TOIL for hours worked in excess of 30.4 part-time hours.
- 111 Nevertheless, as we consider the Commissioner was correct to conclude that Ms McCarthy’s hours were validly varied to 30.4 hours per week, it is necessary to consider her claim for TOIL for time worked in excess of those hours.
- 112 In this single ground of appeal, Ms McCarthy tries to deal with three distinct issues dealt with by the Commissioner. First, the way the Commissioner construed the meaning of the remuneration provisions of the employment contract at [43]-[51]. Second, the Commissioner’s findings as to whether hours worked by her were ‘reasonably necessary’ for the purpose of the contract: [79]-[84]. Third, the way the Commissioner dealt with her alternative claim that she was entitled to TOIL under principles of unjust enrichment or *quantum meruit* at [90]-[94].

The Contract’s meaning

- 113 At the hearing at first instance, the Commissioner had the following exchange with Ms McCarthy:

WALKINGTON C: Sorry, just if you don't mind, if I just ask a question as we go along - - -

McCARTHY, MS: Of course.

WALKINGTON C: - - - in terms of when we're on the topic. Can you show me in your employment contract of 9 October 2021 where it says what rate – yes, the source of authority in that contract that says you will be paid for additional hours and at what rate.

McCARTHY, MS: Um, I don't believe there was one. There's a clause for additional hours in clause one point something, 1.3 I think.

WALKINGTON C: 1.3 is your employment will be fulltime. And then 1.4 it says:

“In addition to the hours set above you may also be required to work reasonable additional hours.”

McCARTHY, MS: Yeah, sorry.

WALKINGTON C: Yes. So what I'm asking you is in this contract where are you basing or sourcing the authority that says how and at what rate would you be paid for any additional hours?

McCARTHY, MS: Well, I believe the contract should stipulate how - - -

WALKINGTON C: Yes, so I understand you believe it should do but I'm asking you where it does do.

McCARTHY, MS: Um, I don't believe it does.

WALKINGTON C: Okay. So what's the authority for me to find that I ought to order payment then?

McCARTHY, MS: For what, sorry?

WALKINGTON C: For the hours that the – the additional hours that you're claiming.

McCARTHY, MS: Um, well, I – I think importantly, um, it is on the company to record hours and overtime as you lodge them and – and keep them accurately and I don't believe that was done.

WALKINGTON C: Yes, I understand that but what I'm looking for is for you to point me to where in this contract of employment it says that the additional hours are to be paid and how they're to be paid and at what rate.

McCARTHY, MS: Ah, the only – the only way – thing with – with that would be – ah, would be under remuneration under point 5. It only mentions, um, 1.4:

“In addition to the hours set above you may also be required to work reasonable additional hours.”

But there's no calculations.

WALKINGTON C: Okay. All right. Thank you. (ts 180-181).

- 114 In the relevant part of the Reasons, the Commissioner noted there was no express provision in the employment contract which entitled Ms McCarthy to be paid for overtime worked in excess of her ordinary hours: [45]. Ms McCarthy had properly conceded this during the appeal hearing. The Commissioner referred to the contract’s clause 5.3, 6.1 and 6.2 which specified that the remuneration package included payment for all hours worked including overtime, and then considered whether there was any basis to incorporate the company’s policy into the contract of employment.

- 115 The Commissioner's approach to answering this question was orthodox, and is not challenged by this ground of appeal. The ground of appeal only challenges the Commissioner's construction of the meaning of clauses 5.3, 6.1 and 6.2: the conclusion that these provisions meant the salary was payment for overtime worked.
- 116 None of Ms McCarthy's submissions offer any other construction of the contract that is open. To the extent that this ground is directed at the first part of the Reasons at [43]-[51], it fails.

Whether hours worked were 'reasonably necessary'

117 Ms McCarthy submits:

160. At Reasons [79], the Commissioner reasoned that the assessment of additional hours could be undertaken over a 12-month period. That approach is inconsistent with the *Fair Work Act 2009* (Cth). The Act does not permit open-ended or annual averaging of hours in assessing reasonableness under s 62. Absent an award or enterprise agreement authorising a longer period, the maximum default averaging period is 26 weeks. There was no industrial instrument or contractual term permitting 12-month averaging in this case. By adopting an unauthorised averaging period, the Commissioner diluted the statutory protection against unreasonable additional hours and treated clause 6.2 as capable of absorbing sustained excess hours beyond its lawful operation. That constitutes an error of law.

118 This is a misstatement of the Reasons. The Commissioner did not reason that the assessment of additional hours could be undertaken over a 12-month period. The Commissioner placed no reliance at all on the contract's provision about averaging ordinary hours. The Commissioner actually identified the clause as being 'not compliant' with s 64 of the FW Act: [82]. The Commissioner then said that even if clause 6.2 was voided, she must nevertheless find a source of an entitlement to overtime payments or TOIL in the contract.

119 The Commissioner proceeded on the basis that under the terms of the contract, salary was inclusive of 'reasonably necessary' overtime. There are two components to the stipulation that overtime be 'reasonably necessary.' First, the overtime must be 'necessary.' Although not expressed in the Reasons, it is implicit that the Commissioner regarded this requirement as meaning that the company *required* or *needed* the overtime to be worked in the sense described in *Dorsch v HEAD Oceania Pty Ltd* [2024] FCA 162 [81].

120 Second, the overtime that was included in the salary was limited to 'reasonable' overtime. Reasonableness in this context usually refers to whether the hours worked are reasonable in light of various qualitative and quantitative considerations including the employer's duty to take reasonable care for an employee's health and safety.

121 The Commissioner referred to *reasonableness* in relation to the issue of the *necessity* of the overtime. This is likely reflective of the way the parties' ran their respective cases. The company's position was that time worked by Ms McCarthy outside of her ordinary hours was not necessary and could have been done within ordinary hours, such that no entitlement to payment arose. Ms McCarthy argued that all overtime worked should be compensated as it was *necessary*. Both cases missed the mark as to what needed to be established.

122 So, when the Commissioner concluded at [84] that there was insufficient evidence to make a finding that additional hours worked were, or were not, reasonably necessary, because there was insufficient evidence to enable the Commission to assess whether any additional hours were reasonable or not, we understand the Commissioner to be addressing the first component of whether the hours worked were required or needed.

123 Ms McCarthy's grounds of appeal challenge this absence of a finding, but also assert that the finding ought to have been that the hours worked were necessary, because they were accepted by the company. Ms McCarthy's submissions at paragraphs 164-175 go to lengths in discussing 'the evidentiary chain' which showed that she did continue to work full-time hours and that the practice was accepted by the company.

124 The effect of this conclusion, however, does not advance Ms McCarthy's claim. Rather, it defeats it, because if the hours worked were necessary, then they were not compensable beyond payment of the salary.

125 Accordingly, as a challenge to the Reasons would not have had a different result for Ms McCarthy's claim, this part of ground 7 should be dismissed.

The quantum meruit claim

126 Ms McCarthy made no submissions in support of this ground challenging the Commissioner's reasoning at [90]-[94] separate to the submissions made about the construction of the contract. For the same reasons that this ground fails on the construction issue, it cannot succeed in relation to the quantum meruit claim.

Ground 8: Procedural Unfairness due to delay in giving reasons

127 Ground 8 states:

The hearing took place in November 2024 but the decision was not delivered until 13 August 2025, a delay of approximately nine months. This caused prejudice to the appellant through prolonged uncertainty and difficulty in enforcing rights.

128 Ms McCarthy submits:

176. The hearing concluded on 1 October 2024. The Reasons for Decision were not delivered until 11 August 2025, a delay of approximately ten and a half months.

177. The delay occurred in a matter that turned centrally on disputed factual findings, credibility assessments and the proper weighing of contemporaneous documentary evidence.

178. Authority recognises that substantial delay between hearing and reasons may give rise to procedural unfairness where credibility and contested factual matters are central.
179. The Appellant does not contend that delay alone constitutes jurisdictional error. The complaint is that, in a case turning on disputed oral conversations and credibility, the delay materially increased the risk that impression and recollection displaced contemporaneous documentary evidence, as identified in *NAIS v Minister for Immigration and Multicultural Affairs* (2005) 228 CLR 470.
- ...
189. In circumstances where credibility and disputed factual matters were determinative, the delay was not neutral. It materially increased the risk of unfairness.
- 129 Ms McCarthy accepts, correctly, that delay in and of itself will not vitiate a decision. For this appeal to succeed, it must be shown that the delay had some consequence: that it contributed to an error or made the decision unsafe.
- 130 As we have already observed, and contrary to Ms McCarthy's submissions, this matter did not turn on disputed factual findings or credibility assessments. The matter could be resolved in the company's favour based on the uncontentious evidence and Ms McCarthy's own evidence. Ms McCarthy has not shown that the delay rendered the Commissioner's findings unsafe.
- 131 This matter is therefore distinguishable from *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 77; 228 CLR 470.
- 132 This ground is not made out.

Ground 9: Witnesses' capacity to give evidence

133 Ground 9 states:

9. Error in accepting evidence from Ms Mai Hughes after ceasing as CEO

The Commission erred in relying on evidence given by Ms Mai Hughes. At the time of the hearing in November 2024, Ms Hughes had already exited her role as Chief Executive Officer of the respondent. Despite this, the Commission accepted her evidence as though she remained an authorised representative of the company and as determinative of whether my employment contract had been varied. Parisrat (Mai) Hughes resigned as CEO and Director of My Foodie Box Limited on 10 May 2024, concurrent with the sale of the business to MFB (WA) Pty Ltd

- 134 This ground is misconceived. There is no 'authority' needed for a witness to give evidence to the Commission and authority is not a requirement for the admissibility of a witness' evidence. Ms Hughes was a relevant witness to the events and dealings on which Ms McCarthy's claim and the company's response to it, was based. Her resignation as a company director after those events and before the hearing does not change the veracity or admissibility of her evidence.

135 Mr Hughes was not a witness.

Conclusion and Disposition

136 As none of the grounds of appeal have been made out, we dismiss the appeal.

2026 WAIRC 00146

APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER B 67/2023 GIVEN ON 13 AUGUST 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JESSICA MAUREEN MCCARTHY

APPELLANT

-v-

TARRINA RESOURCES LIMITED

RESPONDENT

CORAM

FULL BENCH

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T EMMANUEL

COMMISSIONER C TSANG

DATE

FRIDAY, 13 MARCH 2026

FILE NO/S

FBA 8 OF 2025

CITATION NO.

2026 WAIRC 00146

Result

Appeal dismissed

Representation

Appellant Ms J M McCarthy
Respondent (No appearance)

Order

HAVING heard from Ms J M McCarthy, the appellant on her own behalf, and there being no appearance for the respondent, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the appeal be and is hereby dismissed.

By the Full Bench

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2026 WAIRC 00176

MUNICIPAL EMPLOYEES (WESTERN AUSTRALIA) AWARD 2021

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION WA

APPLICANT

-v-

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES
UNION OF EMPLOYEES AND OTHERS

RESPONDENTS

CORAM SENIOR COMMISSIONER R COSENTINO
DATE WEDNESDAY, 25 MARCH 2026
FILE NO/S APPL 8 OF 2026
CITATION NO. 2026 WAIRC 00176

Result	Award varied
Representation	On the papers
Applicant	Local Government, Racing and Cemeteries Union (WA)
First Respondent	Western Australian Municipal, Administrative, Clerical and Services Union
Second Respondent	City of Kalamunda
Third Respondent	Shire of Boddington
Fourth Respondent	Shire of Bridgetown Greenbushes
Fifth Respondent	Shire of Bruce Rock
Sixth Respondent	Shire of Carnamah
Seventh Respondent	Shire of Dalwallinu
Eight Respondent	Shire of Dowerin
Ninth Respondent	Shire of Goomalling
Tenth Respondent	Shire of Halls Creek
Eleventh Respondent	Shire of Harvey
Twelfth Respondent	Shire of Kondinin
Thirteenth Respondent	Shire of Laverton

Fortinth Respondent	Shire of Leonora
Fiftinth Respondent	Shire of Murray
Sixtinth Respondent	Shire of Nannup
Seventinth Respondent	Shire of Narembeen
Eighthtinth Respondent	Shire of Ravensthorpe
Ninetinth Respondent	Shire of Sandstone
Twentieth Respondent	Shire of Three Springs
Twenty-first Respondent	Shire of Victoria Plains
Twenty-second Respondent	Shire of Wagin
Twenty-third Respondent	Shire of Wandering
Twenty-fourth Respondent	Shire of Waroona
Twenty-fifth Respondent	Shire of Woodanilling
Twenty-sixth Respondent	Shire of Yalgoo

Order

WHEREAS the Local Government, Racing and Cemeteries Employees Union WA filed an application to vary the *Municipal Employees (Western Australia) Award 2021* pursuant to s 40 of the *Industrial Relations Act 1979* (WA) (**IR Act**);

AND WHEREAS Schedule A of the application set out the grounds upon which it is made, indicating the application was made to increase the Award's clause 19.5.1 industry allowance by 3.75% in line with the 2025 State Wage Case decision and in accordance with Principle 6 of the Statement of Principles in *State Wage Case*[2025] WAIRC 00365; (2025) 105 WAIG 1184

AND WHEREAS the industry allowance was last varied on 21 June 2025: *Local Government, Racing and Cemeteries Employees Union (WA) v Western Australian Municipal, Administrative, Clerical and Services Union & Ors* [2024] WAIRC 00359, (2024) 104 WAIG 838;

AND WHEREAS the application calculates the new allowance rate at \$36.13, but as the allowance is a weekly allowance it ought to be rounded to the nearest 10 cents;

AND WHEREAS the variations were not opposed by any respondent;

AND BEING satisfied that:

- (a) The amendments proposed do not affect any substantive change to the scope of the Award or its area of operation;
- (b) The application is not made within a term specified in the Award; and
- (c) The requirements for varying the Award are met;

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

- (1) THAT the *Municipal Employees (Western Australia) Award 2021* be varied by deleting \$34.82 in Clause 19.5.1 and inserting in lieu thereof \$36.10; and

- (2) THAT the variations shall have effect from the beginning of the first pay period commencing on or after the date of this order.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

NOTICES—Application for General Order—

2026 WAIRC 00194

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Submissions for the 2026 WA Minimum Wage

The Western Australian Industrial Relations Commission is required to set the minimum wage to apply to employers and employees covered by the WA industrial relations system. It must do this before 1 July each year. The current minimum wage for an adult employee is \$953.00 per week.

The Commission invites interested persons and organisations to make a submission to the Commission on what minimum wage should be set in 2026. The Commission will hear oral submissions on Wednesday, 20 May 2026 and if necessary, a half day on Thursday, 21 May 2026. The proceedings are open to the public and will be webcast.

Any person who wishes to make an oral submission at that time should notify the Registrar of the Commission stating the basis of their interest. This must be done by Wednesday, 13 May 2026.

Written submissions are also welcome. Any person or organisation who wishes to make a written submission should do so by Wednesday, 13 May 2026. Copies of written submissions will be made public. Anonymous submissions will not be considered.

In making its decision, the Commission is required to consider the need to —

- ensure that Western Australians have a system of fair wages and conditions of employment; and
- meet the needs of the low paid; and
- provide fair wage standards in the context of living standards generally prevailing in the community; and
- contribute to improved living standards for employees; and
- protect employees who may be unable to reach an industrial agreement; and
- encourage ongoing skills development.

It is also required to consider:

- the state of the economy of Western Australia and the likely effect of its decision on; and
- that economy and, in particular, on the level of employment, inflation and productivity in Western Australia; and
- to the extent that it is relevant, the state of the national economy; and
- to the extent that it is relevant, the capacity of employers as a whole to bear the costs of increased wages, salaries, allowances, and other remuneration; and
- the need to ensure that the Western Australian award framework represents a system of fair wages and conditions of employment; and
- relevant decisions of other industrial courts and tribunals; and
- any other relevant matters.

People interested in making a submission are invited to address those issues.

Further particulars may be obtained from the Registry of the Commission via telephone **08 9420 4444**, and from the Commission's website at <http://www.wairc.wa.gov.au>

All submissions should be addressed to the Registrar at the following address: **Level 17, 111 St Georges Terrace, Perth** or by email to registry@wairc.wa.gov.au, quoting matter number CICS 1 of 2026.

DATED at Perth, Wednesday, 1 April 2026

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

NOTICES—Award/Agreement matters—

2026 WAIRC 00197

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 7 OF 2026

APPLICATION FOR A NEW AGREEMENT TITLED “CITY OF KWINANA INDUSTRIAL AGREEMENT 2025”

NOTICE is given that an application has been made to the Commission by the *City Of Kwinana* under the *Industrial Relations Act 1979* for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

2. OPERATION OF AGREEMENT

2.1 Title and Nominal Expiry Date

- (a) This Industrial agreement shall be known as the *City of Kwinana Industrial Agreement 2025* (“Agreement”) and it will operate from 1 July 2025 and its nominal expiry date will be 30 June 2028.
- (b) The parties to this Agreement commit to commencing negotiations at least six months prior to the expiry of this Agreement.

2.2 Variation of Agreement

- (a) The parties to this Agreement acknowledge that this Agreement can be varied by consent of the parties in accordance with the IR Act.

2.3 Parties to the Agreement

- (a) This Agreement is between:
 - (i) The City of Kwinana, with the Civic Administration Centre located at the corner of Gilmore Avenue and Sulphur Road, Kwinana (“the City”); and
 - (ii) The Construction Forestry, Mining, Energy Union of Workers (WA) (“CFMEU”), subject to the outcomes of applications (including CICS 9 of 2023) made to the WAIRC in accordance with section 72A of the IR Act;
 - (iii) Western Australian Municipal, Administrative, Clerical and Services Union of Employees (“WASU”); and
 - (iv) The Local Government, Racing Cemeteries Employees Union (WA) (“LGRCEU”).

2.4 Coverage and Application of this Agreement

- (a) The estimated number of Employees covered by this Agreement is approximately 430.
- (b) This Agreement does not cover or apply to:
 - (i) Members of the Executive Leadership Team;
 - (ii) Members of the City of Kwinana Senior Management Team; and
 - (iii) Employees that are engaged as Technical Experts in their field for specialised roles. These technical experts have a tertiary qualification, extensive experience in their profession and are paid above the rates specified in Band 9 of this Agreement.
- (c) This Agreement covers and applies to all Employees, except those excluded by cl. 2.4(b) above, who would be otherwise covered by all State Awards if this Agreement did not exist. These could include:
 - (i) Local Government Officers (WA) Award 2021;
 - (ii) Municipal Employees (WA) Award 2021;
 - (iii) Aged and Disabled Persons Hostels Award, 1987;
 - (iv) Building Trades (Construction) Award 1987;
 - (v) Building Trades and Labourers (General) Award;
 - (vi) Child Care (Out of School Care - Playleaders) Award;
 - (vii) Cleaners and Caretakers Award, 1969;
 - (viii) Metal Trades (General) Award; and
 - (ix) Restaurant, Tearoom and Catering Workers' Award.
- (d) This Agreement will be read and interpreted in conjunction with the MCE Act.
 - (i) Where there is an inconsistency between this Agreement and the MCE Act, and the MCE Act provides a greater benefit, the MCE Act provisions will apply to the extent of the inconsistency.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

[L.S.]

(Sgd.) S BASTIAN,
Registrar.

23 MARCH 2026

INDUSTRIAL MAGISTRATE—Claims before—

2026 WAIRC 00160

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2026 WAIRC 00160
CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN
HEARD : WEDNESDAY, 11 FEBRUARY 2026
DELIVERED : FRIDAY, 20 MARCH 2026
FILE NO. : M 120 OF 2025
BETWEEN : ARIE HENRY JOHN BOURBON

CLAIMANT

AND

BARTHOLEMEWS MEADERY PTY LTD

RESPONDENT

CatchWords : INDUSTRIAL LAW – Small claims procedure under the *Fair Work Act 2009* (Cth) – Failure to pay an amount under a modern award — Whether the claimant was a casual or part-time employee – Determination on the applicable modern award

Legislation : *Fair Work Act 2009* (Cth)
Minimum Conditions of Employment Act 1993 (WA)
Industrial Magistrate’s Court (General Jurisdiction) Regulations 2005 (WA)

Instruments : *Food, Beverage and Tobacco Manufacturing Award 2020* [MA000073]
Pastoral Award 2020 [MA000035]

Cases referred to in reasons : *Workpac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2022] HCA 1; (2022) 275 CLR 165
EFEX Group Pty Ltd v Bennett [2024] FCAFC 35; (2024) 330 IR 171
Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd [2014] FCAFC 148; (2014) 245 IR 449
Noorton v Construction, Forestry and Maritime Employees Union [2025] FCAFC 120
Mildren v Gabbusch [2014] SAIRC 15
Miller v Minister of Pensions [1947] 2 All ER 372
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Sammut v AVM Holdings Pty Ltd [No 2] [2012] WASC 27

Result : The claim is dismissed

Representation:

Claimant : In person
Respondent : Ms C. Kellie (Director)

REASONS FOR DECISION

Background

- 1 Bartholemews Meadery is located in Denmark, Western Australia and is in the business of beekeeping and making bee products, including honey.
- 2 Arie Bourbon (the **claimant**) was employed from about 15 October 2020 to 29 January 2025 by Bartholemews Meadery Pty Ltd, which operates Bartholemews Meadery (**Bartholemews**).
- 3 On 19 September 2025, the claimant lodged an originating claim electing to apply the small claims procedure alleging that Bartholemews contravened the *Food, Beverage and Tobacco Industry Award* [MA000073] (**Food and Beverage Award**) by failing to pay him ‘entitlements under the award for part-time employment, accumulated annual and sick leave’ (the **Claim**).¹
- 4 The claimant claims \$9,551.81 in unpaid accumulated annual leave and \$4,063.27 in accumulated ‘sick leave’.
- 5 In response, Bartholemews says the claimant was at all times a casual employee and his employment was covered by the *Pastoral Award 2020* [MA000035] (**Pastoral Award**). Bartholemews admitted in its response that upon investigating the

Claim, it became aware that it had made a mistake with the applicable pay rates and that the claimant was entitled to be paid \$2,379.44 in wages and \$256.69 in superannuation.

- 6 The basis for Bartholemews' calculation of an underpayment in wages and superannuation was the difference between the casual hourly rate for a Level 3 employee under the Pastoral Award and the hourly rate paid to the claimant.²
- 7 Accordingly, having regard to Bartholemews' admission and where it consented to an order being made, on 4 November 2025, the Industrial Magistrates Court of Western Australia (**IMC** or, the **Court**) made orders for payment of the admitted amounts with the remainder of the Claim referred to pre-trial conference and then, when the Claim did not resolve, a hearing.
- 8 Schedule I of these reasons outline the jurisdiction of the practice and procedure of the Court.
- 9 The claimant relied upon his witness statement lodged on 21 January 2026³ and on his oral evidence.
- 10 The respondent relied upon the witness statements of Careena Kellie,⁴ Bartholemews' director, Carly Whitehouse,⁵ Dionne Wild⁶ and Susan Allen,⁷ all of which were lodged on 3 February 2026. These witnesses also gave oral evidence.
- 11 Bartholemews also lodged a number of documents, which were accepted by the claimant. These documents were tendered into evidence.⁸

Issues for Determination

- 12 There are two issues for determination:
 - (a) Which modern award (if any) applies to and covers the claimant's employment by Bartholemews?
 - (b) Was the claimant employed by Bartholemews as a casual or a part-time employee?

Evidence

Undisputed Facts

- 13 Bartholemews is and operates as an Australian proprietary company limited by shares, registered pursuant to the *Corporations Act 2001* (Cth). The respondent is a *constitutional corporation* within the meaning of that term in s 12 of the *Fair Work Act 2009* (Cth) (**FWA**) and is a *national systems employer* within the meaning of that term in s 14(1)(a) of the FWA. The respondent engages in beekeeping and making bee products, including honey (that is, it is engaged in trade or commerce).
- 14 The claimant was employed by Bartholemews to extract honey and other duties to be described.
- 15 The claimant commenced working at Bartholemews around 15 October 2020 and did not undertake any work after 29 January 2025.
- 16 The claimant was a *national systems employee* within the meaning of that term in s 13 of the FWA. However, the question is whether he was employed as a casual or part-time employee.
- 17 The claimant was paid the following hourly rates:
 - (a) November 2020 to 30 June 2021 – \$25 per hour
 - (b) 1 July 2021 to 30 June 2022 – \$26 per hour
 - (c) 1 July 2022 to 30 June 2023 – \$26 per hour
 - (d) 1 July 2023 to 30 June 2024 – \$27.27 per hour
 - (e) 1 July 2025 to 10 February 2025 – \$27.27 per hour

Disputed Facts

The Claimant

- 18 The claimant could not recall exactly when he commenced employment with Bartholemews but thought it was about 5 November 2020. He said his employment ceased on 5 February 2025. A friend told him about the job.⁹
- 19 The claimant states that throughout his employment it was agreed that he would do a minimum of 30 hours a fortnight, working on Mondays, Wednesdays, and Fridays in accordance with his 'Mutual Job Obligation' with Centrelink. Further, it was agreed that he would be paid \$25 per hour and this rate changed to \$27.27 per hour from 1 July 2023 until he ceased employment.¹⁰
- 20 The claimant states that he would not have accepted the job if the rate of \$25 per hour was payable for casual employment because he was aware that other casual employees were paid \$30 per hour.¹¹
- 21 The claimant states that his payslips changed from casual/part-time to part-time.¹²
- 22 The claimant said his job was to extract honey with two other people and he worked 10-hour shifts until the extraction was done. He also kept the premises clean and tidy, including de-webbing, cleaning and scrubbing floors. Further, he assisted with the storage of honey, did stock control, handled the bees wax after extraction, made smoked honey, filtered the honey, maintained the honey lines, labelled jars and also did pest control.¹³
- 23 On or around 5 February 2025, the claimant had a car accident, and he was unable to work. He has not worked since the car accident. However, it appears that it was not until around 20 May 2025 that the claimant informed Ms Kellie that he would not be returning to work. Ms Kellie was aware the claimant had a car accident and was in hospital.¹⁴
- 24 The claimant informed Ms Kellie that he was not returning to work in the context of his conversation with her about the Claim. Notably, he had no conversation with Ms Kellie about his return to work or any alleged entitlements between 5 February 2025 and 20 May 2025.¹⁵

- 25 In respect of text messages sent by him to Ms Kellie and other employees, the claimant says that of the 32 messages, 16 are consistent with him working on Mondays, Wednesdays and Fridays. In no text message, is it mentioned that he would work on a Tuesday or Thursday. The claimant says that three of the text messages show he was ‘forced’ to take time off which was not requested by him. Four of the text messages confirm the making up of 30 hours per fortnight where he could not work on a Monday.¹⁶
- 26 In terms of the answer given by the claimant on the tax file number declaration,¹⁷ the claimant had no recollection of his answer to question 7, being the type of employment, he was employed under.¹⁸
- 27 In cross-examination, the claimant was asked whether he agreed that the respondent did not pay him in cash for training prior to being formally employed by the respondent. The claimant disagreed.
- 28 The claimant maintained that the agreement was to work 30 hours minimum per fortnight, notwithstanding in the second week of his employment where he worked for 22 hours. The claimant said he was forced to take time off.

Careena Kellie

- 29 Ms Kellie is a director of Bartholemews.
- 30 She believed in ‘good faith’ the Pastoral Award applied to the claimant’s employment. She said the claimant was paid the appropriate casual rate under the Pastoral Award and more than that required under the *Minimum Conditions of Employment Act 1993 (WA) (MCE Act)*.
- 31 Ms Kellie states that the claimant ‘declined to come [to work] at a moment’s notice on many occasions’ and also accepted work when asked. Ms Kellie also stated that the claimant did not appear on any roster as his work was able to be done at times that suited him. The claimant did not work on public holidays and never asked for sick leave or annual leave.
- 32 Ms Kellie says the claimant’s work hours changed with the amount of work required to be done. On weeks that Bartholemews was extracting honey, the claimant would often work more hours and at other times he would work less hours.
- 33 Ms Kellie says that the claimant’s last day of work was 29 January 2025. The claimant did not inform her that he had a car accident on 5 February 2025, and she learnt this from a third party. The first time the claimant mentioned the payment of sick leave for the car accident was during their meeting on 20 May 2025 when he informed her that he was a part-time employee.
- 34 Ms Kellie says the claimant has never given her notice for the termination of his employment.
- 35 Ms Kellie states the claimant’s tax file number declaration shows that the claimant did not check the box for full-time or part-time employment, and the casual box has been cut off, which is the box she says was checked. Ms Kellie has made a request to the Australian Taxation Office for the original.
- 36 Ms Kellie says that there was not a commitment of 30 hours per fortnight. In cross-examination, she said that she did not remember making a commitment of 30 hours per fortnight.
- 37 The casual rate paid to the claimant was initially \$25 and then increased to \$27.27 per hour. She says the rate that was payable was \$24.63 per hour and the part-time rate was \$19.49 per hour. At the time the claimant’s employment ended the casual rate was \$29.33 per hour and the part-time rate was \$23.46 per hour.
- 38 Ms Kellie said that the claimant came when it suited him and agreed that it was often on a Monday, Wednesday or Friday. She said that he came when asked if it suited him and there were times when he did not come if asked.
- 39 Ms Kellie maintained that the Pastoral Award was the most suitable award and that it was the only award that reflected bees and beekeeping. She paid the award rate appropriate to the year.
- 40 Ms Kellie maintained that she found out about the car accident from another staff member. On 20 May 2025, she said the claimant asked to come and see her and told her that he was part-time and that he would not be returning to work.
- 41 Ms Kellie said that the claimant’s hours were not regular and she could not be sure when he was coming to work, consistent with the need for extraction. That is, extraction of honey happens when it happens.
- 42 Ms Kellie mostly agreed with the claimant’s evidence about his duties while employed at Bartholemews.
- 43 In cross-examination, Ms Kellie said that annual leave was not recorded on the claimant’s payslips because he was casual. She maintained the claimant was paid the right award rate.
- 44 Ms Kellie agreed she was ‘hazy’ about the award in 2020 but said it was not the Food and Beverage Award. She maintained the Pastoral Award was connected to or applied to work in beekeeping.
- 45 Ms Kellie disagreed that the claimant worked exclusively on Mondays, Wednesdays and Fridays.
- 46 Ms Kellie said extraction of honey was seasonal but regular over about seven months.
- 47 Ms Kellie explained that the payroll software (Reckon) options were casual part-time, casual full-time, part-time or full-time. She used the casual part-time option until July 2023 when she inadvertently ‘clicked’ it onto part-time but this was an error on her part.¹⁹

Carly Whitehouse

- 48 Ms Whitehouse was employed at Bartholemews from April to November 2024 as a full-time staff member.
- 49 Ms Whitehouse said the claimant worked around Bartholemews doing tasks such as extraction of honey, moving honey from bulk drums to tanks for decanting, deliveries, cleanup, general maintenance and occasional filling of honey.
- 50 Ms Whitehouse said the claimant was able to come and do these tasks on his own schedule. He came when asked on specific times for extraction and did not come when there was no work to do.

51 In cross-examination, Ms Whitehouse said the claimant worked some Fridays and left early on Wednesdays. She told him when extractions happened.

Susan Allen

52 Ms Allen was employed at Bartholemews from September 2014 to November 2024.

53 Ms Allen said the claimant worked hours when he was required rather than having set hours or days.

54 Ms Allen said the claimant did not attend work when he was unwell or had short breaks to see family and friends. She did not think much of it when he was not there.

55 In cross-examination, Ms Allen said that if the claimant did not want to work on a Monday, Wednesday or Friday, then he did not work. She did not take much notice of his days.

Dionne Wild

56 Ms Wild has been employed at Bartholemews since July 2020, initially in full-time employment and then, at her request, in casual employment.

57 Ms Wild stated the claimant worked on his own time schedule doing tasks around Bartholemews, including extraction of honey, moving honey from bulk drums to tanks for decanting, deliveries, cleanup, general maintenance and occasional filling of honey.

58 On occasions, she asked the claimant not to attend work because there was no work to be done and on occasions, she also asked him to come to work for the extraction of honey.

59 Ms Wild confirmed that she was the person, 'Dee', who is referred to in various text messages to and from the claimant.

60 Ms Wild maintained the claimant came and went when he could work.

61 In cross-examination, Ms Wild said she inferred the claimant was casual because he came and went and she said he did not work every Monday, Wednesday and Friday as far as she was aware.

62 Ms Wild was not aware the claimant had to do a minimum of 30 hours per fortnight or that he was required to work every Monday, Wednesday and Friday.

63 Ms Wild said the claimant 'came and went' and that he was at work when he could be there. She did not give it much thought.

Tax File Number Declaration

64 The claimant's tax file number declaration is cut off at the edge. However, in response to question 7 in Section A, there is no 'x' in the part-time employment box. Ms Kellie said the document was cut off during copying but there was an 'x' in the casual employment box on the original. I note that question 7 in Section A is required to be answered by the claimant as the employee and the claimant signed the declaration saying the information is true and correct and signed it on 20 October 2020. Ms Kellie signed the employer's declaration in Section B on 28 October 2020.

Timesheets and Payroll Item Detail

65 The respondent produced a series of handwritten and electronic timesheets, which both parties accepted as the claimant's timesheets while employed at Bartholemews.²⁰ In addition, the respondent produced a payroll item detail, which both parties accepted was a summary of the claimant's payroll, including fortnightly hours worked and amounts paid.²¹

66 The timesheets, including a handwritten notation consistent with the payroll item detail, show the claimant's first work day at Bartholemews was 15 October 2020. The claimant's last day of work, consistent with the payroll item detail, was 29 January 2025.

67 A review of the claimant's days of work shows that the claimant did work on Tuesdays and Thursdays from time to time. The claimant also worked the occasional Saturday. Further, the claimant did not work every Monday, Wednesday and Friday. There were many weeks where the claimant worked on Monday and Wednesday or Wednesday and Friday or a combination of those days.

68 A review of the claimant's hours of work from the timesheets shows that he started work at any time between 6.30 am and 3.30 pm. During the initial part of his employment this was mainly between 7.00 am and 7.30 am but then was between 8.00 am and 8.30 am. When the time recording moved to electronic timesheets, the claimant commenced work at any time between 8.00 am and 9.30 am, and there was little consistency in his start times.

69 A review of the claimant's hours of work from the timesheets shows that he finished work at any time between 11.30 am and midnight. Again, during the initial part of his employment this was mainly between 3.00 pm and 4.30 pm but it was variable depending on the start times.

70 The payroll item detail shows the claimant was paid fortnightly and worked 30 hours per fortnight on four occasions (two of those occasions were marginally over 30 hours but under 31 hours) with the remaining fortnightly hours being either under or over 30 hours per fortnight.

71 Of the remaining occasions over the period of employment, there were 30 occasions where the claimant worked less than 30 hours per fortnight (not counting the fortnight when the claimant had a car accident).

Text Messages

72 There are two bundles of text messages, which the parties agreed were either between the claimant and Ms Kellie or the claimant and Ms Wild (referred to as 'Dee').²²

73 In respect of the first tranche of text messages between the claimant and Ms Wild (and on occasion, Ms Whitehouse), there are about 40 messages although there is some duplication or crossover of messages.

- 74 In two of those messages, Ms Wild or Ms Whitehouse informs the claimant that it is very quiet and to take the rest of the week off. In one different message, the claimant informs Ms Wild or Ms Whitehouse that he is unwell, and, in response, she tells him that it is quiet and to come back on Monday. In another separate message, Ms Wild or Ms Whitehouse asks the claimant whether he will be working on Tuesday because that Monday was a public holiday. The claimant responds that normally he does not work the next day but had no problem coming in on Tuesday.
- 75 The remaining approximately 35 messages involve the claimant informing Ms Wild or Ms Whitehouse that he will not be attending work, for reasons such as he is unwell; his bike is not working; it is his birthday; he is having issues at home; he has a sore hip from falling off a ladder; he has a house inspection; he is stuck in another town, or he gives no reason at all for his non-attendance.
- 76 In respect of the second tranche of text messages between the claimant and Ms Kellie, there are about 32 messages, although at least one of the messages appears to be between Ms Kellie and another person about the claimant.
- 77 In one of those messages, the claimant informs Ms Kellie that he 'may or may not be in today' and that there was nothing 'pressing' at work that he was aware of, but if there was something then he can come in 'tomorrow', otherwise he would be at work on Wednesday.
- 78 In another message, the claimant indicates that he has a bad head cold and says, 'otherwise Monday if that's okay'. Further, the claimant informed Ms Kellie that he 'swapped Monday for today sorting out rego and transfer of new ute'. One another occasion, Ms Kellie also asked the claimant if he was 'ok' as she was expecting to see him 'this morning', on Monday, 18 January 2021, and she wondered if he was well. Another message also shows that Ms Kellie asked the claimant if he was interested in doing a couple of days extra work. On 20 November 2020, the claimant responded that he 'could put in 2 days next week'.
- 79 The remaining messages are otherwise work-related messages of little importance.

Findings of Disputed Facts

- 80 The claimant's evidence of the regularity of his hours and days of work does not wholly accord with the evidence contained in the timesheets, payroll item details and text messages to Ms Kellie and Ms Wild. The claimant said the text messages were consistent with him not working on Tuesdays, but at least one of the text messages indicated he did and the timesheets certainly recorded him working on Tuesdays and Thursdays. Further, the claimant relied upon the regularity of working a minimum of 30 hours per fortnight, however, the timesheets again record that he did not always do so.
- 81 The timesheets record that the claimant's start and finish times were variable, consistent with the evidence given by the respondent's witnesses.
- 82 The text messages between the claimant, Ms Kellie and Ms Wild, save for about two occasions, indicate that the claimant told them when he would or would not be working for whatever reason. If there was additional work to be done, the claimant was asked if he wanted to do it. If there was no work to be done, he was told he was not required to be at work. There was no obvious 'forcing' of anything.
- 83 I find that the claimant's evidence of his hours and days of work was possibly untruthful and certainly not reliable. I find the claimant's evidence concerning his attendance at work was also not reliable.
- 84 While the respondent's witnesses' evidence was limited, as already stated it was consistent with the timesheets. That is, the claimant's hours of work at Bartholemews were variable with no obvious start or finish time on the days he worked. While the claimant worked more on Mondays, Wednesdays or Fridays, he also worked on other days, and it was also variable.
- 85 Notably, the respondent's witnesses, including Ms Kellie, made appropriate concessions and did not try to fill gaps in the evidence.
- 86 I find the respondent's witnesses' evidence was truthful and reliable.
- 87 I find that when the claimant worked at Bartholemews there was no set start or finish time and, to that end, the claimant was able to start and finish generally when he wanted to but also based on what work the claimant was undertaking at the time as needed by the respondent.
- 88 I find that from time to time the claimant informed either Ms Kellie or Ms Wild that he would not be at work for a variety of reasons. I find that Ms Kellie asked the claimant if he was available for other work and/or informed him when there was no work to be done. The claimant responded accordingly.
- 89 There was no dispute about the type of work undertaken by the claimant, and I find that it included duties such as the extraction of honey, moving honey from bulk drums to tanks for decanting, deliveries, cleaning, general maintenance, handling bees wax and labelling of jars of honey.
- 90 In terms of any agreement about undertaking a minimum amount of work of 30 hours per fortnight, I do not accept the claimant's evidence of the conversation he purported to have with Ms Kellie at the commencement of his employment. Firstly, I have found the claimant's evidence to be unreliable in relation to other aspects of his employment. Second, the claimant's evidence does not wholly accord with the timesheets, including for the second fortnight of his employment. Third, Ms Kellie does not recall the conversation in those terms, albeit the claimant and Ms Kellie agreed the claimant would be paid \$25 per hour.
- 91 I find that the content of the conversation between the claimant and Ms Kellie at the start of his employment with Bartholemews did not include a reference to him being employed for a minimum of 30 hours per fortnight.
- 92 I find that the conversation did make reference to the claimant being employed as a casual employee for \$25 per hour, although the parties' label on the employment status is not determinative of the actual status but is a factor for consideration. Further, the

labelling on the claimant's payslips as casual part time or part time is also not determinative of the claimant's employment status, where I accept Ms Kellie's explanation of the payroll system and her error.

- 93 Implicit in these findings is that I do not accept the claimant's evidence that Ms Kellie referred to his employment status as part-time at the commencement of his employment with Bartholemews.
- 94 I find the claimant never informed the respondent or Ms Kellie that he was not returning to work or was unavailable for work until he met with her on or around 20 May 2025. Ms Kellie was made aware the claimant had a car accident on 5 February 2025 by another staff member, and no further work was offered.

Employment Terms

- 95 Notwithstanding there was no written agreement or contract between the claimant and Bartholemews for work undertaken by him, the court is to determine the nature and terms of the employment contract between the parties to ascertain their contractual rights and obligations.²³
- 96 The terms are determined by application of orthodox principles. That is, where the terms are partly in writing and partly oral or wholly oral, the terms may be inferred from all the circumstances, including the parties' conduct and words at the time of contract formation; their conduct over time; their course of dealing; or inferred where necessary for business efficacy.²⁴
- 97 To this end, regard may be had to:
- [C]ircumstances surrounding the making of the [contract and events and matters, known to the parties at the time of contracting, which assist in identifying the object or purpose of the contract. The nature of the work contracted for and the arrangements of the supply or provision of any tools or equipment to the putative employee may also be relevant.²⁵
- 98 In addition, recourse may be had to the post-contractual conduct of the parties if it assists in ascertaining the terms of the contract.²⁶
- 99 In this case, having regard to the undisputed and found facts, the ascertainable terms of the contract are:
- (a) the claimant would undertake casual work at Bartholemews being paid \$25 per hour (which increased over time);
 - (b) the work would include the extraction of honey and other tasks associated with that, including cleaning and general maintenance; and
 - (c) the number of hours was variable but largely dependent on the amount of work that was required to be done at Bartholemews.
- 100 The claimant may have expressed a desire to work mainly on Monday, Wednesday and Friday where this suited both the claimant and Bartholemews.

Which Award Applies to the Claimant's Employment?

- 101 The first issue to be determined is whether the Food and Beverage Award or the Pastoral Award applies to and covers the claimant's employment with Bartholemews. Both parties relied mainly upon what they were told by the Office of the Fair Work Ombudsman or by using online tools.
- 102 Ms Kellie states that in Western Australia, beekeepers are required to be registered and annexes to her witness statement Bartholemews' beekeeping registration with the Department of Primary Industries and Regional Development.
- 103 Whilst contained in her witness statement, Ms Kellie's submissions on the Pastoral Award 'covering businesses keeping bees and making bee products' include:
- (a) the definition of *Pastoral Industry* in the Pastoral Award means 'employers and employees who work in (or connected to) the managing, breeding, rearing or grazing of livestock or poultry', where 'livestock means all animals used in primary production including insects';²⁷
 - (b) the definition of *Bee Products* in the *Beekeepers Act 1963* (WA) means honey, pollen, beeswax, propolis and any other product of the bee hive that may be prescribed; and
 - (c) the registration of Bartholemews as beekeepers,
- 104 In the alternative, Ms Kellie submits that the claimant is an 'award-free' employee and refers to the MCE Act.
- 105 The claimant says the Food and Beverage Award is the most appropriate award for the work he did at Bartholemews.

The Law

- 106 A modern award made by the Fair Work Commission does not impose an obligation or give an entitlement unless the award *applies* to the employer and the employee.²⁸ An award *applies* to the employer and the employee if the award *covers* each of them.²⁹ An award *covers* an employer and employee if the award is expressed to cover each of them.³⁰ The starting point to determine award coverage are the words of the award itself. More specifically, it is 'the objective meaning of the words used [in the relevant award] bearing in mind the context in which they appear and the purpose they are intended to serve'.³¹
- 107 The Claim requires determination of the applicability of two modern awards, where the claimant did a single job with elements that *may* attract the operation of both awards.
- 108 The Pastoral Award and the Food and Beverage Award both contain a clause prioritising the award classification that is 'most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work'.³²
- 109 The determination of which award classification is 'most appropriate' is by 'reference to the primary purpose of the employment in question, the range of tasks for which the employees were trained, and the classification which is the more comprehensive match with the work in question'.³³

110 If the claimant's employment is not covered by any modern award, then he may be 'award free' and the National Minimum Wage and the National Employment Standards (NES) will form the minimum terms and conditions of his employment where he is a national systems employee employed by a national systems employer.

111 The MCE Act does not apply to the claimant's employment where the claimant was a national systems employee employed by a national system employer.

Determination

Pastoral Award

112 Clause 4.1 of the Pastoral Award provides:

This industry award applies to employers throughout Australia in the pastoral industry and their employees in the classifications set out in this award to the exclusion of any other modern award.

113 Clause 4.2 of the Pastoral Award defines 'pastoral industry' to mean all employers and employees who are engaged in or in connection with:

- (a) the management, breeding, rearing or grazing of livestock or poultry;
- (b) the shearing and crutching of sheep and the classing and pressing of wool on farms;
- (c) dairying;
- (d) hatchery work;
- (e) the sowing, raising or harvesting of broadacre field crops and other crops grown as part of a broadacre mixed farming enterprise;
- (f) the treatment of land for any of these purposes; or
- (g) clearing, fencing, well sinking, dam sinking or trenching on such farms or properties.

114 Clause 2 of the Pastoral Award defines 'livestock' to mean:

[A]ll animals used in primary production including insects.

115 Clause 2 of the Pastoral Award defines 'farm and livestock hand' to mean:

[A]n employee performing the work described in the classifications which apply to such work in Part 6—Broadacre Farming and Livestock Operations of this award and who is not a piggery attendant, poultry worker or any employee classified under Part 9—Shearing Operations.

116 Part 6 of the Pastoral Award contains the classifications for 'farm and livestock hand'. Schedule II to these reasons sets out the classifications from level 1 to level 8.

117 The types of work classifications contained in Part 6 include station hands; station cooks; station cook's offsider; cattle farm worker; feedlot employee and dairy operator, of varying experience and qualifications.

118 While the definition of *livestock* relevant to *pastoral industry* includes insects, none of the classifications in Part 6 apply to the work carried out by the claimant while employed at Bartholemews.

119 That is, the claimant did not carry out work as a station hand; station cook; cattle farm worker; dairy operator or feedlot employee at any level, leaving aside that at the more senior levels the claimant did not produce evidence of any relevant qualifications that might have qualified him to work at those levels.

120 The remaining classifications in the Pastoral Award have no relevance to the Claim as they include shearers; wool classers and pressers; poultry workers and piggery attendants.

121 Accordingly, the Pastoral Award does not apply to Bartholemews and the claimant because the claimant was not employed in, or covered by, any of the classifications in Part 6 of the Pastoral Award.

Food and Beverage Award

122 Clause 4.1 of the Food and Beverage Award provides:

This industry award covers employers throughout Australia in the food, beverage and tobacco manufacturing industry and their employees in the classifications in this award to the exclusion of any other modern award

123 Clause 4.2 of the Food and Beverage Award defines *food, beverage and tobacco manufacturing industry* to mean:

Food, beverage and tobacco manufacturing means the preparing, cooking, baking, blending, brewing, fermenting, preserving, filleting, gutting, freezing, refrigerating, decorating, washing, grading, processing, distilling, manufacturing and milling of food, beverage and tobacco products, including stock feed and pet food, and ancillary activities such as:

- (a) the receipt, storing and handling of ingredients and raw materials to make food, beverage and tobacco products, including stock feed and pet food;
- (b) the bottling, canning, packaging, labelling, palletising, storing, preparing for sale, packing and despatching of food, beverage and tobacco products, including stock feed and pet food; and
- (c) the cleaning and sanitising of tools, equipment and machinery used to produce food, beverage and tobacco products, including stock feed and pet food.

124 The claimant suggested that the classification of his work at Bartholemews under the Food and Beverage Award was Level 5.

- 125 Schedule A of the Food and Beverage Award contains the classification structure applicable to employees covered by the award.
- 126 At A.2.5 in Schedule A, Level 5 (100% relativity to the tradesperson) provides:
- (a) An employee at Level 5 is an employee who has either:
 - (i) completed an [Australian Qualifications Framework] Certificate 3 in Food Processing; or
 - (ii) has equivalent recognised enterprise or industrial experience, training or prior learning experience or skills to Level 5.
 - (b) **Competencies**
An employee at Level 5 performs work above and beyond the competencies of a Level 4 employee, and:
 - (i) understands and applies quality control techniques;
 - (ii) has good interpersonal and communication skills;
 - (iii) is able to inspect products and/or materials for conformity with established operational standards;
 - (iv) exercises judgment and decision making skills;
 - (v) works under general supervision either individually or in a team environment;
 - (vi) may undertake structured training to enable the employee to work at Level 6.
- 127 Having regard to the type of work carried out by the claimant at Bartholemews, it involved the extraction of honey from (presumably) bee hives and work associated with that including cleaning, labelling of jars, deliveries and general maintenance.
- 128 The respondent's evidence described Bartholemews as beekeepers, who make bee products including honey.
- 129 In my view, the nature of the business operated by Bartholemews, on the evidence, is that it included the handling of raw materials to make, amongst other things, food products. Accordingly, it is open *on the evidence* to determine the Food and Beverage Award *may* cover Bartholemews and the claimant, *if* the claimant's employment comes within the classifications in Schedule A.
- 130 I do not accept that the work undertaken by the claimant came within classification Level 5 in Schedule A of the Food and Beverage Award. There was no evidence of any qualification held by the claimant, nor was there any evidence of any recognised enterprise or industrial experience, training or prior learning experience or skills to Level 5.
- 131 At its highest, the claimant's evidence was that he assisted two other employees to extract honey and undertook other ancillary tasks or jobs, including cleaning, general maintenance, deliveries and some jar labelling. A friend told him about the job.
- 132 Ms Kellie may be a registered beekeeper but there was no evidence the claimant was, or even if he had any relevant qualifications as, a beekeeper.
- 133 The same situation arises as it relates to classification Level 3 and Level 4 in Schedule A, where both levels require either certain qualifications or recognised enterprise or industrial experience, training or prior learning experience or skills to the associated level.
- 134 To be classified at Level 2 in Schedule A, the claimant was required to have either:
- (a) completed a structured induction program over a period not exceeding three months or for such shorter period as is necessary to reach the required level of competency for appointment to Level 2; or
 - (b) has recognised enterprise or industrial experience, training or prior learning experience or skills to Level 2.
- 135 Neither party's evidence demonstrated that the claimant fulfilled either of those requirements.
- 136 Classification Level 1 in Schedule A provides:
- (a) an employee at Level 1 has less than 3 months' experience in the industry or enterprise and does not possess recognised enterprise or industrial or prior learning experience and/or skills sufficient for appointment to Level 2 or above. Provided that the length of service required to advance to Level 2 for a seasonal employee is 4 weeks and for a casual employee is 152 hours.
 - (b) **Competencies**
An employee at Level 1 performs general duties essentially of a manual nature, and
 - (i) exercises minimal judgment;
 - (ii) works under direct supervision; and
 - (iii) is undertaking up to 38 hours' induction training which may include information on the enterprise, conditions of employment, introduction to supervisors and fellow workers, training and career path opportunities, plant layout, work and documentation procedures, work health and safety, equal employment opportunity and quality control/assurance.
- 137 In my view, the most appropriate classification, having regard to the claimant's work and duties, is Level 1, particularly where his general duties were predominantly manual in nature, he worked under supervision, appeared to exercise minimal judgment, albeit it is unknown whether there was any induction training.
- 138 Notwithstanding the limited evidence, *on the evidence* before the Court, I find the Food and Beverage Award is the modern award covering Bartholemews and the claimant where the claimant's duties is most appropriately classified as Level 1 in Schedule A.

139 However, if I am wrong, I will also consider the claimant's position as an 'award free' employee where the National Minimum Wages and NES form the minimum terms and conditions of his employment by Bartholemews.

The Claimant's Employment Status

140 Having determined which modern award covered the claimant's employment at Bartholemews, the second issue is whether the claimant was employed as a casual or part-time employee.

141 Pursuant to cl 2 of the Food and Beverage Award, a casual employee has the same meaning given by s 15A of the FWA.³⁴ Notably, cl 2 of the Pastoral Award defines casual employee in identical terms. Therefore, even if the Court was wrong in determining the applicable modern award, the outcome on the definition of 'casual employee' is the same.

The Law

142 The employment relationship commenced on or around October 2020. Therefore, the principals in the High Court decision in *Workpac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456 would have been applicable to the characterisation of the engagement relationship between the claimant and Bartholemews, save that s 15A of the FWA was inserted following the enactment of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery Act 2021)* (Cth). The amendments applied retrospectively to employees subject to limited exceptions and also provided that an award of compensation for permanent employee entitlements payable to an employee mistakenly treated as a casual must be reduced by the amount of any identifiable casual loading paid to the employee.³⁵

143 This was before the amendment to the definition of 'casual employee' in the FWA from 26 August 2024, which did not apply retrospectively and where the previous 'casual employee' definition still applies to periods of casual employment occurring before 26 August 2024. Accordingly, whether an employee is correctly engaged as a casual employee will depend on which 'casual employment' definition applied at the commencement of their employment

144 Pursuant s 15A of the FWA, applicable at the time of the claimant's commencement of employment, a 'casual employee' was defined as:

Section 15A Meaning of casual employee

- (1) A person is a casual employee of an employer if:
 - (a) An offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
 - (b) the person accepts the offer on that basis; and
 - (c) the person is an employee as a result of that acceptance.
- (2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:
 - (a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;
 - (b) whether the person will work as required according to the needs of the employer;
 - (c) whether the employment is described as casual employment;
 - (d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.
- (3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.
- (4) To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.
- (5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a casual employee of the employer until:
 - (a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or
 - (b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

145 Therefore, in determining whether the claimant was engaged in casual employment within the meaning of s 15A of the FWA, as was applicable in October 2020, the questions to be answered are:

- (a) Was the claimant offered a job by Bartholemews?
- (b) Did the offer include no firm advance commitment that the work would continue indefinitely according to an agreed pattern of work?
- (c) Did the claimant accept the offer knowing that there was no firm advance commitment when they became an employee?

146 In determining whether Bartholemews' offer did not include a firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, there are four factors to consider and only these factors are to be considered:

- (a) Whether Bartholemews could choose to offer the claimant work and it would be the claimant's choice to work or not?
- (b) Whether the claimant would be offered work when Bartholemews needed him to work?
- (c) If the employment was described as casual.
- (d) If the claimant would be paid a casual loading (a higher pay rate for being a casual employee), or a specific pay rate for casual employees.

Determination

147 There is no dispute the claimant was offered a job by Bartholemews.

148 In determining whether the offer included no firm advance commitment that the work would continue indefinitely according to an agreed pattern of work, and having regard to the findings of fact, the following is relevant:

- (a) the claimant's variable start and finish times, the manner in which the claimant informed Ms Kellie or the respondent when he was not attending work and the manner in which the respondent requested the claimant to work or not to work is such that I find that the claimant chose to work or not work based on Bartholemews' offer of work;
- (b) while there was consistency of work available for the claimant to perform, there was no requirement for him to attend work and Bartholemews adopted an apparently *laissez-faire* approach to his attendance or non-attendance;
- (c) the employment was described as casual, irrespective of the claimant's belated characterisation of the employment as part-time and the reference on later payslips;
- (d) following the claimant's car accident, there was no indication from the claimant or Bartholemews about future work, until the claimant spoke with Ms Kellie on or around 20 May 2025 about the Claim; and
- (e) Bartholemews paid the claimant \$25 per hour on the basis of hours worked. I note that in November 2020, the Pastoral Award hourly rate for a casual farm and livestock hand was between \$24.80 and \$25.88 for level 1 to level 3. A part-time farm and livestock hand hourly rate for the same classification was between \$19.84 to \$20.70. Similarly, in November 2020, the Food and Beverage Award hourly rate for a casual employee was between \$24.80 to \$26.49 for level 1 to level 3. A part-time employee hourly rate for the same classification was between \$19.84 and \$21.19.

149 Consistent with the above, I find that the offer of a job by Bartholemews did not include a firm advance commitment that the work would continue indefinitely according to an agreed pattern of work.

150 The claimant states that he would not have accepted the job as a casual employee being paid \$25 per hour but would have accepted \$30 per hour, similar to other employees. The respondent denies any casual employee was paid \$30 per hour. I do not accept the claimant's evidence, which is clearly in hindsight. At the time of the offer of employment, the claimant accepted the offer of the job on the basis of \$25 per hour, and the text messages, along with the variable start and finish times, gave every indication that the claimant undertook work for Bartholemews by choice understanding he was a casual employee.

151 I find that the claimant accepted the offer of employment knowing that there was no firm advance commitment when they became an employee.

152 Therefore, I find that the claimant was employed by Bartholemews as a casual employee.

Applicable Pay Rates for Casual Employees

153 Under the Food and Beverage Award, the applicable pay rates for a Level 1 casual and part-time employee are as follows:

	November 2020	July 2021	July 2022	July 2023	July 2024
Level 1 casual	\$24.80	\$25.41	\$26.73	\$28.26	\$29.33
Level 1 part-time	\$19.84	\$20.33	\$21.38	\$22.61	\$23.46

154 Under the National Minimum Wage, applicable pay rates for a casual and part-time employee are as follows:³⁶

	November 2020	July 2021	July 2022	July 2023	July 2024
Casual	\$24.80	\$25.41	\$26.73	\$29.03	\$30.13
Part-time	\$19.84	\$20.33	\$21.38	\$23.23	\$24.10

155 Notwithstanding the Claim did not seek underpayment of ordinary hourly rates applicable to a casual employee, I note Bartholemews admitted it underpaid the claimant \$2,379.44 in wages and \$256.69 in superannuation. Given the hourly rates detailed in the above two tables, this was an appropriate admission where it appears the casual hourly rates paid from 1 July 2022 were less than that payable under the Food and Beverage Award for a casual employee at Level 1.

156 Similarly, if the claimant was an 'award free' casual employee, the rates payable from 1 July 2022 were less than that provided under the National Minimum Wage.

157 In so noting, I also observe that by using the figures provided by Bartholemews in its response, there may be an additional \$155.51 outstanding in unpaid wages to the claimant payable under the Food and Beverage Award. This is the case even though in its calculations Bartholemews used the pay rates for a casual Level 3 employee under the Pastoral Award, a classification that is not applicable to the claimant because he is not a station hand or dairy operator.

Outcome

- 158 Notably, the Claim sought payment for the accumulated entitlements under the Food and Beverage Award for a part-time employee as it related to annual leave and 'sick' leave.
- 159 Clause 25.1 of the Food and Beverage Award provides that annual leave does not apply to a casual employee.³⁷
- 160 Clause 26 of the Food and Beverage Award provides that personal leave (the claimant refers to this as 'sick leave') is provided for in the NES.
- 161 Section 61(2)(e) of the FWA provides that paid personal leave is a minimum standard that applies to the employment of employees. Part 2-2, Division 7 of the FWA contains the minimum standards as it relates to, amongst other leave not applicable to the Claim, personal leave. Subdivision A relates to paid personal leave but pursuant to s 95 of the FWA, this subdivision applies to employees other than casual employees.
- 162 I also note the Claim seeks the apparent pay out of accumulated 'sick leave'. Section 101 of the FWA provides for the 'cashing out' of personal leave and, at subsection (1), states a 'modern award or enterprise agreement may include terms providing for the cashing out of paid personal/carer's leave by an employee.'
- 163 The Food and Beverage Award makes no provision for the cashing out of paid personal leave.
- 164 For completeness, I also note cl 11.3(b) of the Pastoral Award provides that the casual loading in cl 11.3(a)(ii) is paid instead of annual leave, personal leave and other entitlements ordinarily attributed to full-time and part-time employees. Annual and personal leave is otherwise provided for in the NES.³⁸ Neither apply to casual employees.
- 165 Similarly, the Pastoral Award makes no provision for the cashing out of paid personal leave.
- 166 The Claim cannot succeed where the claimant was employed by Bartholemews as a casual employee. A casual employee has no entitlement to annual leave or paid personal leave under the Food and Beverage Award, the NES, or the Pastoral Award.
- 167 Accordingly, where the Claim seeks the payment of an amount the claimant says the respondent was required to pay under the Food and Beverage Award because he was a part-time employee, the Court is not satisfied that, in fact, the respondent was required to pay to the claimant an amount on account of any unpaid and accrued annual or personal leave entitlement.
- 168 Alternatively, and notwithstanding it was not specifically claimed, I am also not satisfied that there was an amount required to be paid under the FWA to the claimant on account of any unpaid and accrued annual or personal leave entitlement.
- 169 I am not satisfied the claimant has proven the Claim to the requisite standard even though I am satisfied on the evidence the Food and Beverage Award is the modern award applicable to the claimant's employment.

Orders

- 170 The Claim is dismissed.

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)

SCHEDULE II: Part 6 of the Pastoral Award - Level 1 to Level 8

31.1 Farm and livestock hand level 1 (FLH1)

An employee at this level includes:

- (a) Station hand with less than 6 months’ experience in the industry;
- (b) Station cook with less than 6 months’ experience in the industry;
- (c) Station cook’s offsider with less than 6 months’ experience in the industry; and
- (d) Cattle farm worker grade A who:
 - works under direct supervision either individually or in a team environment;
 - understands and undertakes basic quality control/assurance procedures including the ability to recognise basic quality deviations/faults;
 - understands and utilises basic statistical process control procedures; and
 - has less than 6 months’ experience in the industry (after which the employee will progress to Cattle farm worker grade B).

Indicative of the tasks which an employee at this grade may perform are the following:

- routine mustering;
- routine fence repairs;

- aerial stock sighting;
 - repetitive packing and/or unpacking; and
 - kitchen/cooking assistance not involving food preparation.
- (e) Feedlot employee level 1 with less than 3 months' experience in the industry.
- (f) Dairy operator grade 1A with less than 6 months' experience in the industry who:
- uses their knowledge and skills to perform set procedures such as milking and attending to livestock, haymaking, fencing.

Indicative of the tasks which an employee at this level may perform are the following:

- operate milking plant and equipment in a safe manner;
- identify and report equipment not operating normally;
- work co-operatively as part of a team;
- read and record instrument information i.e. milk vat temperatures and cow numbers; and
- understand the principles of safe working.

31.2 Farm and livestock hand level 2 (FLH2)

An employee at this level includes:

- (a) Station hand with 6 to 12 months' experience in the industry.
- (b) Station cook with more than 6 months' experience in the industry.
- (c) Station cook's offsider with more than 6 months' experience in the industry.
- (d) Cattle farm worker grade B who:
- performs work above and beyond the skills of a cattle farm worker grade A and to the level of their training;
 - is responsible for the quality of their own work subject to routine supervision;
 - works under routine supervision either individually or in a team environment; and
 - exercises discretion within their level of skills and training.

Indicative of the tasks which an employee at this level may perform are the following:

- receive, check, despatch and record goods received and sent;
 - assist a tradesperson;
 - basic non-trades daily maintenance of equipment used by the employee;
 - sort and cut out stock;
 - sort and brand yarded stock;
 - fence repairs;
 - kitchen/cooking assistance not involving unsupervised food preparation;
 - boundary riding;
 - forklift, overhead crane, winch or tractor operation; and
 - household domestic work other than childcare or child education.
- (e) Feedlot employee grade 1 with more than 3 months' experience in the industry who:
- works under direct supervision with regular checking of their work.
- Indicative of the tasks which an employee at this level may perform are the following:
- perform cattle handling procedures;
 - perform cattle health and welfare procedures;
 - assist with [euthanising] livestock;
 - assist with performance of cattle post-mortem procedures;
 - transport, handle and store chemicals applicable to primary work area;
 - prepare and apply chemicals applicable to primary work area;
 - operate moving plant and equipment competently and efficiently;
 - perform grain processing procedures;
 - perform feed manufacture and delivery procedures;
 - perform hygiene and housekeeping procedures associated with the primary work area;
 - perform feedlot and environment maintenance procedures;

- possess understanding of industry quality assurance programs and all site operating procedures; and
- carry out workplace work health and safety procedures.

(f) Dairy operator grade 1A with 6 to 12 months' experience in the industry.

31.3 Farm and livestock hand level 3 (FLH3)

An employee at this level includes:

(a) Station hand who:

- has at least 12 months' experience in the industry as a station hand; but
- does not conform to the definition of senior station hand (FLH5) in clause 31.5.

(b) Dairy operator grade 1B with 12 months' experience in the industry who:

- uses their knowledge and skills to perform set procedures such as milking and attending to livestock, haymaking, fencing.

Indicative of the tasks which an employee at this level may perform are the following:

- operate milking plant and equipment, in a safe manner;
- identify and report equipment not operating normally;
- work co-operatively as part of a team;
- read and record instrument information i.e. milk vat temperatures and cow numbers; and
- understands the principles of safe working.

31.4 Farm and livestock hand level 4 (FLH4)

An employee at this level includes:

(a) Feedlot employee level 2 who:

- has 2 years' experience in the feedlot industry; and
- works under routine supervision with intermittent checking of their work.

Indicative of the tasks which an employee at this level may perform are the following:

- utilise ability to make independent work decisions at this level;
- perform cattle handling procedures;
- perform cattle health and welfare procedures;
- euthanase livestock;
- perform cattle post-mortem procedures;
- select livestock for specific markets;
- transport, handle and store chemicals applicable to primary work area;
- prepare and apply chemicals applicable to primary work area;
- operate moving plant and equipment competently and efficiently;
- perform grain processing procedures;
- perform feed manufacture and delivery procedures;
- perform hygiene and housekeeping procedures associated with the primary work area;
- perform feedlot and environment maintenance procedures;
- possess understanding of industry quality assurance programs and all site operating procedures; and
- carry out workplace work health and safety procedures.

31.5 Farm and livestock hand level 5 (FLH5)

An employee at this level includes:

(a) Dairy operator grade 2 who:

- has 2 years' experience in the industry;
- uses their knowledge and skills to multiple operations involving basic levels of problem solving and decision making; and
- has an appreciation of the overall processes involved in a dairy farm.

Indicative of the tasks which an employee at this level may perform are the following:

- operate milking plant and equipment, undertake multiple functions, produce a quality outcome e.g. farm machinery;

- maintain machinery, undertake adjustments and size changes;
 - solve problems and make decisions within given guidelines;
 - know general scientific terminology and assist with processes such as machine repair, artificial insemination, fertiliser mix design etc.;
 - operate standard measuring equipment;
 - operate computerised systems using menu options;
 - contribute to the team in a specific role, providing input and assisting other team members; and
 - work at times without supervision.
- (b) Senior station hand is an employee who:
- has at least 2 years' experience in the industry; and
 - is capable of performing efficiently without supervision any of the tasks reasonably required of them.

Indicative of the tasks which an employee at this level may perform are the following:

- drive, maintain and operate farm vehicles and machinery;
- animal husbandry;
- stock handling;
- irrigation work; and
- use of chemicals.

31.6 Farm and livestock hand level 6 (FLH6)

An employee at this level includes :

(a) Feedlot employee level 3 who:

- has Certificate III qualifications;
- has worked in the feedlot industry for at least 2 years; and
- works with limited supervision with checking of their work related to overall progress.

Indicative of the tasks which an employee at this level may perform are the following:

- utilise ability to make independent work decisions;
- utilise Certificate III qualifications daily in the employee's primary work area;
- perform cattle handling procedures;
- perform cattle health and welfare procedures;
- euthanase livestock;
- perform cattle post-mortem procedures;
- select livestock for specific markets;
- transport, handle and store chemicals applicable to primary work area;
- prepare and apply chemicals applicable to primary work area;
- operate moving plant and equipment competently and efficiently;
- perform grain processing procedures;
- perform feed manufacture and delivery procedures;
- perform hygiene and housekeeping procedures associated with the primary work area;
- perform feedlot and environment maintenance procedures;
- possess understanding of industry quality assurance programs and all site operating procedures; and
- carry out workplace work health and safety procedures.

31.7 Farm and livestock hand level 7 (FLH7)

An employee at this level includes:

(a) Senior dairy operator grade 1 who:

- uses their knowledge and skills to coordinate the operation of a farm process or area of expertise e.g. milking and animal attendance, pasture and farm maintenance, breeding programs and artificial insemination area.

Indicative of the tasks which an employee at this level may perform are the following:

- overview of all farm operations;
- show strong planning and organising abilities, develop work plans to achieve objectives;

- operate computer equipment and software packages requiring set-up and basic function operation;
 - maintain equipment requiring modification, part replacement and overhauls;
 - gather information, generate a range of options and implement a course of action to solve problems;
 - demonstrate a comprehensive understanding of the dairy industry monitoring the industry through literature;
 - use measuring equipment requiring calibration and measurement conversion;
 - use established scientific processes in at least one area of specification;
 - co-operate with other team members, establish priorities and work goals; and
 - work with others to develop their competencies.
- (b) Feedlot employee level 4 who:
- has Certificate III qualifications;
 - has worked in the feedlot industry for at least 2 years; and
 - works with limited supervision with checking of their work related to overall progress.

Indicative of the tasks which an employee at this level may perform are the following:

- utilise ability to make independent work decisions;
- utilise Certificate III qualifications daily in the employee's primary work area;
- perform cattle handling procedures (where livestock operation is the primary work area);
- perform cattle health and welfare procedures (where livestock operation is the primary work area);
- euthanase livestock (where livestock operation is the primary work area);
- perform cattle post-mortem procedures (where livestock operation is the primary work area);
- select livestock for specific markets;
- transport, handle and store chemicals applicable to primary work area;
- prepare and apply chemicals applicable to primary work area;
- operate moving plant and equipment competently and efficiently;
- perform grain processing procedures (where feeding and milling operations is the primary work area);
- perform feed manufacture and delivery procedures (where feeding and milling operations is the primary work area);
- perform hygiene and housekeeping procedures associated with the primary work area;
- perform feedlot and environment maintenance procedures (where feedlot and environment maintenance operations is the primary work area);
- possess understanding of industry quality assurance programs and all site operating procedures;
- carry out workplace work health and safety procedures.

31.8 Farm and livestock hand level 8 (FLH8)

An employee at this level includes:

- (a) Senior dairy operator grade 2 who:

Indicative of the tasks which an employee at this level may perform are the following:

- set and monitor work goals;
- anticipate potential problems/issues and determine the best course of action;
- approach the resolution of conflict using objectivity and reason, differentiating between the two;
- supervise other grades;
- where appropriate, seek to develop team performance and cohesion, taking into account competencies and the needs of team members;
- keep abreast of dairy industry trends and changes;
- where necessary, exercise foresight in relation to farm needs and make recommendations to farm management; and
- operate scientific processes necessary to achieve farm objectives.

SCHEDULE III: Table of Calculation from Respondent's Response

	Pastoral Award	Paid	Difference	Hours worked	OWED		Super	
	<i>Casual Level 3</i>							
Jul-20	25.43	25	0.43	736.25	316.5875		28.49	9%
Jul-21	25.88	26	-0.12	1059.25		-127.11		
Jul-22	26.53	26	0.53	824.65	437.0645		43.71	10%

Jul-23	27.84	27.27	0.57	867.85	494.6745		54.41	10.50%
Jul-24	29.44	27.27	2.17	521.25	1131.113		130.08	11%
					2379.439		256.69	

¹ Originating claim lodged on 19 September 2025.

² A table of the respondent's calculations is annexed to these reasons at Schedule III.

³ Exhibit 1 – Witness Statement of Arie Henry John Bourbon signed on 21 January 2026.

⁴ Exhibit 6 – Witness Statement of Careena Kellie lodged on 3 February 2026 with attachments.

⁵ Exhibit 7 – Witness Statement of Carly Whitehouse lodged on 3 February 2026.

⁶ Exhibit 9 – Witness Statement of Dionne Wild lodged on 3 February 2026.

⁷ Exhibit 8 – Witness Statement of Susan Allen lodged on 3 February 2026.

⁸ Exhibits 2 - 5.

⁹ ts 9 - 10.

¹⁰ Exhibit 1.

¹¹ Exhibit 1.

¹² ts 11.

¹³ ts 12.

¹⁴ ts 17, 30; exhibit 6.

¹⁵ Exhibit 1; ts 30.

¹⁶ Exhibit 2 – series of text messages between the claimant and respondent, or people on behalf of the respondent; ts 19.

¹⁷ Exhibit 3 – tax file number declaration.

¹⁸ ts 19 – 20.

¹⁹ Response lodged 29 October 2025.

²⁰ Exhibit 4 – handwritten and electronic timesheets of the claimant.

²¹ Exhibit 5 – respondent's payroll item detail.

²² Exhibit 2 – (a) text messages between the claimant and Ms Kellie of varying dates and (b) text messages between the claimant and Ms Wild of varying dates.

²³ *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; (2022) 275 CLR 165 (*Personnel Contracting*) [83], [177]; *EFEX Group Pty Ltd v Bennett* [2024] FCAFC 35; (2024) 330 IR 171 [7], [52] - [56] (*EFEX*).

²⁴ *EFEX* at [9].

²⁵ *EFEX* at [11].

²⁶ *Personnel Contracting* at [48] and [83].

²⁷ Exhibit 6.

²⁸ Section 46 of the FWA.

²⁹ Section 47 of the FWA.

³⁰ Section 48(1) of the FWA.

³¹ *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148; (2014) 245 IR 449 (*Coles Supermarkets*) [22].

³² Clause 4.7 of the Food and Beverage Award; see also cl 4.7 of the Pastoral Award and *Coles Supermarkets* [26].

³³ *Noorton v Construction, Forestry and Maritime Employees Union* [2025] FCAFC 120 [86].

³⁴ Each award includes a note to the definition of 'casual employee' that states '[s]ection 15A of the Act was amended with effect from 26 August 2024. Under clause 102(3) of Schedule 1 to the Act, an existing employee who was a casual employee of an employer under section 15A as it was immediately before that date is taken to be a casual employee of the employer for the purposes of section 15A after that date'.

³⁵ Section 545A of the FWA, Sch 1 cl 46 of the FWA.

³⁶ National Minimum Wage Orders 2020 – 2024, pursuant to the FWA.

³⁷ Clause 10.1 to cl 10.3 of the Food and Beverage Award provides the formula for the casual ordinary hourly rate.

³⁸ See cl 20.1 and cl 21 of the Pastoral Award.

2026 WAIRC 00148

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2026 WAIRC 00148
CORAM : INDUSTRIAL MAGISTRATE C. TSANG
HEARD : TUESDAY, 14 OCTOBER 2025
DELIVERED : MONDAY, 16 MARCH 2026
FILE NO. : M 11 OF 2025
BETWEEN : CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION

CLAIMANT

AND

BHAGWAN MARINE LIMITED

RESPONDENT

CatchWords : INDUSTRIAL LAW – Application for imposition of civil penalties for non-compliance with cl 12.3 of the Agreement requiring the employer to convert eight casual positions to permanent positions within four weeks of registration of the Agreement – Admitted contravention – First contravention – No financial loss to employees – Specific deterrence – General deterrence

Legislation : *Fair Work Act 2009* (Cth)

Instrument : *Bhagwan Marine Ltd Offshore Vessel Operations and MUA Offshore Oil and Gas Enterprise Agreement 2024*

Cases referred

to in reasons: : *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13
Construction, Forestry and Maritime Employees Union v OSM Australia Pty Ltd [2025] WAIRC 00349
Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd [2025] WAIRC 00785
Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2) [2016] FCA 244
Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd [2025] FCA 208

Result : Penalty imposed

Representation:

Claimant : Ms S Sayed (of counsel)

Respondent : Mr J McLean (of counsel)

REASONS FOR DECISION

1 These reasons concern the claimant's (CFMEU) claim for the following orders:

- (a) The respondent pay a civil penalty; and
- (b) Any civil penalty imposed on the respondent be paid to the CFMEU.

Background

- 2 On 28 January 2025, the CFMEU lodged an Originating Claim, claiming that Bhagwan Marine Limited (**respondent**) contravened s 50 of the *Fair Work Act 2009* (Cth) (**FW Act**) by failing to convert eight casual positions to permanent positions within four weeks of the registration of the *Bhagwan Marine Ltd Offshore Vessel Operations and MUA Offshore Oil and Gas Enterprise Agreement 2024* (**Agreement**), pursuant to cl 12.3 of the Agreement.
- 3 On 7 March 2025, the respondent filed a Response, stating that it:
 1. Admits paragraphs [1]–[5].
 2. Denies paragraphs [6]–[7] and says further that the obligations required under clause 12.3 of the [Agreement] was complied with as 8 casual employees were converted to permanent and their permanent employment commenced on 15 October 2024.
 3. In relation to paragraph [8], the Claim should be discontinued or otherwise dismissed.
- 4 On 26 June 2025, the CFMEU filed an Amended Outline of Claim, removing the reference to seeking a declaration that the respondent had contravened s 50 of the FW Act.
- 5 On 27 June 2025, the respondent filed an Amended Response admitting to non-compliance with cl 12.3 of the Agreement, and therefore s 50 of the FW Act; contending that a pecuniary penalty is inappropriate considering the following matters:
 - a. that the Respondent understood that it had reached an agreement with the [CFMEU] that it would convert casual employees to permanent employment after collecting and considering expressions of interest and that that process

would occur some time after 16 October 2024;

- b. on or around 28 January 2025, the Respondent offered permanent contracts to 8 casual employees, with such contracts said to operate retrospectively;
 - c. the Respondent converted 8 casual employees to permanent employment by 27 February 2025 and their permanent entitlements (including leave accruals) were backdated to 15 October 2024;
 - d. the Respondent did not reconcile the difference in casual rates and permanent rates (i.e. 25% casual loading) as an overpayment. As a result, these employees received between \$9,000 - \$23,000 more than what they would have received had the conversion been effected on 15 October 2024[.]
- 6 On 21 July 2025, the parties lodged a Statement of Agreed Facts, stating:
1. The [CFMEU] was at all material times:
 - 1.1 capable of suing in its own name;
 - 1.2 a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth); and
 - 1.3 an employee organisation for the purposes of the [FW Act].
 2. [The Respondent] was at all material times:
 - 2.1 a corporation able to sue and be sued;
 - 2.2 a 'national system employer' for the purposes of the FW Act; and
 - 2.3 conducting business in the oil and gas industry.
 3. The [Agreement] was approved by the Fair Work Commission (**FWC**) on 18 September 2024. ...
 4. The Agreement:
 - 4.1 was registered on 18 September 2024;
 - 4.2 commenced operation on 25 September 2024;
 - 4.3 has a nominal expiry date of 1 August 2027; and
 - 4.4 at all [material] times applied to the Respondent and covered the CFMEU.
 5. Clause 12.3 of the Agreement states: 'The Employer will convert 8 casual positions to permanent positions within 4 weeks of registration of this Agreement.'
 6. As the FWC approved the Agreement on 18 September 2024, the time for compliance with clause 12.3 was 16 October 2024.

The evidence

- 7 On 4 August 2025, the CFMEU filed the witness statement of George Gakis (**Mr Gakis**), Assistant State Secretary for the Western Australia Branch of the Maritime Union of Australia Division of the CFMEU, stating:
3. I was involved in the bargaining negotiations for the [Agreement] that commenced around mid-December 2023 and concluded on or around 1 July 2024.
 4. The Agreement was registered on 18 September 2024 and commenced operation on 25 September 2024.
 5. In those bargaining negotiation meetings, a total of about 10 that were held, the representative for the Respondent was Abhinav Agrawal (**Mr Agrawal**), Head of Human Resources/Industrial Relations for the Respondent.
 6. Sometime around mid-November 2024, I became aware that the Respondent had not made 8 casual employees permanent within 4 weeks of registration of the Agreement. On 13 November 2024, Mr Agrawal and I had a meeting where I raised this with him. Mr Agrawal told me that he was aware and that he was going to ensure that the permanency occurred.
 7. On 3 December 2024, I became aware that the permanency of casual employees still had not occurred. I emailed Mr Agrawal and reminded him that the 4 week period had expired on 15 October 2024.
 8. On 19 December 2024, I sent another email to Mr Agrawal and asked him for an update on whether the permanency had occurred. On 30 December 2024, Mr Agrawal emailed me saying that: 'we hope to make the permanent offers by end of the upcoming week if not earlier.' This did not occur.
- 8 On 8 September 2025, the respondent lodged the witness statement of Kerren Kannikoski (**Ms Kannikoski**), General Manager, Corporate Services for the respondent, stating: [references to attachments omitted]

My role and Bhagwan's operations

3. My role for Bhagwan encompasses dealing with HR, crewing of vessels, payroll, information systems, business systems and marketing.
4. Bhagwan is a marine services provider operating in both the inshore and offshore sectors. In the offshore sector, the business [sic] offshore vessel support services to its clients in the North West Shelf, Western Australia.
5. One of the enterprise agreements that covers the business and employees who perform work offshore includes the [Agreement].
6. Bhagwan employs approximately 800 to 1000 employees at any given time. Those employees are covered by nine different enterprise agreements across various States and Territories in Australia. This presents a particularly

challenging industrial landscape for Bhagwan to navigate.

Discussions between Bhagwan and the CFMEU following approval of the Agreement

7. The delay in making the permanent conversions the subject of this claim was a regrettable consequence of the various challenges and complexities that Bhagwan was attempting to navigate following the Agreement commencing operation.
8. Specifically, between around October and December 2024, and following the commencement of the new Agreement, Bhagwan was required to negotiate with the [CFMEU] for exemptions under Schedule 2 of the Agreement for two hybrid vessels, being the *Bhagwan Renegade* and *Tempest*. These negotiations were protracted and required multiple meetings/discussions with the [CFMEU]. At those meetings, various topics were discussed like alternative vessels to the hybrid vessels, the structure of the hybrid vessels (like amenities, bedding etc) and the type of work to be completed by the hybrid vessel. There was back and forth discussions, and both Bhagwan and the [CFMEU] were navigating these exemption provisions. I know this from speaking with Bhagwan's then Head of HR around the times of the meetings.
9. As the negotiation of these exemptions was taking up considerable time and resources, Bhagwan understood (based on what I was made aware of by Bhagwan's then Head of HR) that Bhagwan and the [CFMEU] had formed an understanding in or around October 2024 that the conversions would be revisited once the exemptions – a matter of pressing operational priority – had been resolved.

Bhagwan's Change of Position

10. At the time that the claim was filed, Bhagwan believed that the understanding it considered it had reached with the [CFMEU] could potentially provide a defence of estoppel. Further, the claim initially sought a declaration of contravention which Bhagwan opposed. That motivated Bhagwan (admittedly incorrectly) to not admit the contravention.
11. However, following the decision of *Construction, Forestry and Maritime Employees Union v OSM Australia Pty Ltd* [2025] WAIRC 00349 [(OSM)] which considered the issue of casual conversion, Bhagwan better understood the issues it would face with defending the claim.
12. In conjunction with the [CFMEU] confirming that it would no longer seek a declaration by the Court, the parties filed consent orders which permitted Bhagwan to file an Amended Response and the [CFMEU] to file an Amended Outline of Claim to remove their claim for a declaration.

Conversion Timing and Employee Financial Benefit

13. On 17 December 2024, Bhagwan issued expressions of interest to relevant employees covered by the Agreement which were open until 24 December 2024 (EOIs).
14. From 30 December 2024, following returning to work after the Christmas and Boxing Day public holidays, Bhagwan's HR department began considering the received EOIs and engaging in internal discussion about which employees should be offered permanent contracts.
15. From as early as around 14 January 2025, Bhagwan began contacting the successful employees by phone (and subsequently text message) to advise them that they had been successful with their EOI and that they would be receiving permanent contracts of employment. As part of that process, Bhagwan explained to the successful employees the mechanics of backdating the commencement of their permanent contracts and future permanent entitlements. This process took about a month to complete and then Bhagwan issued the contracts of employment.
16. On 24 February 2025, Bhagwan emailed eight casual employees attaching their permanent contract of employment.
17. Those eight casual employees (**Employees**) were:
 - a. Ross Palmer;
 - b. Graeme Naylor;
 - c. Brian Parkinson;
 - d. John Walker;
 - e. Benjamin Culloton;
 - f. Rory Hodgkinson;
 - g. Mark Criddle; and
 - h. Vaughn Barkhuizen.
18. The last Employee accepted permanent employment and was converted on 27 February 2025. All [Employees] had their permanent entitlements (including leave accruals) were [sic] backdated to 15 October 2024.
19. Bhagwan did not seek to recover the difference in casual rates and permanent rates (i.e. 25% casual loading) as an overpayment. As a result, the Employees received between \$9,000 [-] 23,000 (as set out in the table below) more than what they would have received had the conversion been effected on 15 October 2024:

Employee	Financial Benefit
Ross Palmer	\$16,920.48
Graeme Naylor	\$11,614.91
Brian Parkinson	\$23,423.88

John Walker	\$15,167.15
Benjamin Culloton	\$9,388.14
Rory Hodgkinson	\$18,387.54
Mark Criddle	\$17,857.51
Vaughn Barkhuizen	\$13,208.08

20. The Employees did not suffer any non-financial detriment as a result of the delay in casual conversion.
21. Bhagwan did not (and never intended to) gain any financial benefit as a result of the delay in processing the conversions, but instead incurred a financial detriment of \$125,967.69 being the sum of the above amounts.

No past contraventions

22. Bhagwan has been operating for over 27 years, and takes compliance with its industrial obligations very seriously. Bhagwan prides itself on its culture of compliance, on being perceived as a good corporate citizen, and ensuring that its employees are looked after and receive any and all amounts to which they are entitled.
23. Notwithstanding the complexity of Bhagwan's industrial arrangements, this proceeding represents, as far as Bhagwan is aware, the first occasion on which Bhagwan has contravened the [FW Act]. Myself and the leadership team are disappointed that Bhagwan has found itself in this position.

Contrition and remediation

24. Bhagwan regrets that it did not comply with the obligation to convert under clause 12.3 of the Agreement by the required time, and Bhagwan apologises to the eight Employees for the delay in securing their conversion to permanency. Bhagwan appreciates that the conversions were required to be completed and in no circumstances did Bhagwan intend to breach its obligation under the agreement or deprive employees of the benefit of clause 12.3.
25. Bhagwan has sent a HR and IR compliance reminder to managers in the business highlighting why compliance is important, and outlining practical measures to ensure future compliance with Bhagwan's obligations. This reminder should serve as a prompt for leaders in the business to being aware of relevant compliance obligations including obligations found within Bhagwan enterprise agreements.
26. Bhagwan is optimistic that it will not breach the Agreement in the future given its past record of compliance and this reminder to managers.
27. The individual who Mr Gakis says he was in contact with about this issue, Mr Agrawal, is no longer employed by Bhagwan.

9 The CFMEU submits that:

- (a) Clause 12.3 provides in very clear terms that the employer *will* convert eight casual positions to permanent positions within four weeks of registration of the Agreement.
- (b) At the time of the making of the Agreement, there were a total of four permanent employees covered by it.
- (c) The respondent's contravention arises with respect to the former part of cl 12.3, that it *will* convert eight casual positions to permanent positions. The parties agree that four weeks of registration of the Agreement is 16 October 2024.¹ The respondent did not make any casual positions permanent by that date.
- (d) In mid-November 2024, Mr Gakis became aware that the respondent had not made any casual positions permanent and raised the issue with the respondent. The discussions between Mr Gakis and the respondent occurred up until 30 December 2024.²
- (e) Despite this, the respondent did not send out an EOI until 17 December 2024.³
- (f) On 28 January 2025, the CFMEU commenced these proceedings.
- (g) The respondent submits that it converted eight casual employees to permanent positions on 27 February 2025.⁴ The conversion occurs shortly before the respondent files its Response on 7 March 2025, denying a breach of cl 12.3 and stating that '8 casual employees were converted to permanent and their permanent employment commenced on 15 October 2024'.⁵
- (h) On 26 June 2025, the CFMEU filed an Amended Outline of Claim, which amended the Originating Claim by removing the reference to the CFMEU seeking a declaration that the respondent has breached s 50 of the FW Act by its contravention of cl 12.3.
- (i) On 27 June 2025, the respondent filed its Amended Response, admitting to the breach of cl 12.3, and admitting that it only converted the casual employees to permanent on 27 February 2025.
- (j) The respondent has submitted that 'the four week period stipulated for compliance was arbitrary, at least in a legal sense'.⁶ However, the four week period for compliance was a timeframe that was agreed to by the parties during the negotiation of the Agreement and is a term of an enterprise agreement. Furthermore, there are other time periods in the Agreement by which certain obligations are to occur. The respondent's submission that the time period for compliance with cl 12.3 is arbitrary in a legal sense causes concerns because it speaks to dismissive conduct.
- (k) Ms Kannikoski states in her witness statement the process that the respondent undertook prior to the conversion of permanency, which commenced with obtaining EOIs from employees. While the CFMEU accepts that the conversion of permanency involves a process, any discussion about the process and commensurate time periods, should have taken place during the bargaining negotiations, prior to the Agreement being drafted and the employees voting for it.

- (l) While the respondent submits that senior management was not involved in its contravention of cl 12.3, and that the HR Manager who was involved, Mr Agrawal, is no longer employed by the respondent; the emails attached to Ms Kannikoski's witness statement, particularly that dated 2 January 2025, indicate that those involved in the decision-making include the following senior decision-makers:
- (i) Tom Kannikoski, General Manager – Operations WA.
 - (ii) Kerren Kannikoski, General Manager – Corporate Services.
 - (iii) Katie Sukiennik, HR Coordinator.
 - (iv) Loui Kannikoski, Managing Director and CEO.
- (m) Ms Kannikoski states in her witness statement that the respondent 'regrets that it did not comply' with cl 12.3 and that it 'apologises to the eight Employees for the delay in securing their conversion to permanency.' However, Ms Kannikoski's witness statement and attachments are close to 300 pages, and while it contains screenshots of text messages and emails sent to the employees, there is no evidence that the respondent has apologised to the employees.
- (n) Ms Kannikoski states in her witness statement that the respondent 'has sent a HR and IR compliance reminder to managers in the business highlighting why compliance is important.' However, the compliance reminder consists of an email on 4 September 2025, one day before Ms Kannikoski lodged her witness statement. Given the timing, the CFMEU considers this a step taken by the respondent to mitigate penalties.
- (o) Ms Kannikoski refers to *OSM*. However, *OSM* involved an enterprise agreement that contained a clause with multiple steps and timeframes, including the sending of an EOI within a specific timeframe, and the making of offers of employment within seven days thereafter; such that it was permissible for the employer to argue that the wording was potentially confusing and the employer was uncertain of the time for compliance. However, in the case of the Agreement, cl 12.3 is clear, concise, straightforward, and without any confusing steps. There is no basis for the respondent to argue any ambiguity with its obligation to comply with cl 12.3.
- (p) Ms Kannikoski states in her witness statement that the respondent has a large number of employees, covered by nine enterprise agreements. However, the respondent is a sizeable business with a dedicated HR team. There is no reason why the respondent cannot comply with its obligations under the Agreement.
- (q) While Mr Agrawal is no longer employed with the respondent, management that were involved in the contravention are still employed with the respondent in their senior roles. Specific deterrence is required, as the most senior management were involved and have not shown any contrition, but engaged in a 'box ticking exercise'.
- (r) Ms Kannikoski states in her witness statement that the respondent understood that there was an understanding between the respondent and the CFMEU, reached in October 2024, essentially that the respondent would not be held to comply with cl 12.3 until a later period. However, there is no evidence of the CFMEU having agreed to this, nor is there evidence from the respondent that this was a matter that was discussed. While Ms Kannikoski gives evidence of the respondent's understanding, she was not involved with the conversations about cl 12.3 that occurred between Mr Gakis and Mr Agrawal. Accordingly, the witness statement of Mr Gakis should be given greater weight. Mr Gakis gives evidence of his discussions with Mr Agrawal, and relevantly, does not refer to any understanding regarding delayed compliance with cl 12.3.
- (s) The CFMEU seeks that a penalty be imposed; payable to the CFMEU: *Milardovic v Vemco Services Pty Ltd (Administrators Appointed) (No 2)* [2016] FCA 244.
- (t) The CFMEU accepts this is the respondent's first contravention.
- (u) The CFMEU relies on *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd* [2025] WAIRC 00785 (*Qube*), where this court, differently constituted (**Court**) imposed a penalty of \$11,268 on Qube, which constituted 12% of the maximum penalty, payable to the CFMEU.
- (v) *Qube* involved a breach of an agreement that contained a clause requiring a certain payment to be made to an employee, which Qube breached by not making that payment to the employee. The CFMEU commenced the Court proceedings, following which, Qube rectified the breach. In Qube's response, it claimed that given the rectification that there was no loss to the employee, such that no penalties ought to be imposed. While a distinguishing feature in *Qube* is Qube's prior contraventions, *Qube* supports the contention that the court should give little weight to the respondent's submission that no penalty should be imposed where an employer rectifies the contravention post-institution of proceedings.
- (w) With respect to specific deterrence, there is no dispute that the respondent was aware of its obligation under cl 12.3. Therefore, the respondent's breach was not inadvertent. The CFMEU does not contest that the respondent did not obtain an industrial advantage and did not engage in a deliberate contravention. However, the CFMEU submits that the respondent was aware of its obligation under cl 12.3, was aware of the requirement to convert the casuals to permanency within four weeks of the Agreement's registration, yet were reckless and the delays continued to occur.
- (x) With respect to general deterrence, the CFMEU relies on *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 (*Pattinson*), that compliance with the terms of an enterprise agreement is not a 'box ticking exercise', to deter employers from only complying with an agreement following the commencement of proceedings. Furthermore, it is an important aspect of general deterrence that employers honour the timeframes that they agreed to when negotiating an enterprise agreement.
- (y) While the respondent elected not to recover the casual loading from the employees, this does not mitigate from the

necessity for general deterrence.

10 The respondent submits that:

- (a) The contravention involves an approximately four-month delay in converting eight employees to permanent positions.
- (b) The contravention is its first contravention of the FW Act, involves no loss or damage, it has exhibited contrition, and therefore, it is neither appropriate nor necessary to award a penalty in the circumstances.
- (c) The CFMEU relies on the considerations in *Pattinson*,⁷ however, the considerations each weigh in the respondent's favour and supports the respondent's submission that no penalty is warranted:

Matters pertaining to both the character of the contravening conduct and the character of the contravenor may be relevant to the balance. Factors that may be relevant to deterrence include the following: [18]–[19], [46]–[48]

 - (a) The nature and extent of the contravening conduct.
 - (b) The amount of loss or damage caused.
 - (c) The circumstances in which the conduct took place.
 - (d) The size (and financial resources) of the contravening company.
 - (e) The deliberateness of the contravention and the period over which it took place.
 - (f) Whether the contravention arose out of the conduct of senior management or at a lower level.
 - (g) Whether the company has a corporate culture conducive to compliance with the Act.
 - (h) Whether the company has shown a disposition to co-operate with regulators in relation to the contravention.
- (d) The considerations at *Pattinson* (a) and (c), the nature and extent of the contravening conduct and the circumstances in which the conduct took place, are addressed in Ms Kannikoski's witness statement.⁸ Relevantly, it has a relatively complex industrial regime, and the Agreement introduced for the first time an obligation to convert eight casual positions to permanent employment.
- (e) Clause 12.3 provides a four-week period to convert the casual employees to permanent. The four-week period was 'ambitious', given a conversion process, if done properly, entails circulating EOIs, allowing the employees an opportunity to consider and nominate the conversion, assessing the nominations received, taking feedback, selecting the successful candidates, preparing the relevant employment documentation, and ultimately effecting those conversions.
- (f) It does not deny that it had an obligation to convert eight employees, nor does it suggest it was not going to honour that obligation and effect the conversion. It was simply a question of when the conversion would actually be effected.
- (g) Ms Kannikoski's evidence for the delay was unchallenged:
 - (i) First, the parties were attempting to deal with the challenges associated with implementing a new enterprise agreement.
 - (ii) Second, as is reflected in the process adopted, it wanted to ensure that the conversion process was done properly through an EOI and that employees had an opportunity to apply through an open and transparent process.
 - (iii) Third, it understood that there was some agreement on the part of the CFMEU that the conversions would be dealt with after the more pressing operational changes that needed to be implemented were attended to.
- (h) In relation to the considerations at *Pattinson* (d), the deliberateness of the contravention and the period over which it took place: the delay was not deliberate, in the sense that it was designed to deliver any financial windfall.
- (i) In relation to the considerations at *Pattinson* (b), the amount of loss or damage caused: the delay resulted in employees being better off financially. The employees continued to be paid at casual rates which included a 25% casual loading during the period that they were not converted. On conversion, their permanent entitlements including leave accruals, were backdated to 15 October 2024, and it elected not to claw back the casual loading. Ms Kannikoski states in her witness statement that the employees received between \$9,000 and \$23,000 more than they would have, had the conversion been effected on 15 October 2024. The extra amount the employees received from the delay totalled \$125,967.69.
- (j) Accordingly, there was no financial loss, with any deprivation of entitlements rectified by the backdating of the accruals to the date when the conversion should have taken place.
- (k) Ms Kannikoski's evidence is that it first sent EOIs on 17 December 2024 and then contacted the successful applicants to advise them that they would be converted to permanent employment from 14 January 2025; which is more than two weeks before the CFMEU lodged the Originating Claim.
- (l) In relation to the consideration at *Pattinson* (f), whether the contravention arose out of the conduct of senior management or at a lower level: the evidence is confined to the involvement of Mr Agrawal, a human resources manager. Firstly, Mr Agrawal was not part of the senior management team, but middle management from the human resources team. Secondly, the evidence of Mr Gakis indicates that Mr Agrawal continually told Mr Gakis that he was working to ensure the conversion to permanency occurred. That evidence was not challenged, and in

any event, is not reflective of a manager working to frustrate the conversion or to avoid it happening.

- (m) While the CFMEU refers to members of the Kannikoski family who hold senior leadership positions, the dates of the emails referenced by the CFMEU post-date the date that EOIs were issued and closed. The emails indicate that it is an approximate 12-day time period between the successful employees being contacted and informed that they have been selected for the conversion and being issued with permanent employment contracts. Accordingly, it cannot be said that at that point in time the senior management are acting in a way that is contrary with compliance with the obligation, or frustrating or delaying or not actioning the correspondence quickly.
- (n) In relation to the consideration at *Pattinson* (g), whether it has a corporate culture conducive to compliance with the FW Act, Ms Kannikoski's evidence is that:
 - (i) It has been operating for over 27 years.
 - (ii) It takes compliance with its industrial obligations seriously, and prides itself on a culture of compliance.
 - (iii) Notwithstanding the complexity of its industrial instruments, this is the first occasion where it has contravened the FW Act.
- (o) In relation to the consideration at *Pattinson* (h), whether it has shown a disposition to co-operate with regulators in relation to the contravention: it has admitted the contravention.
- (p) While the CFMEU criticises it for not initially admitting the contravention, Ms Kannikoski explains the reasons for filing a Response denying the contravention in her (unchallenged) witness statement.⁹ In any event, no prejudice flowed from it filing an Amended Response, as the breach the subject of this proceeding, had been fully remediated prior to the Response being filed, indicating that it was not denying the existing obligation to convert eight casual employees to permanency. Furthermore, no substantive steps were taken by the CFMEU between the filing of the Response and the Amended Response. Indeed the filing of an Amended Response was unavoidable given the CFMEU initially sought declaratory relief it was not entitled to claim and would have been required to, and was required to, file an Amended Outline of Claim.
- (q) In relation to contrition, Ms Kannikoski gives evidence of its expression of regret and apology. While the apology appears in Ms Kannikoski's witness statement, the witness statement is a document offered up to the court and is the most appropriate form for a party to exhibit contrition.
- (r) Ms Kannikoski was not required for cross-examination, therefore her evidence of sending a HR and IR compliance reminder should be accepted as a meaningful attempt to improve compliance so that there are no future instances of non-compliance.
- (s) Furthermore, it has assisted with the efficient conduct of the proceedings, including by assisting with the preparation of the Statement of Agreed Facts.
- (t) In relation to specific deterrence:
 - 36. Despite a complex industrial regime, and over 20 years in business, this is the Respondent's first contravention. The Respondent has acknowledged its error, has fully remedied the contravention, and has exhibited contrition. The Respondent has taken steps to upskill its operations teams and remind them of the importance of compliance with the Respondent's industrial obligations. The individual that the Complainant appears to attribute the blame for the delay to – Mr Agrawal – is not [sic] longer employed by the [Respondent].
 - 37. The nature of the clause breached is such that a repeat breach is not a matter the Court needs to be concerned with nor take steps to deter – conversion was a one off obligation under the Agreement. Moreover, the failure to convert the Employees within the prescribed period has left the Respondent approximately \$125,967 worse off – a strong deterrent against the Respondent failing to comply with its obligations in a timely manner.
- (u) In response to the CFMEU's criticism of its written submissions [16] that 'the four week period stipulated for compliance was arbitrary, at least in a legal sense'; the submission was not intended to downplay the importance of compliance with cl 12.3, but observes that:
 - (i) There was no particular significance that attached to the four-week period; and the employees ultimately did receive the full benefit of the casual conversion.
 - (ii) The benefit of the casual conversion was not defeated, deprived of purpose, or made redundant, by the delay.
- (v) Its culture of compliance, lack of past contraventions, the steps taken to remind managers of their obligations, ultimately allow Ms Kannikoski to credibly express the view in her witness statement that it will not breach the Agreement in the future.
- (w) Furthermore, the delay has resulted in it paying about \$125,000 more to employees than it otherwise would have, which in many respects is a deterrent in its own right.
- (x) In all the circumstances, in response to its first offence, no penalty should be imposed.
- (y) In relation to general deterrence, the \$125,000 it paid to employees serves as both specific and general deterrence. Secondly, responding to the proceedings, also serves as a deterrent.
- (z) It has admitted the contravention, which will appear on its record. If there is any future non-compliance, its admission of a contravention will weigh against it on penalty and will deprive it of the ability to run a similar case

that no penalty is appropriate given this is a first offence.

- (aa) While its primary position is that no penalty should be imposed against it in the circumstances; in the alternative, if a penalty is to be imposed then it should be at the lower end of the potential range.
- (bb) The 12% imposed in *Qube* is not an appropriate reference point. A relevant, and distinguishing factor in *Qube*, was that Qube had a significantly greater number of past contraventions.¹⁰ Furthermore, in *Qube*, there was a financial loss sustained by the affected employee, whereby the affected employee was delayed in receiving payment by several months.¹¹
- (cc) If a penalty is payable, it accepts that the penalty should be paid to the CFMEU.

Consideration

- 11 The respondent has admitted the contravention, therefore, the sole issue for determination is the appropriate penalty, if any.
- 12 Section 546(2)(b) of the FW Act provides that, for a body corporate, the maximum penalty for a contravention of a civil remedy provision is five times the maximum number of penalty units applicable to an individual. For a contravention of s 50 of the FW Act, the maximum for an individual is 60 penalty units (s 539(2), Item 4). Accordingly, the maximum penalty for the respondent is 300 penalty units. The contravention crystallised on 16 October 2024, when the four-week period under cl 12.3 expired without compliance. At the time, the value of a penalty unit was \$313.¹² The maximum penalty is therefore \$93,900.
- 13 In *Pattinson* [9], the High Court confirmed that the primary purpose of a civil penalty is deterrence:
Under the civil penalty regime provided by the [FW Act], the purpose of a civil penalty is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the [FW Act] by the deterrence of further contraventions of the [FW Act].
- 14 The assessment of an appropriate penalty requires consideration of factors relevant to deterrence, including those identified in *Pattinson* [18], which are addressed in turn below; noting that the factors for consideration are not ‘a rigid catalogue for attention’ and that the ‘court’s task remains to determine what is an “appropriate” penalty in the circumstances of the particular case’.¹³

The nature and extent of the contravening conduct; The circumstances in which the conduct took place

- 15 While cl 12.3 refers to ‘registration of this Agreement’, the FW Act uses the term ‘approved by the FWC’ in relation to enterprise agreements.¹⁴ However, nothing turns on the distinction because the parties agree that:
- (a) The Agreement was approved by the FWC on 18 September 2024.¹⁵
 - (b) The Agreement was registered on 18 September 2024.¹⁶
 - (c) The time for compliance with cl 12.3 was 16 October 2024.¹⁷
- 16 Accordingly, I accept the CFMEU’s submission that cl 12.3 is clear, concise, straightforward, and without any confusing steps; such that there is no basis for the respondent to argue any ambiguity with its obligation to comply with cl 12.3.¹⁸
- 17 The respondent does not contend that cl 12.3 is ambiguous; nor does it deny that it had an obligation to comply with cl 12.3, and that the relevant date for compliance was 16 October 2024. The respondent submits that it was operating on the belief that the parties had formed an understanding that strict compliance with cl 12.3 was not required, and that ‘the conversions would be revisited’ once its operational priorities had been resolved.¹⁹
- 18 Ms Kannikoski gives evidence to having an understanding that the parties had agreed to defer the time for compliance with cl 12.3 until after the negotiations regarding the respondent’s vessels, the *Bhagwan Renegade* and *Tempest* were concluded, and that such understanding potentially provided the respondent with an estoppel defence.²⁰
- 19 Whether estoppel could operate to excuse non-compliance with a term of an enterprise agreement was not addressed by either party. Instead, the parties’ submissions focus on Ms Kannikoski’s evidence of the respondent’s understanding that the parties agreed to defer compliance with cl 12.3.
- 20 Ms Kannikoski does not provide any detail of the circumstances in which this understanding was reached, other than to say that it was ‘based on what I was made aware of by Bhagwan’s then Head of HR’ (Mr Agrawal).²¹ Ms Kannikoski does not provide any specifics of how Mr Agrawal made her aware of the understanding, nor does she include any evidentiary support for the understanding and for Mr Agrawal making her aware of it. Relevantly, Ms Kannikoski does not provide any details to support the reasonableness of the respondent holding such an understanding.
- 21 Mr Gakis’ evidence is that he raised the issue of the respondent’s non-compliance with cl 12.3 with Mr Agrawal on 13 November 2024, 3 December 2024 and 19 December 2024.²²
- 22 Accordingly, I accept the CFMEU’s submission that the respondent has not produced any evidence to support the contention of a common understanding that the respondent could delay compliance with cl 12.3.
- 23 I also accept the CFMEU’s submission, to the effect that, cl 12.3 is unambiguous: ‘the employer *will* convert 8 casual positions to permanent positions within 4 weeks of registration of this Agreement.’
- 24 Furthermore, that the four-week period was agreed to by the parties, during the negotiations of the Agreement, which took place over a 6.5 month period (mid-December 2023 to 1 July 2024) and involved 10 bargaining negotiation meetings.²³
- 25 Once approved by the FWC, the Agreement acquires statutory force under s 50 of the FW Act. The agreed deadlines are binding.
- 26 I do not accept the respondent’s characterisation of the four-week period as ‘arbitrary’. The period was a product of negotiation between the parties over 6.5 months across 10 bargaining meetings. Having agreed to it, the respondent’s characterisation of it

as arbitrary risks undermining the integrity of the collective bargaining process.

- 27 I therefore accept the CFMEU's submission that if the conversion could not be implemented within a four-week period, that the time for raising that was during the negotiations and not after the period for compliance has passed.
- 28 In any event, I am not satisfied that the conversion could not be implemented within a four-week period, for the reasons that follow.
- 29 While Ms Kannikoski has given evidence of a challenging industrial landscape of employing 800 to 1,000 across Australia, who are covered by nine different enterprise agreements, the annexures to Ms Kannikoski's witness statement indicate that the following members of the respondent's managerial, HR and administration team, each played a role in effecting the conversion:
- (a) Abhinav Agrawal – Head of HR/IR.²⁴
 - (b) Katie Sukiennik – HR Coordinator.²⁵
 - (c) Kerren Kannikoski – General Manager – Corporate Services.²⁶
 - (d) Tom Kannikoski – General Manager – Operations WA.²⁷
 - (e) Kayla Dingle – Administration Officer (Crewing).²⁸
 - (f) Dipa Bhudia – HR Advisor.²⁹
- 30 Ms Kannikoski's witness statement indicates that:
- (a) The EOIs were sent out on 17 December 2024.
 - (b) Following the Christmas and Boxing Day public holidays, the respondent's HR team commenced contacting the employees to inform them that they had been selected for conversion from casual to permanency on 14 January 2025.
 - (c) The period from 17 December 2024 to 14 January 2025, is exactly four weeks.
 - (d) While Ms Kannikoski states that the respondent did not issue the employment contracts to the employees until 24 February 2025, she does not explain why the respondent required a further six weeks to issue the contracts.
 - (e) The evidence indicates that once the contracts were issued to the employees on 24 February 2025, they promptly signed and returned them, with the last employee signing and returning the employment contract on 27 February 2025.
- 31 Having negotiated and agreed upon cl 12.3, the respondent had an obligation to comply with it.

The amount of loss or damage caused

- 32 During the period of non-compliance, the eight employees remained classified as casual and therefore did not have access to the benefits of permanent employment, including job security and access to paid leave (notwithstanding the subsequent backdating of leave accruals).
- 33 However, Ms Kannikoski's evidence that the employees 'did not suffer any non-financial detriment as a result of the delay in casual conversion'³⁰ was unchallenged. In the absence of evidence to the contrary, I accept that assertion; while observing that the inherent insecurity of casual employment is a matter that the conversion obligation in cl 12.3 was designed to address.
- 34 Furthermore, I accept that the eight affected employees did not suffer any financial detriment, as they received:
- (a) Casual loading payments of \$9,000–\$23,000 each, totalling \$125,967.69; and
 - (b) Their leave accruals backdated to 15 October 2024.³¹

The size of the contravening company

- 35 I accept the CFMEU's submission that the respondent is a large employer, with a sizeable HR team, and provides no cogent reasons for being unable to comply with its industrial relations obligations.
- 36 I accept that the respondent has, through its delayed compliance with cl 12.3, incurred a financial detriment of \$125,967.69.
- 37 The respondent did not make any submissions to the effect that it could not absorb the costs of the penalties that may be imposed.

The deliberateness of the contravention and the period over which it extended

- 38 The contravention involved a delay of less than 4.5 months (from 16 October 2024 to 27 February 2025).
- 39 I accept the respondent's submission that the delay was not designed to achieve an industrial or financial advantage, and to the contrary, the respondent has incurred a financial detriment.
- 40 However, the evidence establishes that the respondent was aware of its obligations under cl 12.3 and of the four-week deadline yet did not commence the conversion process until 17 December 2024.
- 41 While the respondent commenced the EOI process on 17 December 2024, approximately six weeks before the CFMEU lodged its Originating Claim on 28 January 2025, the conversions were not completed until 27 February 2025, which is one month after these proceedings were commenced.
- 42 The EOIs were issued two months after the four-week deadline had expired, and after Mr Gakis had raised the issue with Mr Agrawal on three occasions.
- 43 While the respondent may have held a genuine, though mistaken, belief that the CFMEU had agreed to defer compliance, I

accept the CFMEU's characterisation of the breach as 'not inadvertent'. The respondent knowingly deferred compliance with a binding obligation, albeit without any intention to gain an advantage.

Whether the contravention arose out of the conduct of senior management or at a lower level

- 44 From the emails attached to Ms Kannikoski's witness statement, I accept that numerous members of the respondent's senior and middle management, HR and administration teams were aware the respondent had an obligation to convert casual employees to permanency.
- 45 However, there is a dearth of information regarding the respondent's conduct in the four-week period following the FWC's approval of the Agreement.
- 46 The CFMEU filed the witness statement of Mr Gakis on 4 August 2025, in which Mr Gakis states that he became aware in mid-November 2024 that the respondent had not converted the casuals as required by cl 12.3, and on 13 November 2024 he raised the matter with Mr Agrawal, who informed him that he was aware and was going to ensure the permanency occurred. Mr Gakis also stated that he emailed Mr Agrawal on 3 December 2024, and Mr Agrawal emailed on 30 December 2024 stating that 'we hope to make the permanent offers by end of the upcoming week if not earlier'.³²
- 47 Ms Kannikoski does not deal with any aspect of Mr Gakis' evidence in her witness statement. Where the evidence of Mr Gakis and Ms Kannikoski conflicts, I prefer Mr Gakis' evidence. Mr Gakis provides a direct account of his discussions with Mr Agrawal. Ms Kannikoski's evidence regarding any purported understanding between the respondent and the CFMEU to defer compliance with cl 12.3 is hearsay, and appears based on what she was told by Mr Agrawal. It is also unsupported by any documentary evidence (as discussed further below).

Whether the company has a corporate culture conducive to compliance with the FW Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention

- 48 I accept the respondent's unchallenged evidence that it has operated for 27 years without prior contraventions of the FW Act, despite operating in a complex industrial environment with nine enterprise agreements across multiple jurisdictions.
- 49 This evidences a corporate culture conducive to compliance with the FW Act.
- 50 The compliance reminder email sent to senior managers on 4 September 2025, while proximate to the hearing, is a step that reinforces this culture and reduces the likelihood of future contraventions.

Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the FW Act in relation to the contravention

- 51 The respondent's Response filed on 7 March 2025, filed eight days after the respondent completed the casual conversions on 27 February 2025, states that 'the obligations required under clause 12.3 of the [Agreement] was complied with as 8 casual employees were converted to permanent and their permanent employment commenced on 15 October 2024'.³³
- 52 At best, this was a characterisation that elided the delay in effecting the conversions; given the conversions were not effected until 27 February 2025 and were backdated to 15 October 2024.
- 53 However, I accept that no substantive prejudice flowed given the subsequent filing of the Amended Outline of Claim and the Amended Response.
- 54 I accept that upon the CFMEU filing its Amended Outline of Claim, that the respondent promptly filed an Amended Response admitting to the contravention.
- 55 This has obviated the need for the court to hold a liability hearing.
- 56 I accept that the respondent has contributed to the filing of a Statement of Agreed Facts.
- 57 Furthermore, Ms Kannikoski's unchallenged witness statement, attaches her 4 September 2025 compliance reminder to senior managers, and the respondent's statement of regret, which is on the following terms:

Bhagwan regrets that it did not comply with the obligation to convert under clause 12.3 of the Agreement by the required time, and Bhagwan apologises to the eight Employees for the delay in securing their conversion to permanency. Bhagwan appreciates that the conversions were required to be completed and in no circumstances did Bhagwan intend to breach its obligation under the agreement or deprive employees of the benefit of clause 12.3.

Specific deterrence

- 58 I consider the respondent's contravention to have occurred due to a lack of diligence of ensuring compliance with cl 12.3, coupled with a potential misunderstanding of the CFMEU's position concerning the need for the respondent to comply with cl 12.3 either pending resolution of the issues involving its hybrid vessels or regardless of resolution of those issues.
- 59 While the respondent's breach of cl 12.3 was not deliberate in the sense of being designed to gain an industrial or financial advantage; the respondent was aware of its obligation and the deadline and chose to defer compliance with cl 12.3.
- 60 Accordingly, I consider that there is a need to impose a penalty to ensure specific deterrence, for the reasons that follow.
- 61 This is the respondent's first contravention in 27 years of operation.
- 62 The contravention arose out of unique circumstances involving a one-off obligation that is unlikely to reoccur.
- 63 The CFMEU does not deny that the respondent incurred a financial detriment of \$125,967.69. The CFMEU characterises this as a consequence of the respondent's poor decision making; it was not a consequence of the respondent seeking to pay the employees compensation for not effecting the casual conversion in accordance with cl 12.3.
- 64 I accept the CFMEU's submission.
- 65 It is trite to say that the conversion of casual employees to permanent employees is a matter of importance, in industrial

relations generally, and to the parties particularly such that they sought to specifically bargain for cl 12.3.

- 66 It is also trite to say that the casual loading that was paid to the affected employees is a compensatory payment for the absence of permanent entitlements. The respondent characterises the financial detriment of \$125,967.69 as arising because of its decision not to ‘claw back’ the casual loading as an overpayment.³⁴ However, the employees were entitled to receive the casual loading for the period that they remained casual employees, and the casual conversion was not effected until 27 February 2025.³⁵
- 67 However, whether the respondent could have lawfully recovered the casual loading upon conversion is not a matter I need to determine. I accept that the employees did not incur a financial loss as a result of the respondent’s delay in complying with cl 12.3, and that the respondent has incurred a financial detriment as a result of its delay in complying with cl 12.3.
- 68 While I accept that the respondent has incurred a financial detriment, I note that this was a result of the respondent’s voluntary decision-making. It was not a consequence imposed by operation of law; and is qualitatively different from a court-imposed penalty for non-compliance with a term of an enterprise agreement.
- 69 Nevertheless, it is a relevant consideration insofar as it demonstrates that the respondent has not profited from its non-compliance and has, to the contrary, incurred a financial detriment.

General deterrence

- 70 The integrity of the enterprise bargaining framework depends upon the parties to an agreement honouring the terms they have negotiated and agreed to, including timeframes for compliance.
- 71 Employers should honour the timeframes bargained for, to uphold the integrity of collective bargaining.
- 72 If employers could defer compliance with bargained-for obligations without consequence, the incentive for employees and their representatives to negotiate such terms would be diminished, and confidence in the bargaining system would be undermined.
- 73 The respondent submits that the \$125,967.69 it paid to employees and its participation in these proceedings, serve as adequate general deterrence. I do not accept this submission. The financial detriment was an incidental consequence of the delay; not a sanction for non-compliance. Other employers in similar circumstances may not face the same financial consequences. A court-imposed penalty sends a clearer and more consistent signal than a variable financial by-product of delay.
- 74 I also accept the CFMEU’s submission that general deterrence requires a penalty sufficient to signal to employers that non-compliance with clear bargained-for obligations attracts consequences, to uphold the integrity of collective bargaining.
- 75 Accordingly, I consider there is a moderate need to impose a penalty to ensure general deterrence and to reinforce the importance of employers honouring bargained-for timeframes in enterprise agreements.

Conclusion

- 76 I accept the respondent’s submissions that *Qube* is distinguishable. In *Qube*, the respondent had a significant history of prior contraventions, and the affected employee suffered a financial loss through delayed payment. Neither feature is present here. The respondent has no prior contraventions in 27 years of operation, and the affected employees suffered no financial loss. On the contrary, the employees received between \$9,000 and \$23,000 more than they would have received as a result of the delay, with the respondent incurring a financial detriment of \$125,967.69.
- 77 These distinctions warrant a lower penalty than the 12% of the maximum penalty imposed in *Qube*.
- 78 For the preceding reasons, I consider a penalty of 6% of the maximum penalty is appropriate in circumstances where:
- (a) This is the respondent’s first contravention of the FW Act in its 27-year history;
 - (b) No employees suffered any financial loss, and in fact, each employee received more than they would have received had the conversion been effected on time;
 - (c) The respondent has demonstrated contrition and has taken corrective action to prevent future contraventions; and
 - (d) The contravention was not designed to achieve an industrial or financial advantage and arose in the context of a mistaken belief that the CFMEU had agreed to defer compliance.
- 79 The penalty of \$5,634 represents 6% of the maximum penalty of \$93,900. This is toward the lower end of the available range, reflecting the particular circumstances of this case. It is, in my assessment, neither so low as to be perceived as a mere cost of doing business, nor so high as to be disproportionate to a first contravention that caused no financial loss and has been fully remediated.
- 80 I consider a penalty of 6% of the maximum penalty is sufficient to serve the purpose of the civil penalty regime of promoting both specific and general deterrence of future contraventions of the FW Act, while reflecting the particular circumstances of this case.
- 81 Pursuant to s 546(3) of the FW Act, the court may order a pecuniary penalty to be paid to the Commonwealth, a particular organisation or a particular person. The respondent accepted that if a penalty is to be imposed, that it should be paid to the CFMEU. Therefore, I will order the penalty to be paid to the CFMEU.

Orders

- 82 The respondent is ordered to pay a civil penalty of \$5,634.
- 83 The penalty is to be paid to the CFMEU.

C. TSANG

INDUSTRIAL MAGISTRATE

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- ¹ Statement of Agreed Facts [6].
- ² Witness Statement of George Gakis [6]–[8].
- ³ Witness Statement of Kerren Kannikoski: KK-1.
- ⁴ Amended Response [3.c.]; Witness Statement of Kerren Kannikoski [18].
- ⁵ Response [2].
- ⁶ Respondent’s Submissions [16].
- ⁷ As cited in *Construction, Forestry and Maritime Employees Union v Qube Ports Pty Ltd* [2025] FCA 208 [74] (Feutrill J).
- ⁸ Witness Statement of Kerren Kannikoski [6], [8].
- ⁹ Witness Statement of Kerren Kannikoski [10]–[11].
- ¹⁰ *Qube* [55].
- ¹¹ *Qube* [34].
- ¹² Between 1 July 2023 and 6 November 2024, a penalty unit is \$313: s 4AA of the *Crimes Act 1914* (Cth) and *Crimes (Amount of Penalty Unit) Instrument 2023*.
- ¹³ *Pattinson* [19].
- ¹⁴ Section 12 of the FW Act defines ‘approved by the FWC’ as follows: ‘*approved by the FWC*, in relation to an enterprise agreement, means approved by the FWC under section 186 or 189.’
- ¹⁵ Statement of Agreed Facts [3].
- ¹⁶ Statement of Agreed Facts [4.1].
- ¹⁷ Statement of Agreed Facts [6].
- ¹⁸ At [9(o)].
- ¹⁹ Witness Statement of Kerren Kannikoski [9].
- ²⁰ Witness Statement of Kerren Kannikoski [10].
- ²¹ Witness Statement of Kerren Kannikoski [9].
- ²² Witness Statement of George Gakis [6]–[8].
- ²³ Witness Statement of George Gakis [3], [5].
- ²⁴ Witness Statement of Kerren Kannikoski: KK-1.
- ²⁵ Witness Statement of Kerren Kannikoski: KK-2.
- ²⁶ Witness Statement of Kerren Kannikoski [1].
- ²⁷ Witness Statement of Kerren Kannikoski: KK-2.
- ²⁸ Witness Statement of Kerren Kannikoski: KK-2.
- ²⁹ Witness Statement of Kerren Kannikoski: KK-4.
- ³⁰ Witness Statement of Kerren Kannikoski [20].
- ³¹ Witness Statement of Kerren Kannikoski [18].
- ³² Witness Statement of George Gakis [6]–[8].
- ³³ Response [2].
- ³⁴ Witness Statement of Kerren Kannikoski [19], [21].
- ³⁵ Amended Response [3.c.].
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2026 WAIRC 00170

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2026 WAIRC 00170

CORAM : INDUSTRIAL MAGISTRATE R. COSENTINO

HEARD : MONDAY, 16 FEBRUARY 2026, TUESDAY, 17 FEBRUARY 2026

DELIVERED : WEDNESDAY, 25 MARCH 2026

FILE NO. : M 71 OF 2025

BETWEEN : NATALIA SUZANNE EGGETT

CLAIMANT

AND

WESTERN AUSTRALIAN FAMILY VIOLENCE PREVENTION LEGAL SERVICE
 ABORIGINAL CORPORATION (ICN 7333) T/AS ABORIGINAL FAMILY LEGAL
 SERVICES

RESPONDENT

CatchWords	:	INDUSTRIAL LAW (WA) – damaging action under s 97A of the <i>Industrial Relations Act 1979</i> (WA) – claimant stood down pending investigation – whether stand down is damaging action – whether claimant made an employment related inquiry – whether employment related inquiry was a reason for stand down – whether s 97B(2) precludes orders being made where claimant had made workers’ compensation claim – whether s 418 of the <i>Workers Compensation and Injury Management Act 2023</i> (WA) precludes compensation being awarded by the Industrial Magistrates Court – damaging action proven – contravention of s 97A proven – compensation awarded
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Fair Work Act 2009</i> (Cth) <i>Legal Profession Uniform Law Application Act 2022</i> (WA) <i>Workers Compensation and Injury Management Act 2023</i> (WA)
Cases referred to in reasons:	:	<i>Alam v National Australia Bank Ltd</i> [2021] FCAFC 178; (2021) 288 FCR 301 <i>Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)</i> [2013] FCA 525; (2013) 216 FCR 70 <i>Batista v Wells Fargo International Finance (Australia) Pty Ltd (No 2)</i> [2020] FCCA 829 <i>Board of Bendigo Regional Institute of Technical and Further Education v Barclay</i> [2012] HCA 32; (2012) 248 CLR 500 <i>Cigarette & Gift Warehouse Pty Ltd v Whelan</i> [2019] FCAFC 16; (2019) 268 FCR 46 <i>Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)</i> [2012] FCA 697 <i>Cummins South Pacific Pty Ltd v Keenan</i> [2020] FCAFC 204; (2020) 281 FCR 421 <i>Elisha v Vision Australia Ltd</i> [2024] HCA 50; (2024) ALJR 171 <i>Ermel v Dulux Group (Australia) Pty Ltd (No 2)</i> [2015] FCA 17 <i>Haley v Laing O'Rourke Australia Management Services Pty Ltd (No 8)</i> [2024] FedCFamC2G 779 <i>Hughes v East Metropolitan Health Service</i> [2024] WAIRC 982; (2024) 104 WAIG 2560 <i>James Cook University v Ridd</i> [2020] FCAFC 123; (2020) 278 FCR 566 <i>Khiani v Australian Bureau of Statistics</i> [2011] FCAFC 109 <i>Klein v Metropolitan Fire and Emergency Services Board</i> [2012] FCA 1402 <i>Lattouf v Australian Broadcasting Corporation (No 2)</i> [2025] FCA 669; (2025) 341 IR 105 <i>Leggett v Hawkesbury Race Club Limited (No 4)</i> [2022] FCA 622; (2022) 293 FCR 608 <i>Lewis v Australian Capital Territory</i> [2020] HCA 26; (2020) 271 CLR 192 <i>Maritime Union of Australia v Fair Work Ombudsman</i> [2015] FCAFC 120 <i>Murray v The Peninsula School</i> [2015] FCA 447 <i>Paras v Public Service Body Head of the Department of Infrastructure</i> [2006] FCA 622 <i>Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia</i> [1998] HCA 30; (1998) 195 CLR 1 <i>PIA Mortgage Services Pty Ltd v King</i> [2020] FCAFC 15; (2020) 274 FCR 225 <i>Police Federation of Australia v Nixon</i> [2008] FCA 467; (2008) 168 FCR 340 <i>Qantas Airways Ltd v Australian Licensed Aircraft Engineers' Association</i> [2012] FCAFC 63; (2012) 202 FCR 244 <i>Richards v GB & G Nicoletti</i> [2016] WAIRC 00941; (2016) 97 WAIG 117 <i>SBP Employment Solutions Pty Ltd v Smith</i> [2021] FCA 601 <i>Shea v TRUenergy Services Pty Ltd (No 6)</i> [2014] FCA 271, (2014) 242 IR 1 <i>Transport Workers' Union of Australia v Qantas Airways Ltd</i> [2024] FCA 1216; (2024) 334 IR 187 <i>Whelan v Cigarette & Gift Warehouse Pty Ltd</i> [2017] FCA 1534; (2017) 275 IR 285 <i>Wong v National Australia Bank Limited</i> [2021] FCA 671
Result	:	Claim upheld Proceedings adjourned for determination of penalty
Representation:		

Claimant : In person
 Respondent : Mr T. Ledger (of counsel)

REASONS FOR DECISION

- 1 The Western Australian Family Violence Prevention Legal Service Aboriginal Corporation is a not-for-profit Aboriginal Community-Controlled Organisation that provides legal assistance and social support to Aboriginal and Torres Strait Islander people experiencing or at risk of family and domestic violence. It has locations in Perth and several regional Western Australian locations. It trades as Aboriginal Family Legal Services (AFLS).
- 2 The claimant, Ms Natalia Eggett, was employed by AFLS. She commenced working with AFLS in the full-time position of Restricted Solicitor in September 2023.
- 3 On 4 April 2025, Ms Eggett was stood down from her role on full pay pending an investigation into her alleged conduct. The stand down ended on 28 April 2025 with no findings of misconduct made against Ms Eggett.
- 4 Ms Eggett's claim in these proceedings alleges that the stand down was due to her having made an employment-related inquiry during an AFLS lawyers' meeting on 3 April 2024 and/or because she was able to make an employment-related inquiry to the Legal Practice Board. She says that the stand down constituted damaging action under s 97 of the *Industrial Relations Act 1979* (WA) (IR Act), in contravention of s 97A of the IR Act.
- 5 Ms Eggett seeks compensation for loss and injury and for a penalty to be imposed on AFLS.
- 6 AFLS denies that Ms Eggett made an employment-related inquiry within the meaning of that term in s 97A of the IR Act, and that even if she did, such inquiry was not a reason for the stand down. AFLS also denies that the stand down constituted damaging action.
- 7 To succeed in this case, Ms Eggett must demonstrate that AFLS subjected her to 'damaging action' and did so because, or for reasons that included, that she had the ability to, or had the ability to and did make, an employment-related inquiry. There is a statutory presumption in s 97A(2) which means that it is for AFLS to prove that any proven damaging action was not taken because the employee made the employment-related inquiry.

Uncontested Evidence at Trial

- 8 The Court heard evidence from Ms Eggett and Ms Pritika Naini as part of Ms Eggett's case and from Ms Gail Dodd, Ms Vanessa Barlow and Ms Corina Martin in AFLS's case.
- 9 Much of the relevant factual context is uncontroversial.
- 10 Ms Dodd is and was AFLS's Principal Legal Officer.
- 11 Ms Dodd reported to the AFLS's Chief Executive Officer, Ms Martin.
- 12 Ms Barlow is and was AFLS's Human Resources Manager.
- 13 Ms Eggett was employed under a written contract dated 30 August 2023. Its relevant terms include:
 - D. It is a condition of your employment that upon admission you are entitled to practice law in Western Australia at all times during your employment. A failure to maintain a practising certificate will result in your inability to perform any inherent requirements of your position.

...

4.2 In the performance of your duties you must:

- (a) Strictly comply with the *Legal Profession Uniform Law Application Act 2022* and any of the applicable Rules and Regulations made under this Act, including, but not limited to, the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and the *Legal Profession Uniform General Rules 2015*.
- (b) Substantially devote all of your time, attention and skill to the performance of your duties both during normal business hours and at other times as reasonably necessary;
- (c) Perform the role honestly, faithfully, diligently and in a competent and ethical manner;
- (d) Promote the interests of the Organisation and its Business favourably;
- (e) Use your best endeavours to protect and promote the Organisation's reputation;
- (f) Refrain from acting in conflict with the interests of the Organisation;
- (g) Follow lawful and reasonable directions given by the Organisation;
- (h) Not use any Confidential Information gained in the course of employment except for the performance of duties or the promotion of the Organisation's Business;
- (i) Provide any confidential information that the Organisation requests;
- (j) Comply with the fiduciary obligations in clause 15;
- (k) To the best of your knowledge and abilities, perform the duties assigned to you; and
- (l) Perform your duties in compliance with the standards required by the Organisation as set out in Organisation policies and procedures (as amended from time to time).

...

22. Disciplinary Action

- 22.1 The Organisation may initiate disciplinary action against you for unsatisfactory performance or misconduct. The outcome of the disciplinary action may include redeployment, demotion or termination of your employment. The Organisation may reduce or change your duties as a result of disciplinary action taken to demote or redeploy you. The Organisation may also reduce your remuneration to reflect the level to which you are redeployed or demoted.
- 22.2 Disciplinary action undertaken by the Organisation to redeploy or demote you does not terminate the employment or this Agreement.
- 22.3 The Organisation has the right to suspend you from duties, with or without pay, where the Organisation considers it necessary to adequately investigate allegations of misconduct or impropriety against you.

...

24. Practising Certificate

- 24.1 You are required to hold and maintain a practising certificate entitling you to work as a lawyer in Western Australia during your employment with the Organisation.
- 24.2 The Organisation may require you to provide evidence that you hold the above practising certificate.
- 24.3 This is considered an essential requirement of your role. The Organisation reserves the right to terminate your employment without notice in the event that you fail to maintain a legal practising certificate and you are unable to perform the requirements of your role.
- 24.4 You must notify the Organisation in the event that you no longer hold, or are no longer eligible to hold, a practising certificate.
- 24.5 The Organisation will pay your annual practicing certificate fees (paid one (1) year in advance) upon admission.
- 24.6 Compliance with the Continuing Professional Development Rules (CPD) is a condition on practicing certificates. It is your responsibility to ensure that you comply with your CPD obligations. Failure to comply with the requirements may result in your application for renewal of a practising certificate being delayed or refused.
- 24.7 Should you leave the Organisation, prior to the expiration period of the practising certificate, you will be required to reimburse the Organisation for the remaining amount paid for in advance (i.e. an amount to be calculated on a pro rata basis). You authorise the Organisation to deduct any such amount from any money to be paid to you by the Organisation, upon your termination and departure from the Organisation.
- 14 Ms Eggett took a period of parental leave for eight months, returning to work at AFLS on 3 February 2025.
- 15 On her return from parental leave, Ms Eggett shared an office on the first floor with Ms Naini, who was a restricted practitioner. Ms Eggett and Ms Naini both reported to Ms Dodd, whose office was located on the second floor.
- Events of 3 April 2024*
- 16 On the morning of 3 April 2024, Ms Eggett had a distressing and difficult dilemma in relation to one of her clients. She had a conversation with one of her co-workers, Ms Dianne Welsh, about this situation. Ms Welsh was not a lawyer, but a social worker employed by AFLS. Ms Eggett said she spoke with Ms Welsh because she was seeking her support. During the conversation she told Ms Welsh that she needed to speak with Ms Dodd about the situation. She also said something to Ms Welsh along the lines that she did not want to end up before the Legal Practice Board.¹
- 17 This exchange between Ms Eggett and Ms Welsh is referred to in a medical report that Ms Eggett introduced into evidence through her witness statement,² where Ms Eggett describes expressing to Ms Welsh ‘that she had been unable to access legal guidance from her line manager.’³
- 18 Commencing from around 1.30 pm on 3 April 2024, Ms Eggett participated in a monthly **lawyers’ meeting** which was held in person and via Teams. A group of lawyers including Ms Eggett, Ms Dodd, Ms Naini and Ms Kim Axford, attended from AFLS’s Perth boardroom and five lawyers, including Managing Solicitor Amy Bowlay, participated remotely.
- 19 The lawyers’ meeting was described by Ms Eggett as a forum to allow for discussion about legal concerns and matters within the organisation. Ms Dodd described the meeting’s purpose as to get all the regions together, discuss developments, keep in contact and share information. She said it is intended to be an educational experience for the lawyers.
- 20 What happened in the course of the lawyers’ meeting is uncontroversial because it was audio-visually recorded. The recording was tendered into evidence.⁴
- 21 The lawyers’ meeting lasted for about one and a half hours. Ms Dodd chaired it. There was a set agenda, including the introduction of new staff, discussions about law reform, and legal practice issues.
- 22 About an hour into the lawyers’ meeting, Ms Dodd invited contributions from participants on ‘Metro Updates’. After a few moments of silence, Ms Eggett spoke. She raised an issue about Ms Naini’s ability to provide advice to clients and the supervision that was required. A discussion of about 10 minutes’ duration followed, between Ms Dodd, Ms Eggett and Ms Bowlay.
- 23 It is unnecessary to reproduce the discussion in full. The critical parts are Ms Eggett’s contributions to the lawyers’ meeting, as the key issue is whether what she said constitutes an employment-related inquiry. Ms Dodd’s response is relevant only to the extent that it reveals how she regarded Ms Eggett’s conduct. The following is part of the discussion, but includes all of what Ms Eggett said during the discussion:

Ms Eggett: One update, I think, not training for staff that aren’t legal, but I think we need to consider we’ve got [a restricted practitioner] working in our office. A big thing I’ve noticed is that the [Legal] Practice Board here are extremely vigilant. Pritika technically should not be giving clients advice or meeting a client without running any advice by an

unrestricted practitioner. That's a big no-no. So I know where we've got an issue with the way community legal works. The client comes in, they tell you their issue, we speak to them there and then. I know that private practice is a bit different. You might know what the facts are if it's criminal even before, but I think we need to be mindful of reception coming in and Pritika is the only one sitting there. You need to talk to this client and I know she won't stand and she's felt pressured if [human resources] come past, like 'are you working?' It's not about that, we need to know, someone, what's the advice she's going to give? She's [a restricted practitioner]. She can't actually give advice without an unrestricted solicitor. Just so you're not put in that position giving it in areas you've not worked in.

Ms Dodd: Yeah. I'll take it outside of the meeting because I don't think that's [indecipherable]. I'm Pritika's direct supervisor. We've had some discussions around it, so if there are some concerns, just come up and speak with me.

You can, actually, I'm aware of the legal practitioners thing, I'm aware – I've got those copies. You can speak with clients and get instructions. You can then walk away, come and speak with somebody, confirm what you're going to do and go back in.

Ms Eggett: I just noticed when we're really busy, she's under the pump, you're a lawyer, technical –

Ms Dodd: [interrupting Ms Eggett] Well yeah. And look, that's probably something that Metro needs to deal with ... we're aware there's some teething but as I said we'll take it out of this meeting. That's more specific to Metro....got to be aware of it, to change it, but yeah.

Ms Bowlay: ... This is not about Pritika specifically, but for any [restricted practitioner] – anyone who's practicing in the new, in this new space, just to feel comfortable to go to your managing or next senior lawyer, because everything should be getting signed off if you're new, but giving this advice, nothing should go out that hasn't been signed off by your senior. So, just a reminder and not to be afraid because I know were sometimes have, you know, more junior lawyers who are operating by themselves sometimes or not junior, but you know, in the area. So, just making sure that's happening so that advice is across the board and upskilled to the same level.

Ms Eggett: And correct me if I'm wrong, so that Gail's not bothered, it is my understanding the board's provision is just another solicitor that's not restricted anymore can technically sign off and the onus is then on their practice certificate. It's just someone has to be aware.

Ms Dodd: As long as the advice is sound and it comes from somebody with an unrestricted to confirm it. But no, because of our CRC and the way it works, [indecipherable] has to sign every bit of document ... But yes, absolutely right, we are a team.... But when it comes down to signing off that's got to be the PLO that signs off, whether it's me or Ted. You can also have Responsible Persons who can do some of that. But we've also, not only do we have the Legal Practitioners Board, we also have our responsibilities under our CLC risk management guide and our cross-checking and our accreditation as well. So it's across a whole lot of things. ...

Ms Eggett: It is just to protect Pritika. There was a situation where [a human resources] person said 'what's the problem?' It's not actually a problem. I have no question, Pritika is amazing. But you've got [a restricted practitioner] who is required to check advice before seeing a client. You know what advice is given in a practice area she's never practiced in. For her own development she wants to check that advice is correct. It wasn't a case she was refusing to see a client. You can't give advice...

Ms Dodd: It's not – it's not going on with what's being sent out, so I don't know why...

Ms Eggett: Yeah, because like I said we're busy, no one wants to turn a client away.⁵

24 Ms Eggett's tone when speaking at the meeting was firm and forthright, but it was not aggressive or hostile. She did not challenge Ms Dodd in any way. She did not contradict or criticise Ms Dodd. Ms Dodd's tone and demeanour was not hostile either, although she does appear to have been taken by surprise, and to be unprepared for the discussion. She and Ms Eggett speak over each other to a minor extent.

25 Ms Naini's evidence was that she got more clarity about supervision arrangements from the discussion during the lawyers' meeting.⁶

26 As foreshadowed by Ms Dodd during the lawyers' meeting, immediately after the lawyers' meeting, Ms Dodd met with Ms Eggett and Ms Naini, to discuss this topic further (**the second meeting**). Ms Naini gave evidence about what was said during the second meeting. She and Ms Eggett asked Ms Dodd more questions about supervision, and Ms Naini told Ms Dodd that their discussion had given her a bit more clarity.⁷

27 Sometime after the second meeting, Ms Axford and Ms Welsh came to Ms Dodd's office. According to Ms Dodd, they told her that Ms Eggett had been 'making derogatory comments' about Ms Dodd in the office to other staff members. Ms Dodd refers to three statements that Ms Axford and Ms Welsh attributed to Ms Eggett:

- (a) That Ms Dodd was incompetent.
- (b) That Ms Dodd had thrown Ms Eggett under the bus regarding a court matter; and
- (c) Mention of the Legal Practice Board.

28 Ms Dodd asked Ms Axford and Ms Welsh if they would be happy to speak to Human Resources (**HR**) about any concerns they wished to raise.

Events of 4 April 2025

29 The next day, on 4 April 2025, Ms Axford and Ms Welsh told Ms Dodd that they would make a complaint to HR. Ms Dodd invited Ms Barlow to her office, and Ms Axford and Ms Welsh then informed Ms Barlow that they had concerns about things Ms Eggett was saying. According to Ms Barlow, Ms Axford and Ms Welsh told Ms Barlow that 'there was some gossip and

derogatory comments being spread from Ms Eggett regarding Ms Dodd.' Ms Barlow describes the 'details' given to her at that point as outlines of conversations Ms Axford and Ms Welsh had separately had with Ms Eggett on 3 April 2025 where Ms Eggett 'expressed concerns' around Ms Dodd's competency and her decision making. According to Ms Barlow, Ms Dodd also mentioned to her that Ms Eggett 'had raised a query about staff supervision' at the lawyers' meeting.

- 30 Ms Axford, Ms Welsh and Ms Barlow then moved to another room to discuss the matter in Ms Dodd's absence.
- 31 At this point, Ms Barlow had also received information from a third employee about something Ms Eggett has said to that employee, concerning Ms Dodd.
- 32 Ms Dodd rang her manager, Ms Martin, because she was, in Ms Dodd's words, 'overcome with emotion'.
- 33 Although Ms Barlow was, in the meantime, meeting with Ms Axford and Ms Welsh about their complaints, she does not give any greater content to the substance of their complaints than what has previously been outlined.
- 34 Ms Barlow then received a call from Ms Martin, who relayed her call from Ms Dodd. Ms Martin asked Ms Barlow to conduct an investigation. She and Ms Martin jointly decided to stand down Ms Eggett on full pay until the investigation was concluded.
- 35 Ms Eggett was working from home at the time.
- 36 At around 12.30 pm on 4 April 2025 Ms Eggett received a phone call from Ms Barlow advising her that she was stood down effective immediately. I deal with this conversation further at [72] to [74] below.
- 37 Ms Barlow asked Ms Eggett if she could attend Ms Eggett's home to retrieve her work laptop, mobile phone and client files.
- 38 Following the phone call, at about 1.00 pm, Ms Barlow sent Ms Eggett an email attaching a letter which said:

04 April 2025

...

Dear Natalia

Stand Down

I have been made aware of your conduct towards the Principal Legal Officer, Ms Gail Dodd during the meeting held on 03 April 2025 (and other instances preceding this meeting) and the decision has been made to stand you down effective immediately with pay, until further notice, whilst we conduct an investigation into the concerns raised.

Whiles you are stood down, you will continue to accrue annual leave, personal leave and long service leave.

I instruct that you are not to attend the 2025 Family Law Intensive Conference on Saturday 05 April 2025.

I will be in contact with you in due course.

- 39 The letter was signed by Ms Barlow for Ms Martin.
- 40 Ms Barlow then attended Ms Eggett's home to collect her work items.
- The Stand Down Period*
- 41 On Saturday, 5 April 2025 Ms Eggett sent an email to Ms Barlow expressing her concerns about the stand down, her distress, 'about the procedural fairness involved in this matter,' requesting a copy of the Disciplinary Procedure and requesting details of the allegations against her.⁸
- 42 Ms Eggett had no further correspondence or contact directly from AFLS between 5 April 2025 and Monday, 28 April 2025.
- 43 Ms Eggett proceeded on pre-planned annual leave on 14 April 2025.
- 44 The Easter public holidays occurred between 18 April 2025 and 21 April 2025.
- 45 The Anzac Day public holiday was on Friday 25 April 2025.
- 46 Ms Eggett engaged solicitors to act for her. On 10 April 2025 her solicitors wrote to AFLS seeking details of the allegations made against Ms Eggett and the basis for her being stood down. In a letter in response dated 28 April 2025, AFLS repeated that the stand down came about because of the lawyers' meeting:

AFLS was made aware of Natalia's concerns towards the Principal Legal Officer, Ms Gail Dodd during the meeting held on 03 April 2025 and concur this was not the only factor taken into account with the decision to stand Natalia down.

On 4 April 2025 AFLS, Human Resources became aware other employees had raised concerns with alleged disparaging comments made by Natalia to other employees regarding Ms Gail Dodd, including a comment about reporting her to the Legal Practitioners Board (which is not a decision that should be made by Natalia) and other professional decisions made by Ms Dodd as well as advising another employee that Ms Dodd deems this employee 'incompetent'.

Due to the seriousness of the allegations concerns raised a decision was made to stand Natalia down effective immediately with pay, until further notice, whilst we conducted an investigation into the concerns raised to ensure proper processes and policies were followed.⁹

- 47 By that same letter, the stand down was revoked although the letter also implicitly accepts that there was a valid basis for the employees to have raised concerns, despite the fact that no allegations had been put to Ms Eggett for her response:

During this period, we have consulted with other employees regarding those concerns raised, of which staff have stood by what they have alleged. We note at no time has Natalia raised any concerns with Ms Dodd the [Chief Executive Officer] and/or Human Resources, which would have been the correct process for Natalia to raise any concerns she had.¹⁰

- 48 AFLS proposed that there be a mediation and/or informal discussions for Ms Eggett to return to work and ensure a 'professional working relationship' going forward.¹¹ It did not exonerate Ms Eggett.

Workers Compensation Claim and End of Employment with AFLS

49 On 2 May 2025 Ms Barlow sent Ms Eggett's lawyer an email confirming that the stand down direction had been revoked, but stating:

The investigation conducted highlights that there are some areas of communication between Ms Eggett and Mrs Gail Dodd that need to be resolved and Mrs Dodd is Ms Eggett's Line Manager. We felt the best way to do this would be with the assistance of a third party mediator.¹²

50 I note that at no time prior to this point was any allegation put to Ms Eggett that AFLS had concerns about her communications with Ms Dodd. None of the evidence, including Ms Dodd's own evidence, indicates there was any basis for concerns about Ms Eggett's communications with Ms Dodd.

51 Ms Eggett had not been invited to participate in any investigation. No allegations had been put to her, and her input had not been sought. In cross-examination, Ms Barlow confirmed that she formed the view expressed in this letter from her discussions with other employees (without naming Ms Dodd) and without having sought any response or explanation from Ms Eggett.

52 Ms Eggett did not return to the workplace. On 2 May 2025, she lodged a claim for workers compensation benefits, in respect of the events that occurred on 4 April 2025. The claim was accepted and weekly incapacity payments were made to her until about July 2025.

53 On 3 June 2025 AFLS wrote to Ms Eggett 'to respond to various questions you have raised and clarify any confusion our prior correspondence may have caused.' The 3 June 2025 letter states that:

- (a) During the investigation into reports received to the effect that Ms Eggett had made disparaging comments to AFLS employees about Ms Dodd, it became apparent that the 'concerns raised' likely stemmed from 'possible misunderstandings between you and Ms Dodd';
- (b) AFLS therefore decided not to continue the stand down and not to proceed with a formal investigation;
- (c) There have been no findings of misconduct against Ms Eggett;
- (d) It was identified that the conduct complained of related to communication between Ms Dodd and Ms Eggett including, but not limited to, conversations and differing views about the supervision of restricted practitioners;
- (e) AFLS proposed mediation between Ms Dodd and Ms Eggett; and
- (f) Ms Eggett was asked to confirm she would meet with an external mediator together with Ms Dodd.¹³

54 In the meantime, Ms Eggett was referred by the workers' compensation insurer to be reviewed by Dr Andrew Jackson, Consultant Psychiatrist. He reported on 24 June 2025 that Ms Eggett:

- (a) suffered a sudden and acute anxiety response to the stand down on 4 April 2025;
- (b) had no previous psychiatric history;
- (c) was diagnosed as suffering Adjustment Disorder with Anxiety; and
- (d) had been engaging in treatment with a psychologist and had commenced medication prescribed by her general practitioner.¹⁴

55 Dr Jackson opined that Ms Eggett's employment with AFLS had contributed to a significant degree to the diagnosis; that she would not have suffered her current symptoms if not for the events of 4 April 2025; that Ms Eggett would continue to require treatment for six months, and that although her condition had improved over the last two weeks, she was not fit to return to work at the AFLS, although she had regained capacity to return to work as a lawyer on a full-time basis in other workplaces.

56 On 27 June 2025, Ms Eggett resigned from her employment with the AFLS.

57 Ms Eggett quickly obtained alternative employment as a lawyer in the private sector.

58 On 30 August 2025 Ms Eggett's Clinical Psychologist, Christian Hetebry reported to the workers' compensation insurer that:

- (a) Ms Eggett had been receiving psychological therapy in response to mental health concerns that arose out of conflict with the AFLS;
- (b) Ms Eggett's primary symptoms were worry, physical tension, sleeping difficulty, reduced motivation, feeling distant from her family and generally low mood;
- (c) As at 22 August 2025 Ms Eggett was still experiencing significant distress. Her anxiety and depression had been exacerbated by 'her legal process with her former employer';
- (d) The severity of her symptoms had not changed from May 2025;
- (e) Her level of depression and anxiety was in the moderate range, but her level of stress was in the severe range; and
- (f) Six further sessions of therapy were recommended.¹⁵

59 Ms Eggett described her symptoms including that stress factors at home and at work are heightened; she has emotional reactions to simple tasks; she wakes up irritable most days; finds herself in a state of fight or flight; wanting to avoid social interactions, and generally feeling fatigued. She has chosen not to work full-time because she is exhausted by lunch time due to a lack of sleep. She is also concerned by the reputational damage the stand down caused her.

Contested Evidence: Reasons for the Stand Down

60 The reasons why AFLS suspended Ms Eggett and initiated the investigation are contested. Ms Eggett says I should find that her actions in raising the supervision topic during the lawyers' meeting was a reason for the stand down. AFLS denies this was

the reason, as it says the relevant decision-makers had no knowledge of any complaint being raised against Ms Eggett concerning her conduct at the lawyers' meeting. It says that the reason for the stand down was because it had become aware of complaints about Ms Eggett disparaging Ms Dodd to other employees outside the lawyers' meeting.

- 61 Ms Dodd's evidence was that while she was surprised that Ms Eggett raised the restricted practitioner issue in the monthly meeting, she was not concerned by it, although she did want to get to the bottom of what concerns were held. She said that she thought the matter had been addressed and put to bed after she had discussed it privately with Ms Eggett and Ms Naini during the second meeting.
- 62 Ms Dodd did not refer to having mentioned anything to Ms Barlow about the lawyers' meeting. She did not herself suggest that the matters raised by Ms Eggett in the lawyers' meeting, or the way she raised them, was inappropriate in any way.
- 63 Ms Dodd was not subsequently involved in the matter, which was then handled by Ms Martin and Ms Barlow. Ms Dodd was not a relevant decision-maker in respect to the stand down.
- 64 Ms Barlow says the decision to stand down Ms Eggett was made by her and Ms Martin, despite the fact that she had limited knowledge of the specific allegations against Ms Eggett at that time. She considered suspension was warranted because of the potential impact of the conduct on other staff, and the possibility of it sewing further disharmony in the workplace.
- 65 Ms Martin's evidence was that during the phone call Ms Dodd made to her on 4 April 2025, Ms Dodd was 'highly emotional' and was in tears.¹⁶ Ms Dodd told her that two employees had complained that Ms Eggett was publicly disparaging her.
- 66 Ms Martin then contacted Ms Barlow for further details. What she gleaned from Ms Barlow was that 'there had been some complaints about Ms Eggett' from two employees, which were affecting other staff and making staff members uncomfortable.¹⁷
- 67 Ms Martin makes no reference in her evidence to the lawyers' meeting.
- 68 At the time that she decided it was appropriate to suspend Ms Eggett, Ms Martin was not aware that Ms Eggett was in fact working from home.¹⁸
- 69 Ms Martin said in her evidence that at the time of the stand down, her knowledge of the allegations that were to be investigated was limited to Ms Axford and Ms Walsh's complaints that Ms Eggett had been making disparaging comments about Ms Dodd to other staff after the lawyers' meeting.¹⁹
- 70 Ms Martin said her concern was not the substance of what Ms Eggett was saying, but rather the public nature of the comments and their potential to disrupt team cohesion. She mentions in her evidence that comments about the 'Legal Practice Board' was not an actual complaint, so she appears to have been aware that at least part of the complaints concerned Ms Eggett making reference to the Legal Practice Board. She also described Ms Eggett's comments as 'loud' and that they made other staff members uncomfortable.²⁰ Her evidence-in-chief is piece-meal and cannot be the whole truth. She could not have formed views she did form, without receiving more detail about the allegations than what she conveyed in her evidence.
- 71 Further, Ms Martin's evidence as to her knowledge of the allegations is inconsistent with what she said in the stand down letter of 4 April 2025 which refers to being made aware of conduct toward Ms Dodd 'during the meeting held on 03 April 2025 (and other instances preceding this meeting)'. It is also inconsistent with Ms Martin's letter to Ms Eggett's lawyers dated 28 April 2025:
- AFLS was made aware of Natalia's concerns towards the Principal Legal Officer, Ms Gail Dodd during the meeting held on 03 April 2025 and concur this was not the only factor taken into account with the decision to stand Natalia down.²¹
- 72 I expected that the evidence about Ms Barlow's telephone call made to Ms Eggett on 4 April 2025 would be revealing as to what the reasons for the stand down were, given its proximity to the actual decision, and the fact that it involved a conversation between two witnesses. However, the quality of the evidence about this event is lacking. There was little cross-examination on it.
- 73 Ms Barlow's evidence-in-chief is that she told Ms Eggett an investigation would take place into allegations regarding comments Ms Eggett was alleged to have made about Ms Dodd the previous day.²² Ms Eggett's evidence-in-chief was that Ms Barlow referred to 'an allegation of misconduct' towards Ms Dodd 'during a meeting on the afternoon of 3 April 2025.'²³ However, during cross-examination, Ms Eggett resiled from this account, suggesting that Ms Barlow did not specify what the stand down was about, saying only that it would become clear when she receives a foreshadowed letter from AFLS.²⁴
- 74 I make no findings as to what was said during this telephone call as an explanation for the stand down.
- 75 Ms Barlow watched the recording of the lawyers' meeting as part of her investigation into the allegations. She says it was only following her review of the recording that 'it was apparent that the alleged conduct' raised by the other employees happened outside of the meeting.²⁵
- 76 The fact that Ms Barlow thought it was necessary to watch the recording of the lawyers' meeting can only mean that, at the time she commenced the investigation, she thought that the complaints related to Ms Eggett's conduct at the meeting. Had she not had that understanding, there would be no reason for her to view the recording.
- 77 I therefore find that at the time Ms Barlow and Ms Martin were involved in the joint decision to suspend Ms Eggett, both believed that the relevant comments which were being complained about, or at least some of them, were made during the lawyers' meeting. Their evidence to the effect that Ms Eggett's conduct at the lawyers' meeting was not a reason for the stand down decision is unreliable. It is both incomplete and inconsistent with their subsequent conduct and the content of their subsequent correspondence.
- 78 The beliefs that I have found Ms Barlow and Ms Martin had were mistaken ones.

79 The critical point, though, is that Ms Martin and Ms Barlow jointly decided to stand Ms Eggett down because they had received complaints which they believed involved Ms Eggett raising concerns about Ms Dodd or disparaging Ms Dodd during the lawyers' meeting.

The Legislative Framework

80 Section 97A is found in Part 6B of the IR Act, headed 'Protection of Employee Rights'. It is designed to safeguard employees' ability to make an employment-related inquiry or complaint in these terms:

- (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.

81 Section 97 defines 'damaging action.' Relevantly, an employer subjects an employee to damaging action if the employer does one of the following:

- (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).

82 In *Hughes v East Metropolitan Health Service* [2024] WAIRC 982; (2024) 104 WAIG 2560 (*Hughes v EMHS*), 2574 - 2575 [157] - [158], Industrial Magistrate Scaddan observed that these provisions are based on the general protections against adverse action contained in s 340, s 341 and s 342 of the *Fair Work Act* (Cth) (**FWA**) to the extent that those sections deal with the workplace right in s 341(1)(c)(ii). The federal caselaw is therefore helpful in determining the approach to, and applying, s 97A.

83 The correct approach to the protection against damaging action was summarised by her Honour at [213]:

- (a) where an employee alleges an employer has taken or has threatened to take action against them, the employee is required to prove the action taken or threatened to be taken by the employer constitutes damaging action within the meaning of s 97(a) or (b) of the IR Act;
- (b) the employee is also required to establish that they made an employment-related inquiry or complaint which they were able to make (which precipitated the damaging action);
- (c) if the employee proves the action was damaging action and the employee *alleges* that the damaging action was taken for the reason or reasons that include the employee made or was able to make an employment-related inquiry or complaint, the onus shifts to the employer to prove that the employer was not motivated by the *reason alleged*; and
- (d) if the employer does not discharge the onus, the *reason alleged* by the employee stands as proof of the fact that the employer has taken damaging action for that reason alleged (or reasons that include).

(original emphasis)

84 Her Honour observed that there is a lack of complete alignment between the relevant provisions of the FWA and the IR Act, because of how the rebuttable presumption is expressed in s 97A(2). I would add that s 97A(1) only expressly refers to the employee being 'able to make' an employment-related complaint or inquiry, whereas the concept of a workplace right in s 340 and s 341 of the FWA involves not only having the workplace right, but also, exercising or not exercising the workplace right, and proposing or proposing not to, exercise the workplace right.

85 There is a further inconsistency between s 97A(1) which refers only to being '*able to make*' an employment-related complaint or inquiry, and s 97A(2) in which the rebuttable presumption is said to apply to disproving damaging action was taken because the employee *made* the inquiry or complaint, or *proposed* to make the inquiry or complaint. Section 97A may therefore have a narrower scope of application than s 340(1)(a) as it concerns the workplace right in s 341(1)(c).

86 The parties did not address the correct construction of s 97A(1) in their submissions. Both proceeded on the understanding that s 97A(1) prohibited damaging action for a reason, or reasons that include, that an employee has the ability to make an employment-related inquiry or complaint, but also prohibits damaging action for a reason, or reasons that include, that an employee exercised that right, provided it was also an employment-related inquiry or complaint that the employee was able to make.

87 This must be correct, given the terms of s 97A(2).

88 Accordingly, I will apply the Full Federal Court's summary of the settled principles in *Alam v National Australia Bank Ltd* [2021] FCAFC 178; (2021) 288 FCR 301 (*Alam*), 306 - 308 [14], as follows:

- (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;

- (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. 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.
- (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.
- (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.
- (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.
- (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.
- (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, 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. 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.
- (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.
- (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. Nor does the fact that the adverse action has some association with a matter supporting a proscribed reason; 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.

(citations omitted)

89 Section 97A is a civil penalty provision for the purpose of s 83E of the IR Act.²⁶ Under s 83E, the Industrial Magistrates Court (IMC) may make an order imposing a pecuniary penalty on a person if the person contravenes a civil penalty provision.

Was Ms Eggett Subject to Damaging Action?

90 To succeed in her claim, Ms Eggett must first establish that a form of damaging action took place.²⁷

91 The damaging action Ms Eggett relies on is being stood down on 4 April 2025.

92 AFLS says that the stand down was not damaging action because Ms Eggett’s position was not altered to her disadvantage.

93 For the purposes of s 342 of the FWA it has been held that an employer:

- (1) ‘[injures an] employee in his or her employment’ if it subjects him or her to legally compensable injury; and
- (2) ‘alters the position of [an] employee to the employee’s prejudice’ if, by its conduct, it visits any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.²⁸

94 An alteration to the position of an employee will be relevantly prejudicial if it visits adverse consequences that are real and substantial, rather than merely possible or hypothetical.²⁹

95 In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525; (2013) 216 FCR 70 (*Visy*), an employee who was also a union delegate and a health and safety representative, was suspended by the employer in order for the employer to conduct an investigation concerning the employee’s conduct. The relevant conduct occurred in the course of a dispute between the employee and the employer after the employee tagged out-of-service forklifts in the factory which he considered were unsafe as their reversing beepers were defective. In the proceedings, the Union alleged that each investigation itself, the suspension, and a resulting written warning constituted adverse action. The employer denied any of this conduct amounted to adverse action.

96 Murphy J found that in *Visy* at [110], the employee’s suspension was adverse action, referring to the observations of Ryan J in *Police Federation of Australia v Nixon* [2008] FCA 467; (2008) 168 FCR 340 that the term ‘alteration’ required ‘substantive change,’ and that ‘suspension from duties’ constituted such substantive change.

97 At [114] - [115] Murphy J said:

In my view the removal of an employee from their employment against his or her will, even temporarily, will usually be adverse to their interests. To say otherwise would be to deny the benefit one gains from the successful pursuit of activity in a field of expertise. The observation that active employment is a source of more than simply financial benefit is neither new, nor should it be considered controversial.

I consider that the suspension resulted in a deterioration in the advantages otherwise enjoyed by [the applicant] in [their] employment and constitutes adverse action.

(citations omitted)

98 This reasoning was applied by Kendall J in *Batista v Wells Fargo International Finance (Australia) Pty Ltd (No 2)* [2020] FCCA 829 [102] - [104] notwithstanding that the employer had a right to suspend the employee and that the employee continued on full pay and by Murphy J in *Murray v The Peninsula School* [2015] FCA 447 [19].

99 AFLS argues that this case is distinguishable from *Visy* because:

- (a) there was no written warning issued against the Claimant (as there was in *Visy*);
- (b) in *Visy*, the employee was acting in their capacity as a member and a delegate of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, and also the elected health and safety representative under the *Occupational Health and Safety Act 2004* (Vic);
- (c) in *Visy*, the employee was exercising a workplace right when they tagged the relevant equipment for a safety issue; and
- (d) in *Visy*, there was no separate misconduct as the primary reason for the suspension.

100 None of these points are pertinent to the reason why suspension from employment has been held to be adverse action, namely, the widespread acceptance of the social reality that employment is associated with benefits to employees other than remuneration, including identity and self-esteem.³⁰

101 I accept AFLS's submission that a stand down or suspension will not in every case amount to damaging action. However, in Ms Eggett's case the stand down is damaging action. Ms Eggett was deprived of the ability to fulfil her role and duties, was denied the opportunity to participate in the Family Law Intensive Conference which she had previously been approved to attend and was subject to the embarrassment of her unexplained absence from the workplace.

When Does an Employee Possess an Ability to Make an Employment-Related Inquiry?

102 In *PIA Mortgage Services Pty Ltd v King* [2020] FCAFC 15, (2020) 274 FCR 225 (*PIA*), 252 - 253 [134] - [139] Snaden J made the following relevant observations about s 341(1)(c)(ii) of the FWA:

In order that the making of a complaint or inquiry might amount to the exercise of a workplace right of the sort to which s 341(1)(c)(ii) of the [FWA] refers, it must pertain, as a matter of substance, to its maker's employment. That being so, it is necessary to consider whether either or both of the [complaints that were made in that case] were of that nature: that is, were they complaints or inquiries that pertained to Mr King's employment?

That requires analysis at two levels: first, did each of the [relevant complaints] qualify as a 'complaint or inquiry'; and, second, did each arise 'in relation to [Mr King's] employment'?

The *Macquarie Dictionary* relevantly defines 'complaint' and 'inquiry' respectively as follows:

complaint

...

1. an expression of grief, regret, pain, censure, resentment, or discontent; lament; fault-finding.
2. a cause of grief, discontent, lamentation, etc

...

inquiry

...

2. the act of inquiring, or seeking information by questioning; interrogation.
3. a question; query.

...

Whether a complaint or inquiry qualifies as a complaint or inquiry made 'in relation to... employment' depends upon the subject matter that is sought to be agitated. It is not necessary that a complaint be directly related to its maker's employment: *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697, [64] (Katzmann J); *Shea*, [631] (Dodds-Streeton J). In *Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456; (2014) 243 IR 468, 476 [42] (Bromberg J), this court determined that the connection between a complaint and employment would likely exist in circumstances '[w]here the subject matter of the complaint raises an issue with potential implications for the complainant's employment'.

That reasoning has been followed (see, for example, *Milardovic v Vemco Services Pty Ltd (Administrators Appointed)* [2016] FCA 19, [68]-[69] (Mortimer J)) although not universally without qualification (see, for example, *The Environmental Group Ltd v Bowd* [2019] FCA 951, [126] (Steward J)).

103 In *Wong v National Australia Bank Limited* [2021] FCA 671 [66], Snaden J also said:

Although I dissented in the outcome in *[PIA]*, [the above] observations were not obviously controversial. The majority (Rangiah and Charlesworth JJ) did not address the conceptual boundaries of 'complaints' or 'inquiries'; their Honours instead focused upon the primary issue in that case, namely whether the complaints that had been made were complaints that the former employee was 'able to make'.

104 It is only if the complaint or inquiry is one the employee is 'able to make' that the employee is afforded protection under s 97A. This means that not all inquiries that an employee makes in connection with employment are protected.

- 105 Exactly how the words ‘is able to’ limits the operation of the relevant protection is a matter of some controversy. The leading authorities are *Cigarette & Gift Warehouse Pty Ltd v Whelan* [2019] FCAFC 16; (2019) 268 FCR 46 (*Whelan*), 55 - 56 and *PIA*.
- 106 In *Whelan*, at [28], a unanimous Full Federal Court (Greenwood, Logan and Derrington JJ) endorsed as ‘unremarkable and correct’ the approach of Collier J at first instance.³¹ There, her Honour stated the principles as follows at [33] - [34]:
- Section [341(1)(c)(ii)] defines a workplace right in an employee as being the entitlement of the employee to make a complaint or inquiry in relation to his employment. In such cases as *Shea v TRUenergy Services Pty Ltd (No 6)* [2014] FCA 271; (2014) 242 IR 1 (*Shea*), *Murrihy v Belezny.com.au Pty Ltd* [2013] FCA 908; (2013) 238 IR 307 and *Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456; (2014) 243 IR 468 (*Walsh*), [s 341(1)(c)(ii)] was interpreted broadly. In *Walsh* [41], Bromberg J observed that the requirement in [s 341(1)(c)(ii)] that a complaint or inquiry by the employee be ‘in relation to’ his employment means that there must be a relationship between the subject matter of the complaint and the complainant’s employment. As Dodds-Streeon J further observed in *Shea*, a complaint that an employee is able to make in relation to his or her employment is not at large, but must be founded on a source of entitlement, whether instrumental or otherwise.
- As a general proposition, a complaint or inquiry to the employer by an employee in relation to his or her entitlement to an incentive bonus, or the failure of the employer to prepare an incentive bonus plan, where the terms of employment of that employee make provision for payment of such bonuses or the preparation of such plans, would fall within the scope of [s 341(1)(c)(iii)] of the [FWA]. (emphasis added)
- 107 The Full Federal Court in *Alam* at [75] observed that in so reasoning, Collier J treated a complaint or inquiry to an employer about an entitlement for which the contract of employment makes provision as within the scope of s 341(1)(c). It is not a requirement that the right or entitlement to make a complaint or inquiry be itself found in the employment contract. The Full Federal Court also noted that her Honour ‘did not purport to state exhaustively the kinds of complaints or inquiries which would be within, and without, s 341(1)(c).’
- 108 In *PIA*, the majority said at [26] - [27]:
- An employee is ‘able to complain’ to his or her employer within s 341(1)(c)(ii) of the [FWA] concerning the employer’s alleged breach of the contract of employment. The source of that ability is the general law governing contracts of employment. Further, an employee is ‘able to complain’ to the employer or to a relevant authority of their employer’s alleged contravention of a statutory provision relating to the employment. That ability derives from at least the statutory provision alleged to have been contravened. The statute need not expressly or directly confer a right to bring proceedings or to complain to an authority. As Dodds-Streeon J held in *Shea* at [29], the complaint must be made genuinely, in good faith and for a proper purpose.
- The variety of circumstances arising in employment law cases is notoriously wide. Nothing we have said is intended to foreclose argument as to other circumstances that may give rise to an ability to make a complaint. Nor is it intended to foreclose argument about any limitation as to whom a complaint may be made for the purposes of s 341(1)(c)(ii) of the [FWA].
- 109 There are some differences in the statements of the principles as between *Whelan* and the majority in *PIA*, but, as the Full Federal Court noted in *Alam*, at [94] and [98], any difference in the application of the two approaches is unlikely to be significant.
- 110 In *Cummins South Pacific Pty Ltd v Keenan* [2020] FCAFC 204; (2020) 281 FCR 421 (*Cummins*), 435 - 441 [45] - [67], Bromberg J, with whom Mortimer J agreed, described the reasoning in *PIA*, *Whelan* and *Shea* as ‘plainly wrong’. His Honour expressed the view that any employment-related complaint, whether or not made as an exercise of some right or entitlement, would suffice for the purpose of s 341(1)(c)(ii) of the FWA, as long as the employee is able to make the complaint, in the sense of being capable of communicating it. His Honour’s observations were obiter.
- 111 In *SBP Employment Solutions Pty Ltd v Smith* [2021] FCA 601 [134] - [142], Rangiah J contended with the uncertainty as to the true construction of the words ‘is able to’ in s 341(1)(c)(ii) of the FWA and Bromberg J’s reasoning. His Honour’s persuasive analysis concluded against the view of the majority in *Cummins*.
- 112 The above authorities were predominantly concerned with when a complaint falls within the scope of s 341(1)(c)(ii) of the FWA, rather than when an inquiry is within its scope. Nevertheless, the principles apply equally to inquiries and complaints.³²
- Did Ms Eggett Possess an Ability to Make an Employment-Related Inquiry?**
- 113 Ms Eggett submits that she had an ability to make inquiries about supervised legal practice sourced in her employment contract. She notes that her employment contract requires that she maintain her practice certificate (Recital D) and strictly comply with the *Legal Profession Uniform Law Application Act 2022* (WA) and any Rules and Regulations made under it (**Uniform Law**) (clause 4.2(a)).
- 114 I agree. While it was not articulated precisely in this way by Ms Eggett, her contractual obligations must mean that there is a reciprocal implied obligation on AFLS not to require Ms Eggett to perform her role in a manner which would contravene the Uniform Law, or, alternatively, that Ms Eggett had an entitlement, sourced in the implied terms of her employment contract, to refuse unlawful directions which might compromise her ability to maintain a practice certificate or cause her to contravene the Uniform Law: see, for example, Riley J, O’Grady P and Sappideen C, *Macken’s Law of Employment* (9th ed, 2022) 5.410.
- 115 Accordingly, Ms Eggett had an ability to make an inquiry of AFLS about matters which would impact on her ability to comply with her obligations under her contract of employment, specifically, her ability to comply with the Uniform Law. A genuine inquiry about that matter, and an inquiry to clarify what AFLS could, and could not, lawfully direct her to perform is an inquiry that is within the scope of s 97A(1).

Did Ms Eggett Exercise Her Ability to Make an Employment-Related Inquiry?

- 116 AFLS did not disagree that there was ‘an inquiry of some sort’ by Ms Eggett at the lawyers’ meeting.³³ Although at first blush Ms Eggett’s conduct would appear to involve the making of general statements, it is an appropriate concession to make, given the described purpose of the lawyers’ meeting as ‘educational’. While Ms Eggett was making general statements as to her understanding of the position, she was implicitly also inviting discussion, feedback or the expression of contrary views. At one point she expressly says ‘correct me if I’m wrong’.³⁴
- 117 Ms Dodd appears to have understood that the discussion involved Ms Eggett making an inquiry, as she described it as involving ‘concerns’.³⁵ According to Ms Barlow, Ms Dodd described the exchange as ‘a query about staff supervision’.³⁶
- 118 However, AFLS says the inquiry was not employment-related in the limited sense described by the authorities because it was not about matters which would impact on Ms Eggett’s obligations or entitlements under her contract of employment. That is because the matters Ms Eggett raised concerned another employee, and the organisation more generally. Ms Eggett had no relevant responsibility or duties with respect to supervising staff.
- 119 Ms Eggett submitted that the matter she raised in the lawyers’ meeting directly related to her role as a solicitor with AFLS and her obligation under her employment contract to comply with the Uniform Law. She pointed in particular to the part of the exchange during the lawyers’ meeting when she referred to her understanding that any unrestricted practitioner could supervise the work of a restricted practitioner, and Ms Dodd’s comments to the effect that only she could sign off on Ms Naini’s advice.³⁷
- 120 Nowhere in the exchange between Ms Eggett and Ms Dodd during the lawyers’ meeting is there any instance where Ms Eggett expressly touches on her contractual obligations or her professional ethical obligations when supervising other employees. Indeed, Ms Eggett appeared to be at pains to say that the issue was not about her and instead that she was raising the issue to protect and assist Ms Naini: ‘It is just to protect Pritika’.³⁸
- 121 However, at one point, Ms Eggett referred to her understanding that any unrestricted practitioner could sign off on a restricted practitioner’s advice, and ‘the onus is then on their practice certificate’.³⁹ Her view, on which she was seeking input, was that if an unrestricted practitioner authorised a restricted practitioner’s advice to a client, the unrestricted practitioner was accountable for that advice and exposed to regulatory sanctions if the advice was in breach of the Uniform Law.
- 122 In the context known to Ms Dodd and most of the other participants in the lawyers’ meeting that Ms Eggett was a relatively inexperienced practitioner, that she had only recently returned from parental leave, shared an office with the only restricted practitioner at AFLS, and that the administration staff had placed pressure on Ms Naini to see new clients, this comment could reasonably be understood to be referring to Ms Eggett’s own position with respect to Ms Naini.
- 123 This snippet of the discussion can therefore be characterised as an employment-related inquiry.
- 124 Accordingly, I am satisfied that Ms Eggett did make an employment-related inquiry in the course of the lawyers’ meeting. Her words were conduct that amounted to seeking information about her role in supervising Ms Naini in the context of her having obligations under her employment contract to follow directions and to do so in a way that preserved her maintenance of her practice certificate.

Was Damaging Action Taken Because of Ms Eggett’s Inquiries and Complaints?

- 125 The reason or reasons for the damaging action, as matters of fact, must be proved. In this regard, the presumption in s 97A(2) comes into play, so that if it is alleged the employer engaged in the damaging action for the prohibited reason, then it is presumed to have acted for that reason unless or until the employer establishes otherwise.
- 126 How an employer might rebut the presumption was considered in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; (2012) 248 CLR 500 at 517 [44] - [45]:
- There is no warrant to be derived from the text of the relevant provisions of the [FWA] for treating the statutory expression ‘because’ in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer’s reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains ‘why was the adverse action taken?’.
- This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker’s evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity. (citations omitted)
- 127 See also *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109 [31].
- 128 The relevant inquiry is whether the decision-maker formed an opinion and, if yes, whether the decision-maker was moved to act as they did as a consequence of the opinion. The Court is not to engage in ‘a broad inquiry as to whether the applicant has been subjected to a procedurally or substantively unfair outcome’.⁴⁰
- 129 At the time they decided to stand down Ms Eggett, neither Ms Barlow nor Ms Martin knew precisely what Ms Eggett said during the lawyers’ meeting. However, as found at [77], they believed the complaints related to Ms Eggett’s conduct during the lawyers’ meeting. Ms Barlow became aware of what Ms Eggett actually said only after she commenced the investigation. When she watched or heard the recording of the lawyers’ meeting, she realised that the complaints about Ms Eggett’s conduct

could not have related to what was said in the lawyers' meeting. Simply, Ms Eggett said nothing in the lawyers' meeting which disparaged or criticised Ms Dodd in any way.

- 130 Ms Barlow believed, based on what she was told by Ms Axford and Ms Welsh, that Ms Eggett had disparaged Ms Dodd to other employees on 3 April 2025. She believed, mistakenly, that this included remarks during the lawyers' meeting.
- 131 This begs the question of how Ms Barlow arrived at the mistaken view that the complaints related to the lawyers' meeting.
- 132 Ms Dodd, Ms Barlow and Ms Martin all refer in their evidence-in-chief to the complaints being about the 'public' nature of the comments attributed to Ms Eggett, although there has never been any suggestion that the comments were made to anyone outside of the AFLS. It was the 'public' nature of the conduct that Ms Martin was concerned about.
- 133 The description of the allegations as having a 'public' element reveals that Ms Barlow and Ms Martin understood the alleged conduct to have occurred in a forum with a wider audience, such as the lawyers' meeting, as opposed to private conversations between co-workers.
- 134 Further, Ms Barlow said that Ms Dodd 'mentioned that Ms Eggett had raised a query about staff supervision' at the lawyers' meeting.⁴¹ It may be that Ms Dodd's mention of the lawyers' meeting to Ms Barlow triggered the assumption that the lawyers' meeting and the complaints were linked.
- 135 Had Ms Eggett made disparaging comments about Ms Dodd during the lawyers' meeting, it could naturally be expected that Ms Dodd would have told Ms Barlow this when referring to the lawyers' meeting. But what Ms Dodd raised was Ms Eggett's query about supervision, not any disparagement or disrespect.
- 136 In a context where other employees are complaining about Ms Eggett's conduct towards Ms Dodd, it is predictable that Ms Barlow would conclude that the complaints related to Ms Eggett's conduct at the lawyers' meeting. Additionally, it must be inferred that Ms Barlow understood Ms Eggett's relevant conduct was related to her query about supervision. There is simply nothing else for Ms Barlow to have hung her hat on, as concerns the lawyers' meeting, to form a view that the complaint warranted Ms Eggett's stand down.
- 137 Ms Barlow offered no plausible alternative explanation for her to have formed the view that Ms Eggett's conduct warranted her being stood down.
- 138 Ms Martin relied on Ms Barlow's judgment as the Human Resources Manager and the person who had spoken directly to the complainants, in forming her decision. In effect, Ms Martin has adopted Ms Barlow's reasons for the stand down decision. Simply, if Ms Eggett had not made her employment-related inquiry, Ms Barlow and Ms Martin would have had no reason to stand Ms Eggett down.
- 139 The AFLS has not discharged the onus on it of establishing that Ms Eggett's employment-related inquiry made during the lawyers' meeting was not a reason for the stand down decision.
- 140 Ms Eggett has therefore established that the stand down was a contravention of s 97A.

What Remedies are Available for a Proven Contravention of s 97A?

- 141 If the Court determines that AFLS has contravened s 97A in respect of Ms Eggett, then it may order AFLS to pay Ms Eggett compensation for any 'loss or injury' suffered 'as a result of the contravention.': s 97B(2).
- 142 Section 97B(5) contains an exception to the Court's power to make the orders in s 97B(2):
- The industrial magistrate's 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.
- 143 Because the suspension was with pay, Ms Eggett did not suffer any loss of wages for the period of the suspension, and, accordingly, she does not claim compensation for loss of wages for that period. Ms Eggett was in receipt of workers compensation benefits including payments for total and partial incapacity, from the time she was certified unfit for work, until she was certified fit for full-time employment. She therefore does not claim compensation for economic loss in the form of loss of wages for this period either.
- 144 In her Originating Claim, Ms Eggett claims a sum for legal fees incurred by her in relation to the misconduct investigation. However, she did not produce any evidence to establish she incurred this expense or suffered loss in the specified amount.
- 145 Ms Eggett seeks compensation for:
- (a) Pain and suffering, humiliation, reputational damage and bullying; and
 - (b) The significant impact of the damaging action on her mental health and her family.

146 Ms Eggett submits that her workers compensation claim does not fall within the ambit of the exception in s 97B(5) because 'I have not initiated legal proceedings in another jurisdiction, under any other written law, seeking relief in relation to the same damaging action' and 'I have not accepted any financial offer to settle my workers' compensation claim.'⁴²

147 AFLS conceded during the hearing that s 97D(5) is not intended to preclude the recovery of compensation for injury, as that would not amount to any double-dipping with workers' compensation benefits. However, it maintains that the effect of s 418 of the *Workers Compensation and Injury Management Act 2023* (WA) (**WCIMA**) is to preclude the award of compensation for psychological injury in these proceedings.

Does s 97B(5) Apply?

148 I have not had the benefit of fulsome submissions in relation to the correct construction of s 97B(5).

149 The section refers to ‘relief in relation to the same damaging action.’ It does not preclude relief for the same ‘loss or injury.’ In other words, the particular categories of ‘relief’ need not be identical to be the subject of the exception, but rather, any relief.

150 Further, it is not only relief in the form of compensation that is precluded by s 97B(5). If the conditions of the sub-section are met, no order under s 97B(2) can be made, including orders for reinstatement or employment. Further, the exception itself contains express exclusions, of which there are only two very specific circumstances: the proceedings ‘for that relief’ being withdrawn or failing for want of jurisdiction.

151 The Explanatory Memorandum to the *Industrial Relations Legislation Amendment Bill 2021* says at [479] - [480]:

However, s 97B(5) prevents the IMC from making an order under s 97B(2) if the employee has applied for relief in relation to the same damaging action (e.g. the same dismissal, or the same refusal to promote or transfer the employee etc.) under another provision of the IR Act or any other written law. The only exception is if the alternative proceedings have been withdrawn or failed for want of jurisdiction, in which case the employee would not have obtained relief or had their application dealt with on the merits. The intent is to prevent an employee from obtaining redress under s 97B(2) if they have already sought relief via another legislative avenue, to avoid ‘double dipping’ or ‘forum shopping’.

For example, an employee could not obtain an order under s 97B(2) if:

- a) the damaging action was dismissal, and the employee had referred an unfair dismissal claim to the Commission under s 29(1)(c) of the IR Act; or
- b) the damaging action was a refusal to appoint the employee to a position, and the employee had lodged a breach of Standard claim with the Public Sector Commission pursuant to the PSM (Breaches of Public Sector Standards) Regulations.

152 The exclusions from the exception in s 97B(5) reflect the section’s purpose of discouraging ‘forum shopping.’

153 Most of the textual indications of the section therefore suggest that the exception is intended to have a broad application. The Explanatory Memorandum also supports a broad construction.

154 On a broad construction, it is not to the point to attempt to distinguish the type of relief claimed in these proceedings, from the relief sought in a workers compensation claim, in order to avoid the operation of s 97B(5). But I do not wish to express a concluded view about the correct construction, given the issue was not fully ventilated before me.

155 Ultimately, I do not consider that Ms Eggett’s worker’s compensation claim meets the criteria of being an application for ‘relief in relation to the same damaging action.’ The WCIMA provides a scheme for employers to compensate workers who suffer injury from their employment. Under s 17 of the WCIMA, an employer is liable for compensation if a worker suffers an injury from employment with the employer. The trigger for an entitlement to claim compensation under s 18 is an ‘injury.’ Injury is defined in s 6:

(1) In this Act —

injury means an injury from employment that is —

- (a) a personal injury by accident; or
 - (b) a disease, or the recurrence, aggravation or acceleration of a pre-existing disease.
- (2) A personal injury by accident is an injury from employment if the injury arises out of or in the course of the employment or while the worker is acting under the employer’s instructions.
- (3) Unless otherwise provided in this Act, a disease, or the recurrence, aggravation or acceleration of a pre-existing disease, is an injury from employment if —
- (a) the disease is contracted, or the recurrence, aggravation or acceleration is suffered, in the course of the employment, whether at or away from the place of employment; and
 - (b) the employment contributed to a significant degree to the contraction of the disease, or the recurrence, aggravation or acceleration of the pre-existing disease.

156 Ms Eggett’s worker’s compensation claim is a claim for the specific kinds of compensation set out in s 18 of the WCIMA, for an injury from employment. The criteria for her entitlement to workers’ compensation are different to the elements of a damaging action claim under s 97A. Section 97A squarely concerns the actions of an employer in contravening the protection of employee rights to make employment-related inquiries and complaints to the employer or another person.

157 On this basis, section 97B(5) does not apply to preclude an order being made under s 97B(2) in these proceedings.

Does s 418 of the WCIMA Preclude the Award of Compensation to Ms Eggett?

158 Section 418 in Part 7, Division 2 of the WCIMA says:

A court must not award damages against a worker’s employer contrary to this Division.

159 ‘Damages’ is defined in s 411:

(1) In this Part —

damages —

- (a) means damages due or payable to, or claimed by, a worker for an injury caused to that worker by the tort of another person; but
- (b) does not include —

- (i) any sum required or authorised to be paid under an award or industrial agreement as those terms are defined in the *Industrial Relations Act 1979* section 7(1); or
 - (ii) any sum payable under a superannuation scheme or any life or other insurance policy; or
 - (iii) any amount paid in respect of costs incurred in connection with legal proceedings;
- 160 The same section defines 'tort' to mean negligence or other tort or breach of statutory duty.
- 161 Section 421, in Part 7, Division 2 sets out threshold requirements for the award of damages, including requirements for having a degree of permanent whole of person impairment of at least 15%, and making an election. It is uncontested that Ms Eggett has not met the requirements of s 421.
- 162 The starting point for consideration of this issue is the nature of the compensation the IMC can order an employer to pay an employee under s 97B. The compensation must be 'for any loss or injury suffered as a result of the contravention.'⁴³ I note that s 545(2)(b) of the FWA refers to compensation for 'loss that a person has suffered because of the contravention.' Section 545 does not refer expressly to injury, although it has been held that compensation under s 545(2)(b) of the FWA extends to damage to feelings and loss of enjoyment of life.⁴⁴
- 163 'Injury' is not defined in Part 6B nor in s 7 of the IR Act. However, it is used in other provisions of the IR Act, namely s 23A which deals with the Western Australian Industrial Relations Commission's powers in unfair dismissal claims, and in s 36AL and 51BZ. 'Injury' is also referred to in s 51BZB, s 51BZC, s 51HA, s 97G and s 97YG in relation to remedies the IMC can impose for certain contraventions of the IR Act.
- 164 The meaning of 'injury' and the correct approach to assessing compensation for injury as it concerns unfair dismissal claims and s 23A was discussed in *Richards v GB & G Nicoletti* [2016] WAIRC 00941; (2016) 97 WAIG 117. It is worth reproducing her Honour Smith AP's observations at [37] - [39] and [42] - [44]:

The leading statement of principles to be applied by the Commission when considering whether to make an award of compensation for injury is set out in the following passage of the joint judgment of Coleman CC and Smith C in [*AWI Administration Services Pty Ltd v Birnie* [2001] WAIRC 04015; (2001) 81 WAIG 2849] wherein it was said at [200]:

It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299). The injury may be manifested by the detrimental impact on the physical or emotional wellbeing of the person whose services were terminated. However dismissals will impact to varying degrees on individuals and while the need for professional care may be evidence of that impact, this will not necessarily always be the case in order to establish the causal link between the termination of employment and the injury. While it is necessary to exercise a degree of caution to ensure that compensation is confined to reasonable limits (*Timms v Phillips Engineering Pty Ltd* (1997) 70 WAIG 1318 and *Burazin v Blacktown City Guardian Pty Ltd* 142 ALR 144) that is not to say that every claim for injury necessarily involves expert evidence of emotional trauma.

- 1 The circumstances in which the dismissal from employment has been effected may be sufficient to demonstrate the injury which is experienced. Situations where an employee is locked out of the workplace or is escorted from the premises, or the termination has been conducted in full view of other staff are examples of callous treatment justifying recognition for compensation for injury (*Lynham v Lataga Pty Ltd* (2001) 81 WAIG 986).
- 2 However, the Commission is not able to adjust the measure of compensation according to the opinion of the employer or employee or of the conduct of the respective parties (*Capewell v Cadbury Schweppes Australia Limited* (op cit)).

From these principles emerges a requirement to assess the gravity or scale of the injury. In particular, when considering whether to make an award of compensation for injury, the following matters should be considered:

- (a) Whether the behaviour by or on behalf of an employer by the termination of employment has caused injury to the employee.
- (b) If the behaviour in question has caused an injury, the gravity of the behaviour of the employer.
- (c) The level of effect or impact of the behaviour on the employee and whether the effect or impact goes beyond a level of distress that is caused by almost all employer initiated terminations of employment.

This approach was implicitly approved of by the Full Bench in *Anthony & Sons Pty Ltd v Fowler* [2005] WAIRC 01744; (2005) 85 WAIG 1899.

...

The approach of the Full Bench in *Anthony & Sons Pty Ltd v Fowler* was applied by the Full Bench in *Bone Densitometry Australia Pty Ltd v Lenny* [2005] WAIRC 02081; (2005) 85 WAIG 2981. In that matter, Sharkey P, with whom Scott and Mayman CC agreed, after applying the principles approved of in *Birnie*, said [124]-[126]:

'Injury', as the Commissioner found, embraces the actual harm done to an employee by an unfair dismissal and 'comprehends all manner of wrongs' including being treated with callousness. The Commissioner correctly observed, too, that whilst injury may be manifested by the detrimental impact on the physical or emotional

wellbeing (or, for that matter, the reputation) of an employee unfairly dismissed, dismissals will affect individuals to varying degrees and, I might add, not at all.

The Commissioner observed, too, that, while the need for professional care may be evidence of this impact, this will not always be necessary to establish the causal link between the termination of employment and the injury. Not every claim for injury, as the Commissioner correctly observed, necessarily involves or should involve expert evidence of emotional trauma. (The Commissioner referred, too, to *Timms v Phillips Engineering Pty Ltd* (1998) 78 WAIG 4460 and *Burazin v Blacktown City Guardian Pty Ltd* (FC) (op cit).)

The Commissioner went on to observe, too, and correctly, that the circumstances in which the dismissal from employment had been effected may be sufficient to cause the injury experienced. Examples were given of locking an employee out of the workplace or escorting an employee from premises in full view of staff, particularly, I might add, if this were unjustifiably done by a police officer or uniformed security officer (see the discussion of these matters in *Lynham v Lataga Pty Ltd* (FB) (op cit).)

His Honour in *Bone Densitometry Australia Pty Ltd* also applied the principle that an employer is bound to take an employee's reaction to a dismissal as it found him or her. He said [133]:

Ms Lenny clearly did not suffer shock and humiliation because of her personality. She, first of all, suffered it as a result of, and caused by, the unfair dismissal and the surrounding treatment of her, effected by Professor Will. That was entirely clear. That she might have suffered greater injury than someone else would, or any injury, was not established at all. Even if it were, it is trite to observe that BDA, as the respondent, was bound to take Ms Lenny as it found her. There was also unshaken evidence and uncontradicted evidence of her being bullied and exploited by Professor Will in the past, which might reasonably be found, if it were necessary, which it was not, to have caused a greater susceptibility to hurt and humiliation when the dismissal did come.

Finally, his Honour found [136]:

In this case, and the authorities which I have cited above are clear, one must look at the nature of the unfair dismissal and other evidence to determine whether the unfair dismissal caused any injury alleged to have been caused by it. One has to look at the alleged injurious act and assess the conduct in that light when it has been alleged to be injurious.⁴⁵

165 'Injury', for the purpose of the IR Act, then, is not the same as 'injury' under s 6 of the WCIMA. 'Injury' under the WCIMA, for the purposes of this case, is limited to psychiatric injury. 'Injury' under the IR Act means the impact or actual harm done to an employee by the relevant act of the employer, over and above the 'normal' or inevitable distress associated with the employer's act, and includes shock, distress, hurt and humiliation, and reputational harm.

166 Further, s 418 of the WCIMA is addressed to damages that might be awarded at common law. An order made under s 97B is not made at common law, but is rather a form of statutory compensation for loss and injury caused by a contravention of s 97A, or the statutory consequence of a contravention of s 97A causing loss. It does not turn on establishing a claim in negligence or another tort. While common law principles might be of assistance in evaluating the quantum of compensation under s 97B, that does not make the compensation common law damages.⁴⁶

167 The IMC is not precluded from awarding compensation to Ms Eggett by reason of her worker's compensation claim and the effect of s 418 of the WCIMA.

Assessment of Compensation for Injury

168 My foregoing conclusions mean that I must decide whether to order AFLS to pay compensation for injury Ms Eggett has suffered as a result of its contravention of s 97A, and if so, in what amount.

169 Ms Eggett submits that the stand down caused her injury in the form of:

- (a) Adjustment Disorder;
- (b) Distress to her and her family; and
- (c) Loss of enjoyment of life, pain and suffering, and angst.

170 The words of s 97B(2)(c) denote a causal connection between the injury a person claims to have suffered, and the conduct that constitutes the contravention of s 97A. In *Maritime Union of Australia v Fair Work Ombudsman* [2015] FCAFC 120 the Full Federal Court said of similar provisions in the FWA:

The task of the primary judge, having found the relevant contraventions, was to assess the compensation, if any, that was causally related to those contraventions. That involved not an examination of what did happen, but an assessment of what would or might have occurred, but which could no longer occur (because of the contraventions). Subject to any statutory requirement to the contrary, questions of the future or hypothetical effects of a wrong in determining compensation or damages are not to be decided on the balance of probability that they would or would not have happened. Rather, the assessment is by way of the degree of probability of the effects – the probabilities and the possibilities: *Malec v JC Hutton Pty Ltd* [1990] HCA 20; 169 CLR 625 at 642-643; *Sellars v Adelaide Petroleum NL* [1994] HCA 4; 179 CLR 332 at 352-356. The above proposition must be qualified by the recognition that, where the fact of injury or loss is part of the cause of action or wrong, it must be proved on the balance of probability. Compensation is generally awarded for loss or damage actually caused or incurred, not potential or likely damage: *Tabet v Gett* [2010] HCA 12; 240 CLR 537; *Sellars* at 348; *Wardley Australia Ltd v Western Australia* [1992] HCA 55; 175 CLR 514 at 526; that is equally so here under ss 807(1)(b) and 545(2)(b).

171 In *Haley v Laing O'Rourke Australia Management Services Pty Ltd (No 8)* [2024] FedCFamC2G 779 (*Haley*) [152], Manousaridis J said that the test for causation for the purpose of s 545(2)(a) of the FWA is to be determined, at least in most

cases, by applying the ‘but for’ test or the ‘counterfactual test’ as explained by Edelman J in *Lewis v Australian Capital Territory* [2020] HCA 26; (2020) 271 CLR 192. The test requires that the contravening conduct be removed from the facts as found, to then ask whether the loss or injury would have occurred but for the contravening conduct.

- 172 Finally, I refer to the observations made by Lee J in *Transport Workers' Union of Australia v Qantas Airways Ltd* [2024] FCA 1216; (2024) 334 IR 187, 240 [208]:

As is well recognised, the assessment of compensation for emotional distress or the like is inherently imprecise and non-scientific ([*Fair Work Ombudsman v Maritime Union of Australia (No 2)* [2015] FCA 814; (2015) 252 IR 101] (at 113 [68])) due to the fact that the Court is required to place a monetary value on something that is not easily able to be financially quantified: *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82; (2014) 223 FCR 334 (at 359 [94] per Kenny J). In this sense, it has been observed that it is impossible to precisely translate such non-economic loss into a monetary sum: *O'Brien v Dunsdon* (1965) 39 ALJR 78 (at 78 per Barwick CJ, Kitto and Taylor JJ). Nevertheless, the Court must, doing the best that it can, award an amount it considers to be reasonable compensation for the non-economic loss sustained, taking into account the individual facts of each case: *O'Brien v Dunsdon* (at 78 per Barwick CJ, Kitto and Taylor JJ).

- 173 I consider s 97B is intended to operate in a manner consistent with the above authorities. Ms Eggett bears the onus of proving that injury was suffered by her as a result of AFLS’s contravention of s 97A.
- 174 Ms Eggett says that while Ms Barlow’s attendance at her home to collect her work belongings was ‘extremely humiliating, intrusive and intimidating’, Ms Barlow was professional and courteous towards her.⁴⁷ It is not suggested anyone else observed this event. There is no suggestion that the manner in which the stand down was effected was callous or cruel, even if it contained suggestions of predetermination, was premature, and misinformed.
- 175 Ms Eggett attended her general practitioner because of her health concerns and distressed state on the Monday immediately following the stand down. She attended her general practitioner again on 23 April 2025 as she was not sleeping and was ‘replaying every moment of the past few weeks in [her] head.’⁴⁸ She was provided with a referral for psychological assistance.
- 176 She describes significant impairment in her social and occupational functioning, and symptoms of sleep disruption, headaches, irritability and heightened emotion, stress and fatigue on a daily basis. Her level of distress was evident when giving evidence in the proceedings.
- 177 Understandably, the way the stand down was communicated to Ms Eggett, specifically by referring to her conduct at the lawyers’ meeting in circumstances where her conduct at that meeting was completely benign, would cause Ms Eggett to feel confused, betrayed, suspicious and distressed.
- 178 However, it is also apparent that from at least 19 May 2025, some of the distress Ms Eggett was experiencing and her concerns about career damage were due to the legal proceedings against the AFLS, and the AFLS’s response to it. For example, she refers to her prospects of working with the Women’s Legal Service (WLS) being jeopardised because Ms Martin had discussed Ms Eggett’s (subsequently withdrawn) claim to the Fair Work Commission or Federal Court with the WLS’s Managing Solicitor. Her psychologist, Christian Hetebry in his 30 August 2025 report also refers Ms Eggett’s anxiety and depression being exacerbated by ‘[h]er legal process with her former employer’.⁴⁹
- 179 Further, it is apparent from Ms Eggett’s submissions that some of her angst, grievance and distress relates to the fact that she was not afforded procedural fairness in the investigation of the allegations against her and was never ultimately exonerated. This is most evident in her resignation letter which refers to having to chase up a ‘cost of living payment’, a lack of procedural fairness and impartiality in dealing with concerns raised, and the lack of communication with her since 4 April 2025.⁵⁰ Any denial of procedural fairness is not a contravention in respect of which compensation is to be assessed.
- 180 Ms Eggett suggests that the effects of the stand down include her having to leave the job she loves, due to her diagnosis and treatment, which she says was ‘[arguably] not voluntary.’⁵¹ She also vaguely suggests that she is unable to work full-time due to her diagnosis. While the medical evidence supports a conclusion that the stand down and its psychological sequelae meant Ms Eggett could not return to work at AFLS, it does not support a conclusion she cannot work full-time. For the purposes of assessing compensation, I consider that the contravention did result in the premature end to Ms Eggett’s employment with AFLS, but Ms Eggett has not established that it has resulted in her being unable to work in the community legal sector, or being unable to work full-time.
- 181 I accept that the stand down resulted in Ms Eggett being deprived of the opportunity to attend a scheduled continuing professional development session on 5 April 2025, and the associated CPD points it would have attracted. It also resulted in her being the subject of office gossip concerning her absence from work. In particular, she was informed by a co-worker that another had suggested she had been fired.
- 182 Ms Eggett says that the impact of the stand down was particularly distressing for her because she is a lawyer, and the stand down had the potential to impact on her professional reputation. She said that the stand down coincided with the period for renewing her practice certificate, and she was fearful that she would have to disclose to the Legal Practice Board that she was under investigation for alleged misconduct.
- 183 In *Paras v Public Service Body Head of the Department of Infrastructure* [2006] FCA 622 [29], Young J acknowledged the gravity of disciplinary action taken by an employer against an employed solicitor:

The summary dismissal without notice of an employee solicitor is a very grave matter. Necessarily, it will have a detrimental effect on [their] reputation, and may impose a stigma that adversely affects [the applicant’s] future career prospects.

- 184 This extract was referred to by Manousaridis J in *Haley* at [158], supporting the proposition that loss of reputation is compensable under s 545(2)(b) of the FWA. The nature of Ms Eggett's profession is relevant to the seriousness of the reputational harm the contravening conduct has caused.
- 185 Having said that, I am mindful that the contravention does not involve the termination of Ms Eggett's employment. There must be an appropriate causal connection between the contravention and the loss claimed.⁵² The loss claimed must properly relate to the stand down, not Ms Eggett's resignation from AFLS. A hypothetical possibility of detriment cannot be compensated either.
- 186 The stand down ended by 28 April 2025. It was in place for 24 days, including a period of pre-approved leave from 14 to 22 April 2025. While AFLS did not ever completely exonerate Ms Eggett, it did inform her that there had been no findings of misconduct against her on 3 June 2025. She resigned on 27 June 2025. The saga played out for under three months. It did not involve particularly prolonged or serious bullying and harassment, or psychological impacts that have precluded Ms Eggett from working at all, such as would put this case in the high range of impact.
- 187 Ms Eggett is entitled to a sum that fairly compensates her for the hurt, humiliation and distress suffered because she was stood down in contravention of the IR Act and the associated infringements of her right to make an employment-related inquiry. In the circumstances of this case, I consider an appropriate order for compensation for injury resulting from AFLS's contravention is \$35,000.

Some Miscellaneous Matters

- 188 Ms Eggett's written submissions allege AFLS failed to comply with the dispute resolution clause of the *Social and Community Services (Western Australia) Interim Award 2011*. This is not a claim that is made in the Originating Claim, which refers only to s 97A of the IR Act. In any event, Ms Eggett did not appear to press this issue, as I asked her to identify in the evidence where the dispute resolution procedure had been invoked, and by whom. She was unable to do so.
- 189 Ms Eggett's written submissions also allege that 'the Respondent's damaging action against me' is a contravention of rule 32 of the *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015*. That rule is one that relates to a solicitor's conduct. The AFLS is not a solicitor. The rule does not apply to AFLS. Nor is there any evidence of an allegation of unsatisfactory professional conduct or professional misconduct being made against Ms Eggett. In any event, the IMC does not have jurisdiction to enforce the Solicitor's Conduct Rules.

Orders and Disposition

190 For the above reasons, I propose to make the following orders:

1. AFLS is to pay to Ms Eggett \$35,000 for loss or injury suffered as a result of its contravention of s 97A(1) of the IR Act.
2. The question of what, if any, penalty should be imposed be adjourned to a directions hearing for programming.

R. COSENTINO INDUSTRIAL MAGISTRATE

¹ ts 34.

² Exhibit C1.

³ Exhibit C1, annexure 12.

⁴ Exhibit C2.

⁵ Exhibit C2, 1:00:23 – 1:06:12.

⁶ ts 21.

⁷ ts 22.

⁸ Exhibit C1, annexure 4.

⁹ Exhibit C1, annexure 7; see also exhibit R3, CM-1.

¹⁰ Exhibit C1, annexure 7.

¹¹ Exhibit C1, annexure 7.

¹² Exhibit R1, VB-6.

¹³ Exhibit R1, VB-8.

¹⁴ Exhibit C1, annexure 12.

¹⁵ Exhibit C1, annexure 19.

¹⁶ Exhibit R3 [8].

¹⁷ Exhibit R3 [12] - [13].

¹⁸ ts 98.

¹⁹ ts 101 - 102.

²⁰ Exhibit R3 [13].

²¹ Exhibit R3, CM-1.

²² Exhibit R1 [22].

- ²³ Exhibit C1 [15].
- ²⁴ ts 36.
- ²⁵ Exhibit R1 [31].
- ²⁶ IR Act, s 97A(3).
- ²⁷ *Hughes v EMHS*, 2574 - 2575 [213].
- ²⁸ *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30; (1998) 195 CLR 1, 17 - 18 [4] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).
- ²⁹ *Qantas Airways Ltd v Australian Licensed Aircraft Engineers' Association* [2012] FCAFC 63; (2012) 202 FCR 244, 250 [32] (Gray, North and Besanko JJ); *Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 [48] (Katzmann J); *Klein v Metropolitan Fire and Emergency Services Board* [2012] FCA 1402 [84] (Gordon J).
- ³⁰ See for example, *Elisha v Vision Australia Ltd* [2024] HCA 50; (2024) ALJR 171, 188 [67] (Gageler CJ, Gordon, Edelman, Gleeson and Beech-Jones JJ).
- ³¹ *Whelan v Cigarette & Gift Warehouse Pty Ltd* [2017] FCA 1534; (2017) 275 IR 285.
- ³² *Alam* [95].
- ³³ ts 110.
- ³⁴ Exhibit C2, 1:03:37.
- ³⁵ Exhibit R1 [15].
- ³⁶ Exhibit R1 [9].
- ³⁷ ts 116, 118.
- ³⁸ Exhibit C2, 1:05:34.
- ³⁹ Exhibit C2, 1:03:42.
- ⁴⁰ *Ermel v Dulux Group (Australia) Pty Ltd (No 2)* [2015] FCA 17 [48].
- ⁴¹ Exhibit R1, [9].
- ⁴² Claimant's additional submissions dated 20 November 2025, [5] - [6].
- ⁴³ IR Act, s 97B(2)(c).
- ⁴⁴ See *James Cook University v Ridd* [2020] FCAFC 123; (2020) 278 FCR 566, 598-599 [151] - [155]; *Haley v Laing O'Rourke Australia Management Services Pty Ltd (No 8)* [2024] FedCFamC2G 779 [154] - [156] and *Lattouf v Australian Broadcasting Corporation (No 2)* [2025] FCA 669; (2025) 341 IR 105 (*Lattouf*), 231 [662] in relation to what is compensable 'loss' for the purpose of s 545(2)(b) of the FWA; see also *Leggett v Hawkesbury Race Club Limited (No 4)* [2022] FCA 622; (2022) 293 FCR 608, (*Leggett*), 622 [40].
- ⁴⁵ See also the observations of Kenner ASC (as he was then) at [186] - [188].
- ⁴⁶ *Leggett* [52], [60].
- ⁴⁷ Exhibit C1 [29].
- ⁴⁸ Exhibit C1 [82].
- ⁴⁹ Exhibit C1, annexure 19.
- ⁵⁰ Exhibit C1, annexure 16.
- ⁵¹ Exhibit C1 [158].
- ⁵² *Lattouf* [663].

2026 WAIRC 00178

INDUSTRIAL MAGISTRATES COURT OF WESTERN AUSTRALIA

CITATION : 2026 WAIRC 00178

CORAM : INDUSTRIAL MAGISTRATE D. SCADDAN

HEARD : WEDNESDAY, 10 DECEMBER 2025 & THURSDAY, 11 DECEMBER 2025

DELIVERED : FRIDAY, 27 MARCH 2026

FILE NO. : M 149 OF 2024

BETWEEN : RUBEN SANZANA

CLAIMANT

AND

STATE OF WESTERN AUSTRALIA

FIRST RESPONDENT

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

SECOND RESPONDENT

CatchWords	:	INDUSTRIAL LAW – <i>Industrial Relations Act 1979</i> – Allegation of damaging action taken by employer – Whether the employer took damaging action against the employee – The reasons taken by the employer and whether the employer has discharged its onus – Turns on the facts
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Industrial Magistrate’s Court (General Jurisdiction) Regulations 2005</i> (WA) <i>Fair Work Act 2009</i> (Cth)
Instrument	:	<i>School Education Act Employees’ (Teachers and Administrators) General Agreement 2021</i> [2022] WAIRC 00834
Cases referred to in reasons	:	<i>Western Australian Prison Officers’ Union of Workers v Minister for Corrective Services</i> [2024] WAIRC 00139; (2024) 104 WAIG 322 <i>Hughes v East Metropolitan Health Service</i> [2024] WAIRC 982; 104 WAIG 2560 <i>Alam v National Australia Bank Limited</i> [2021] FCAFC 178; (2021) 288 FCR 301 <i>Ermel v Duluxgroup (Australia) Pty Ltd (No 2)</i> [2015] FCA 17; (2015) 67 AILR 102-332 <i>Khiani v Australian Bureau of Statistics</i> [2011] FCAFC 109; (2011) 63 AILR 101-446 <i>Short v Ambulance Victoria</i> [2015] FCAFC 55; (2015) 249 IR 217
Result	:	The claim is dismissed
Representation:		
Claimant	:	In person
Respondents	:	Mr J. Carroll (of counsel)

REASONS FOR DECISION

Background

- 1 Ruben Sanzana (the **claimant**) is employed by the State of Western Australia as a teacher within the Department of Education (the **Department**).
- 2 The claimant commenced in the remote teaching service (**RTS**) on 18 June 2021 and was employed on fixed term contracts at various remote schools. While employed on a fixed term contract at Halls Creek District High School in 2023, the claimant became a permanent employee with the Department.
- 3 On 29 January 2024, the claimant commenced at the Burringurah Remote Community School (**BRCS**) on a fixed term contract to end on 13 July 2024.
- 4 The claimant did not undertake teaching duties between approximately 15 July 2024 and 18 November 2024.
- 5 On or around 18 November 2024 the claimant commenced a relief teaching position followed by a fixed term teaching position at Belridge Secondary College, Perth.

The Claim

- 6 On 20 November 2024, the claimant lodged an originating claim against the Department under the *Industrial Relations Act 1979* (WA) (**IR Act**). The originating claim did not clearly identify the basis for the claim save that the claimant made reference to ‘a grievance’ he had made against a former Principal, being treated unfairly by the Department and having lost entitlements.
- 7 At a pre-trial conference, the claimant was ordered to lodge an amended statement of claim, and following orders made by the Court on 15 May 2025, a further amended statement of claim was lodged on 13 June 2025 and 23 October 2025 (the **October Amended Claim**).
- 8 The name of the respondent was also amended to the State of Western Australia, and the State did not oppose the addition of a second-named respondent, the Director General, Department of Education (the **respondents**).
- 9 The October Amended Claim outlines the claimant’s claim for determination. The October Amended Claim was also clarified with the claimant at the start of the hearing because the claimant has never clearly identified his cause of action beyond stating he made certain complaints and alleging certain things occurred because he did so.
- 10 However, the claimant also alleged that the Department placed him on leave without pay (**LWOP**) from 7 October 2024 despite being a ‘permanent teacher and never requesting leave’,¹ which he describes as altering his position to his disadvantage. In a conflation of two issues, he also describes being informed that he was on LWOP because he did not comply with certain requirements, which he says was a ‘clear violation of the Teacher’s Employment Award’.²
- 11 Therefore, from the Court’s perspective there was concern that embedded in the October Amended Claim was, arguably, an allegation of the respondents contravening a term of an industrial agreement. The respondents responded to this part of the October Amended Claim admitting the claimant was not paid from 7 October 2024 to 15 November 2024 because he was not teaching at any school and he had not provided the requisite documents to the relevant staff member so as to progress his redeployment.

- 12 The Court sought to clarify this with the parties after the hearing. The claimant responded to the Court in an email dated 24 February 2026, and he did not raise any further issue to that raised in the October Amended Claim and in the hearing.
- 13 However, while the respondents attempted to address in closing submissions what they referred to as an ‘entitlement claim’, the second respondent’s position is that the claimant has not identified any entitlement provision he says has been contravened and the claimant should not be allowed to progress such a claim. Further, where the second respondent has never been put on notice of what an ‘entitlement claim’ might be, if any, it is not for the Court to identify a possible claim. The second respondent refers to *Western Australian Prison Officers’ Union of Workers v Minister for Corrective Services* [2024] WAIRC 139; (2024) 104 WAIG 322 at [16].
- 14 In clarifying the claimant’s claim at the hearing, the Court confirmed the two complaints he said he made, and which were referred to in the October Amended Claim.³ The Court then asked the claimant to identify the consequences he says occurred as a result of these two complaints.⁴
- 15 The claimant informed the Court that the consequences were that he missed out on two job opportunities and was put on LWOP because of the complaints, causing him to lose \$15,615 and having his entitlements ‘frozen’.⁵
- 16 The Court then requested the claimant to identify what ‘damaging action’ he says the respondents engaged in by reference to the definition of that term in s 97 of the IR Act, to which the claimant responded that his position was altered to his disadvantage (or using the claimant’s words, ‘changed his employment status’).⁶
- 17 To the extent that the October Amended Claim made reference to a ‘clear violation of the Teacher’s Employment Award’ in respect of LWOP, I am satisfied that this was raised only in the context of the claimant’s allegation that the respondents altered his position to his disadvantage, and did not raise a separate cause of action of an alleged contravention of any industrial agreement by the second respondent.
- 18 Accordingly, the Court has proceeded on the understanding that the claimant’s claim was made only under s 97A of the IR Act, which was confirmed by the claimant at the commencement of the hearing. The claimant’s email dated 24 February 2026 does not alter this.
- 19 The claimant alleges that he made two complaints on:
 - (1) 29 April 2024, when he made an informal complaint via email to Jasmine Harris (**Ms Harris**), the Principal of BRCS, copied to Lisa Criddle (**Ms Criddle**) and Danielle Wilton, senior district officers, about Ms Harris’ behaviour towards him (the **First Complaint**); and
 - (2) 26 June 2024, when he lodged a formal complaint with the Department about Ms Harris’ behaviour towards him (the **Second Complaint**).
- 20 The claimant alleges that nothing happened because of the First Complaint, but the First Complaint led to the Second Complaint and the combined effect was that:
 - (a) he missed out on job opportunities at Ngaanyatjarra Lands School (**NLS**) and at One Arm Point;
 - (b) he was placed on LWOP for which he lost \$15,615 in salary;
 - (c) his personal and long service leave entitlements were ‘frozen’; and
 - (d) he was subject to performance management at Belridge Secondary College.(the **Alleged Damaging Actions**).
- 21 The claimant seeks orders that:
 - (a) he be credited with six months of additional paid leave for the fourth year of RTS;
 - (b) he be compensated for \$15,615 in unpaid salary for being placed on LWOP;
 - (c) he be credited with personal and long service leave entitlements; and
 - (d) the Department stop any further harassment, discrimination and damaging actions against him ‘for complaining about Ms Harris’.
- 22 At the hearing, the claimant identified that the damaging action he relies upon is s 97(a)(ii) of the IR Act, namely, that his position was altered to his disadvantage.
- 23 While the respondents admit the claimant sent the First Complaint and the Second Complaint, the respondents deny the circumstances as alleged by the claimant and deny that any damaging action was taken or that the claimant has not and cannot make out a claim of damaging action under s 97A of the IR Act.

Issues for Determination

- 24 The principal issues for determination in respect of the First and Second Complaints and the Alleged Damaging Actions are:
 - (1) do the First and Second Complaints amount to ‘employment-related inquiries or complaints’ under s 97A(1) of the IR Act?
 - (2) does the Alleged Damaging Actions constitute ‘damaging action’ as that term is defined under s 97(a) of the IR Act?
 - (3) if the First and Second Complaints amount to ‘employment-related inquiries or complaints’ and the Alleged Damaging Actions constitute ‘damaging action’, did the respondents do so for the reason, or reasons that include, that the claimant made the First and Second Complaints? That is, is there a causal link between the Alleged Damaging Actions and the First and Second Complaints?
- 25 There are also factual issues in dispute.

Legislative Framework

26 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.

27 Section 97 of the IR Act defines certain terms, and, relevant to the Alleged Damaging Actions, 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).

28 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.⁷

29 The Full Court of the Federal Court of Australia in *Alam v National Australia Bank Limited* [2021] FCAFC 178; (2021) 288 FCR 301 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;
- (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. 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;
- (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;
- (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;
- (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;
- (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;
- (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, 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. 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;
- (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;
- (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. Nor does the fact that the adverse action has some association with a matter supporting a proscribed reason; 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.

(citations omitted)

30 Relevant to the October Amended Claim, the claimant bears the onus of proving on the balance of probabilities that:

- (1) the First and Second Complaints he said he made or raised were 'employment-related inquiries or complaints' he was able to make; and

- (2) the Alleged Damaging Actions taken by the respondents were ‘damaging action’ within the meaning of s 97(a) of the IR Act.
- 31 If the claimant proves that the First and Second Complaints he made were employment-related inquiries or complaints he was able to make and the Alleged Damaging Actions were damaging action taken by the respondents against him, it is for the respondents to prove on the balance of probabilities that it did not do so for the reason, or for reasons that include, the fact that the claimant made the First and Second Complaints.
- 32 A claim for damaging action does not entitle the claimant to ‘a broad inquiry as to whether [he] has been subjected to a procedurally or substantively unfair outcome’.⁸
- 33 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]:⁹

A general protections application is not intended to provide an opportunity for the appellant to raise whatever issues [the applicant] wishes to about the validity of the steps taken before [their] 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.

Evidence

- 34 The claimant’s evidence consisted of three witness statements signed or dated by him on: 8 September 2025 with annexures attached;¹⁰ 16 October 2025 with annexures attached;¹¹ and 25 November 2025 with annexures attached.¹² The claimant also gave oral evidence.
- 35 The respondents’ evidence included witness statements by: Mark Batka (**Mr Batka**) signed on 15 September 2025 with annexure MB1; Ms Harris signed on 16 September 2025 with annexures JH1 to JH5; Jason Van Poelgeest (**Mr Van Poelgeest**) signed on 7 September 2025 with annexures JVP1 to JVP3; and Lucina Barnard (**Ms Barnard**) signed on 19 September 2025. Ms Harris also provided a supplementary statement dated 28 October 2025.
- 36 Ms Harris is employed as the Principal of BRCS. She has been employed by the Department since 2002 and has taught in remote areas since 2010.¹³
- 37 Mr Batka is employed as the Principal of One Arm Point Remote Community School (**One Arm Point**) and has been in this position since April 2025. He has been employed by the Department since 2005 and has worked in remote areas.¹⁴
- 38 Mr Van Poelgeest is employed as the Executive Principal of NLS and has been in this position since April 2024. He has been employed by the Department since 2006.¹⁵
- 39 Ms Barnard is the Director, Staff Recruitment and Employment Services and has held the position for about 10 years but has been within the Department since 2005. She is responsible for the team which provides support and placement services to employees requiring placement within the Department.¹⁶

Undisputed Facts

- 40 There are some facts which are not in dispute between the parties. Alternatively, there is uncontroverted evidence I consider to be reliable.
- 41 The claimant is a permanent teacher within the Department.
- 42 In or around January 2024, Ms Harris offered the claimant a six-month contract as a teacher at BRCS for the first half of 2024.¹⁷
- 43 On 29 April 2024 at 8.25 am, Ms Harris emailed the claimant requesting him to provide her with a list of on-line courses he had completed related to literacy before 3.00 pm.¹⁸
- 44 On 29 April 2024 at 1.00 pm, the claimant sent the First Complaint stating:¹⁹

This is to respond your today email, where you are demanding I provide information and evidence of all online PDs I have done in week 2 and I have till 3 pm to do so.

The PDs are as follows:

...

You have sent my colleague, Jessica to supervise me, while I am teaching in my class, without even providing a reason or explanation for it and without prior notification on your intentions to do so.

On one occasion, I asked Jess to demonstrate a practical lesson, using The Reading Eggs Program, as I wasn't familiar with it. She struggled to get all my students engaged in the lesson.

Her students often ask if they can come and work in my class. My students have told me they do not like going to her, when Jess takes my class during my [Duties Other Than Teaching Time].

As you are aware, I have built a strong rapport, not only with my students, but all the school community, specially [sic] the Senior Class (Jessica’s class)

It seems to me that everything I do, is wrong in your eyes and that you go out of your way to find faults.

At the beginning of the year, I had to deal with some serious challenging behaviours in my class. On one occasion, I had to remove a kitchen knife from a student who wanted to stab another student.

In my incident report I described being physically hit a couple of times, while intervening and suppressing this dangerous confrontation. Despite my report, you showed no consideration for my wellbeing at all after that event. On the contrary,

next day, after you read my report, you came to my class, demanding that I show you the knife and then you just denied the knife I showed you was the knife in question. As if you were there during the incident. You even asked Pricilla, in front of me, if it was the real knife. This demonstrates a lack of empathy and a failure of duty od [sic] care from my perspective.

I have successfully introduced a 'Cash Reward Program' in my class. The students enjoy 'money' rewards for their good work and behaviours, expecting to earn a toy of their choice. Despite your initial support and agreement to purchase toys, which students had selected from a Kmart Catalogue, if they achieved their targets. Yu [sic] later reneged on this arrangement and refused to purchase the agreed toys. I understand that there are funds for this type of programs in the budget. Furthermore, you are trying to stop me, from buying those toys, with my own funds. The students are working and saving to achieve their goals. How can I tell them that now they will not get their toys? This seems like another attempt to undermine me good relationship with my students.

You seem determinate to make me resign from this teaching post. If this unprofessional harassment against me person doesn't stop, I may have to do that. But I will make a formal complaint to the Department ad [sic] maybe an outside agency, if I don't get justice and more respectful, mature, professional attitude from you.

- 45 In June 2024, the claimant applied for other RTS positions, including at NLS.²⁰
- 46 On 17 June 2024, Scott Fatnowna, Executive Deputy Principal of NLS (**Mr Fatnowna**), informed the claimant that he would like to make contact with his current Principal and share in their information about his time at BRCS.²¹
- 47 The claimant emailed, in response to a telephone conversation he had with Mr Fatnowna, informing him that he did not get on with his current Principal (Ms Harris) and would rather his former Principal and Deputy Principal at Halls Creek District High School were his referees.²²
- 48 On 18 June 2024 at 4.16 pm, Ms Harris sent an email to Andrew Cleary (**Mr Cleary**), School Staffing Support, stating:
- Hi Andrew,
- Ruben going to be trying to go out into The Lands for work. He had Ngangatjarra or similar written next to his phone.²³
- 49 On 18 June 2024 at 4.41 pm, Mr Cleary sent an email to a staff member at NLS stating:
- Hi Beck,
- Give me a buzz in the morning can you please? (Need to give you a BIG RED FLAG warning with this one...)²⁴
- 50 This email was not copied to Ms Harris.
- 51 In response to this email, on 19 June 2024, Mr Van Poelgeest spoke separately with Mr Cleary and Ms Harris and made notes of his conversation with them.²⁵
- 52 Mr Cleary informed Mr Van Poelgeest to speak with Ms Harris at BRCS where there was a reason she was not included as a referee as a current Principal and there were 'alarm bells'.²⁶
- 53 On the same day, Mr Van Poelgeest spoke with Ms Harris. Mr Van Poelgeest's handwritten record of the conversation is:
- Poor [behaviour] management
- Doesn't know how to teach lit
- Unprofessional dressing at review
- Asks for lots of [personal leave]
- Doesn't integrate it
- Background: 2 teachers left unexpectedly
- Had ppl lined up – ppl pulled out
- Panel – CV – not accepted to RTS post previously
- Sent CV
- Plays the system – knows all his rights – can't teach
- Looking for way out
- Looking to sue people²⁷
- 54 Following his conversations with Mr Cleary and Ms Harris, Mr Van Poelgeest spoke with Mr Fatnowna about the claimant. Mr Van Poelgeest decided not to follow up further with the claimant on the basis that there were concerns about his conduct and performance and all of the information made him think that the claimant was not a good fit for NLS.²⁸
- 55 Between 21 and 28 June 2024, the claimant took personal leave and did not return to BRCS.²⁹
- 56 On 26 June 2024, the claimant submitted the Second Complaint.³⁰
- 57 On 15 July 2024, the claimant commenced paid leave for a period of 10 weeks, in addition to being paid two weeks' vacation leave prior to taking the 10 weeks' leave and being paid two weeks' vacation leave after taking the 10 weeks' leave.
- 58 On or around 16 July 2024, the claimant spoke with Mr Batka about commencing a teaching position at One Arm Point and sent him some forms.³¹
- 59 On 17 July 2024 at 3.08 pm, Mr Batka sent an email to the claimant stating:
- Good afternoon, Ruben.

My sincere apologies but we will need to advertise this teaching position officially, for 6 months with a possible 30 month extension. My apologies for getting ahead of ourselves.

Please feel free to apply for the role when it is officially advertised in the next few days.

Once again, my apologies for the confusion and inconvenience.³²

- 60 On 18 July 2024, Mr Batka sent an email to Mr Cleary stating:

Hi Andrew,

...

After talking to members of the local community who sit on our school council and said they would like to be represented on all staffing decisions, I sent Ruben the email below.

I got ahead of myself because of the need for a teacher and rightly so, I was pulled up as due process should be followed.

Ideally, if we advertise and are successful in finding a solid application the school council endorses, it should be a walk in the park to extend the contract.³³

- 61 On 18 July 2024, the claimant received a letter via email from Ms Criddle about the Second Complaint. In this letter, Ms Criddle states:

I have met with the Principal, Ms Harris to discuss your concerns. She has disputed some of your concerns, however, is fully aware of them.³⁴

- 62 On 19 July 2024, the claimant received an email from Helen Barnes, a staff member at BRCS, copied to Ms Harris about the state of his classroom.³⁵

- 63 On 20 August 2024, the claimant received a letter via email from the Manager Complaints and Integrity Education, Standards and Integrity Directorate about his behaviour towards another staff member and for taking students off premises without permission and without adequate equipment and water.³⁶

- 64 On or around 7 October 2024, the claimant was advised that he was on LWOP.³⁷ The claimant was on LWOP from 7 October 2024 to 15 November 2024.

- 65 On 8 October 2024, the claimant said he was informed by Mr Cleary that LWOP was imposed because he had not submitted an updated CV, a redeployment statement and a working with children check.³⁸ However, the attachment referred to by the claimant in support of this conversation does not refer to LWOP and instead refers to RTS leave.³⁹

- 66 On 14 October 2024, the claimant states he was sent a Redeployment Information Package.⁴⁰

- 67 On 18 November 2024, Mr Cleary arranged for the claimant to undertake a relief teaching position at Belridge Secondary College and the claimant's salary commenced being paid from that date.⁴¹

Disputed Evidence

The Claimant

- 68 The claimant's evidence was mainly focused on his grievances with Ms Harris and issues he had while at BRCS. I do not intend on summarising these grievances and issues. They are not matters upon which the Court will making findings to determine the Claim. That is, determination of the Claim does not require the Court to make findings about whether a 'serious incident' occurred in a classroom on 14 February 2024 and what Ms Harris did or did not do about that 'serious incident' or whether Ms Harris continued to make 'minor complaints' about the claimant after the purported success of a 'Toy Cash Reward Program'.

- 69 The only observation I make for contextual reasons is that based on their evidence, the claimant had issues with respect to Ms Harris's management and Ms Harris had issues with the claimant's behaviour and performance during his employment at BRCS.

- 70 The claimant made the First Complaint directly to Ms Harris, copied to others in the Department, which he admitted in cross-examination that nothing happened as a result of the First Complaint.

- 71 The claimant made the Second Complaint to the Department. For reasons that will be explained, he made the Second Complaint using the Department's online facility after he commenced personal leave on 21 June 2024.

- 72 Otherwise, in respect of evidence that has not already been covered, the claimant states on 24 July 2024, he attended a 'Redeployment CV Webinar', where one of the presenters stated that principals generally contact a teacher's most recent principal.⁴²

- 73 The claimant states he was on LWOP from 7 October 2024 to 18 November 2024.⁴³

- 74 As outlined, the claimant made a vague reference in the October Amended Claim to there being a 'violation' of the 'Teacher's Employment Award' when he was placed on LWOP for not submitting an 'updated CV, redeployment statement and working with children card.'⁴⁴

- 75 This was never fully addressed by the claimant beyond referring to the Redeployment Information Pack sent to him by Mr Cleary,⁴⁵ which states:

There will be no change in your conditions of employment – you will retain your permanent status as an employee of the Department of Education, but this will likely be at another school or worksite.

Your salary and [full time equivalent] will not change, and you will have no breaks in pay other than any leave you may book.

76 The same document goes on to say:

It is expected that you will:

- provide me with a regularly updated, high quality deployment CV and statement
- engage positively in all vacancy referral activities, including speaking with Principals and line managers about vacancies at their school
- apply for suitable advertised positions at www.jobs.wa.gov.au
- participate in regular performance management and development
- discuss any plans you have for leave exceeding four weeks.

77 On 15 July 2024, Mr Cleary referred the claimant to cl 40.8 and cl 45 of the *School Education Act Employees' (Teachers and Administrators) General Agreement 2021 (Teachers Agreement)*.⁴⁶

78 The claimant states that in May 2025 he 'learned that Ms Harris had requested [his] performance appraisal as early as August 2024'.⁴⁷

79 The claimant says that the treatment by Ms Harris and subsequently by the Department has caused him significant stress, financial loss and the forfeiture of an additional six months' leave entitlement that he would have earned had he completed a fourth year of remote service. He calculates his financial loss as \$15,615.⁴⁸

80 In cross-examination, the claimant confirmed that he did not work in the second half of the school year in 2024 (the BRCS contract being for term one of 2024).

81 The claimant agreed that he did not tell Mr Fatnowna or Mr Batka that he made a complaint about Ms Harris but he said he told Mr Fatnowna that Ms Harris would not provide fair feedback about his performance.⁴⁹

82 The claimant agreed that as of 15 July 2024 he did not have a contract for RTS and that the leave he took in term three of 2024 was paid RTS leave for 10 weeks, and the two weeks prior to this he was on paid vacation leave and two weeks after he was on further paid vacation leave.⁵⁰

83 In relation to the Redeployment Information Pack,⁵¹ the claimant agreed that it made reference to certain requirements by teachers requiring positions, but it also said that his salary would not change and there would be no breach in pay.⁵²

84 The claimant agreed that although he spoke with some principals, he did not apply for any teaching positions in term two of 2024. However, he agreed that he did not provide Mr Cleary with certain information referred to in the Redeployment Information Pack, saying he was not in Australia at the time.⁵³ This information included a Statement of Deployment.

85 Emails between Mr Cleary and the claimant between June and October 2024 show the interactions between the Department and the claimant in relation to trying to secure the claimant a teaching position.⁵⁴

86 The claimant was asked about the document he said he saw in May 2025 and which he said was generated by Ms Harris. It was suggested that the document he saw online was a reference to his complaint about Ms Harris and that he completed the online form and provided additional documents via the ICT Self-Service Hub.⁵⁵ The claimant seemed confused about what he did although he appeared to accept that he submitted a complaint online, which is consistent with a response document confirming the claimant's complaint was made via a complaints portal.⁵⁶

87 The claimant gave evidence to the best of his ability. However, he often focused on issues unrelated to the Claim and had a vague recollection of matters expected to be within his knowledge, such as him making the Second Complaint online. I did not find the claimant to be a reliable witness. I find the contemporaneous documents more reliable than the claimant's evidence. I also found the respondents' witness evidence to be more reliable.

Mark Batka

88 In addition to the undisputed facts, Mr Batka stated that following his telephone conversation with the claimant and Deputy Principal Vivian McDermott (**Ms McDermott**), he had a conversation with one of the Aboriginal Elders at One Arm Point and another person, Keith Bedford. He was reminded that he should discuss the proposed appointment of the claimant with the school council. Mr Batka agreed, stating that he 'should have known better', as he always 'run staffing decisions by council'. As a result, it was decided that the position should be advertised.⁵⁷

89 Mr Batka stated that on this occasion he was under a lot of pressure with the school review and he 'jumped the gun in [his] telephone conversation with [the claimant]'.⁵⁸

90 Consequently, he retracted his offer to the claimant and the position was advertised, and the claimant did not apply for the position.⁵⁹

91 In cross-examination, Mr Batka denied the claimant 'won' the job or 'earned' the position. While Mr Batka spoke with Mr Cleary often about a variety of subjects, he did not recall speaking to Mr Cleary about the claimant.⁶⁰

92 Mr Batka maintained that he was under a lot of pressure at the time and admitted that he did not follow 'due process' with respect to the teaching position he offered to the claimant and he was reminded of this by members of the school council. That is, there was a requirement for an Aboriginal team member to be part of the recruitment process, and there was no Aboriginal member taking part in the conversation with the claimant, including Ms McDermott who is not Aboriginal.⁶¹

93 Mr Batka did not know the name 'Jasmine' or 'Justine' Harris and he did not speak to the claimant's referees.⁶²

Jason Van Poelgeest

- 94 In addition to the undisputed facts, Mr Van Poelgeest stated that both he and Mr Fatnowna are responsible for teacher recruitment at NLS. Mr Van Poelgeest would have requested Mr Fatnowna to follow up with the claimant by speaking with him, requesting his CV and speaking with the claimant's referees.
- 95 Mr Van Poelgeest spoke with Ms Harris, after Mr Cleary recommended that he do so. He said Ms Harris informed him that the claimant had poor behaviour management; did not know how to teach literacy and numeracy; dressed unprofessionally at a review function; asked for a lot of professional development but did not incorporate it into his practice; and had berated her for the number of meetings she was holding with him. Ms Harris also informed him that the claimant had not previously been accepted into the RTS pool following an interview panel, and she gave her view that the claimant could not teach.⁶³
- 96 In cross-examination, Mr Van Poelgeest denied being aware of any of the claimant's issues with Ms Harris because he had been told something by Mr Fatnowna.⁶⁴
- 97 Mr Van Poelgeest denied having seen the emails between the claimant and Mr Fatnowna dated 14 and 17 June 2024⁶⁵ and the first time he had seen them was in Court during cross-examination.⁶⁶ He denied knowing the claimant had made a complaint about Ms Harris at the time of the claimant's application to teach at NLS.⁶⁷
- 98 Mr Van Poelgeest said he had never seen the First Complaint.⁶⁸
- 99 Mr Van Poelgeest maintained that his handwritten notation of the conversations with Ms Harris and Mr Cleary was everything he noted from the conversations.⁶⁹
- 100 Mr Van Poelgeest denied Mr Cleary spoke about any complaint about Ms Harris and he did not recall that being said or mentioned.⁷⁰
- 101 Mr Van Poelgeest said he was not aware of any formal complaint about Ms Harris. Mr Van Poelgeest maintained that it was Mr Cleary who advised him to be in contact with Ms Harris and he contacted Ms Harris on the same day. The information provided by Ms Harris was more detailed but similar to the information provided by Mr Cleary. Mr Van Poelgeest said Mr Cleary initiated contact with NLS.⁷¹
- 102 Mr Van Poelgeest said that it was normal practice to provide details of a teacher's current line manager (for the purpose of recruitment) and if this was not done the current line manager can still be contacted.⁷²
- Lucinda Barnard*
- 103 Ms Barnard explained that the claimant's appointment to the RTS finished at the end of the second term in 2024. He was then required to take his RTS leave where he was an employee requiring placement within the Department. As an employee requiring placement, the claimant was required to participate in the process of identifying an alternative placement.⁷³
- 104 When teachers take RTS leave after completing RTS and require placement in another position, they are placed in an 'unattached position' on the Department's payroll system, known as HRMIS.⁷⁴
- 105 When an alternative position is located while a teacher is on RTS leave, they are moved from the 'unattached position' to the new position effective from their RTS leave completion and no further support is required from Recruitment and Employment Services.⁷⁵ In that situation, once the staff member returns from RTS leave and commences working in the new position, their pay continues as usual.
- 106 For teachers who remain 'unattached' at the end of their RTS leave (for example, where no new position has been found), it was the practice of some payroll officers to place the employee on LWOP from the end date of their paid leave so that the employee was not overpaid when the paid leave ended.⁷⁶
- 107 Ms Barnard explained that this practice has now ceased. That is, teachers on RTS leave who remain 'unattached' at the end of their RTS leave will only be placed on LWOP at the instruction of a senior officer in Recruitment and Employment Services.⁷⁷
- 108 Ms Barnard reviewed the claimant's payroll records and confirmed the claimant was put on LWOP as part of the former practice due to him being recorded and remaining in an 'unattached position' at the conclusion of his RTS leave. This former practice has now ceased.⁷⁸
- 109 In cross-examination, Ms Barnard further explained that the process of placing RTS teachers with an 'unattached position' on LWOP had changed, but she could not say whether the process had changed because of the claimant's situation.⁷⁹
- 110 That is, the former process was for RTS teachers who were identified as 'unattached position' to be put on LWOP to prevent overpayments without obtaining senior officer instruction. The current process is for the payroll team to obtain direction from an officer in Staff Recruitment and Employment Services before the RTS teacher was put on LWOP.⁸⁰
- 111 HRMIS will 'flag' to a payroll officer that RTS leave is ending and the teacher does not have a new position or is not in a position. Ms Barnard is not sure if the teacher gets notice of the commencement of LWOP.⁸¹
- 112 Ms Barnard said there are reasons why a teacher may want to remain on LWOP, for example if the teacher did not want to come back to work. If a teacher did want to come back to work but no position was located for them, their pay would be resumed. In the claimant's case, he was difficult to get in contact with, and it was then difficult to place him.⁸²
- Jasmine Harris*
- 113 Similar to the claimant, Ms Harris goes into considerable detail in response to the claimant's evidence about matters which the Court will not be making findings on.
- 114 That is, Ms Harris provides answers to the grievances and issues raised by the claimant in his evidence, no doubt because she wanted to ensure her side of the story was recorded and because the claimant 'pleaded' the claim in the way that he did.

- 115 However, as already stated and for contextual purposes, Ms Harris had issues or difficulties with the claimant's behaviour and performance while he was at BRCS, which she sought to address. The Court is not required to make findings on whether Ms Harris dealt with those issues properly or if she could have dealt with them differently or better.
- 116 Otherwise, Ms Harris states that she recalled speaking with Mr Van Poelgeest and Mr Fatnowna and provided an honest reference based on her experiences and observations of the claimant. This was around 19 June 2024.⁸³
- 117 Ms Harris states she had no contact with anyone from One Arm Point concerning the claimant.⁸⁴
- 118 Ms Harris also states that the claimant's last day working at BRCS was on 20 June 2024 and he did not return to the school after he submitted a medical certificate for the period between 21 to 28 June 2024.⁸⁵
- 119 Ms Harris denies making a performance appraisal request for the claimant in August 2024. She said that the claimant was no longer at BRCS, and she was no longer his principal so she would have no reason to request for his performance to be appraised.⁸⁶
- 120 In cross-examination, Ms Harris explained her understanding of the nature of the First Complaint but she said that it did not seem like a complaint and described it as a response to an email sent by her to the claimant. Ms Harris had no response from the Department's District Office about the First Complaint.⁸⁷
- 121 Ms Harris said she would have had conversations with Mr Cleary about the claimant but in the same way that she has similar conversations with him about many teachers.⁸⁸
- 122 Ms Harris outlined the reference she gave to NLS about the claimant.⁸⁹
- 123 Ms Harris denied seeing the Second Complaint and she only found out about it in December 2024 when the claimant made a complaint to the Human Rights Commission. She was aware the claimant had contacted the Department's District Office, but she did not know the extent of what his complaints were about.⁹⁰
- 124 Ms Harris denies that she was informed of the Second Complaint or the complaints made by the claimant more generally. She cannot explain why Ms Criddle said she was 'fully aware'⁹¹ of the Second Complaint because she was not and she has never been provided with a copy to answer to it.⁹²
- 125 Ms Harris maintained her denial that she 'put a performance appraisal' on the claimant.
- 126 Ms Harris denied taking any form of retaliatory action against the claimant because he made complaints about her. She said her only concern was for the students and making sure they had the best person for the job in teaching them.⁹³
- 127 The respondents' witnesses gave evidence truthfully and it was consistent with other evidence, including the respondents' other witness evidence. Overall, I find their evidence to be credible and reliable.

Findings of Fact

128 I accept and find as follows:

- (a) Mr Van Poelgeest was not aware of any complaint made by the claimant about Ms Harris when he spoke with her about the claimant after the claimant expressed interest in a teaching position at NLS;
- (b) Mr Van Poelgeest spoke with Ms Harris in her capacity as the claimant's current or more recent principal and she gave her opinion about his teaching performance;
- (c) NLS made no offer of a teaching position to the claimant. The claimant expressed interest in a teaching position and Mr Van Poelgeest determined that the claimant was not the right fit for NLS;
- (d) Mr Batka was not aware of any complaint the claimant made about Ms Harris, did not know Ms Harris, and did not speak with her before he retracted the offer of a teaching position at One Arm Point;
- (e) the claimant did not 'win' or 'earn' a teaching position at One Arm Point. He applied for a teaching position at One Arm Point and Mr Batka erroneously offered him a position before having approval by the school council; and
- (f) Ms Harris was not aware of the extent of the Second Complaint until December 2024, and I accept her evidence that any discussion she had with Ms Criddle was brief and did not go into detail about the content of the Second Complaint. Ms Harris cannot speak to the contents of Ms Criddle's letter.

Was the First and Second Complaints 'Employment-Related Inquiries or Complaints' the Claimant was Able to Make?

129 The respondents accept that the form and content of the First Complaint and the Second Complaint are capable of being characterised as 'employment-related inquiries or complaints' the claimant was able to make for the purposes of s 97A of the IR Act.

Did the Alleged Damaging Actions Constitute Damaging Action Within the Meaning of s 97(a) of the IR Act?

- 130 The respondents accept that aspects of the Alleged Damaging Actions are capable of being characterised as 'damaging action' within the meaning of s 97(a)(ii) of the IR Act, including being placed on LWOP (and 'losing salary') and ancillary to that, the effects on personal leave and long service leave. However, even if these actions are characterised as damaging action, the respondents say they were not carried out for a reason or reason that included the First and Second Complaints.
- 131 The respondents do not accept that the claimant 'missing out' on the job opportunities at NLS and One Arm Point constitutes 'damaging action' within the meaning of s 97(a)(ii) of the IR Act, although it accepts that the character of each is, arguably, different. However, if this action is characterised as damaging action, again, the respondents say it was not carried out for a reason or reason that included the First and Second Complaints.
- 132 The respondents do not accept that the claimant being placed on performance management at Belridge Secondary College constitutes 'damaging action' within the meaning of s 97(a)(ii) of the IR Act. However, if this action is characterised as

damaging action, again, the respondents say it was not carried out for a reason or reason that included the First and Second Complaints.

Missing Out on Job Opportunities

- 133 The claimant says NLS initially expressed interest but then subsequently ceased communication with him, and this constitutes damaging action.
- 134 The respondents say that Mr Fatnowna, of NLS, initially showing interest in offering the claimant a position and then losing interest does not amount to ‘damaging action’ within the meaning of s 97(a)(ii) of the IR Act.
- 135 The difficulty for the claimant is that the found facts do not support any offer of a position at NLS. At best, NLS were making enquiries with a view to appointing a suitable teacher to a position at NLS. The claimant’s position as a permanent employee, as either an RTS teacher or as a non-RTS teacher, had not been altered. At the end of the contracted period at BRCS, the claimant was required to find or be allocated another teaching position, a process which he was required to engage in. There was no requirement for the Department to place the claimant at NLS and there was no requirement for NLS to make an offer to the claimant.
- 136 This is not to say that there might not be occasions where missing out on a job opportunity constitutes damaging action, however, the facts in this case as it relates to an expression of interest at NLS do not go so far as to show that the claimant was given any promise for a position. He expressed an interest and NLS decided not to pursue the claimant’s interest any further.
- 137 The claimant says the retraction of the offer of a teaching position at One Arm Point also constitutes damaging action.
- 138 The respondents say that the offer of a position at One Arm Point and its subsequent retraction *may* constitute ‘damaging action’ within the meaning of s 97(a)(ii) of the IR Act. However, the reasons for the retraction explained by Mr Batka demonstrate that it was unrelated to the First and Second Complaints.
- 139 It is at least open to the Court to consider that the retraction of the offer of a teaching position at One Arm Point may constitute ‘damaging action’ within the meaning of s 97(a)(ii) of the IR Act. That is, in the circumstances, the claimant had an offer of future employment and then he did not, and to that extent, on the view most favourable to the claimant, his position was altered to his disadvantage.

Performance Management

- 140 The claimant says he was placed on performance ‘appraisal’ (or management) when he commenced full time at Belridge Secondary College in early 2025. Prior to that from 18 November 2024, he was teaching in a relief position at Belridge Secondary College.
- 141 However, he provides no detail or evidence as to how his position as a teacher was in some way altered to his disadvantage because he was placed on performance management.
- 142 He later says that he suffered stress, but any such assertion was merely in a general sense and suffering stress does not alter his position as a teacher.
- 143 While there might be occasions where an employee being placed on performance management does, in fact, alter their position to their disadvantage, the evidence in this claim does not rise to one of those occasions.
- 144 Accordingly, I am not satisfied, nor do I find, that being placed on performance management at Belridge Secondary College amounted to ‘damaging action’ within the meaning of s 97(a)(ii) of the IR Act.
- 145 For the sake of completeness, the same evidence would not satisfy me that the claimant was otherwise injured in relation to his employment within the meaning of s 97(a)(iv) of the IR Act.

If the Action Taken was Damaging Action, was it Taken Because the Claimant made an Employment-Related Inquiry or Complaint?

- 146 Notwithstanding the determination in relation to the missed job opportunity at the NLS and being placed on performance management or appraisal, I will consider whether all of the Alleged Damaging Actions were taken because the claimant made the First and Second Complaints.
- 147 Where an employee alleges an employer has taken action against them, if the employee proves the action was damaging action *and* the employee *alleges* that the damaging action was taken for the *reason* or reasons that include the employee made or was able to make an employment-related inquiry or complaint (assuming the employee also proves this element), the onus shifts to the employer to prove that the employer was not motivated by the *reason alleged*.
- 148 If the employer does not discharge the onus, the reason alleged by the employee stands as proof of the fact that the employer has taken damaging action for that *reason alleged* (or reasons that include the reason alleged).
- 149 In considering whether the employer has discharged its onus, the Court is to determine why the employer took the damaging action and ask if it was wholly or in part because the employee made or was able to make an employment-related inquiry or complaint.
- 150 In determining why the employer took the damaging action, the Court’s inquiry is into ‘the reason’ by the decision-maker (or decision-makers) for taking the action and to determine if the ‘substantial or operative reason’ (or reasons that included) was because the employee made or was able to make an employment-related inquiry or complaint.
- 151 This 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.⁹⁴

The Reasons or Reasons Alleged by the Claimant for the Taking of the Damaging Action

- 152 The claimant alleges the Alleged Damaging Actions were because he made the First and Second Complaints about Ms Harris.

153 The claimant did not identify who was the decision-maker in respect of any of the Alleged Damaging Actions. He merely attributed the alleged consequences of the First and Second Complaints about Ms Harris and retaliatory action by her, or more generally to the respondents.

154 Therefore, it has largely been left to the Court to fill in the blanks.

Missing Out on Job Opportunities at NLS and One Arm Point

Who Was the Decision-Maker?

155 In respect of the decision to not proceed further with the claimant's expression of interest for a teaching position at NLS, Mr Van Poelgeest and Mr Fatnowna discussed Mr Van Poelgeest's telephone conversations with Mr Cleary and Ms Harris.⁹⁵ However, I am satisfied that Mr Van Poelgeest was the principal decision-maker with Mr Fatnowna agreeing with his assessment.

156 In respect of the decision to retract the offer of a teaching position at One Arm Point, the decision-maker or makers were members of the school council and Mr Batka.

The Reasons Relevant to Mr Van Poelgeest and NLS

157 Mr Van Poelgeest explained that in light of the information provided by Mr Cleary and Ms Harris, and his discussions with Mr Fatnowna, concerning the claimant's behaviour and performance at his previous school and all of the information he had received, he decided the claimant was not a good fit for NLS. He did not follow up the claimant's expression of interest as a result.⁹⁶

158 In cross-examination, Mr Van Poelgeest denied being aware of the First Complaint (the Second Complaint had not been made at the time the claimant made enquiries with NLS), denied being aware of any formal complaint about Ms Harris, and denied that Mr Cleary informed him of any complaint made about Ms Harris.

159 The contemporaneous note made by Mr Van Poelgeest of his conversations with Mr Cleary and Ms Harris about the claimant, and his subsequent emails with Mr Fatnowna, are consistent with his witness statement and his oral evidence.

160 I am satisfied that *if* missing out on a job opportunity at NLS constituted damaging action and *if* the respondents took this damaging action, then the reason for doing so, as it relates to Mr Van Poelgeest, was not because the claimant made the First or Second Complaints, a combination of them both, or for reasons that include the claimant was able to, or did, make the First or Second Complaints.

161 Simply put, Mr Van Poelgeest had no knowledge of any complaint made by the claimant about Ms Harris and had no knowledge of the First or Second Complaints (noting the Second Complaint had not yet been made).

162 Mr Van Poelgeest made his own assessment based on his discussion with Mr Fatnowna and his discussions with Mr Cleary and Ms Harris, which was *solely* about the claimant's behaviour and performance at BRCS. To that end, Ms Harris's discussions with Mr Van Poelgeest did not reference any complaints made by the claimant about her. I accept Ms Harris's evidence that she was not motivated to take retaliatory steps against the claimant when she spoke with Mr Van Poelgeest, particularly where on her evidence she did not view the First Complaint as a complaint but a response to an email sent by her to the claimant, she was not aware of the Second Complaint or its substance until after she spoke with Mr Van Poelgeest and her motivation was to do the right thing for the students.

163 There is no evidence that in any way casts doubt on Mr Van Poelgeest's evidence of his reasons for not following up further with the claimant in respect of a teaching position at NLS.

164 I am satisfied, and I find that, as it relates to Mr Van Poelgeest's reasons for not following up further with the claimant for a teaching position at NLS, if the alleged damaging action was taken, the respondents have discharged their onus set out in s 97A(2) of the IR Act, and I am satisfied that First and Second Complaints made by the claimant was not a substantive and operative reason or included as a substantive or operative reason for the decision.

The Reasons Relevant to Mr Batka and the One Arm Point School Council

165 Mr Batka explained that following a conversation with Aboriginal members of the school council, he realised that he had 'jumped the gun' and made the job offer to the claimant without first seeking approval of the school council for teaching appointments. He retracted the offer made to the claimant and the teaching position was advertised.⁹⁷

166 Mr Batka further explained he was under a lot of pressure at the time with the school review.

167 In cross-examination, Mr Batka denied knowing Ms Harris and denied speaking to Mr Cleary about the claimant.

168 The contemporaneous emails between Mr Batka, Mr Cleary and the claimant sent on 17 and 18 July 2024 are consistent with his witness statement and his oral evidence.

169 I am satisfied that the retraction of the offer of a teaching position at One Arm Point was not for the reason, as it relates to Mr Batka or the One Arm Point school council, that the claimant made the First or Second Complaints, a combination of them both, or for reasons that include the claimant was able to, or did, make the First or Second Complaints.

170 Simply put, Mr Batka had no knowledge of any complaint made by the claimant about Ms Harris, he had no knowledge of the First or Second Complaints, and did not know Ms Harris in any event.

171 Mr Batka, by his own admission, did not follow the correct procedure as it related to the appointment of teachers at One Arm Point, and when advised of this, took steps to remedy his error.

172 There is no evidence that in any way casts doubt on Mr Batka's evidence of the reasons for retracting the offer of a teaching position at One Arm Point.

173 I am satisfied, and I find that, as it relates to Mr Batka's reasons (and the school council's reasons) for retracting the teaching position at One Arm Point, if the alleged damaging action was taken, the respondents have discharged their onus set out in s 97A(2) of the IR Act, and I am satisfied that the First and Second Complaints made by the claimant was not a substantive and operative reason or included as a substantive or operative reason for the decision.

LWOP/Leave Entitlements

Who Was the Decision-Maker?

174 The claimant does not identify any person as the decision-maker who he says placed him on LWOP. The claimant says this was part of the retaliatory action taken because he made the First and Second Complaints.

175 Other than Ms Barnard's evidence about the practice of 'some payroll officers' exercising a discretion to put unallocated teachers on LWOP, there was no other evidence of which payroll officer made the decision to put the claimant on LWOP in or around 7 October 2024.

176 Mr Cleary followed up with the claimant informing him of the reason he was placed on LWOP but it does not follow that he was the person who made the decision to do so. If the claimant is suggesting Ms Harris was the decision-maker, Ms Barnard's evidence completely refutes this suggestion.

177 Assuming in some general sense it was the respondents who made the decision, the reasons for doing so can best be explained by Ms Barnard.

The Respondents' Reasons

178 Ms Barnard explained that for teachers on RTS leave who remained unattached at the conclusion of their leave, the former practice within the relevant department was for individual payroll officers to place the unattached teacher on LWOP so they were not overpaid.

179 This practice remains but the difference is that it is now not up to individual payroll officers to make that decision, but the same decision is made at the instruction of a senior officer within Ms Barnard's team.⁹⁸

180 Ms Barnard's review of the claimant's payroll records shows the claimant was placed on LWOP as part of the Department's former practices due to him remaining 'unattached' at the end of his RTS leave.

181 While the claimant relied upon a conversation from Mr Cleary explaining why he was on LWOP (the content of the conversation being the claimant had not provided the Department with updated documents), the email the claimant relies upon in support of this conversation does not refer to LWOP but refers to RTS leave.

182 The respondents say the claimant did not have a contract for term three in 2024 and was on paid student vacation leave from 1 to 12 July 2024 (that is, the school holidays). Since the claimant did not have a contract for term three, and the claimant had accrued 10 weeks' RTS leave, he was required to clear this leave before commencing at a school outside of the RTS pursuant to cl 45.4 of the Teachers Agreement. Therefore, the claimant was on RTS leave from 15 July 2024 to 20 September 2024. From 23 September 2024 to 4 October 2024 the claimant was again on paid student vacation leave (that is, school holidays).

183 The respondents say the claimant was on LWOP between 7 October 2024 and 15 November 2024 because during this period he was not teaching at any school and had not provided the relevant documents and information to Mr Cleary enabling Mr Cleary to progress the claimant's redeployment within the Department.

184 Mr Cleary found the claimant a fixed term teaching position at Belridge Secondary College and the claimant resumed a paid position from 18 November 2024.

185 In closing submissions, the respondents referred to cl 45 of the Teachers Agreement in the context of demonstrating that the claimant's assertion that he 'missed out' on six months of leave, if he had completed an extra year of service, was incorrect. That is, pursuant to cl 45.1 of the Teachers Agreement, the RTS leave entitlement was 22 weeks upon completion of eight semesters, inclusive of the 10 weeks' entitlement after six semesters. On the assumption the claimant proved his claim, the entitlement he 'missed out on' could only be 12 weeks. In further explanation, the respondents again referred to cl 45.4 of the Teachers Agreement requiring the clearance of all RTS leave before an employee commences at a school outside the RTS, disputing the claimant's assertion that he was 'forced' to take RTS leave. It was a requirement under the Teachers Agreement that he do so.

186 I am satisfied that the claimant being placed on LWOP was not for the reason or reasons that included because the claimant made the First or Second Complaints or the combination of them both.

187 Simply put, Ms Barnard's evidence is that this was done as a matter of departmental practice for teachers who remained in an unattached position on HRMIS. The practice remains the same, but the approval process has changed.

188 There is no evidence that in any way casts doubt on Ms Barnard's evidence of the reasons for the claimant being placed on LWOP, and the consequential 'freezing' of leave entitlements.

189 Further, whether the procedure for placing the claimant on LWOP was correct or incorrect, the reasons why this occurred as explained by Ms Barnard bears some relationship with the information contained in the Redeployment Information Pack in that the claimant was required to engage in the redeployment process.

190 I am satisfied, and I find that, as it relates to the respondents' reason for placing the claimant on LWOP (and the consequential 'freezing' of leave entitlements), the respondents have discharged their onus set out in s 97A(2) of the IR Act, and I am satisfied that the First and Second Complaints made by the claimant was not a substantive and operative reason, or included as a substantive or operative reason, for the decision.

Performance Management

Who Was the Decision-Maker?

- 191 The claimant states that he found out in May 2025 that Ms Harris was the person who requested his 'performance appraisal' after he commenced at Belridge Secondary School in early 2025.
- 192 The claimant states he saw a document on the Department's internal system from August 2024 which he says was attributable to Ms Harris.
- 193 Ms Harris disavows that she ever requested for the claimant to be subject to performance appraisal in August 2024 or at all. She denies generating such a request in August 2024 because at the time she was no longer the claimant's principal and would have no reason to request his performance appraisal.
- 194 In cross-examination, it was put to the claimant that the document he saw was a reference to his complaint about Ms Harris and that he completed the online form and provided additional documents via the ICT Self-Service Hub.⁹⁹ The claimant seemed confused about what he did although he appeared to accept that he submitted a complaint online.¹⁰⁰
- 195 I accept Ms Harris' evidence that she was not involved in any performance appraisal request in August 2024 or when the claimant attended Belridge Secondary College in early 2025. Her evidence was unequivocal and there was a sound basis for her evidence. The claimant's evidence was based on something he thinks he saw but that something seems to be his own complaint submitted via the Department's online platform.
- 196 Who placed the claimant on performance management at Belridge Secondary College is unknown, but it was definitely unrelated to any decision made by Ms Harris. The claimant alleges that she did so because he made the First and Second Complaints about her.
- 197 There is simply no evidentiary nexus between any decision (not) made by Ms Harris, the First and Second Complaints and the claimant being subject to performance appraisal at Belridge Secondary College.
- 198 In those circumstances, I am satisfied, and I find that the respondents have discharged their onus set out in s 97A(2) of the IR Act, and I am satisfied that the First and Second Complaints made by the claimant was not a substantive and operative reason or included as a substantive or operative reason for the decision to place the claimant on performance appraisal at Belridge Secondary College.

Conclusion

- 199 I am not satisfied that the claimant has proven to the requisite standard the respondents took damaging action against him in relation to the missed job opportunity at NLS or when he was subject to performance management at Belridge Secondary College.
- 200 However, *if* these actions did amount to damaging action within the meaning of s 97(a)(ii) of the IR Act, I am satisfied that any such damaging action was not for the reason or a reason that included, or because the claimant made employment-related inquiries or complaints, being the First and Second Complaints.
- 201 That is, I am satisfied that the respondents have discharged their onus under s 97A(2) of the IR Act as it relates to the missed job opportunity at NLS and performance management at Belridge Secondary College.
- 202 While I am satisfied that the retraction of the offer of a teaching position at One Arm Point and the placing of the claimant on LWOP (with the consequential effects on any leave) *may* amount to 'damaging action' within the meaning of s 97(a)(ii) of the IR Act, I am satisfied that any such damaging action was not for the reason or a reason that included, or because the claimant made employment-related inquiries or complaints, being the First and Second Complaints.
- 203 That is, I am satisfied the respondents have discharged their onus under s 97A(2) of the IR Act as it relates to the retraction of the offer of a teaching position at One Arm Point and the placing the claimant on LWOP.

Outcome

- 204 The 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 October Amended Claim at [14].

² October Amended Claim at [15].

³ ts 5.

⁴ ts 5 - 6.

⁵ ts 7 - 9.

⁶ ts 10.

⁷ *Hughes v East Metropolitan Health Service* [2024] WAIRC 982; 104 WAIG 2560 (*Hughes*) [156] - [158].

⁸ *Ermel v Duluxgroup (Australia) Pty Ltd (No 2)* [2015] FCA 17; (2015) 67 AILR 102-332 [48] referred to in *Hughes* at [82] - [83].

⁹ Also referred to in *Hughes* at [82] and [83].

¹⁰ Exhibit 1 – Witness Statement of Ruben Sanzana signed 8 September 2025 with annexures A - M2.

¹¹ Exhibit 2 – Witness Statement of Ruben Sanzana signed 26 October 2025 with annexures A1 - E1.

¹² Exhibit 3 – Witness Statement of Ruben Sanzana dated 25 November 2025 with annexures 3A - 3E.

¹³ Exhibit 7 – Witness Statement of Jasmine Harris dated 16 September 2025 at [1].

¹⁴ Exhibit 6 – Witness Statement of Mark Batka dated 15 September 2025 at [1].

¹⁵ Exhibit 10 – Witness Statement of Jason Van Poelgeest dated 16 September 2025 at [1] - [2].

¹⁶ Exhibit 9 – Witness Statement of Lucinda Barnard dated 19 September 2025 at [1] - [3].

¹⁷ Exhibit 7 at [2].

¹⁸ Exhibit 7 at JH-1.

¹⁹ Exhibit 1 at annexure B; Exhibit 7 at JH-2.

²⁰ Exhibit 1 at [20]; Exhibit 10 at [5] and JVP-1.

²¹ Exhibit 1 at annexure C.

²² Exhibit 1 at annexure C.

²³ Exhibit 10 at JVP-2.

²⁴ Exhibit 10 at JVP-2.

²⁵ Exhibit 10 at [11] and JVP-3.

²⁶ Exhibit 10 at [12] and JVP-3.

²⁷ Exhibit 10 at JVP-3.

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- ²⁸ Exhibit 10 at [15] - [17] and JVP-2.
- ²⁹ Exhibit 1 at [22].
- ³⁰ Exhibit 1 at annexure D.
- ³¹ Exhibit 6 at [3].
- ³² Exhibit 6 at MB1 and Exhibit 1 at F.
- ³³ Exhibit 6 at MB1.
- ³⁴ Exhibit 1 at annexure G.
- ³⁵ Exhibit 1 at annexure H.
- ³⁶ Exhibit 1 at annexure I.
- ³⁷ Exhibit 1 at annexure J.
- ³⁸ Exhibit 1 at [32]. The attachment referred to in Exhibit 1 is not what is stated in the witness statement.
- ³⁹ Exhibit 1 at annexure K.
- ⁴⁰ Exhibit 1 at [33] and annexure L.
- ⁴¹ Exhibit 1 at [35] and [36].
- ⁴² Exhibit 1 at [29].
- ⁴³ Exhibit 1 at [34].
- ⁴⁴ October Amended Claim at [15].
- ⁴⁵ Exhibit 1 at annexure L.
- ⁴⁶ Exhibit 1 at annexure K.
- ⁴⁷ Exhibit 1 at [37].
- ⁴⁸ Exhibit 1 at [38] - [39].
- ⁴⁹ ts 18 - 19.
- ⁵⁰ ts 21.
- ⁵¹ Exhibit 1 at annexure L.
- ⁵² ts 21 - 22.
- ⁵³ ts 22 - 23.
- ⁵⁴ Exhibit 4 – emails between Mr Cleary and the claimant from June to October 2024.
- ⁵⁵ Exhibit 5 – Attachments A – A1 of the Document Signed by Ruben Sanzana on 2 December 2025, at A and A1.
- ⁵⁶ ts 25 - 26.
- ⁵⁷ Exhibit 6 at [4].
- ⁵⁸ Exhibit 6 at [4].
- ⁵⁹ Exhibit 6 at [5] and [7].
- ⁶⁰ ts 35.
- ⁶¹ ts 35 - 37.
- ⁶² ts 38.
- ⁶³ Exhibit 10 at [13] and JVP-3.
- ⁶⁴ ts 75 - 77.
- ⁶⁵ Exhibit 1 at annexures C and C1.
- ⁶⁶ ts 76.
- ⁶⁷ ts 77 - 78.
- ⁶⁸ Exhibit 1 at annexure B; ts 78.
- ⁶⁹ ts 77 referring to JVP-3.
- ⁷⁰ ts 77.
- ⁷¹ ts 79.
- ⁷² ts 79.
- ⁷³ Exhibit 9 at [4].
- ⁷⁴ Exhibit 9 at [5].
- ⁷⁵ Exhibit 9 at [6].

- ⁷⁶ Exhibit 9 at [7].
⁷⁷ Exhibit 9 at [8].
⁷⁸ Exhibit 9 at [9].
⁷⁹ ts 48.
⁸⁰ ts 48.
⁸¹ ts 50.
⁸² ts 49.
⁸³ Exhibit 7 at [73].
⁸⁴ Exhibit 7 at [74].
⁸⁵ Exhibit 8 at [3] - [4].
⁸⁶ Exhibit 8 at [6] - [7].
⁸⁷ ts 61.
⁸⁸ ts 62.
⁸⁹ ts 62 - 63.
⁹⁰ ts 65.
⁹¹ Exhibit 1 at annexure G.
⁹² ts 65 - 66.
⁹³ ts 70.
⁹⁴ *Short v Ambulance Victoria* [2015] FCAFC 55; (2015) 249 IR 217 at [55] and the cases referred to therein.
⁹⁵ Exhibit 10 at [16].
⁹⁶ Exhibit 10 at [17].
⁹⁷ Exhibit 6 at [4] - [5].
⁹⁸ Exhibit 9 at [7] - [8].
⁹⁹ Exhibit 5 at Documents A and A1.
¹⁰⁰ ts 25 - 26.

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2026 WAIRC 00136

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2026 WAIRC 00136
CORAM	:	SENIOR COMMISSIONER R COSENTINO COMMISSIONER T B WALKINGTON COMMISSIONER C TSANG
HEARD	:	THURSDAY, 26 FEBRUARY 2026
DELIVERED	:	MONDAY, 9 MARCH 2026
FILE NO.	:	APPL 4 OF 2025
BETWEEN	:	JD Appellant AND COMMISSIONER OF THE WESTERN AUSTRALIAN POLICE Respondent

CatchWords	:	INDUSTRIAL LAW (WA) – Police officer appeal against removal action under <i>Police Act 1892</i> (WA) – application to amend grounds of appeal and adduce fresh evidence under s 33R of the <i>Police Act 1892</i> (WA) on day of appeal hearing – whether to allow appellant to amend appeal – procedural history – lack of explanation for late application – prejudice to respondent – application dismissed
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Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Police Act 1892</i> (WA)
Result	:	Application to amend grounds of appeal and adduce fresh evidence dismissed
Representation:		
Counsel:		
Appellant	:	Mr R French (of counsel) on behalf of JD
Respondent	:	Ms A Miller (of counsel) on behalf of the Commissioner of the Western Australian Police
Solicitors:		
Appellant	:	Tindall Gask Bentley Lawyers
Respondent	:	State Solicitor's Office

Case(s) referred to in reasons:

Aon Risk Services Australia Ltd v Australian National University [2009] HCA 27

JD v Commissioner of the Western Australian Police [2026] WAIRC 00067

Gordon v Commissioner of Police [2010] WAIRC 00334; (2010) 90 WAIG 645

Waddell v Commissioner of Police [2012] WAIRC 00112; (2012) 92 WAIG 254

Reasons for Decision

THE COMMISSION

- 1 This matter was listed for a hearing of the appeal commencing on 23 February 2026.
- 2 Shortly before the commencement of the first day of the hearing of the appeal, the appellant made an application to amend his Form 8C – Notice of Appeal grounds of appeal and for leave to adduce fresh evidence pursuant to s 33R of the *Police Act 1892* (WA).
- 3 As matters stood, the parties and the Commission were proceeding on the basis that the appeal involved a single ground of appeal that is articulated as follows:
 - Ground 1

It was harsh, oppressive or unfair for the respondent to take removal action against the applicant, in November 2024 (**2024 removal action**), more than seven years after the alleged incidents (January 2017 to September 2017) relied upon in support of the 2024 removal action in circumstances were the

 - (a) alleged incidents were initially investigated in September 2017 to 10 May 2018 (**First Investigation**).
 - (b) first investigation resulted in findings and a decision not to remove the applicant on or before 10 May 2018 (**2018 Non-Removal Decision**)
 - (c) the applicant was permitted to serve as a working member of the police force continuously prior to and during the First Investigation from September 2017, prior to and after the 2018 Non-Removal Decision, until 2 May 2023 when he was stood down pending the outcome of the 2024 removal process.¹
- 4 The application for leave to amend the appeal and the application for leave to adduce fresh evidence are said by the appellant to go hand in hand. That is, the appellant does not seek to amend the grounds of appeal unless also permitted to adduce fresh evidence and does not seek to adduce fresh evidence unless also permitted to amend the grounds of appeal.
- 5 The proposed amendment would substitute for the existing ground of appeal the following single ground:

Ground 1A. - Not open to make findings in light of evidence given at criminal trial.

It was harsh, oppressive and unfair for the respondent to maintain the removal action against the applicant after the conclusion of the applicant's criminal trial (for which he was acquitted) on the basis that the evidence given at that trial establishes that it was no longer reasonably open to conclude on the balance of probabilities, in accordance with the principle in *Briginshaw v Briginshaw*, that the appellant engaged in the conduct set out at [342] – [344] and [372] of the Summary of Investigations.
- 6 The appellant says the reason for seeking to amend the grounds of appeal in this way is that if the appeal were to proceed on the current ground, then his true and more fulsome position as to the very serious factual allegations made about him would not be before the Commission in the appeal. This could have serious consequences for the appellant should he not be able to challenge them.
- 7 The proposed new ground is introduced apparently to deal with a submission made by the respondent, in paragraph 10 of his written submissions for the hearing of the appeal, to the effect that the appellant's grounds of appeal do not challenge the correctness of the conclusion that he engaged in the sexual misconduct and domestic violence alleged.
- 8 The respondent opposes the appellant being granted leave to appeal at this very late stage for three reasons:

- (a) The appellant made strategic decisions earlier in the proceedings to formulate his case on a narrow basis, no doubt with the benefit of considered legal advice.
- (b) The appellant has not provided sufficient explanation for making the application at this very late stage.
- (c) Granting the applications will result in significant delay in the resolution of these proceedings and cause prejudice to the respondent.

9 The respondent says that if the Commission decides to grant leave to amend, the s 33R application should also be granted.

Legal Principles

- 10 Section 27(1)(l) and (m) of the *Industrial Relations Act 1979* (WA) (**IR Act**) empower the Commission to allow the amendment of any proceedings on such terms as it thinks fit.
- 11 In exercising its discretion, the Commission is required to act ‘...according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms’: s 26(1)(a).
- 12 Factors relevant to exercising the discretion to allow amendment to the grounds of appeal include:
- (a) the nature and importance of the amendment to the party applying, and that the Commission has a duty to allow an amendment for the purpose of deciding the real issues in the proceedings;
 - (b) the extent of delay and costs associated with the amendment and whether this can be overcome by an arrangement for costs;
 - (c) the prejudice to the other party;
 - (d) the point the litigation has reached relative to a final hearing when the application to amend is made;
 - (e) the need to avoid disruption in the Commission’s lists with consequent inconvenience to the Commission and prejudice to the interests of other litigants waiting to be heard;
 - (f) whether the proposed amendment constitutes a reasonably arguable ground of appeal: *Gordon v Commissioner of Police* [2010] WAIRC 00334; (2010) 90 WAIG 645 [26] citing *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27.
- 13 At [102] – [103] of *Aon Risk Services Australia Ltd*, Gummow, Hayne Crennan, Kiefel and Bell JJ said (our emphasis):
- 102 The objectives stated in r 21 do not require that every application for amendment should be refused because it involves the waste of some costs and some degree of delay, as it inevitably will. Factors such as the nature and importance of the amendment to the party applying cannot be overlooked. Whilst r 21 assumes some ill-effects will flow from the fact of a delay, that will not prevent the parties dealing with its particular effects in their case in more detail. It is the extent of the delay and the costs associated with it, together with the prejudice which might reasonably be assumed to follow and that which is shown, which are to be weighed against the grant of permission to a party to alter its case. Much may depend upon the point the litigation has reached relative to a trial when the application to amend is made. There may be cases where it may properly be concluded that a party has had sufficient opportunity to plead their case and that it is too late for a further amendment, having regard to the other party and other litigants awaiting trial dates. Rule 21 makes it plain that the extent and the effect of delay and costs are to be regarded as important considerations in the exercise of the court’s discretion. **Invariably the exercise of that discretion will require an explanation to be given where there is delay in applying for amendment.**
- 103 The fact that an explanation had been offered for the delay in raising the defence was regarded as a relevant consideration in *J L Holdings*. **Generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for. The importance attached by r 21 to the factor of delay will require that, in most cases where it is present, a party should explain it.** Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court’s attention, so that they may be weighed against the effects of any delay and the objectives of the Rules. There can be no doubt that an explanation was required in this case.

Nature and Importance of Amendment

- 14 The appellant concedes that the proposed new ground of appeal goes beyond what was previously advanced in that it seeks to challenge whether the Commissioner of Police’s findings of fact upon which he relied to remove the appellant were open to be made given the additional evidence given by the appellant during the criminal trial in respect of the same facts.
- 15 Previously, the appellant had limited his appeal to the issue of the substantial delay in removing the appellant in circumstances where many of the allegations that led to his removal had been investigated seven years earlier and he had been allowed to continue in his role with the police force: [6] of the Appellant’s submissions filed 23 February 2026.
- 16 The factual allegations which the appellant seeks to now challenge are extremely serious allegations concerning sexual penetration without consent and domestic violence over the course of a relationship. While the appellant has always denied and continues to deny the allegations, the proposed amended grounds of appeal now squarely put the soundness of the findings against him in dispute. It cannot be doubted that the nature of the amendment is significant both in that it departs significantly from the grounds previously articulated and because of its importance to the appellant in ensuring his true case is before the Commission.

The extent of the delay

- 17 It is appropriate to set out the procedural history in this matter.
- 18 The appeal was commenced on 2 January 2025 in relation to removal action which was taken on 3 December 2024.
- 19 The original grounds of appeal were prepared by the appellant before he was legally represented. They were threefold:
1. I have previously been compelled by the West Australian Police to respond these allegations when the matter was investigated by Internal Affairs. This compelled interview was subsequently accessed by the investigator handling the alleged criminal allegations against me. Such access appears to be unfair and potentially unlawful as established in *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53 which stipulates that investigators should not have access to compelled interviews.
 2. The issuance of the NOR compels me once again to respond to allegations that form the basis of serious criminal charges currently pending against me. Providing a comprehensive response at this juncture would contradict the competent and extensive legal advice I have received – advice that remains protected under legal privilege – indicating that I should refrain from commenting on the charges until my defence is fully prepared and proceedings are completed. Given that my previous compelled interview has been made available to those investigating these allegations, I harbor legitimate concerns about providing further accounts of the alleged offences outside the context of my defence.
 3. Notably as stated above, this matter was previously investigated seven years ago and the allegations against me were unfounded. I am also a victim of domestic violence from the complainant, and the false allegations levelled against me have compounded my trauma. The charges I am facing are grave and have significantly disrupted my life. I am prepared to present newly determined and previously undisclosed information in the appropriate legal forum i.e. at trial. Being compelled to respond to the NOR at this stage undermines the Commissioner’s obligations to ensure that I receive natural justice.
- 20 The appellant’s lawyers commenced acting for him in the appeal on about 5 January 2025.
- 21 On 14 February 2025 the Commission adjourned the proceedings pursuant to s 33T(1) of the *Police Act* pending the District Court trial of criminal charges laid against the appellant. The adjournment was by the consent of both parties.
- 22 The District Court trial occurred between 13 August 2025 and 24 September 2025 and resulted in the appellant’s acquittal on all charges.
- 23 These proceedings were listed for a Directions Hearing on 14 October 2025. At that time neither party had formed a view as to whether any s 33R application would be made to adduce fresh evidence in light of the District Court trial. However, the appellant urged that the matter be programmed to hearing without unnecessary delay.
- 24 On 29 October 2025, directions programming the appeal for hearing were made by consent. The directions required any party who sought to make a s 33R application to adduce new evidence to do so by 9 December 2025.
- 25 The date for making a s 33R application was subsequently extended by consent to 19 December 2025.
- 26 On 17 October 2025, notices of hearing were issued listing the appeal for a four-day hearing commencing on 23 February 2026.
- 27 On 11 November 2025, the respondent filed a Response to the original grounds of appeal. Under heading ‘D. Matters in reply to the Appellant’s case’, the respondent says the appellant’s case outlined in his Form 8C Notice of Appeal contains a number of allegations and complaints, which the respondent understands essentially raised the following three grounds of appeal:
- (a) The respondent decided to take removal action prior to the conclusion of the criminal proceedings;
 - (b) Alleged bias, negligence and unfairness in the investigation; and
 - (c) Assertions that the allegations upon which the respondent’s decision to take removal action was based were unfounded.
- 28 The Response then goes on to address the third of these grounds under paragraph 1.3 ‘Assertion that the allegations were unfounded’ referring to the fact that the respondent’s decision was based on the matters set out in a summary of investigation and that the respondent was persuaded to a high level of probability that the appellant had engaged in the conduct and it was open for him to come to his conclusions.
- 29 On 19 December 2025, the appellant filed his amended grounds of appeal substituting two grounds for the original grounds. On the same date the respondent:
- (a) filed his regulation 92 bundle of documents for hearing, comprising 1152 pages of documents; and
 - (b) applied to adduce fresh evidence under s 33R in the form of the transcript of the District Court trial and text messages exhibited during the District Court trial.
- 30 The appellant opposed the respondent’s s 33R application and made no application of his own to adduce fresh evidence by the date stipulated in the Commission’s orders.
- 31 On 15 January 2026, the appellant filed his written submissions opposing the respondent’s s 33R application. In his written submissions, he indicated that he proposed to abandon ground 2 of the grounds of appeal filed by him on 19 December 2025.
- 32 The respondent’s s 33R application was dealt with by the Commission on the papers. The Commission dismissed that application on 23 January 2026: *JD v Commissioner of the Western Australian Police* [2026] WAIRC 00067.
- 33 On 4 February 2026, the respondent filed a further s 33R application to adduce fresh evidence relevant to the appellant’s amended ground of appeal as filed on 19 December 2025. That application was not opposed by the appellant and although no

final orders were made or formalised, the Commission indicated it would grant the respondent's application given the documents related to the new ground of appeal.

- 34 On 12 February 2026, the appellant's lawyers advised the Commission that they consented to the second and third hearing dates being vacated in light of the narrower scope of the appeal than had been contemplated as at the October directions hearing.
- 35 On 18 February 2026, the respondent filed a supplementary bundle of documents containing the documents the subject of his s 33R application filed on 4 February 2026.
- 36 On 4 February 2026, the respondent filed his submissions for hearing.
- 37 On 23 February 2026, the first day of the listed hearing, the appellant filed his application to amend the grounds of appeal and adduce fresh evidence.
- 38 The respondent says the appellant must have been clearly apprised of the fact that the basis for the factual findings made against the appellant were in issue in the proceedings at the time he decided to seek to narrow his grounds of appeal, because the 11 November 2025 Response identified this as an issue.
- 39 The respondent also highlights the fact that in the appellant's submissions opposing his s 33R application on 15 January 2026 at [3] – [4], he acknowledged that the grounds of appeal strictly limit the scope of the appeal and that the trial transcript must therefore be irrelevant as being irrelevant to the only ground of appeal.
- 40 The procedural history gives the appearance of a considered strategy since 19 December 2025 to narrow the scope of the appeal. The current application therefore involves the appellant in a last-minute backflip.
- 41 From 19 December 2025, steps that have been taken are the agitation of the respondent's s 33R application, the filing of submissions in relation to the single ground of appeal, and the respondent's second s 33R application being made. All of these developments have unfolded over a relatively short period of two months in the scheme of proceedings that have been on foot for just over 12 months. But they also constitute the bulk of the work in these proceedings.
- 42 It is not surprising that the appellant would seek to amend his grounds of appeal following the outcome of the District Court trial. The possibility of him doing so was no doubt in both parties' contemplation. The appropriate time for him to do so was the months between the outcome of the District Court trial in September 2025 and 19 December 2025 when, in accordance with directions which the parties themselves consented to, any s 33R application was due to be filed. Attention ought to have been given to the grounds of appeal particularly in light of the respondent's s 33R application and before the Commission was required to dispose of that application.

Explanation for the delay

- 43 The appellant has made no real attempt to explain the timing of the current application. While he articulates why the amendment is important in order to put the real issues before the Commission, he does not explain why the application is made at the time it is made.
- 44 The appellant's counsel indicated that there were constraints on what could be said by way of explanation for the delay given issues of legal advice privilege and professional indemnity issues. The appellant says no more than that he has reconsidered his case and fully come to grips with the implications of not challenging Commissioner's factual findings in circumstances where he has always maintained his denials.
- 45 The absence of a compelling explanation for the very late stage of the application is concerning.

Prejudice to the Respondent

- 46 The appellant frankly concedes that it would have been better for him to have sought to amend his grounds earlier. He accepts the amendment application has caused the loss of the two days allocated for the final hearing and if granted, it will require additional time and effort for the parties and the Commission to prepare for the substantive hearing.
- 47 The respondent accepts that prejudice associated with the amendment is reduced by the fact that the respondent had already given consideration to the new evidence and the issues raised by the proposed amended ground. Counsel for the respondent advised that in the event the application was granted, the respondent may or may not decide to reformulate his reasons for decision, but if he does decide to reformulate his reasons, he can do so quickly. Counsel advised that the main delay will be in collating written and oral submissions in light of the amended grounds. No additional responsive evidence is likely to be relied upon by the respondent. The respondent will seek to make submissions in relation to the findings that the Commission ought to make in light of the new evidence.
- 48 The respondent says that his interests will be prejudiced by any delay in the reconvening of the hearing, additionally because the respondent will be liable to pay the appellant back pay from the date of his removal, should his appeal be successful and he be reinstated. The respondent will also be prejudiced through the costs thrown away in relation to work undertaken on behalf of the respondent preparing for the hearing of the appeal. That will include the making of the second s 33R application, the formulation of submissions relating to the single ground of appeal and filing of supplementary bundle of s 92 documents. We estimate this amounts to more than half of the work done in the history of the matter. The only documents filed by the respondent prior to 19 December 2025 was the Response.

Disruption and inconvenience to the Commission

- 49 Some weight ought to be given to the disruption the amendments will cause to the Commission and the interests of other parties presently before the Commission or who in the future may seek access to the Commission and the delays this may cause in their matters being heard and determined. This is particularly so, given this appeal involves three Commissioners.

50 The weight is lessened to some extent because the proceedings inevitably must be relisted given we reserved our decision on this application.

Whether the proposed amendment constitutes a reasonable arguable ground of appeal

51 There is no serious contest that the proposed ground is not arguable. The respondent does say that the new ground for appeal is misconceived because it attacks a decision not the subject of the appeal namely, the maintenance of the notice of removal in light of the appellant's acquittal. In *JD v Commissioner of the Western Australian Police* [2026] WAIRC 00067 [31] the Commission noted that the decision under appeal is the decision to take removal action, not any decision to refuse to revoke the decision to remove. However, the respondent also concedes that this deficiency could be overcome by slight tweaking of the ground of appeal.

Consideration

52 Balancing the competing factors in accordance with equity, good conscience and the substantial merits of the case, ultimately, we do not consider that the appellant has established that the interests of justice require us to permit him to amend his grounds of appeal. The procedural history and lateness of the application, combined with the absence of an explanation for the delay and prejudice to the respondent means the interests of justice are against permitting the late amendment.

53 The only factor which weighs for the appellant is the prejudice that the appellant would suffer if the amendment is not permitted. He would be forced to run his appeal on a narrow ground which does not reflect his fundamental denial of the factual allegations in which the notice of removal was based. Nevertheless, we do not consider this factor, as compelling as it is, adequately offsets the many factors pointing the other way.

54 We will accordingly make orders:

- (a) That the appellant's application dated 23 February 2026 to amend his grounds of appeal and adduce fresh evidence be dismissed; and
- (b) That the appeal be relisted for a one-day hearing on a date to be fixed.

¹ Technically, the original grounds of appeal had not yet been amended to reflect this single ground, as an order permitting the amendment of the notice of the appeal to substitute this ground for the original grounds of appeal had not formally been made although the Commission had indicated, with the parties consent, that an order would be made formalising this as the ground of appeal.

2026 WAIRC 00067

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2026 WAIRC 00067
CORAM : SENIOR COMMISSIONER R COSENTINO
 COMMISSIONER T B WALKINGTON
 COMMISSIONER C TSANG
HEARD : ON THE PAPERS, LAST SUBMISSIONS RECEIVED ON 15 JANUARY 2026
DELIVERED : THURSDAY, 5 FEBRUARY 2026
FILE NO. : APPL 4 OF 2025
BETWEEN : JD
 Appellant
 AND
 COMMISSIONER OF THE WESTERN AUSTRALIAN POLICE
 Respondent

CatchWords : Loss of confidence – Removal of Police Officer – Appeal against removal – Application to tender new – District Court trial transcript – where acquittal and no factual findings – Whether tender is in the interests of justice – Application dismissed

Legislation : *Police Act 1892* (WA)
Industrial Relations Commission Regulations 2005 (WA)
Criminal Procedure Act 2004 (WA)
Evidence Act 1906 (WA)

Result : Leave to tender new evidence dismissed

Representation: : (on the papers)

Counsel:

Appellant	:	Mr R French on behalf of the appellant
Respondent	:	Ms A Miller on behalf of the respondent
Solicitors:		
Appellant	:	Tindall Gask Bentley Lawyers
Respondent	:	State Solicitor's office

Case(s) referred to in reasons:

Carlyon v Commissioner of Police [2004] WAIRC 11428; (2004) 84 WAIG 1395

Carlyon v Commissioner of Police [2004] WAIRC 11966; (2004) 85 WAIG 708

Ferguson v The Commissioner of Police [2017] WAIRC 00238; (2017) 97 WAIG 502

Henderson v Commissioner of Police [2025] WAIRC 00763; (2025) 105 WAIG 2249

Moran v Commissioner of Police [2014] WAIRC 1358; (2014) 95 WAIG 185

Moran v Commissioner of Police [2015] WAIRC 00464; 95 WAIG 804

Reasons for Decision

- 1 The appellant was an officer of the Western Australian Police Force. He has appealed under section 33P of the *Police Act 1892* (WA) against the Commissioner of Police's decision to take removal action against him.
- 2 The legislative scheme for the determination of appeals against removal action in Part IIB Division 3 of the *Police Act* includes an ability for both an appellant, and the Commissioner of Police as respondent to the appeal, to apply to the Western Australian Industrial Relations **Commission** for leave to tender new evidence, that is, evidence that was not part of the information that formed the basis of the removal decision: *Police Act*, s 33R.
- 3 The respondent has made such an application (**s 33R application**).
- 4 The respondent made the s 33R application on 19 December 2025, after the appeal had been listed for a final hearing commencing on 23 February 2026. On 7 January 2026, the appellant informed the Commission that he opposed the s 33R application. The Commission did not have availability to list the s 33R application for hearing in January 2026 and, given the proximity of the hearing and existing programming for the final hearing, decided to determine the s 33R application on the papers.
- 5 We are grateful to the parties for their prompt filing of written submissions for the determination of the s 33R application.
- 6 Given the current programming of this matter and to ensure the final hearing of the appeal will not be delayed, the Commission treated the s 33R application expeditiously. Consequently, these reasons are relatively brief and may suffer from some infelicity of expression.

The nature of this appeal

- 7 An appeal under s 33P of the *Police Act* may be brought on the ground that the Commissioner of Police's decision to take removal action was harsh, oppressive or unfair: *Police Act*, s 33P(1).
- 8 An appellant must specify in the notice of appeal the reasons for the decision the subject of the appeal being harsh, oppressive or unfair: *Police Act*, s 33P(2)(a); *Industrial Relations Commission Regulations 2005* (WA) reg 90.
- 9 The notice of appeal must be articulated in such a way that the respondent is on notice of the case he has to meet on the appeal: *Moran v Commissioner of Police* [2015] WAIRC 00464; (2015) 95 WAIG 804 [175] (Kenner C).
- 10 It is the notice of appeal filed in accordance with the *Regulations* that marks out the scope of the appeal, and which dictates what it is the Commission must determine: *Moran v Commissioner of Police* [177] (Kenner C). The Commission may only consider the issues raised by the notice of appeal: *Moran v Commissioner of Police* [96]–[97] (Beech CC).
- 11 In *Carlyon v Commissioner of Police* [2004] WAIRC 11428; (2004) 84 WAIG 1395 [21]–[24] the Commission said:
 - 21 Consistent with the interests of justice necessary for admitting new evidence and the requirement to act according to equity, good conscience and the substantial merits of the case, the Commission is directed to consider in the sequence specified, matters set out in section 33Q(1) of the *Police Act 1892*. Furthermore, without limiting the matters to which the Commission is otherwise required or permitted to have regard in determining the Appeal, it shall have regard to:
 - (a) the interests of the Appellant; and
 - (b) the public interest which is taken to include –
 - (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and
 - (ii) the special nature of the relationship between the Commissioner of Police and members of the Force.” (section 33Q(4))
 - 22 Indeed it may be seen that on the basis of public interest as identified in section 33Q(4) of the *Police Act 1892* it is incumbent upon the Commission to have regard for the fact of an appellant's criminal conviction. Where, as in this case, the grounds upon which the Appellant claims that the decision of the Commissioner of Police was

harsh, oppressive or unfair go directly to the issues determined in criminal proceedings, the sworn and tested evidence together with the findings should be available to the Commission.

23 If this is the case the Appellant's argument that the Commission must consider the Appeal and matters relating to it within the confines of the evidence and material available to the Commissioner of Police and issues he considered at the time of his decision cannot be accepted. In our view the scope of sections 33Q(1) and (4) and section 33T of the *Police Act 1892* make it clear that such a narrow view of the appeal process and new evidence which is in the interests of justice cannot apply. Similarly, these provisions militate against an interpretation of the scheme of the *Police Act 1892* which so limits consideration of the appeal as if it was to be determined at the time of the Commissioner of Police's decision to issue a notice removing the officer. The availability of an adjournment to the Commissioner of Police under section 33T where the Appellant has been charged with a relevant offence, does not act to impose a limitation on the Commission to consider only what was before the Commissioner of Police when his decision was made to remove the officer.

24 The Appellant has at all times the burden of establishing that the Commissioner of Police's decision to take removal action was harsh, oppressive and unfair. In determining the appeal the Commission has a duty to have regard to the interests of the Appellant and the public interest. In this latter respect the Appellant's ability to maintain public confidence in the integrity, honesty, conduct and standard of performance of the Police Force must be assessed.

12 The appellant was removed from office for loss of confidence on the grounds that the respondent was persuaded, to a high level of probability, that during 2017, he engaged in:

- (a) serious sexual misconduct against a woman with whom he was in a domestic relationship; and
- (b) conduct of a violent, abusive, controlling and/or threatening nature towards the same woman.

13 The appellant was charged with Aggravated Sexual Penetration without Consent, Common Assault in Circumstances of Aggravation, Acts Creating False Apprehension as to the Existence of Threats of Danger and Persistently Engaged in Family Violence. The appellant pleaded not guilty to all charges.

14 These proceedings were adjourned pursuant to s 33T of the *Police Act* while the Aggravated Sexual Penetration without Consent and Persistent Family Violence (one count, and ten individual alternative counts) charges were dealt with by the District Court of Western Australia. The other two charges were discontinued.

15 After a 28-day District Court trial, the jury returned a not guilty verdict in relation to the remaining charges, and the appellant was acquitted.

16 The District Court proceedings were the subject of a suppression order pursuant to s 171(4)(b) of the *Criminal Procedure Act 2004* (WA) with an exception for disclosure of information or material to the respondent and the Commission for the purpose of these proceedings.

17 The appellant's *Form 8C – Notice of Appeal* contains two grounds stating the reasons why he says his removal was harsh, oppressive or unfair. Only ground 1 pressed. It is:

Ground 1-delay action harsh

It was harsh, oppressive or unfair for the respondent to take removal action against the applicant, in November 2024 (**2024 Removal Action**), more than 7 years after the alleged incidents (January 2017 – September 2017) relied upon in support of the 2024 Removal Action in circumstances where the:

- a) alleged incidents were initially investigated in September 2017 – 10 May 2018 (**First Investigation**);
- b) First Investigation resulted in findings and a decision not to remove the applicant on or before 10 May 2018 (**2018 Non-Removal Decision**);
- c) applicant was permitted to continue to serve as a working member of the police force continuously prior to and during the First Investigation from September 2017, prior to and after the 2018 Non-Removal Decision, until 2 May 2023 when he was stood down pending the outcome of the 2024 removal process.

Applicable principles

18 Section 33R of the *Police Act* relevantly says:

33R. New evidence on appeal

- (1) New evidence shall not be tendered to the WAIRC during a hearing of an appeal instituted under this Part unless the Commission grants leave under subsection (2) or (3).
- (2) The WAIRC may grant the Commissioner of Police leave to tender new evidence if —
 - (a) the appellant consents; or
 - (b) it is satisfied that it is in the interests of justice to do so

...

- (5) If the Commissioner of Police is given leave to tender new evidence under subsection (2), the WAIRC shall give the appellant a reasonable opportunity to consider the new evidence and the appellant may tender new evidence without the leave of the WAIRC under this section in response to the new evidence tendered by the Commissioner.

...

(11) In this section —

new evidence means evidence other than evidence of —

- (a) any document or other material that was examined and taken into account by the Commissioner of Police in making a decision to take removal action;
- (b) the notice given under section 33L(1);
- (c) a written submission made to the Commissioner of Police by the appellant under section 33L(2);
- (d) the notice given under section 33L(3)(b); and
- (e) a notification of the removal from office.

19 The approach taken to such applications was recently discussed in *Henderson v Commissioner of Police* [2025] WAIRC 00763; (2025) 105 WAIG 2249 at [8] – [9]:

8 In *Lee v West Australian Police Force* [2021] WAIRC 00481; (2021) WAIG 1294, in relation to an application to tender new evidence, the Commission observed at [14] as follows:

The terms of s 33R reflect the restrictive nature of an appeal to the Commission under Part IIB of the Police Act. The definition of “new evidence” in s 33R(11) also confirms the limitations on an appeal, such that it is only material not considered and taken into account by the respondent in making a removal decision, that may be so characterised. Further, the language of s 33R(1) itself, the use of the words such as “shall not be tendered ...” “unless the Commission grants leave ...” affirms this limited scope and constraint. The qualification for the grant of leave, without consent by the respondent, which is the case in these proceedings, on an appellant’s application, is satisfaction of s 33R(3)(b). As this provision is expressed disjunctively, it is clear that the Commission may be so satisfied if any of sub pars (b)(i), (ii) or (iii) are made out. However, the Commission’s discretion to do so is further qualified by s 33R(4), such that irrespective of which ground(s) may be met in s 33R(3)(b), the Commission must have regard to, in effect, the appellant’s prior awareness of the substance of the new evidence. Thus, s 33R of the Police Act, dealing with the circumstances in which new evidence may be tendered in appeals of the present kind, is far more restrictive than the common law principles applicable to the adducing of new evidence in appeals, for example, to the Full Bench under s 49 of the Industrial Relations Act 1979 (WA): *Magyar v Director General, Department of Education* [2020] WAIRC 00988; (2020) 101 WAIG 1. (See too *Laurent v Commissioner of Police* [2009] WAIRC 00839; (2009) 89 WAIG 2177; *Moran v The Commissioner of Police* [2014] WAIRC 01358; (2014) 95 WAIG 185).

9 Furthermore, as to the question of the meaning of ‘in the interests of justice’ for the purposes of ss 33R(2)(b) and 33R(3)(b)(iii), that concept is to be construed broadly in the context of s 33R of the Police Act as a whole: *Carlyon v Commissioner of Police* [2004] WAIRC 11428; (2004) 84 WAIG 1395 at [18] – [21].

20 A document will be relevant to the appeal only if it goes to one or more of the grounds of appeal, or to the relief sought in the appeal: *Moran v Commissioner of Police* [2014] WAIRC 1358; (2014) 95 WAIG 185 [13].

The new evidence sought to be tendered

21 The respondent is seeking leave to tender the following new evidence in the appeal:

- (a) Transcript of the trial of the appellant in the District Court of Western Australia between 13 August 2025 and 19 September 2025 (**trial transcript**);
- (b) Text messages between the appellant and the woman tendered by the prosecution at trial (**message exhibits**).

22 The trial transcript is new evidence as defined in s 33R(11). It consists of 2651 pages, including transcript of the trial judge empanelling the jury, directions to the jury, the evidence in chief, cross-examination and re-examination of some 12 witnesses, as well as the appellant’s and his ex-partner’s evidence over multiple hearing days.

23 The message exhibits are not new evidence. The text messages that comprise the message exhibits were before the respondent and were taken into account in making the decision to take removal action, being documents which are attached to the Summary of Investigation as document 1.13. The particular version of the text messages contained in the message exhibits are only sought to be tendered if leave is granted in relation to the trial transcript, as it is this copy of the text messages which is referred to in the trial transcript, with some small errors corrected and in a different format to the messages the respondent had.

24 We have doubts as to whether the message exhibits are new evidence as defined in s 33R(11), and therefore whether leave can be granted for their tender. However, it is only necessary for us to make a finding in this regard if leave is granted in respect of the trial transcript, as their tender is only sought to accompany the trial transcript.

25 The respondent seeks leave to be granted on the basis that it is in the interests of justice to do so. As the appellant does not consent to the tender of the documents, the only basis on which leave can be granted is if the Commission is satisfied that to do so is in the interests of justice: *Police Act*, s 33R(2).

Is it in the interests of justice that the new evidence be permitted to be tendered?

26 Referring to *Carlyon* [22], the respondent at [13] of their outline of submissions submits:

Just as it may be seen that that on the basis of public interest as identified in section 33Q(4) of the *Police Act 1892* it is incumbent upon the Commission to have regard for the fact of an appellant’s criminal conviction, it is equally incumbent

on the Commission to have regard to the record of criminal proceedings in the absence of a conviction where removal is based on alleged criminal conduct.

- 27 Because the criminal proceedings resulted in the appellant's acquittal on all charges, there are no findings resulting from the criminal proceedings, other than the ultimate finding that the appellant was not guilty of the charges laid. Accordingly, it does not follow that the Commission is compelled or required to have regard to the record of the criminal proceedings in this case, in order to consider the public interest as mandated by s 33Q(4) of the *Police Act*.
- 28 This is not a case where, like in *Carlyon*, facts established by a conviction and reasons for conviction can be identified, relevant to the determination of the appeal. The grounds of appeal do not go directly to the issues tried and tested in the criminal proceedings. Mr Carlyon's appeal directly put into issue the complainant's credibility, and the Commissioner of Police's reliance on the complainant's and other witnesses' 'unsworn, uncorroborated and conflicting evidence' and 'untested evidence': *Carlyon v Commissioner of Police* [2004] WAIRC 11966 [4]. In Mr Carlyon's case, the fact of the conviction established for the Commission the facts of the incident upon which the Commissioner of Police took removal action. The facts that the conviction necessarily established were taken to be conclusively proven: *Carlyon* [49]. While it is implicit in the grounds of appeal that the appellant maintains he did not engage in the misconduct alleged, the fact that the appellant was acquitted of all charges means the trial transcript cannot be taken to establish or prove anything. It is no more than a transcript (that is, secondary evidence) of the evidence that was given at the District Court trial.
- 29 The respondent says that he has had regard to the trial transcript and the message exhibits, and continues to be positively satisfied that the appellant perpetrated family violence, including sexual assault. He submits that, notwithstanding the acquittals, the evidence is compelling and reinforces the respondent's reasons for the removal action.
- 30 There can be no criticism of the respondent for having regard to the trial transcript. It is appropriate that the respondent has had regard to the criminal proceedings, including its outcome, in determining whether or not to reconsider the removal action in light of the acquittals. The respondent may be justified in not reconsidering the removal action, having regard to the trial transcript and message exhibits.
- 31 However, the Commission is not reviewing the respondent's decision not to reconsider the removal action. Nor does it necessarily follow that the public interest requires the Commission to have regard to the trial transcript. The Commission is to have regard to the respondent's reasons for deciding to take removal action, the grounds contained in the Notice of Appeal, and the respondent's answer to those grounds: *Police Act*, s 33Q(1).
- 32 The respondent's submissions are to the effect that the trial transcript shows the appellant's ex-partner's evidence at the trial to be 'largely consistent' with her witness statement which was taken into account by the respondent in deciding to take removal action. In that case, the ex-partner's witness statement is before the Commission. It is unclear what purpose is served by also including the trial transcript.
- 33 Further, the fact of the acquittal itself casts doubt over what can be made of the ex-partner's evidence in the trial transcript. The Commission simply cannot know which parts of the evidence the jury accepted and which parts it rejected in deciding to acquit.
- 34 On the other hand, the respondent says the trial transcript reveals that the appellant gave evidence that was 'unpersuasive, and in some respects, fanciful.' This was said to be so, particularly in relation to his evidence about the message exhibits. The respondent also says that the appellant's evidence was 'in several instances' directly inconsistent with his managerial interview, casting serious doubt over his credibility.
- 35 The core difficulty with the s 33R application is revealed by the inconsistent use which the respondent seeks the trial transcript be put. On the one hand, the respondent seeks to rely on the transcript of the ex-partner's evidence as a consistent statement bolstering the statement which was before the respondent. On the other hand, the respondent seeks to rely on the transcript of the appellant's evidence in the trial transcript to attack his credibility. And the respondent seeks both uses in the face of the appellant's acquittal and the absence of findings either consistent with the ex-partner's version or counter to the appellant's version of events.
- 36 The respondent acknowledges that parts of the trial transcript revealed weaknesses in the prosecution case, or reflected adversely on prosecution witnesses, but says the trial transcript is the 'best record of the evidence of these witnesses, as compared to the witness statements that were before the Respondent when deciding to take removal action.' The respondent says that without access to the trial transcript, the Commission is unable to consider the appeal according to the substantial merits of the case, as it would only have 'out of date' and 'incomplete' evidence.
- 37 We accept that ordinarily the quality of oral evidence given at a trial is preferable to that contained in a witness statement, first, because the witness has been sworn to give evidence and second, because their evidence is tested, or able to be tested, by cross-examination, and third, because their evidence is their own oral evidence, rather than a statement drafted by a third person and adopted by them.
- 38 However, a transcript of the evidence given at trial is not the evidence given at the trial. The evidence of the witnesses is the oral evidence.
- 39 The jury was in a far better position to assess the witnesses' evidence, having had the benefit of hearing it orally, being able to observe tone, inflections, pauses and demeanour generally.
- 40 The assertion that the evidence before the respondent is 'out of date' or incomplete compared with the trial transcript is not substantiated. By the time of the trial, some eight years had passed since the date of the alleged events the subject of the charges. The significant period of time that had elapsed was a matter that likely impacted on the jury's assessment of the witnesses and the reliability of their evidence. The witness statements which were before the respondent were made two years earlier than the dates of the District Court trial, so they were substantially closer in time to the events which the witnesses were giving evidence about.
- 41 The Commission should only grant leave to tender the new evidence if it is relevant to the appeal. The respondent says the trial transcript is relevant in six ways.

- 42 First, the respondent has suggested in a generalised way that regard to the trial transcript is relevant to the public interest under s 33Q(4) of the *Police Act*. If the suggestion is that the Commission might otherwise be led to make findings that are inconsistent with those made in the criminal proceedings, as we have already said, the District Court proceedings did not result in any findings being made. If the suggestion is that there is a broader public interest in the proceedings themselves, this must be discounted because the District Court trial was subject to an order prohibiting the publication, outside the courtroom, of the proceedings.
- 43 Second, the respondent says that it is implicit in the grounds of appeal that the appellant is contending that harshness or unfairness is based on the fact that he was ultimately acquitted of the criminal charges. Even if this is correct, it does not follow that the trial transcript should be admitted, for the reasons previously expressed above at [28] and following.
- 44 Third, the respondent says that the trial transcript is relevant to Ground 2 of the appeal, because the transcript includes the appellant's evidence and his version of events, so arguably entirely ameliorates any denial of procedural fairness. The appellant does not press Ground 2
- 45 Fourth, it is said that 'a possible issue that may arise' in the appeal is the respondent's reliance on witness statements rather than sworn testimony. It is not apparent from the Notice of Appeal or the Response that this will be an issue. There is no such possibility.
- 46 Fifth, even if the grounds of appeal are made out, it does not necessarily follow that the appeal ought to be allowed because the Commission may still decide to dismiss the appeal on the basis the respondent's decision to take removal action was reasonably and soundly based. That is an uncontentious proposition. But in making such a finding, the Commission is primarily giving attention to the Commissioner of Police's reasons, examining them closely in terms of substance and the process by which they were formulated: *Carlyon v Commissioner of Police* [2004] WAIRC 11966; (2004) 85 WAIG 708 [15]; *Ferguson v The Commissioner of Police* [2017] WAIRC 00238; (2017) 97 WAIG 502. This process will not be assisted by having regard to the trial transcript to show that the witness statement of the ex-partner which was before the respondent is reliable. As for the respondent's decision not to accept the appellant's response to the allegations against him, there is no suggestion that the appellant made any concessions in his evidence in the District Court trial. Rather, the respondent has judged the appellant's evidence as being fanciful and inconsistent so as to reflect on his credibility more generally. The appellant is not giving evidence in these proceedings. His credibility is not an issue.
- 47 Sixth, the respondent says whether the evidence leads to an ultimate conclusion that the appellant in fact assaulted his ex-partner may be relevant to the question of remedy in the event that the appellant is successful in his appeal. For the reasons already stated, the Commission will not be assisted by the trial transcript in forming any necessary ultimate conclusion as to whether the finding that the appellant committed an assault was sound and reasonably based.
- 48 The respondent notes that if leave is granted to tender the new evidence, then the appellant must be given a reasonable opportunity to consider the new evidence and permitted to tender new evidence in response: *Police Act*, s 33R(5). The appellant submits that if leave is granted, the Commission will be in the position of having to make findings of fact for itself in respect of matters that had not been put in issue by the grounds of appeal, based on the transcript of 28 days of trial. The scope of the appeal will effectively be significantly expanded.
- 49 Consequently, the appellant may seek to give additional evidence about what occurred at the trial, to put the trial transcript into context, such as non-verbal matters that have a bearing on the meaning of the words in the trial transcript. The appellant may seek to put on additional evidence that was ruled inadmissible in the criminal trial. The parties would need to make argument in closing submissions about how to treat the trial transcript. All of this would create a significant amount of work for the parties and the Commission. It would likely mean the current hearing must be adjourned and a longer hearing programmed for later in the year.
- 50 These are also factors that suggest it is not in the public interest for leave to tender the new evidence to be granted.
- 51 For the above reasons, the s 33R application was dismissed.

2026 WAIRC 00173

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JD

APPELLANT

-v-

COMMISSIONER OF THE WESTERN AUSTRALIAN POLICE

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T B WALKINGTON

COMMISSIONER C TSANG

DATE

WEDNESDAY, 25 MARCH 2026

FILE NO/S

APPL 4 OF 2025

CITATION NO.

2026 WAIRC 00173

Result Orders issued
Representation
Appellant Mr D Weekley of counsel on behalf of the appellant
Respondent Ms A Miller on behalf of the respondent

Order

HAVING HEARD from Mr D Weekley of counsel on behalf of the appellant and Ms A Miller of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979* (WA), and by consent, hereby orders –

- (1) THAT order 2 issued on 5 February 2026 ([2026] WAIRC 00065), being the order for non-publication of the reasons for decision released on 5 February 2026 be revoked; and
- (2) THAT the appellant be and is hereby granted leave to withdraw the appeal.

By the Commission

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2026 WAIRC 00137

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JD **APPELLANT**
 -v-
 COMMISSIONER OF THE WESTERN AUSTRALIAN POLICE **RESPONDENT**

CORAM SENIOR COMMISSIONER R COSENTINO
 COMMISSIONER T B WALKINGTON
 COMMISSIONER C TSANG

DATE MONDAY, 9 MARCH 2026

FILE NO/S APPL 4 OF 2025

CITATION NO. 2026 WAIRC 00137

Result Orders issued
Representation
Applicant Mr R French on behalf of the appellant
Respondent Ms A Miller on behalf of the respondent

Order

HAVING heard from Mr R French of counsel on behalf of the appellant and Ms A Miller of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Police Act 1892* (WA) and *Industrial Relations Act 1979* (WA), hereby orders –

- (a) THAT the appellant’s application dated 23 February 2026 to amend his grounds of appeal and adduce fresh evidence be dismissed; and
- (b) THAT the appeal be relisted for a one-day hearing on a date to be fixed.

By the Commission

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2026 WAIRC 00104

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JD

APPELLANT

-v-

COMMISSIONER OF THE WESTERN AUSTRALIAN POLICE

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T B WALKINGTON

COMMISSIONER C TSANG

DATE

MONDAY, 23 FEBRUARY 2026

FILE NO.

APPL 4 OF 2025

CITATION NO.

2026 WAIRC 00104

Result

Directions issued

Representation**Appellant**

Mr R French (of counsel) on behalf of the appellant

Respondent

Ms A Miller (of counsel) on behalf of the respondent

Direction

HAVING heard from Mr R French (of counsel) on behalf of the appellant, and Ms A Miller (of counsel) on behalf of the respondent, the Commission, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA) hereby directs –

- (1) THAT the appellant's application for leave to amend his grounds of appeal and adduce fresh evidence filed on 23 February 2026 be listed for hearing on Thursday, 26 February 2026 at 2:30 p.m.;
- (2) THAT the appellant file written submissions in support of the application by 4:30 p.m. on 23 February 2026;
- (3) THAT the respondent file written submissions in opposition to the application by 4:30 p.m. on Wednesday, 25 February 2026; and
- (4) THAT the substantive hearing be adjourned to a date to be fixed.

By the Commission

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2026 WAIRC 00065

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

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

BRETT MORGAN PALMER

APPELLANT

-v-

COMMISSIONER OF THE WESTERN AUSTRALIAN POLICE

RESPONDENT**CORAM**

SENIOR COMMISSIONER R COSENTINO

COMMISSIONER T B WALKINGTON

COMMISSIONER C TSANG

DATE

THURSDAY, 5 FEBRUARY 2026

FILE NO/S

APPL 4 OF 2025

CITATION NO.

2026 WAIRC 00065

Result

Orders issued

Representation

Appellant Mr D Weekley (of counsel) on behalf of the appellant
Respondent Ms A Miller (of counsel) on behalf of the respondent

Order

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

- (1) THAT the appellant be identified in these proceedings by the pseudonym 'JD';
- (2) THAT publication or disclosure of the Commission's reasons for decision released on 5 February 2026 be prohibited except for publication or disclosure to the appellant, the respondent, the respondent's officers and the parties' legal representatives; and
- (3) THAT the hearing of the appeal be conducted in private and be closed to the public.

By the Commission

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2026 WAIRC 00149

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2026 WAIRC 00149
CORAM : COMMISSIONER C TSANG
HEARD : FRIDAY, 13 FEBRUARY 2026
DELIVERED : MONDAY, 16 MARCH 2026
FILE NO. : B 50 OF 2025
BETWEEN : DAVID MARK BIGNOLD
 Applicant
 AND
 THE ORANGE CARD PTY LTD
 Respondent

CatchWords : Industrial Law (WA) – Contractual benefit claim for wages, superannuation and reimbursement of expenses – Whether the true nature of the relationship is that of employment despite the contract being a contract for services – Evidence uncontested – Onus on applicant to establish both the claim and the quantum of the claim on the balance of probabilities

Legislation : *Industrial Relations Act 1979* (WA), s 7, s 7A, s 29(1)(d)
 Industrial Relations Commission Regulations 2005 (WA), reg 24(2)(b)
 Industrial Relations Legislation Amendment Act 2024 (WA)

Result : Application granted in part

Representation:

Applicant : Mr D M Bignold
Respondent : No appearance

Case(s) referred to in reasons:

HotCopper Australia Ltd v Saab [2001] WAIRC 03827

Oze-Igiehon v Uber Technology Inc [2017] FCA 1024

Shaddock v Cockburn Cement Ltd [2004] WAIRC 11726

Reasons for Decision

1 On 12 June 2025, the applicant (**Mr Bignold**) filed a *Form 3 – Contractual Benefit Claim (Form 3)*, claiming \$43,310.[03] in

denied contractual benefits to ‘recover unpaid wages, recover unpaid expenses, no super payment’s’ from The Orange Card Pty Ltd (**respondent**), as follows:

12/8 – 18/11 – Nett 883.46 x 15	13,251.90
25/11 – 2/6 – Nett 1250.45 x 29	36,263.[05]
Expenses not paid	562.00
Not including accrued leave/super	Total 50,076[.95]
Less: 2 x 883.46 (Nett); 1 x 5000 (Don’t know no payslip)	6,766.92
Total Outstanding	43,310.[03]

Principles

2 Mr Bignold’s claim is made pursuant to s 29(1)(d) of the *Industrial Relations Act 1979* (WA) (**Act**), which states:

29. Who may refer industrial matters to Commission

(1) An industrial matter may be referred to the Commission –

...

(d) in the case of a claim by an employee that the employer has not allowed the employee a benefit, other than a benefit under an award or order, to which the employee is entitled under the contract of employment – by the employee;

3 Sharkey P outlined the principles that apply in denied contractual benefit claims under the Act in *HotCopper Australia Ltd v Saab* [2001] WAIRC 03827 (*HotCopper*) [34]:

The limitations (and/or conditions precedent to the exercise of jurisdiction and/or power) include the following:

- The claim must relate to an ‘industrial matter’, as defined in s.7 of the Act.
- The claim must be made by an ‘employee’, as defined in s.7 of the Act.
- The benefit claimed must be a contractual benefit, i.e. the claimant must be entitled to the claim under his/her contract of service.
- The subject contract must be a contract of service.
- The benefit must not arise under an award or order of the Commission.
- The benefit must have been denied by the employer.

4 Pertinent to the principles in (b) and (d) of *HotCopper* [34], Mr Bignold attached to his Form 3 his ‘National Sales Director Contract’ signed on 8 August 2023 (**Contract**).

5 The Contract is 14 pages long, and on pages 1 and 2 defines ‘TOC’ as the respondent, and contains the following definitions:

NSD means the person contracted to deliver the Services and includes the employees, principals and agents of the National Sales Director and any other persons duly authorised to act on the NSD’s behalf in relation to providing the Product and/or Services of TOC.

National Sales Director means the National Sales Director role in providing the Product and/or Service/s set out in Schedule 1 to this Contract.

Services means those services to be provided by the NSD to TOC set out in Schedule 1 to this Contract and any other services agreed to by the parties from time to time.

Term means the period from the Commencement Date until such date that this Contract is terminated in accordance with the terms and conditions of this Contract.

6 Schedule 1 to the Contract on page 11 states:

SCHEDULE 1 – TOC Products and Services

- Respect@Work
- First Step
- AOD (formerly PRO)
- AOD+ (formerly PRO+)
- White Labelling
- Future courses

7 Schedule 2 to the Contract on page 12 states:

REMUNERATION

SCHEDULE 2: TABLE 1

SALARY AMOUNT PA	BASE WEEKLY AMOUNT	WEEKLY SALES TARGET	MONTHLY SALES TARGET
\$90,000.00 + Super	\$1,730.77	\$10,000.00 (Nett)	\$40,000.00 (Nett)

- Fuel allowance for travel over 100km, logbook required via TOC issued credit card.
- Parking expenses paid via TOC issued credit card
- Commission (amount TBD) to be paid ABOVE agreed KPI (TBD)
- Working hours as per 0830–1730 Mon–Fri, minimum 40 hours per week, with some additional unclaimed overtime within reason if required. If additional overtime exceeds expectations, negotiated hourly pay can be agreed between both parties for outside jobs etc.
- Opportunity for Pay increase reviewed on yearly performance review.

The following allowances applies only when the assignment requires travel outside a radius of 100 kilometres of the Perth metropolitan area

- Full reimbursement made on behalf of TOC to cover all expenses including meals, accommodation and petrol
- Meal allowance of up to \$50.00/day
- Accommodation allowance of up to \$150.00/night

8 Relevantly, cl 9 of the Contract on page 7 states:

9. RELATIONSHIP BETWEEN THE PARTIES

- 9.1 Nothing contained in this Contract will be construed or have effect as constituting any relationship of employer and employee, agency, partnership or joint venture between TOC and the NSD.
- 9.2 The NSD agrees that its engagement by TOC is non-exclusive and that TOC may engage other Sales team members to provide services that are identical with or similar to the Services during the Term.
- 9.3 Subject to Clause 8 [Protective Restraints], TOC agrees that the NSD may provide services that are identical with or similar to the Services to third parties during the Term.

9 Given the terms of the Contact, specifically cl 9 (at [8] above), in considering the principles in *HotCopper* [34] (at [3] above) it is also necessary to consider s 7A of the Act, which was inserted by the *Industrial Relations Legislation Amendment Act 2024* (WA) and applies to claims filed from 31 January 2025:

7A. Determining whether individual is employee or person is employer

- (1) This section applies for determining, for the purposes of this Act, the LSL Act or the MCE Act –
- (a) whether an individual is an employee of a person; or
 - (b) whether a person is an employer of an individual.
- (2) The matter is determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person.
- (3) For the purposes of subsection (2), consideration must be given to the totality of the relationship between the individual and the person, including –
- (a) the terms of the contract governing the relationship; and
 - (b) other factors relevant to the totality of the relationship, including how the contract is performed in practice.

Note for this section:

This section was enacted as a response to the decisions of the High Court of Australia in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

The respondent

10 The Commission obtained ASIC company searches of the respondent on 13 June 2025, 23 July 2025, 10 October 2025 and 21 January 2026. Each of these searches states:

- (a) The respondent was registered on 9 October 2017.
- (b) At registration, the officeholders were:
 - (i) David Charles Hobbs: director and secretary to 17 June 2020; and
 - (ii) Rodney Bridge (**Mr Bridge**): director to 1 June 2023 and secretary from 12 August 2020 to 1 June 2023.
- (c) Mr Bridge was the sole director and secretary from 12 August 2020.
- (d) Andrew Choon Kheng Tan (**Mr Tan**) was the sole director and secretary from 10 May 2023 to 10 February 2025.
- (e) Since 10 February 2025, Remo Wayne Parsons (**Mr Parsons**) is the sole director and secretary.
- (f) Since 1 September 2024, the respondent's principal place of business is Suite 10, 24 Parkland Road, Osborne Park, Western Australia.
- (g) Since 3 October 2024, the respondent's registered address is DPS Tax Consultant at Unit 2, 278 Beaufort Street, Perth, Western Australia.

11 Regulation 24(2)(b) of the *Industrial Relations Commission Regulations 2005* (WA) states:

- (2) Where any notice or document is required to be served under the Act or these regulations such service may be

effected –

...

(b) in the case of a corporation ... by leaving it at, or sending it by pre-paid post to, its principal place of business or principal office in the State or the registered office of the corporation; or

- 12 On review of the Commission’s records, I am satisfied that each of the following documents was served on the respondent:
 - (a) The Form 3.
 - (b) The Notices of Hearing listing the Directions Hearing on 26 September 2025.
 - (c) The Directions ([2025] WAIRC 00809) issued on 26 September 2025, which required the parties to file the outlines of witness evidence and documents and the outline of submissions that each party intended to rely upon at the hearing.
 - (d) The Notices of Hearing listing the hearing on 13 February 2026 (**Hearing**).
- 13 The respondent did not file any documents nor respond to any of the Commission’s correspondence, and did not attend the Hearing.
- 14 Given the respondent was duly notified of the Hearing, I was satisfied that the Hearing could proceed in the respondent’s absence.

The evidence

- 15 At the Hearing, Mr Bignold gave the following evidence:
 - (a) He commenced working for the business trading as ‘The Orange Card’ on 1 November 2021, when he commenced employment with Sideffect Australia Ltd (**Sideffect**) pursuant to a ‘Contract of Employment – Salary Employee’ dated 18 October 2021 as National Sales Manager on a full-time basis, on an annual salary of \$90,000 (**Exhibit 5**).
 - (b) In 2023, the business was sold to Mr Tan.
 - (c) Mr Tan issued him with the Contract (**Exhibit 6**) (see [4]–[8] above).
 - (d) In 2025, the business was ‘taken over’ by Mr Parsons (see [10(e)] above). Mr Parsons did not issue him with a new contract, so he ‘just continued on the one that I had from [Mr Tan]’, i.e. Exhibit 6.
 - (e) He read Exhibit 6 when it was issued to him and understood Exhibit 6 to be ‘exactly the same as my old employment contract’, as Exhibit 6 stated that he was employed in the position of National Sales Director which was the position he had been performing for the prior two-and-a-half years.
 - (f) Other than issuing him with the Contract, Mr Tan did not effect any other changes to his work. His salary, hours of work, and duties remained unchanged.
 - (g) His job involved signing up new customers. He also recruited sales agents nationally to sell the respondent’s courses. He was the point of contact for the agents. The agents were on a commission-only arrangement and would invoice the respondent a percentage of the new business that they secured. The agents’ work was no different to his, with the exception that in addition to selling the respondent’s courses, he would also create courses for customers. An example is the online training course on responsible pet ownership that he created for the RSPCA.
 - (h) He remained on an annual salary of \$90,000 from the time he commenced employment with Sideffect on 1 November 2021 until his contract with the respondent ended (in the week beginning Monday, 9 June 2025).
 - (i) He was the sole employee and reported to Mr Parsons.
 - (j) The business was originally located at 80 Albert Street, Osborne Park. Mr Tan found new premises when he took over the business in Parkland Road, Osborne Park (see [10(f)] above). He attended the office most days. The Parkland Road office remained the business’ office for approximately one month after Mr Parsons took over the business from Mr Tan. Thereafter, from November 2024, he performed his duties from home.
 - (k) When he reported to Mr Tan, he was paid weekly, provided with payslips, and was required to log onto Xero (payroll software) to apply for leave.
 - (l) Mr Tan stopped paying him ‘towards the end of the year’ and when Mr Parsons took over he ‘never received another formal payslip’.
 - (m) **Exhibit 1** is a payslip he has located for the Pay Period 03/07/2023–09/07/2023, Payment Date: 10/07/2023. It states:

EMPLOYMENT DETAILS

Pay Frequency: Weekly
Annual Salary: \$90,000

			THIS PAY	YTD
SALARY & WAGES		RATE		
Ordinary Hours	40.0000	\$43.2692	\$1,730.77	\$1,730.77

- (n) **Exhibit 2** is an email he has located for leave he applied for through Xero. It states:

From: noreply@post.xero.com
Sent: Monday, 12 August 2024 6:55pm

To: David.bignold@bigpond.com

Subject: Andy Tan has approved your leave application

Your Leave Request Has Been Approved!

Approved from 8 August 2024 – 8 August 2024

Hi David,

Great News! Your leave request from: **8 August 2024 – 8 August 2024** has been approved by Andy.

- (o) He had agreed with Mr Tan to reduce his hours of work to three days a week. This was to assist Mr Tan with cashflow. He also needed to take time off for medical treatments while he was undergoing nine months of chemotherapy.
- (p) **Exhibit 4** is the schedule he has prepared of the amounts he is owed. It states:

WEEK	DATE	AMOUNT
1	12/8	883.46
2	19/8	883.46
3	26/8	883.46
4	2/9	883.46
5	9/9	883.46
6	16/9	883.46
7	23/9	883.46
8	30/9	883.46
9	7/10	883.46
10	14/10	883.46
11	21/10	883.46
12	28/10	883.46
13	4/11	883.46
14	11/11	883.46
15	18/11	883.46
16	25/11	1250.45
17	2/12	1250.45
18	9/12	1250.45
19	16/12	1250.45
20	23/12	1250.45
21	30/12	1250.45
22	6/1	1250.45
23	13/1	1250.45
24	20/1	1250.45
25	27/1	1250.45
26	3/2	1250.45
27	10/2	1250.45
28	17/2	1250.45
29	24/2	1250.45
30	3/3	1250.45
31	10/3	1250.45
32	17/3	1250.45
33	24/3	1250.45
34	31/3	1250.45
35	7/4	1250.45
36	14/4	1250.45
37	21/4	1250.45

38	28/4	1250.45
39	5/5	1250.45
40	12/5	1250.45
41	19/5	1250.45
42	26/5	1250.45
43	2/6	1250.45
44	9/6	1250.45

- (q) '883.46' is the nett amount he received in his bank account when he was working three days a week and '1250.45' is the nett amount he received in his bank account when he was working full-time.
- (r) The amounts in Exhibit 4 total \$49,514.95, and from this is to be deducted \$6,766.92 which he received in December 2024 and February 2025 from Mr Tan who 'still had access to the bank account in those days. [Mr Tan] paid me but it was made by [Mr Parsons, who] insisted that it was done. [Mr Parsons] was in charge by that stage':

Date	Description	Payments
16/12	2x backpay	1766.92
31/12	No payslip provided	2000
24/2	No payslip provided	3000

- (s) His employment ended when Mr Parsons effectively shut down the business on Monday, 9 June 2025, by disabling the LMS (learning management system) and the email server, which prevented him from logging into the business' systems. However, he was still working that week as '[Mr Parsons] never terminated me or finished me or anything else, he just went missing' and 'I still had customers ringing me up'.
- (t) In relation to expenses, there was a practice in place where whatever he spent for the business (for example, if he had to buy cables or a mouse for presentation or audio visual equipment, or if he bought milk for morning tea for clients), he would submit the invoice for the expense and be reimbursed for it.
- (u) **Exhibit 7** is a list of beverages that have been charged to his Lake Karrinyup Country Club (**LKCC**) account on 3 April 2025, totalling \$171.13. On this day, he had three or four back-to-back meetings at LKCC. In the morning, he met with John Shingleton and Chris McCarthy. In the afternoon he met with Mr Bridge.
- (v) **Exhibit 8** is an email he sent to Mr Parsons on 24 May 2025, which refers to Exhibit 7, and states:

Hi

Please see attached the invoice for entertaining clients at LKCC on 03/04/2025.

John Shingleton, Rodney Bridge, Chris McCarthy

Outstanding for immediate payment:

LKCC 13/01 2025 \$150

LKCC 03/04 2025 \$171.00

Mobile Phone allowance December 2024 to May 2025 @ \$40 months 6 months = \$240.00

Total outstanding \$561.00

Can you please confirm when this outstanding balance will be processed.

- (w) Exhibit 8's reference to 'LKCC 13/01 2025 \$150' relates to the light working lunch that he had at LKCC with Mr Parsons, the Chairman of Fortuna Insurances and Peter Newbound (General Manager of Fortuna Insurances) on 13 January 2025.
- (x) While Exhibit 8 refers to a monthly mobile phone allowance of \$40 per month, the correct amount was \$39 per month. This correction reduces the total expenses claim to \$555.13.
- (y) He would submit his invoices, and they would be reimbursed directly to his bank account once a month. The amount varied between \$20 to \$200 a month depending on the expenses incurred during that month.
- (z) Schedule 2 of the Contract (at [7] above), states that 'when the assignment requires travel outside a radius of 100 kilometres of the Perth metropolitan area' that there will be 'full reimbursement made on behalf of TOC to cover all expenses including meals, accommodation and petrol'. This clause applied once when he was required to travel to Busselton.
- (aa) **Exhibit 3** is an email he sent to Mr Parsons on 30 May 2025, which evidences that he was an employee and evidences that he made a claim for his unpaid wages from the respondent. It states: (original emphasis)

Hi Remo,

As you know, the business is facing serious operational and financial challenges ...

My Proposal:

I propose a **business continuity and recovery agreement** where I take full control of all sales and agent engagement operations, allowing us to rebuild revenue and trust quickly. The structure would be as follows:

1. Revenue Sharing Agreement

...

- From **first gross revenue**, I will retain **50% until my outstanding \$35K (plus agreed expenses)** is repaid. A calculated amount will also be paid to my superannuation.

Consideration

16 Although the respondent did not attend the Hearing or file any material, Mr Bignold bears the onus of establishing his claim on the balance of probabilities. The respondent's absence does not relieve the Commission of the obligation to scrutinise the claim against the requirements in *HotCopper* [34] and the evidentiary basis for the amounts claimed. However, as the respondent did not attend the Hearing, Mr Bignold's evidence is uncontested. Therefore, while Mr Bignold did not produce any bank statements or other documentary evidence to support the amounts claimed, Mr Bignold's evidence may be accepted where it is internally consistent.

Is Mr Bignold an 'employee'? / Is the Contract a contract of service?

- 17 The requirements in paragraphs (b) and (d) of *HotCopper* [34] are interrelated and conveniently dealt with together.
- 18 Pursuant to s 7A(3)(a) of the Act, requiring consideration of the terms of the contract governing the relationship, cl 9 of the Contract casts the relationship between Mr Bignold and the respondent as an independent contracting arrangement.
- 19 Pursuant to s 7A(3)(b) of the Act, requiring consideration of other factors relevant to the totality of the relationship, including how the Contract is performed in practice, Mr Bignold gave evidence that:
- He reported directly to the sole director, Mr Parsons.
 - Other than when he negotiated to vary his working hours to three days a week, he worked full-time hours.
 - He was paid a fixed salary of \$90,000 per annum, which was paid weekly, and was reduced proportionately when he agreed to vary his working hours to three days a week.
 - The Contract stated that his working hours were to be 8:30am–5:30pm, Monday to Friday, working a minimum of 40 hours per week, in addition to reasonable additional hours with no entitlement to claim overtime for the reasonable additional hours.
 - His weekly salary payments were accompanied by payslips.
 - Exhibit 1 refers to:
 - His 'Employment Details' and his 'Annual Salary'.
 - His 'Salary & Wages' for working 40 'Ordinary Hours'.
 - The withholding of PAYG tax.
 - A superannuation contribution calculated at 11% of the ordinary hours amount.
 - He was required to use Xero to apply for leave and his leave was approved by the respondent's director (Exhibit 2).
 - While he used his own mobile phone, the respondent agreed to reimburse his monthly phone bill. Apart from using his own mobile phone, the respondent supplied him with all the necessary tools and resources.
 - Prior to November 2024, he performed his duties from the respondent's offices.
- 20 Section 7A of the Act (at [9] above), provides that ascertaining the real substance, practical reality and true nature of the relationship between Mr Bignold and the respondent requires that consideration be given to the totality of the relationship, which includes the matters at [18]–[19] above. Having considered these matters, I am prepared to find that Mr Bignold was an employee and that the Contract was, in substance, a contract of service.

Does the claim relate to an 'industrial matter' as defined in s 7 of the Act?

21 Section 7 of the Act defines an 'industrial matter' as follows:

industrial matter means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee in the industry and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to –

- the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment; ...

22 Mr Bignold's claim is for unpaid wages, superannuation contributions and unreimbursed expenses arising from his performance of the National Sales Director role for the respondent. Given the finding at [20] above, Mr Bignold's claim plainly relates to an industrial matter as defined in s 7 of the Act.

Is the benefit claimed a contractual benefit, i.e. is Mr Bignold entitled to claim wages, superannuation and the reimbursement of expenses under the Contract?

23 Schedule 2 of the Contract states Mr Bignold's remuneration as 'Salary Amount PA' of '\$90,000.00 + Super', at a 'Base Weekly Amount' of \$1,730.77.

24 Therefore, I am satisfied that the Contract entitled Mr Bignold to weekly wages of \$1,730.77 gross.

25 I have considered whether the reference to '+ Super' creates a contractual entitlement to the payment of superannuation contributions in addition to the statutory obligations under the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGA Act).

- 26 As outlined in *Oze-Igiehon v Uber Technology Inc* [2017] FCA 1024 [10]–[12], [15]–[16] citing *Shaddock v Cockburn Cement Ltd* [2004] WAIRC 11726 [6], the liability to pay superannuation arises as a statutory obligation under s 16 of the SGA Act and, without more, is not a contractual entitlement:

The superannuation guarantee charge statutory scheme

- 10 The relevant statutory scheme for the applicant’s claims comprises the SGA Act and the *Superannuation Guarantee Charge Act 1992* (Cth) (**SGC Act**), which are to be read as one: s 3 of the SGC Act.
- 11 In general terms, this statutory framework creates an obligation for an employer to provide a prescribed minimum level of superannuation to all employees: *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2010] FCAFC 52 at [4]. Where an employer fails to make superannuation contributions as required, the employer is liable to pay a tax imposed by the SGC Act, known as a superannuation guarantee charge.
- 12 Section 5 of the SGC Act establishes an obligation to pay a superannuation guarantee charge, by imposing the charge ‘on any superannuation guarantee shortfall of an employer for a quarter’. Section 16 of the SGA Act then provides that the obligation is on the employer to pay the charge. Section 15B extends the application of Part 3, including s 16, to contributions for the benefit of former employees. Superannuation guarantee shortfall is to be calculated using the method set out in ss 17 and 19 of the SGA Act.
- ...
- 15 Whilst the obligation to pay superannuation necessarily depends upon a person being an employee, in the event that superannuation is not paid and there is a ‘shortfall’, this is dealt with by the SGC Act. That shortfall is payable as a debt to the Commissioner and the Commissioner is the one that has standing to recover that debt. I will return to the role played by the Commissioner in relation to the superannuation guarantee charge later in these reasons.
- 16 The liability to pay a superannuation charge arises as a statutory obligation under s 16 of the SGA Act. It is not a contractual entitlement: *Shaddock v Cockburn Cement Ltd* [2004] WAIRC 11726 at [6].
- 27 I accept that where a contract makes express and specific provision for the payment of superannuation, for example by specifying a particular contribution rate or specifying a particular superannuation fund, a contractual entitlement may arise in parallel with the statutory obligation. However, I am not satisfied that ‘+ Super’ in Schedule 2 does any more than acknowledge the respondent’s existing statutory obligation to make superannuation contributions at the prevailing rate. Schedule 2 does not specify a contribution rate, a particular fund, nor any obligation beyond what the statute requires. Accordingly, I am not satisfied that the Contract gives rise to the superannuation benefit claimed.
- 28 While Schedule 2 of the Contract provides for a reimbursement of expenses for meals, accommodation and travel when an assignment required Mr Bignold to travel more than 100 kilometres outside of the Perth metropolitan area, I am prepared to find that there was a custom and practice pursuant to which reasonable work-related expenses incurred by Mr Bignold were reimbursed by the respondent on his submission of invoices. I am prepared to find that this custom and practice was consistently followed by the respondent and does not contradict the express term in Schedule 2 of the Contract. Accordingly, I am prepared to find that Mr Bignold had an entitlement, under an implied term, to the reimbursement of reasonable work-related expenses supported by the provision of invoices.

Does the benefit arise under an award or order of the Commission?

- 29 I am satisfied that the benefits claimed do not arise under an award or order of the Commission.

Was the benefit denied by the employer?

- 30 Mr Bignold’s uncontested evidence is that the respondent ceased paying him his wages from the week commencing Monday, 12 August 2024, and that other than \$6,766.92 paid to him in December 2024 and February 2025, that his wages remained unpaid until the end of his employment (at the end of the week beginning Monday, 9 June 2025).
- 31 Therefore, I am prepared to find (subject to determining the quantum, discussed below) that the benefit to wages and the reimbursement of expenses were denied by the respondent.

Quantum

- 32 Mr Bignold’s claim, as corrected at the Hearing, totals \$43,303.16, comprising of:
- Nett unpaid wages of \$42,748.03 (\$49,514.95 minus \$6,766.92); and
 - Unreimbursed expenses of \$555.13 (\$150 and \$171.13 for LKCC expenses incurred on 13 January 2025 and 3 April 2025 plus \$234 in monthly mobile phone expenses of \$39 per month for six months from December 2024 to May 2025 inclusive).
- 33 As outlined at [24] above, the Contract entitles Mr Bignold to the contractual benefit of a weekly wage of \$1,730.77 gross. Accordingly, the respondent’s obligation under the Contract is to pay Mr Bignold \$1,730.77 gross, with the respondent having a separate statutory obligation to remit to the Australian Taxation Office the requisite PAYG withholding on this gross amount.
- 34 However, Mr Bignold’s Form 3 (at [1] above) and Exhibit 4 which he prepared in support of his claim, expresses the amounts claimed as nett amounts. Mr Bignold claims a nett amount of \$883.46 a week when he worked three days a week and a nett amount of \$1,250.45 a week when he worked full-time hours. Mr Bignold did not provide any evidence in the form of bank statements, payslips or tax returns to support these specific nett amounts.
- 35 Exhibit 1 records that on 10 July 2023, Mr Bignold was paid \$1,730.77 gross, from which PAYG tax of \$414 was withheld, resulting in a nett amount of \$1,316.77. The difference of the nett amount in Exhibit 1 (\$1,316.77) and the nett amount claimed by Mr Bignold (\$1,250.45) is \$66.32 per week.
- 36 However, Mr Bignold has consistently claimed in his Form 3, in Exhibit 4 (which was filed with his outline of witness evidence on 23 October 2025), and in giving his oral evidence at the Hearing, that the nett amounts of \$883.46 and \$1,250.45 are accurate. Mr Bignold’s evidence at the Hearing was that these specific amounts were the amounts he received in his bank account and that he had regard to his bank statements when he prepared the various documents he relied upon in this matter.
- 37 As outlined at [16] above, in circumstances where Mr Bignold’s evidence is uncontested, his evidence may be accepted where

it is internally consistent. However, Mr Bignold bears the onus of establishing both his claim generally and the specific amounts claimed, so where his evidence is internally inconsistent, he may not satisfy the onus on him to establish an element of his claim, even though the respondent has not contested any of his evidence.

- 38 As outlined at [15(aa)] above, Mr Bignold claims in Exhibit 3 that at 30 May 2025 the amount outstanding from the respondent was '\$35K (plus agreed expenses)'.
- 39 Accordingly, there is an internal inconsistency between Exhibit 4 and Exhibit 3.
- 40 Exhibit 4 was prepared for these proceedings, which commenced on the filing of the Form 3 on 12 June 2025.
- 41 Exhibit 3 is an email from Mr Bignold to Mr Parsons, with the subject 'Proposal to Secure Business Continuity and Rebuild Operations'. The introductory paragraph of Exhibit 3 states:

Introduction

I have sort [sic] external guidance in preparing this proposal, I have demonstrated growth with new clients and the pipeline has options.

- 42 Given Exhibit 3 pre-dates these proceedings and was prepared with 'external guidance', I place greater weight on Exhibit 3 than Exhibit 4.
- 43 The amount stated in Exhibit 3 (\$35,000) is clearly a rounded figure. I have considered whether the rounded figure may reflect a negotiating concession. However, Exhibit 3 was framed as a detailed proposal for business continuity, prepared with external guidance, in which accuracy about the outstanding amount was important to establishing a workable repayment structure. Mr Bignold's proposal was for him to retain 50% of gross revenue 'until my outstanding \$35K (plus agreed expenses) is repaid.' In this context, understating the amount owed would have been contrary to Mr Bignold's own interests. Therefore, I am satisfied that \$35,000 represents Mr Bignold's genuine assessment of his outstanding wages at 30 May 2025.
- 44 Accordingly, I am prepared to find that at 30 May 2025, the respondent had denied Mr Bignold a contractual benefit in the form of unpaid wages of \$35,000. Absent any evidence to the contrary, I am prepared to find that Mr Bignold's reference is to total unpaid wages of \$35,000 as a nett amount.
- 45 There is no evidence contradicting that Mr Bignold worked a further two weeks after 30 May 2025, namely the weeks beginning Monday, 2 June 2025 and Monday, 9 June 2025, and I am prepared to find accordingly. There is also no evidence contradicting that in those two weeks Mr Bignold was entitled to receive payment of his weekly wages. Given that the evidence establishes that the nett amount received for a full-time working week was \$1,250.45, I am prepared to find that Mr Bignold is owed a further \$2,500.90 nett for these two weeks.
- 46 Therefore, I am prepared to find that the respondent denied Mr Bignold \$38,056.03 nett, comprising of the following contractual entitlements:
- (a) Nett unpaid wages of \$37,500.90 (\$35,000 plus \$2,500.90); and
 - (b) Unreimbursed expenses of \$555.13 (\$150 for LKCC expenses incurred on 13 January 2025; \$171.13 for LKCC expenses incurred on 3 April 2025 per Exhibit 7; and \$234 in monthly mobile phone expenses at \$39 per month for six months from December 2024 to May 2025 inclusive).
- 47 I acknowledge that the contractual entitlement under Schedule 2 is properly expressed as a gross weekly wage of \$1,730.77. However, the evidence, specifically the amounts that Mr Bignold says he received in his bank account and on which he has relied upon throughout these proceedings, is expressed in nett terms. In the absence of evidence of the precise PAYG withholding applicable throughout the claim period, I am unable to calculate the gross equivalent. Accordingly, the order will necessarily reflect the nett amounts established by the evidence. The order will not relieve the respondent of any separate statutory obligations in respect of PAYG withholding.

Conclusion

- 48 For the preceding reasons, I am satisfied that each of the requirements in *HotCopper* [34] are established.
- 49 I will make an order that the respondent pay Mr Bignold the sum of \$38,056.03 nett within fourteen days of the order issuing.

2026 WAIRC 00162

CONTRACTUAL BENEFIT CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

DAVID MARK BIGNOLD

APPLICANT

-v-

THE ORANGE CARD PTY LTD

RESPONDENT

CORAM

COMMISSIONER C TSANG

DATE

FRIDAY, 20 MARCH 2026

FILE NO.

B 50 OF 2025

CITATION NO.

2026 WAIRC 00162

Result Order issued
Representation
Applicant Mr D M Bignold
Respondent No appearance

Order

HAVING heard from Mr D M Bignold on his own behalf and there being no appearance on behalf of the respondent, and Reasons for Decision ([2026] WAIRC 00149) having been delivered on 16 March 2026, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the respondent pay the applicant the sum of \$38,056.03 nett within fourteen days of the date of this order.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

2026 WAIRC 00196

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JAMES VERESS

APPLICANT

-v-

ROADMAC PTY LTD

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON
DATE THURSDAY, 2 APRIL 2026
FILE NO/S U 133 OF 2025
CITATION NO. 2026 WAIRC 00196

Result Application dismissed for want of jurisdiction
Representation
Applicant Mr J Veress
Respondent Ms J Price

Order

WHEREAS this is an application pursuant to s 29(1)(c) of the *Industrial Relations Act 1979* (WA);

AND WHEREAS on 28 November 2025, the applicant filed a *Form 2 – Unfair Dismissal Application*;

AND WHEREAS on 12 December 2025 the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application* and objected to the application on the basis that the respondent was a National System Employer and the Commission lacked jurisdiction to deal with this application (**Jurisdictional Objection**);

AND WHEREAS on 17 December 2025, the Commission listed a Directions Hearing for 31 March 2026 to program the Jurisdictional Objection for hearing and determination;

AND WHEREAS at the Directions Hearing on 31 March 2026, the applicant agreed with the respondent’s Jurisdictional Objection;

AND WHEREAS at the Directions Hearing on 31 March 2026, the applicant consented to the Commission dismissing the application for want of jurisdiction;

AND WHEREAS at the Directions Hearing on 31 March 2026, the Commission sought the respondent’s views, and the respondent consented to the application being dismissed;

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

THAT this application be and is hereby dismissed.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2026 WAIRC 00192

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JAMES VERESS

APPLICANT

-v-

ROADMAC

RESPONDENT**CORAM** COMMISSIONER T B WALKINGTON**DATE** WEDNESDAY, 2 APRIL 2026**FILE NO/S** U 133 OF 2025**CITATION NO.** 2026 WAIRC 00192**Result** Order issued to amend the name of respondent**Representation****Applicant** Mr J Veress**Respondent** Ms J Price*Order*

HAVING heard from the applicant on his own behalf and Ms J Price 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 be amended to 'Roadmac Pty Ltd'

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

2026 WAIRC 00174

UNFAIR DISMISSAL APPLICATION

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2026 WAIRC 00174
CORAM : COMMISSIONER T EMMANUEL
HEARD : WEDNESDAY, 4 FEBRUARY 2026
DELIVERED : WEDNESDAY, 25 MARCH 2026
FILE NO. : U 34 OF 2025
BETWEEN : MATTHEW TRAN
 Applicant
 AND
 EAST METROPOLITAN HEALTH SERVICE
 Respondent

CatchWords : Industrial law (WA) – Unfair Dismissal Application – Whether employee was unfit to fulfil inherent requirements of role – Whether dismissal was harsh, oppressive or unfair – Employee was totally unfit to work and would remain so for the foreseeable future – Employer did not exercise its lawful right to dismiss so harshly or oppressively as to amount to an abuse of that right – Application dismissed

Legislation : *Industrial Relations Act 1979* (WA) s 29(1)(c)
Health Services Act 2016 (WA)
Workers Compensation and Injury Management Act 2023 (WA) ss 166, 168, 504, 505(1)(a)
Equal Opportunity Act 1984 (WA)
Minimum Conditions of Employment Act 1993 (WA)

Result : Application dismissed

Representation:

Applicant : On his own behalf
 Respondent : Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Miles & Ors t/a Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Reasons for Decision

- 1 Mr Tran was dismissed from his role as a Patient Care Assistant at East Metropolitan Health Service (**Health Service**) because his employer considered that he was unfit to fulfil the inherent requirements of his role and he would be for the foreseeable future.
- 2 Mr Tran says he was unfairly dismissed and asks the Commission to reinstate and compensate him.
- 3 The Health Service says the dismissal was not unfair.
- 4 This matter has a long and complicated history. Mr Tran has many concerns about the way he says the Health Service treated him over the years leading up to his dismissal. However, this decision deals with the Health Service's decision to dismiss Mr Tran on the basis of incapacity for work.

Questions to be answered

- 5 The Commission must decide whether the Health Service unfairly dismissed Mr Tran.
- 6 In the circumstances of this case, that involves deciding whether at the time of dismissal and for the foreseeable future, Mr Tran was unfit to fulfil the inherent requirements of his role.

Legal framework and principles

- 7 Section 29(1)(c) of the *Industrial Relations Act 1979* (WA) gives Mr Tran a right to refer to the Commission the Health Service's decision to dismiss him.
- 8 Justice Brinsden in *Miles & Ors t/a Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386 (*Undercliffe*) describes the test that the Commission must apply when determining whether a dismissal was harsh, oppressive or unfair. Namely, whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right.

Background

- 9 In September 2022 the Health Service directed Mr Tran away from the workplace after his colleague (who I refer to as Ms C in these reasons) obtained an interim violence restraining order against him. After Ms C made allegations against Mr Tran, the Health Service started a disciplinary process in respect of those allegations. Ultimately, the allegations were not substantiated. At the end of the disciplinary process, the Health Service proposed by letter dated 27 April 2023 to move Mr Tran to a different location or roster to Ms C. Mr Tran strongly opposed being moved.
- 10 Mr Tran has not attended work since July 2023. He provided medical certificates to support his non-attendance from that point onward, continuing even after his dismissal. Until 6 January 2025, Mr Tran's certificates consistently said he had no capacity for work.
- 11 Mr Tran's workers' compensation lawyers engaged Dr Katherine Sevar, a psychiatrist, to review Mr Tran and write an independent medical report dated 21 August 2024 for the purpose of a medico legal assessment in respect of Mr Tran's workers' compensation claim (**Sevar Report**). The Sevar Report notes Mr Tran understood that he was being seen for independent assessment rather than treatment and he consented to the written report being given to third parties.
- 12 The Sevar Report describes a detailed psychiatric assessment. In effect, Dr Sevar said Mr Tran had a number of serious diagnoses, including Adjustment Disorder with Anxiety, Gambling Disorder and Methamphetamine Use Disorder. Further, Dr Sevar said that Mr Tran was unfit for work. She noted that Mr Tran's difficulties were complex and seemingly intractable, saying her prognosis was 'somewhat guarded' and that she hoped that with treatment, Mr Tran might be able to improve to a point where he may be able to contemplate returning to work on a full-time basis within 12 months.
- 13 On 15 November 2024 the Health Service received the Sevar Report. After considering the Sevar Report, on 11 December 2024 the Health Service proposed dismissing Mr Tran on the basis that he was unable to perform the inherent requirements of his role and he would be for the foreseeable future.
- 14 In response to the Health Service's proposal to dismiss, Mr Tran gave the Health Service a WorkCover Progress certificate from his treating general practitioner dated 6 January 2025 (**6 January 2025 GP Progress Certificate**) which both indicated that Mr Tran had no capacity for work, with no end date, and also some capacity for work from 6 January 2025 until 3 February 2025 (see below at [27]).
- 15 On 7 March 2025 the Health Service dismissed Mr Tran with four weeks' notice.

The hearing

- 16 This matter was heard in person after the parties had an opportunity to file the materials they relied on. I have carefully considered all of the material before the Commission.
- 17 Mr Tran filed many hundreds of pages of documents. He also made extensive written and oral submissions. Despite being reminded many times to focus on matters relevant to the issues in question, much of Mr Tran's evidence and submissions was not relevant to the issues to be determined by the Commission.

- 18 The Commission gave Mr Tran significant assistance to ensure he had a fair hearing, including extensive procedural information, guidance and further time to comply with programming directions. During the hearing I asked him multiple times if there was anything more he wanted to say in his evidence. I gave him time to organise his thoughts and present his case.
- 19 Mr Tran gave evidence on his own behalf. He eventually made some concessions. However, Mr Tran frequently did not make other concessions that were very obviously due. Below I describe some examples of this. At times Mr Tran was less than forthcoming. He had to be asked several times to answer questions in cross-examination. Overall, I have some concern about the reliability of Mr Tran's evidence and I treat it with some caution.

At the time of dismissal and for the foreseeable future, was Mr Tran unfit to fulfil the inherent requirements of his role?

- 20 The Sevar Report notes that Dr Sevar reviewed the following documents provided to her:
- a. PeopleSense - Psychological Treatment report dated 2 February 2024;
 - b. Dr S K Jagadeesan to UHG dated 28 February 2024;
 - c. Medical Certificate of Dr S K Jagadeesan dated 6 June 2023;
 - d. First Certificate of Capacity dated 13 May 2024;
 - e. Progress Certificate of Capacity dated 4 July 2024;
 - f. Progress Certificate of Capacity dated 29 July 2024;
 - g. Carousel Medical Centre – Medical records as at 15 July 2024;
 - h. PeopleSense – Medical records as at 14 August 2024; and
 - i. Hannington Clinical Psychology – Medical records as at 19 August 2024.
- 21 The Sevar Report is a comprehensive, detailed 17-page document. Relevantly it considers:
- a. Mr Tran's current circumstances;
 - b. the timeline associated with his workers' compensation claim;
 - c. the psychological symptoms related to his workers' compensation claim;
 - d. Mr Tran's longstanding methamphetamine use disorder which started in adolescence and intensified in the past 12 months, long standing alcohol use, and longstanding gambling disorder which he has had for over 10 years and has intensified during the past 12 months;
 - e. past psychiatric history, including being previously diagnosed with anxiety and depression;
 - f. past medical history;
 - g. forensic history;
 - h. personal/developmental history;
 - i. mental state examination; and
 - j. psychiatric diagnosis.
- 22 The Sevar Report diagnoses Mr Tran with:
- a. Adjustment Disorder with Anxiety;
 - b. Gambling Disorder, described as 'persistent and severe'; and
 - c. Methamphetamine Use Disorder.
- 23 The Sevar Report states that Mr Tran possibly has an 'underlying neurodevelopmental disorder' and refers to 'repeated evidence of disregard and contempt for authority figures, commencing in childhood with multiple fights, being involved in a Police chase and his own interpretation of his current actions as being "heroic" "fighting against the system"'.
- 24 The Sevar Report goes on to answer 13 specific questions. It is useful to set out the following extracts:

8. In addition to your response in the preceding question 8, can you confirm your opinion, as to whether our client's diagnosable injuries have arisen:

- a. directly out of or in the course of their employment with Royal Perth Hospital (East Metropolitan Health Service); or
- b. by way of a recurrence, aggravation or acceleration of any pre-existing disease (or condition) where the employment with Royal Perth Hospital (East Metropolitan Health Service) was a contributing factor to that recurrence, aggravation, or acceleration and it contributed to a significant degree

The development of his **Adjustment Disorder with Anxiety** has arisen directly as a result of his perceived sense of injustice secondary to his treatment through the process of investigation and Royal Perth Hospital's suggestion that he return to work in an alternative department.

His previous diagnoses of both a **Problem Gambling Disorder and Methamphetamine Use disorder** have both worsened in the context of the development of an **Adjustment Disorder with Anxiety** over the past 12 to 18 months.

...

10. What future treatment is our client likely to require and what would be the likely duration and costs of the same? Please include an estimate only of all treatment costs and duration.

I would recommend that he is referred for specific drug and alcohol counselling and for support with his Gambling Disorder. I would recommend that this continue over the course of at least the next 12 months. This could occur within the public system to one of the many drug and alcohol services, ideally the one being most local to him would be most convenient. Therefore, under the public system he would not incur any costs.

If he were to elect to enter a private detox and rehabilitation unit then the estimated cost of this within a private psychiatric hospital could be upwards of \$20,000.00.

There is some evidence for the use of antidepressant medication to treat Gambling Disorder and I would recommend this be commenced.

Ideally, his care would be coordinated by a consultant psychiatrist and the estimated cost of an initial appointment with a consultant psychiatrist is estimated at between \$500-600 for an initial appointment with subsequent appointments estimated at between \$200-300. I would suggest he would require 4-6 appointments over the next 12 months.

The treatment though that he requires for his Adjustment Disorder with Anxiety would be a cognitive and behavioural therapy. The estimated cost of weekly psychological therapy as per the Australasian Psychological Society's website is approximately \$300.00 per hour for a Clinical Psychologist. The estimated cost of treatment with an antidepressant medication would be approximately \$100.00-200.00 per year.

11. Do you consider that our client's capacity for work has been adversely affected by reason of their condition and if so, in what way?

Yes. At present he has been unable to work given the reduction in his ability to concentrate and his ongoing level of preoccupation and cognitive rigidity around what has occurred in his workplace with Royal Perth Hospital.

12. If you consider our client to be unfit for work, please specify in your opinion for how long you consider they will remain unfit for work, and at what capacity (i.e.: full time, part time, if part time, how many hours per week, etc).

He is currently unfit for work until he is able to access the psychiatric and psychological treatment as detailed above, but I would hope that with that treatment that he might be able to improve to such a degree where he would be able to contemplate a return to work on a full-time basis in the next 12 months.

13. At this stage, what is the general prognosis?

Given the complex and seemingly intractable nature of some of Mr Tran's difficulties both psychological, social and financial at present that my current prognosis is somewhat guarded but I would hope that he would access the treatments listed above and in those circumstances he may be able to make a reasonable recovery from his adjustment disorder in the next 12 months although he may experience some difficulty achieving full remission for his methamphetamine use disorder and gambling disorder.

25 In examination in chief, Mr Tran appeared to dispute that he had ever been diagnosed with 'depression, anxiety and all that', although he equivocated about whether and when he was diagnosed and by which doctor:

Oh, so with the, um – with the – the – not intellectual. Um, not, ah – with the, um, depression, anxiety, and all that, um, there is no record of me ever being diagnosed with those injuries, um, before EMHS. Um, I'm pretty sure it would've been Dr – actually, it could have been the doctor just before, um, Dr Sanjeevi. Um, I think it – Dr Abul Barker, who I started seeing, um, probably a few months into my suspension. Um, I think she could have – she could – but I – I don't know – I can't even remember if she prescribed any depression medication or whatever.

Um, so I, um – I – I think it was Dr Sanjeevi Kanan Jagadeesan, who was the first doctor to diagnose me with, um, anxiety, um, depression, and, um, I think, stress. Um, but I think, um, based on his documentation, he opined that, um, it was from the alleged bullying at Royal Perth Hospital. Um, with the substance use, ah – so 2018, I'm pretty – if I can – so 2018, I didn't – I don't think I thought about, um, that question, ah, with much thought. Because I'm – I – I can't recall, um, using substances, um, around that time, for a long time.

26 In cross-examination Mr Tran agreed:

- a. in September 2022 his colleague Ms C obtained an interim violence restraining order against him, and on 9 September 2022 the Health Service directed Mr Tran away from the workplace;
- b. after Ms C made allegations against him, the Health Service started a disciplinary process in respect of her allegations. Ultimately the Health Service did not substantiate any of the allegations and at the end of the disciplinary process the Health Service proposed that Mr Tran would be moved to a different location or roster to Ms C;
- c. the Health Service directed Mr Tran to return to the workplace on 6 June 2023. That morning, Mr Tran emailed the Health Service to say that he was unwell and would not attend work;
- d. Mr Tran never attended Royal Perth Hospital for work again from that date;
- e. in September 2023 Mr Tran applied for salary continuance insurance;
- f. the basis for Mr Tran's salary continuance insurance application was that he was fully unfit for work. His application was approved and he received salary continuance insurance payments for 24 months;

- g. Mr Tran was still receiving salary continuance insurance payments when he was dismissed, and he received those payments until around September or October 2025;
 - h. Mr Tran received those salary continuance insurance payments on the basis that he was representing to the insurer that he was fully unfit for work;
 - i. Mr Tran identified the date of the onset of his symptoms as 9 September 2022, which was the date Mr Tran became aware of Ms C's allegations against him and was suspended because of them;
 - j. the report he received from PeopleSense states that Mr Tran's reported symptoms appear to be situational and related to work stressors associated with allegations made against him by a co-worker in 2022, (being Ms C's allegations);
 - k. he made his workers' compensation claim in 2024. His first certificate of capacity was signed by his treating general practitioner (Dr Jagadeesan) in May 2024;
 - l. he attended an appointment with Dr Sevar on 21 August 2024. During that appointment, Mr Tran disclosed that he had a longstanding methamphetamine use disorder that started when he was a teenager and intensified in the 12 months leading up to Dr Sevar's review. Mr Tran told Dr Sevar those matters because they were true;
 - m. Mr Tran was still using methamphetamine in mid-2024 and could not recall when he started abstaining from using methamphetamine. When asked when he started abstaining from methamphetamine use, Mr Tran said 'there were a lot of times. So, like, I can't – I can't pinpoint it. So what – sorry, Mr Carroll. So what I meant to say is, um, yes, um, it – it was probably one of the times';
 - n. he told Dr Sevar he had intermittent contact with other psychologists over the past 10 years;
 - o. Mr Tran relied on the Sevar Report for the purposes of his workers' compensation claim, although at first Mr Tran was reluctant to admit this;
 - p. The Guardian Exercise Rehabilitation report dated 11 December 2024:
 - i. recorded his current max pain scores as '10 out of 10', his anxiety as extremely severe, and his stress and depression as severe;
 - ii. said he currently had no capacity for work, and he agreed that at that time he had no capacity for work;
 - q. that the WorkCover summary of the directions hearing on 11 February 2025 at WorkCover in his workers' compensation claim says that Mr Tran's lawyer made it clear that Mr Tran was claiming income compensation for total incapacity from either 6 June 2023 or 14 March 2024 to date and ongoing, although Mr Tran would not agree that his lawyer was indicating that he was claiming workers' compensation for total incapacity that was ongoing, despite it being an obvious concession he should have made. Mr Tran agreed that document recorded that, because he instructed his lawyer to take that position, despite Mr Tran initially refusing to concede that he had done so;
 - r. when he filled out his pre-employment health assessment in February 2018, Mr Tran ticked 'no' when asked if he had 'anxiety, depression other mental health conditions'; and
 - s. his workers' compensation claim was resolved in or around June 2025, after he was dismissed.
- 27 Mr Tran relies on the 6 January 2025 GP Progress Certificate in support of his case. As the Health Service submits, the 6 January 2025 GP Progress Certificate is unreasoned. It does not adequately explain that there had been a change in Mr Tran's capacity. It is internally inconsistent, because it says both that Mr Tran had no capacity from 25 November 2024 (with no end date) and some capacity from 6 January 2025 until 3 February 2025. Further, it says both that Mr Tran could do his pre-injury duties and pre-injury hours, and also modified or alternative duties and modified hours. The subsequent GP Progress Certificate dated 3 February 2025 is also internally inconsistent. It says Mr Tran had some capacity from 3 February 2025 until 17 March 2025, and could do pre-injury duties and pre-injury hours, and also modified duties six hours per day, three days per week.
- 28 To the extent of inconsistency in the evidence about Mr Tran's fitness for work, I place the most weight on and ultimately prefer the Sevar Report because it was written by a highly qualified, independent medical specialist. It is detailed and reasoned. The Sevar Report was not undermined. I accept the Sevar Report.
- 29 At first in cross-examination Mr Tran would not agree that he told Dr Sevar that he had previously been diagnosed with anxiety and depression. When taken to the Sevar Report, he said 'I think it was taken out of context.' He denied that he told Dr Sevar that he had contact with other psychologists in respect of anxiety and depression.
- 30 Despite his concessions set out above, Mr Tran would not agree in cross-examination that:
- a. the position he was putting forward in his workers' compensation litigation, as of 11 February 2025, was that he was totally incapacitated for work. He eventually said 'it was the position at that time' but 'things changed later on'; and
 - b. it was untrue to tick 'no' in response to questions about whether he had ever had anxiety, depression or other mental health conditions. Mr Tran said he had had anxiety and depression 'in the past now' but not prior to 2018. Mr Tran would not agree that when he filled out the pre-employment health assessment he had been diagnosed with anxiety or depression prior to 2018, nor that he lied in the document when he ticked 'no' to that question. In re-examination Mr Tran said that he had not been diagnosed with anxiety, depression or other mental condition until June 2023.

- 31 Despite agreeing that he filled out and signed a pre-employment health assessment that he dated 23 February 2018, and that he understood the need to be truthful to his future employer in filling it out, Mr Tran denied he read the document before he filled it out.
- 32 I accept that Mr Tran's rehabilitation consultant told the Health Service that Mr Tran was motivated to return to work. However, contrary to Mr Tran's submission, the evidence does not 'significantly undermine any claim that he had no capacity for work for the foreseeable future'.
- 33 Mr Tran's argument about the Health Service ignoring to up-to-date medical information is inconsistent with, and undermined by:
- a. his workers' compensation position that he had no capacity for work; and
 - b. his claim for and ultimately payment of salary continuance insurance on the basis that he had no capacity for work. Mr Tran's argument that his insurer-funded RESTORE program report dated 20 November 2024 showed that he had partial capacity, despite his insurer paying him on the basis that he had no capacity, does not overcome this.
- 34 Mr Tran submits that his general practitioner accidentally ticked the box stating that he has no capacity for work. He says that because that certificate says he had partial capacity, this means that the Health Service knew he had partial capacity for work at the time of his dismissal. The 6 January 2025 GP Certificate, Sevar Report and Mr Tran's position in his workers' compensation claim that he had no capacity to work all lead to the obvious finding that Mr Tran was not fit for work and would not be fit for work for the foreseeable future. Ultimately Mr Tran would not make obvious concessions that were due in relation to his incapacity to work and the effect of the medical evidence in the context of his workers' compensation claim and his claim for, and receipt of, salary continuance insurance payments. This did not reflect well on him and is consistent with the inference that Mr Tran was reluctant to make concessions where they did not suit his case.
- 35 I accept the Health Service's submission that Mr Tran's evidence that he was claiming and receiving salary continuance insurance payments, on the basis that he was fully unfit for work, until well after he was dismissed, is fatal to his case. I agree that while a lack of desire to return to work may count against an employee whose capacity to work is in question, the issue in this case is not whether Mr Tran wanted to return to work. The issue is Mr Tran's capacity to work.
- 36 The evidence clearly shows that the Health Service was right to conclude that Mr Tran was not able to perform the inherent requirements of his role, and would not be able to do so for the foreseeable future. On the evidence before the Commission, I am satisfied that at the time of dismissal and for the foreseeable future (being at least the 12 months to August 2025), Mr Tran lacked capacity to work and was unable to fulfil the inherent requirements of his role.

Was dismissal harsh, oppressive or unfair?

- 37 In summary, Mr Tran argues that his dismissal was harsh, oppressive or unfair because the Health Service:
- a. did not genuinely consider his capacity to return to work;
 - b. ignored medical evidence that supported his gradual return to work; and
 - c. denied him procedural fairness throughout the process.
- 38 Mr Tran's arguments focus on:
- a. his desire and efforts to return to work, which he says was supported by his general practitioner and allied health professionals. However, placing due weight on the fact that the progress reports were from Mr Tran's treating general practitioner, for the following reasons, I find that the general practitioner progress reports were not a basis on which the Health Service needed to act. Ultimately, the evidence that Mr Tran relies on about his capacity to work does not move the needle. I accept the Health Service's submission that the evidence shows that the first time Mr Tran engaged to try to return to work was after the Health Service proposed to dismiss him, and in the context of the Health Service having the Sevar Report which concluded that Mr Tran was unfit for the foreseeable future. The evidence Mr Tran produced to contest the Sevar Report does not meaningfully undermine the Sevar Report. As the Health Service says, the 6 January 2025 GP Progress Certificate does not contain any reasoning and was materially inconsistent in that it says that Mr Tran had both 'no capacity' from 25 November 2024, with no end date, and 'some capacity for work' between 6 January and 3 February 2025 performing pre-injury duties, and modified or alternative duties, at pre-injury hours, at 6 hours a day on Monday, Wednesday and Friday. It does not explain the change of circumstance vis-à-vis the Sevar Report nor the report from Mr Tran's exercise physiologist dated 11 December 2024 which also said Mr Tran was completely unfit for work at that time;
 - b. the Chief Executive 'ignoring' the up-to-date medical and rehabilitation evidence and dismissing him anyway. Mr Tran says the Health Service did not test his incapacity and relied on outdated documents. In effect Mr Tran said that if the Health Service was confused by his general practitioner's progress reports, it should have asked him to explain them. However I am satisfied that there was no requirement for further testing or requests for explanations in the circumstances. The evidence the Health Service relied on establishes that Mr Tran did not have capacity to return to work for the foreseeable future;
 - c. the process being unfair, lacking consultation and exploration of alternatives. However, I accept that in all the circumstances the Sevar Report gave the Health Service a sufficient foundation to conclude that there were no reasonable other alternatives in the context where Mr Tran was employed to do a particular job;
 - d. Mr Tran's view that the Health Service caused his injury and then dismissed him for it. However, on the evidence before me I cannot find that the Health Service caused Mr Tran's injury. At best the evidence Mr Tran

relies on suggests that Ms C's allegations against Mr Tran may have contributed to his injury. But in any event, the Commission is not determining why Mr Tran was unfit for work. Rather, the Commission must decide whether the decision to dismiss was harsh, oppressive or unjust. Even if I could find that the Health Service's actions had a causal impact on Mr Tran's injury, here I do not consider that the Health Service's actions were unfair or unreasonable. As the Health Service submits, suspending an employee when very serious allegations are made against them by a colleague, and changing their roster to avoid contact between the two employees, is 'par for the course', and does not make it unfair to dismiss the employee years later when he still has not returned to work;

- e. Mr Tran's view that the Health Service and its Chief Executive acted in bad faith by relying on the Sevar Report to dismiss him while also disputing aspects of his workers' compensation claim;
- f. his complaints about the Chief Executive as decision-maker, including the allegations Mr Tran raised against her after his dismissal of fraud, dishonesty as a medical practitioner and breach of privacy. However, the evidence provides no basis to find that that the dismissal was unfair because the Chief Executive was the decision-maker. Mr Tran's submission in this regard was unfounded;
- g. his view that it was unfair of the Health Service to raise for the first time in the termination letter Mr Tran's non-disclosure of anxiety, depression and substance use in Mr Tran's pre-employment health assessment. However, non-disclosure was not the reason the Health Service dismissed Mr Tran;
- h. the timing of the dismissal was premature and harsh because it happened just before the WorkCover hearing; and
- i. his view that it was unfair that in February 2025 the Health Service had said that it would organise an appointment for Mr Tran with a psychiatrist, Dr Victor Cheng, in the context of his workers' compensation matter, but then dismissed him in March 2025.

39 Ultimately none of the matters set out above at [38] mean the dismissal was harsh, oppressive or unjust.

40 Mr Tran also made general submissions to the effect that the Health Service breached the:

- a. *Workers Compensation and Injury Management Act 2023 (WA) (WCIM Act)*;
- b. *Equal Opportunity Act 1984 (WA)*;
- c. *Industrial Relations Act 1979 (WA)*; and
- d. *Minimum Conditions of Employment Act 1993 (WA)*;

as well as the Health Service's fitness for work, injury management, equal opportunity and discrimination policies and relevant WA Health System agreements. The gist of Mr Tran's arguments seemed to be:

- a. it is an offence under the WCIM Act for the Health Service to fail to establish an injury management system for him;
- b. the Health Service should have filled out a prescribed form to dismiss him; and
- c. the Health Service discriminated against him on the grounds of impairment and it was unlikely it could not make reasonable adjustments for him given its size.

41 Overall Mr Tran's submissions about the matters at [40] were too vague to be of real assistance. This case is not about, and does not turn on, non-compliance with the WCIM Act. To the extent it is necessary to address Mr Tran's complaint about a breach of confidentiality or privacy, I accept the Health Service's submission that s 505(1)(a) of the WCIM Act provides an exception to the confidentiality provision at s 504, providing that, for the purposes of that Act, use or disclosure of information is authorised if information is used or disclosed in good faith for the purposes of, or in connection with, performing a function under that Act or another law. Plainly the Health Service was performing a function under another law, being the *Health Services Act 2016 (WA)*, when it dismissed Mr Tran. There was a lawful basis for the use of the information.

42 Dismissing an employee while there is an ongoing workers' compensation matter is not unfair in and of itself. Sections 166 and 168 of the WCIM Act prohibit an employer from dismissing an injured worker for 12 months from the date of the injury. Even if Mr Tran's injury was covered by the WCIM Act, he was dismissed well after 12 months from the time Mr Tran says he suffered the injury.

43 Mr Tran's focus on alternative rosters or duties is misguided. That the Health Service did not consider alternative duties or rosters for Mr Tran does not, in this case, make the decision to dismiss Mr Tran unfair. I accept that Mr Tran has been significantly affected by the long history leading to this matter, his lack of capacity for work and his dismissal. However it is clear from the oral and documentary evidence, as well as his submissions, that taken as a whole, the evidence about Mr Tran's capacity to work supports a finding that Mr Tran was totally unfit to perform the inherent requirements of his role as a Patient Care Assistant and he would be for the foreseeable future. I am satisfied that Mr Tran was totally unfit to work and would remain so for the foreseeable future. Further, this was in the context of Mr Tran having not attended work since 6 July 2023 and the Health Service having given Mr Tran significant time to recover from his initial incapacity.

44 It was not unfair for the Health Service to dismiss Mr Tran because he was unfit to fulfil the inherent requirements of his role and would be for the foreseeable future, in circumstances where:

- a. from September 2023 until around September 2025, Mr Tran claimed and received salary continuance insurance on the basis that he was fully unfit for work;
- b. on 11 December 2024 the Health Service proposed dismissing Mr Tran on the basis that he was unable to perform the inherent requirements of his role and he would be for the foreseeable future; and
- c. the position Mr Tran put forward in February 2025 in his workers' compensation claim was that he was totally incapacitated for work.

45 Applying the test in *Undercliffe*, in all the circumstances of this matter, I find that the Health Service did not exercise its lawful right to dismiss Mr Tran so harshly or oppressively as to amount to an abuse of that right.

- 46 For completeness, I find that Mr Tran was dishonest in his pre-employment health assessment when he answered 'no' to the question 'Do you have, or have you ever had' anxiety, depression, other mental health conditions, substance use or any other condition or disability. I am satisfied on the evidence that prior to 2018 when he filled out that document, at the very least Mr Tran had a methamphetamine use disorder that had started in adolescence. Had it been necessary to determine, I would have found that Mr Tran's dishonesty in filling out his pre-employment health assessment would have weighed against an order reinstating him.
- 47 An order will issue dismissing application U 34 of 2025.

2026 WAIRC 00175

UNFAIR DISMISSAL APPLICATION

THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

MATTHEW TRAN

APPLICANT

-v-

EAST METROPOLITAN HEALTH SERVICE

RESPONDENT**CORAM**

COMMISSIONER T EMMANUEL

DATE

WEDNESDAY, 25 MARCH 2026

FILE NO/S

U 34 OF 2025

CITATION NO.

2026 WAIRC 00175

Result

Application dismissed

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 –

THAT application U 34 of 2025 be, and by this order is, dismissed.

(Sgd.) T EMMANUEL,
Commissioner.

[L.S.]

2026 WAIRC 00165

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION

: 2026 WAIRC 00165

CORAM

: COMMISSIONER C TSANG

HEARD

: MONDAY, 13 OCTOBER 2025

TUESDAY, 14 OCTOBER 2025

WEDNESDAY, 15 OCTOBER 2025

FRIDAY, 17 OCTOBER 2025

DELIVERED

: FRIDAY, 20 MARCH 2026

FILE NO.

: U 3 OF 2025

BETWEEN

: NATALIE WARNOCK

Applicant

AND

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

Respondent

CatchWords	:	Industrial Law (WA) – unfair dismissal – breach of discipline under the <i>Public Sector Management Act 1994</i> (WA) – teacher providing driving lessons to a student – student performing chores at teacher’s house as a result of damage caused to teacher’s vehicle during driving lessons – teacher texting student during class time on student’s personal phone – teacher-student professional boundaries – small town context – summary dismissal – proportionality
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Public Sector Management Act 1994</i> (WA) <i>School Education Act 1999</i> (WA)
Result	:	Application dismissed
Representation:		
Applicant	:	Mr C Fogliani (of counsel)
Respondent	:	Mr M McIlwaine (of counsel)

Cases referred to in reasons:

Balfour v Attorney-General [1991] 1 NZLR 519

Bi-Lo Pty Ltd v Hooper (1992) 53 IR 224

Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36

Jones v Dunkel (1959) 101 CLR 298

Laws v London Chronicle (Indicators Newspapers) Ltd [1959] 2 All ER 285

McDonald v Kwik Express (Timemasters Pty Ltd) [2006] WAIRC 03603

Miles v The Federated Miscellaneous Workers’ Union of Australia, Hospital, Service and Miscellaneous, W. A. Branch (1985) 65 WAIG 385

Newmont Australia Ltd v Australian Workers Union, WA Branch (1988) 68 WAIG 677

North v Television Corporation Ltd (1976) 11 ALR 599

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority of Western Australia [2017] WAIRC 00066

Trestrail v City of Karratha [2025] WAIRC 00820

Reasons for Decision

- 1 On 6 January 2025, the applicant (**Ms Warnock**), filed a *Form 2 – Unfair Dismissal Application (Form 2)*, in relation to her dismissal on 10 December 2024 as a Teacher at Merredin College, stating:

3.1 What reasons did your employer give for the dismissal?

1. Providing driving lessons to a student [who in these reasons will be referred to as **AB**].
2. Allowing [AB] to perform chores at Ms Warnock’s house to repay her for the damage he caused to her car.
3. Messaging [AB] during class to check on his whereabouts.
4. Driving [AB] home from extra-curricular activities.

- 2 In her Form 2, Ms Warnock states:

Why the dismissal was unfair

13. The [respondent’s] decision to terminate Ms Warnock’s employment was harsh and unreasonable. This is because the decision to dismiss was a disproportionate response to Ms Warnock’s conduct.
14. It is unclear whether the Department had issued any directions, policies, or procedures that prohibited the conduct that the [respondent] relied upon to terminate Ms Warnock’s employment. Ms Warnock would not have engaged in any of the conduct if she was aware that it may have created problems in her employment.

- 3 On 24 January 2025, the respondent filed a *Form 2A – Employer Response to Unfair Dismissal Application*, stating:

Overview

1. The respondent commenced the relevant disciplinary process on 15 May 2024 in response to information received that [Ms Warnock] might have breached professional boundaries with one of her year 12 students, [AB].
2. [Ms Warnock] was afforded procedural fairness throughout the disciplinary process.
3. The respondent’s disciplinary findings were open based on the available evidence that was gathered through a disciplinary investigation that was conducted as part of the disciplinary process.

Response to section 3.2 of the application

...

12. As to [13], the respondent says that the decision to dismiss [Ms Warnock] was not harsh or unreasonable. [Ms

Warnock's] conduct (which was not isolated) was a significant breach of professional boundaries with one of her students. The respondent's conclusion – that [Ms Warnock's] ongoing employment was untenable due to doubts about her suitability – was rational and justified the decision to dismiss.

13. The respondent does not accept [14] and says that [Ms Warnock's] conduct was a breach of the Department's Code of Conduct. Further, [Ms Warnock] had received relevant training (Accountable and Ethical Decision Making) in June 2022 on the importance of professional boundaries.
14. Further to the above, [Ms Warnock's] conduct was clearly at odds with the Teacher Registration Board of WA's [(TRBWA)] 'Teacher-Student Professional Boundary' publication, which is widely known throughout the teaching profession.

4 The parties agree that:

The overarching issue to be determined is whether the Respondent's right to terminate the contract of employment has been abused, such as to render the exercise of that right unfair. See: [*Miles v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W. A. Branch* (1985) 65 WAIG 385 (*Undercliffe*)].

The evidence

5 On 4 April 2025, the parties filed an Agreed Statement of Facts, stating:

1. On 28 January 2018, [Ms Warnock] commenced employment with the Respondent as a Teacher at Merredin College.
2. Ms Warnock is acquainted with [AB's mother, who in these reasons will be referred to as **Mrs B**, and references to Mrs B's family referred to as the **B-family**] and her son, [AB], through the Merredin Church of Christ. This predated the student/teacher relationship between Ms Warnock and [AB].
3. During 2024, [AB] was a Year 12 Student at Merredin College. Ms Warnock was [AB's] English teacher.

Driving lessons

4. In 2024, Ms Warnock provided driving lessons to [AB]. This was to assist [AB] in learning how to drive and to obtain his driver's licence.
5. The driving lessons commenced on or before 5 April 2024. The driving lessons were conducted on a one-on-one basis in Ms Warnock's personal vehicle.
6. One of the driving lessons involved a return trip from Merredin to Perth.
7. After one driving lesson, on or about 5 April 2024, [AB] offered to give Ms Warnock his and [Mrs B's] personal mobile phone numbers.
8. At least one driving lesson took place before Ms Warnock had confirmed with [Mrs B], over Facebook Messenger, that she gave her permission. In response, [Mrs B] confirmed that she was okay with Ms Warnock providing driving lessons to [AB] after tutoring on Monday evenings. On a subsequent occasion, [Mrs B] gave permission for Ms Warnock to take [AB] on a driving lesson from Merredin to Perth and back.
9. During one of the driving lessons, on or before 5 April 2024, [AB] hit a curb. This caused damage to a tyre on Ms Warnock's car. [AB's] mother offered to pay for the damage. Ms Warnock rejected the offer. Ms Warnock suggested that [AB] could instead assist Ms Warnock with some chores at her home as compensation for the damage. [AB] and his mother agreed.
10. [AB] attended Ms Warnock's house on at least two occasions. On the first occasion, he assisted in moving some artificial turf and performing other gardening activities. On the second occasion, he chopped a load of firewood.
11. During a different driving lesson on around 27 April 2024, [AB] hit a gate when pulling into his driveway. This caused damage to the body of Ms Warnock's car. [Mrs B] offered to pay the \$500 excess to cover Ms Warnock's out-of-pocket costs. Ms Warnock accepted [Mrs B's] offer. [Mrs B] transferred the \$500 to Ms Warnock and then she submitted the insurance claim, including paying the excess. Ms Warnock's insurance repaired the damage.

Phone message

12. On 22 April 2024, Ms Warnock was teaching her Year 12 English class. [AB] was supposed to be in the class but was absent without notice or explanation. Ms Warnock had seen [AB] at school earlier that day. During the class, Ms Warnock sent a text message to [AB] from her personal mobile phone to his personal mobile phone to ascertain his whereabouts.

Lift from tutoring and repertory club

13. On various occasions, Ms Warnock provided [AB] with a lift home after tutoring and the Repertory Club.

Termination

14. On 10 December 2024, the Respondent terminated Ms Warnock's employment without notice or payment in lieu of notice, for serious misconduct.
15. Ms Warnock was a permanent employee and was not on probation at the date of the dismissal.
16. Aside from the events that led to her dismissal, Ms Warnock had not previously been the subject of any disciplinary actions. She had an otherwise satisfactory employment record.
17. At the date of dismissal, [Ms Warnock's] gross salary was \$111,476 per annum, being a salaried Teacher increment 2.6 under the *School Education Act Employees' (Teachers and Administrators) General Agreement 2023*

[(Agreement)].

- 6 Ms Warnock called Trevor John Stace, who gave the following evidence-in-chief:
- (a) He has worked for the respondent since 2015. Previously, he worked for the Education Department for five years followed by seven years with the Catholic Education Office.
 - (b) Since the start of 2023, he has been the Head of Learning Area (**HOLA**) for English and the Humanities at Merredin College. He has been Ms Warnock's direct line manager since the beginning of 2024. He did not work with Ms Warnock in 2023 because she took the year off on a deferred salary arrangement.
 - (c) As Ms Warnock's line manager, he is responsible for ensuring that the curriculum is delivered appropriately, supporting Ms Warnock in carrying out her role and with behaviour management, and general day-to-day support of a teacher in his learning area.
 - (d) He is comfortable with Ms Warnock working in his department and has no concerns about her working with students. He is aware of Ms Warnock's values, ethics and character. He is also aware that she is a person of very deep faith and is very active in her church. She would go out of her way to help students. She is the type of teacher that cares and will do whatever she can to help somebody.
 - (e) 'However, as I said, a little bit naively, she might have crossed a boundary or two.'
 - (f) He became aware that Ms Warnock had been providing driving lessons to AB when he noticed some damage to her car in the carpark and asked her about it, at which time Ms Warnock mentioned the driving lessons.
 - (g) He had previously heard rumours from discussions around the staffroom that Ms Warnock was providing driving lessons to AB, but did not speak to Ms Warnock about it, because 'I was confident that she was behaving with the full consent of [AB's] mother, who is her friend'. 'It didn't register with me that, actually, that it was highly inappropriate.'
- 7 Mr Stace gave the following evidence under cross-examination:
- (a) While he is aware that Ms Warnock was dismissed on the basis of unprofessional conduct regarding contact she had outside of the school with AB, and that the contact involved her giving AB driving lessons; he does not know how long the lessons went for or how often they occurred.
 - (b) He did not give permission for Ms Warnock to be in a car nor drive with AB. He did not give permission for Ms Warnock to have AB at her home to perform chores and was not aware that was occurring. He also did not give permission for Ms Warnock to swap personal phone numbers with AB and for her to text AB on that personal phone number.
 - (c) Ms Warnock did not discuss with him beforehand what she was intending to do and seek his views.
 - (d) He was Ms Warnock's supervisor for one term, being Term 1 of 2024.
 - (e) He agrees with what he said in the statement he provided to Standards and Integrity (**SID**) (**Exhibit A1**) that:

Our role is a unique profession and position which has certain professional boundaries, and we can't do these things others ordinarily would.
 - (f) He believes the statement above to be correct. It is an understanding that he has gained over 22 years of teaching. His knowledge arises from his learning at university in addition to his experience. He was a member of a WACOT (Western Australian College of Teaching, the predecessor body to the TRBWA) committee that oversaw professional conduct.
- 8 Mr Stace gave the following evidence under re-examination:
- (a) It is normal for a teacher to develop their understanding of professional standards from university and from experience, although he is unfamiliar with what is now covered in the university courses.
 - (b) It is also important for there to be explicit induction at every school, and the Principal is currently developing an induction booklet for staff at Merredin College.
 - (c) Based on his experience when he started at Merredin College, he expects that when Ms Warnock started that she was provided with a copy of the Code of Conduct and asked to familiarise herself with it.
 - (d) He has not seen a detailed induction anywhere he has taught that 'really spells out all of your professional responsibilities'. In relation to professional standards and the relationship between teachers and students, there is 'nothing of any great depth'.
- 9 In answer to clarifying questions from the bench, Mr Stace said:
- (a) Merredin College is a kindergarten to Year 12 school. In the secondary school there are two Deputy Principals, approximately 320 students, 20–30 teachers, three HOLAs, and a Teacher in Charge. Each HOLA or Teacher in Charge is responsible for approximately four or five teachers.
 - (b) In **Exhibit A1**, he said:

She has ultimately done her friend a favour and was teaching her son to drive. Our role is a unique profession and position which has certain professional boundaries, and we can't do these things others ordinarily would.
 - (c) By 'these things' he means that there are some things you might normally do for a friend such as teaching their child to drive, but as a teacher, if that friend's child is a student at your school, then 'you would have to go about seeking permissions for that to occur' and there are things that you have to say no to.

- (d) At the time, it did not register with him that Ms Warnock providing driving lessons to AB was highly inappropriate. That is regrettable, because it should have. He accepts that it is highly inappropriate.
- (e) His role is to oversee the day-to-day running of the department, ensure they are delivering the curriculum appropriately, managing students appropriately, and are behaving appropriately towards students. He had 'no inkling that there was any issue at all' with the way that Ms Warnock managed students. 'To the best of my understanding, things were fine.'
- 10 Ms Warnock gave the following evidence-in-chief:
- (a) In January 2018, she commenced employment with the respondent at Merredin College. She primarily taught English but sometimes taught drama or HASS (Humanities and Social Sciences).
- (b) She has known the B-family since she moved to Merredin in 2018. Mrs B was a regular attendee at her church, together with her two youngest children who were still in primary school at the time. In 2018, she had two of Mrs B's older children in her homeroom and taught one of them Year 10 English. During those first few years, one of Mrs B's older children 'was going through a pretty tough time, [so Mrs B] would regularly come and speak to me after church about [him] and his struggles at school' and she would give Mrs B encouragement, 'so we would talk quite regularly'. She and Mrs B were also in the same morning tea group at church which involved organising food and washing up afterwards. When she had an abundance of vegetables she was growing in her garden, she offered them to the church, and she would drop them off at Mrs B's house or pass them to her at church. Additionally, being part of a church community, she would sometimes make meals for the members, which included making meals for Mrs B and delivering them to Mrs B's house.
- (c) She had previously taught AB in 2021 for a semester for Year 9 HASS.
- (d) At a Follow the Dream session (after-school tutoring for indigenous students), at the end of Term 1 2024, AB mentioned that he wanted to be a driver in the army. She enquired whether he had his licence and he said that he did not because his mother does not like teaching him and his siblings how to drive. She said 'I give you a lift home after Follow the Dream anyway, if it's okay with your mum, maybe I can give you some driving lessons?'
- (e) During the school holidays, she ran into AB at the hardware store (where he works) when she went to purchase some gardening supplies and asked him whether he had his learner's permit or logbook. He said that he had, and as he was going on his lunchbreak, she asked him if he had discussed it with his mum and if he wanted to do a driving lesson during his lunchbreak. AB said that it was okay with his mum, so she gave him a driving lesson.
- (f) The next day, she followed up with Mrs B who confirmed that 'Yes, he did mention it' and 'it's fine with me.'
- (g) Originally, she was providing AB with short driving lessons after school. After one of these lessons when she dropped AB home, she was chatting with Mrs B, who said she was too much of a control freak to teach her kids how to drive and asked her if she would 'take care of all of [AB's] driving lessons, and also, if I would be happy to do logbook hours with [one of Mrs B's] adult daughters.'
- (h) The first driving lesson with AB was during lunchtime on 4 April 2024, which was during the school holidays between Term 1 and Term 2.
- (i) She 'didn't want it to appear like it was something secret', so on the first day of Term 2, she spoke about providing driving lessons to AB with those in the humanities department who were present in the staffroom during a learning area meeting. She mentioned it 'partly because I didn't want people to raise questions if they saw me and him leaving the school in the same car.' She did not officially tell anyone but made it quite well-known around the school.
- (j) They said 'Gee, that's brave, I wouldn't be that brave', which she took to mean that they would not be brave enough to have a learner driver in their car. No one said that she was not supposed to have students in the car nor that she should not be giving driving lessons.
- (k) Just over a month after she first started providing driving lessons, on 10 May 2024, the Principal, Kylie Cattaway, approached her and said that she wanted to see her. She asked whether this was about the driving lessons with AB because 'why else would the Principal need to see me?' After school that day, she attended a meeting in Ms Cattaway's office with the Union representative attending as her support person.
- (l) At the meeting, Ms Cattaway presented her with a list of concerns that had been raised, and they talked about them. Ms Cattaway explained that the driving lessons were not really appropriate as they are one-on-one and need to stop. To clarify where the line was, because in a small country town the line is rather blurred, she asked some questions. She said that her driving lessons involve an instructor-student relationship given in a car and she asked how that differed from the teachers who were on football teams with students and using the changerooms at the same time. Ms Cattaway told her it was not appropriate and that she had to stop. She said that she understood, and from that point stopped providing driving lessons to AB.
- (m) Page 75 of the Agreed Bundle (**Exhibit A2**) is Ms Cattaway's notes of the meeting. It records the seven items of concern that were raised with her. It records that she had mentioned how she knew Mrs B and the B-family. She had mentioned it because she sees that as the cause; if she did not have a familiar relationship with Mrs B and the B-family then she would not have been giving driving lessons to a student.
- (n) Ms Cattaway's notes record that she asked whether it would make a difference if AB's sister was in the car. She asked this because she was trying to find out where the boundary was. Her experience with other staff members is that they would be involved with students outside of school for various reasons so 'I was just trying to find where is the line, so that I don't cross it again.'

- (o) When asked whether before this conversation with Ms Cattaway she had turned her mind to where the line in relation to [AB] is, she said:

I think, yes. Because you do hold in your mind, is – is this okay, as teachers do with everything. But because I knew his family, I thought that it was on the right side of the boundary. Just as, you know, there's a maths teacher, who coaches the junior – like, the colts football team. Um, so he's constantly got outside of school contact with, um, students. There's a number of staff members who actually play on the same netball team as students. So they're constantly, um, in group chats with students and seeing them outside of school. I've even had students confess that they were at Mad Monday activities with staff members.

I'll just – what's 'Mad Monday activities'? What's that?---Mad Monday is basically a big drinking session after the football grand final. Um, so having that as an example, I wanted to clarify where my driving lessons sat on this continuum of appropriate or not appropriate. And that's why I was asking clarifying questions, because I wanted to know, is it inappropriate because it's one-on-one with the student? And if there was a second person, would it be okay? Or is it inappropriate, just, full stop, because he is a student?

And Ms Cattaway's note says, 'I suggest that to manage perceptions, it would be best not to'. Is that your recollection of what Ms Cattaway said?---From what I recall, I think it was that she just said – she did talk about perception a lot. That some people may perceive it as something that it's not. And because of that, it would be best to stop. I can't remember her exact words.

- (p) Ms Cattaway's notes record their discussion about the Repertory Club's mid-year production. The Repertory Club is the town's local theatre that puts on a play at least twice a year. Anyone in the town can audition to play a part in the production and there are other teachers in the Repertory Club. As the mid-year production was coming up and it was too late to pull out, she asked Ms Cattaway, either at this or a different meeting, whether it was okay for her to be in the play if AB was also in the play, and Ms Cattaway said 'as long as you're keeping your distance, it should be fine'.
- (q) AB had performed chores at her house twice. The first time was during the Term 1 school holidays when he went to her house to feed her pet rabbits while she was away. The second time was closer to May 2024 when he chopped firewood for her.
- (r) When asked about Ms Cattaway raising her communications with AB via SMS and what her recall of that discussion was, she said:

Yes. Um, she did bring it up. And I did say, 'Yes. I did message him during class to find out why he wasn't there'. Um, I did explain to her that it was because I had seen him in homeroom that morning, and then he wasn't in class. And this was very close to when he had had a PTSD episode a couple of weeks' prior. Um, so I was concerned, because I had seen him, not even, like, an hour ago, and then he wasn't at school. It wasn't in the system that he'd signed out. So I was a bit worried about where he was. And I understand, like, when I had that conversation, and I mean, even after the fact, that when I did it, I was like, 'Mm. Probably shouldn't be using my personal phone to message a student about their absences'. I should have just raised it with student services and said, 'Hey. [AB's] not in class', and they would've looked into it.

And did you stop communicating with [AB] via his phone number and your phone number after this?---Yes. Yep.

- (s) When asked what her understanding was, prior to her meeting with Ms Cattaway, as to how her conduct fell within her responsibilities in relation to teacher-student professional boundaries, she said:

Yep. Um, so as I've said before, the – my only educational context as a teacher has been at Merredin College. And I have seen staff go beyond the classroom with many students. Um, whether – like I said, whether it's coaching, being on the same team as them, employing them. All sorts of things like that. So – and by 'employing', I mean as babysitters or doing yard work. That sort of thing. Not necessarily employing them at a business. Um, I am also very much a pastoral care person. That's from my background as a youth pastor and a chaplain. And my understanding was, yes, there are professional boundaries. We always need to keep that in mind. But we are also asked to look after the well-being of our students and provide pastoral care. I saw what I was doing as an extension of both my teacher job and as my, um, role in the church, to provide pastoral care to this family. It just so happened that it was driving lessons with [AB], um, that it came about. I – because I knew that my intentions weren't nefarious, I didn't think it was a breach of boundaries. Because I was doing it to help someone, I thought that it was on the right side of the continuum. I didn't think, prior to all of this being raised, that what I was doing was a problem, because also, nobody else had raised it as an issue. All I saw was the examples that I had had from other teachers – senior teachers, deputy principals, of this sort of behaviour. And so I thought that what I did was falling in the same category as what they did.

- (t) When asked what her understanding is now of teacher-student professional boundaries and what occurred, she said:

Um, I understand that boundaries are different to what I thought they were. Um, that even though they were part of my church community, and I thought I was also wearing a church hat at the same time as a teacher hat, there is a – a different, um, standard to which teachers are held. Um, I had a conversation with, um, another teacher, who had been at Merredin College, and also at the church, and he said he went through a similar thing of having to realise that, um, just because it's something that you would do in a church capacity, it's not something that you can do as a teacher. And so I now have a better understanding that, um, the line is a lot closer than what I thought it was. Um, just because it's something that I think is appropriate, doesn't necessarily mean that it was. And, um, if anyone ever requests something outside of the classroom again, like,

tutoring or something else, I would be more cautious, and definitely seeking advice from line managers and others as to whether or not it's appropriate for whatever activity it is.

- (u) Follow the Dream is a program that the Department of Education has for indigenous students who are academically talented and looking at university. It involves two tutoring sessions a week, in addition to camps and excursions connecting the students to universities. She started tutoring with the Follow the Dream program in 2023 while she was on deferred salary leave for 12 months. She had been giving AB lifts home from Follow the Dream since she started tutoring in 2023. She never turned her mind to what driving AB home from Follow the Dream tutoring might mean in terms of professional boundaries, because:

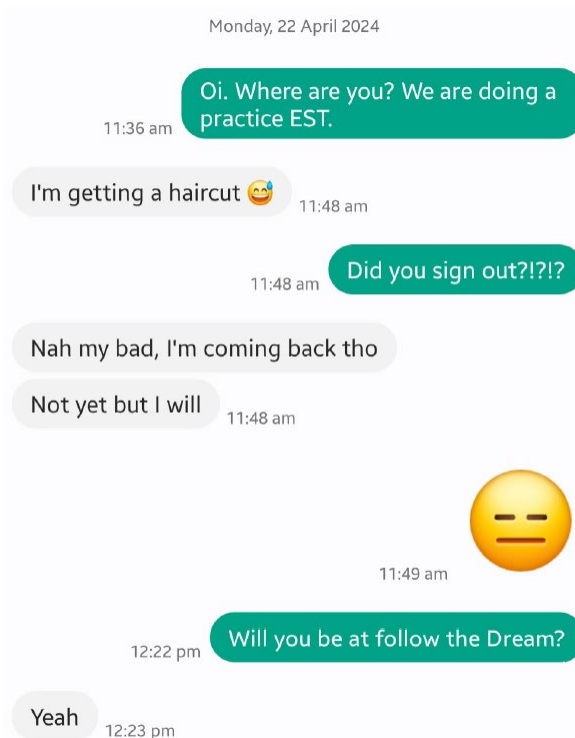
Um, probably because it was common practice. So, um, students – like, teachers giving students a lift home from tutoring, it was, in my mind an extension of that tutoring. They were staying late. It's 5 o'clock. You know, they need to get home. They need to get home safely. Um, and so – yeah. It was just something that was done.

- (v) She had not seen the Follow the Dream Enrolment Form (**Exhibit R3**) prior to her dismissal.
- (w) On the first night of the Repertory Club play, AB arrived late, so the usual person who applies the make-up had left. She and some male cast members were backstage in the greenroom. They were going onstage in 15 minutes, so she applied AB's make-up.
- (x) Prior to her meeting with Ms Cattaway, she drove AB home from rehearsals on three or four occasions. The rehearsals generally finished around 9:00pm.
- (y) Since her dismissal, she has secured two part-time roles, on reduced pay. As the loan repayments on her house and car outweighed her post-dismissal income, she had to sell her house. The dismissal also had a huge impact on both her mental and physical health.
- (z) If she was reinstated:

I would be a lot more mindful, um, of interactions with students outside of the classroom teaching role. Um, like, I was running camps, um, prior to this. Being the house coordinator. Doing the tutoring. All of those things, I would be a lot more cautious about. Um, but I would also be a lot more – I'd take the initiative more about checking with my line manager, you know, 'Is doing this okay?' Um, you know, 'A parent has requested that I tutor their student. Is that all right?' Um, 'It's this student and this is where we're going to meet, and how and why'. And I would, um – being aware of my own neurodivergence and my, um, blind spots, when it comes to, ah, social rules and – and unwritten rules, I would make sure that I am a lot more proactive in checking that something is okay before I do it.

11 Ms Warnock gave the following evidence under cross-examination:

- (a) The driving lessons with AB started on 4 April 2024. After one of the drives, they swapped personal phone numbers. They messaged each other about arranging drives.
- (b) Document 4 of the respondent's bundle (**Exhibit R1**) is the screenshot of the text messages between herself and AB on 22 April 2024:



- (c) She accepts that there are more messages between herself and AB. She accepts that in AB's interview with SID he

talks about messaging her in relation to driving lessons. She accepts that counsel for the respondent made a request for her to produce her text messages with AB and that her response was that she had deleted the messages and AB's phone number, because 'my understanding was that it was a bad thing to have. So after the investigation concluded in December, I deleted them off my phone'. This occurred before the Union confirmed that they would support her unfair dismissal claim. Other than the text messages exchanged on 22 April 2024 (at [11(b)] above), she did not take screenshots of the deleted messages.

- (d) In light of everything, she accepts that it was inappropriate for her to message AB via personal phones. She accepts (and now understands) that one of the reasons why it is inappropriate to message a student via personal numbers is because that form of communication is unsupervised, and therefore, not open to scrutiny.
- (e) She accepts that her language in the messages at [11(b)] above is informal. She does not accept that it demonstrates a familiarity between her and AB. She says the familiarity is 'no more than I would have with any other student', although she had not messaged any other student.
- (f) Off the top of her head, there were probably between five to 10 more text messages between her and AB. She did not show those messages to anyone. She denies that she deleted the messages because she did not want anyone else to read them.
- (g) The day prior to the message exchange at [11(b)] above, was Sunday, 21 April 2024.
- (h) Page 116 of the Agreed Bundle is the logbook she wrote out:

Record of supervised driving

Supervising driver name (print)	Supervising driver's licence number	Supervising driver signature	Date	Time of day		Driving time (minutes)	
				Start	Finish	Day	Night
N Warnock	[redacted]	<i>N Warnock</i>	21/4/24	1:44pm	2:30pm	46	
N Warnock	[redacted]	<i>N Warnock</i>	21/4/24	2:38pm	3:25pm	47	
N Warnock	[redacted]	<i>N Warnock</i>	21/4/24	4:46pm	5:10pm	24	
N Warnock	[redacted]	<i>N Warnock</i>	22/4/24	4:37	5:24pm	47	
N Warnock	[redacted]	<i>N Warnock</i>	27/4/24	7:47am	10:25	158	
N Warnock	[redacted]	<i>N Warnock</i>	27/4/24	4:05pm	5:50	105	
N Warnock	[redacted]	<i>N Warnock</i>	27/4/24	6:20pm	8:05pm		105
N Warnock	[redacted]	<i>N Warnock</i>	6/5/24	4:05	4:36pm	31	

- (i) On 21 April 2024:
- (i) The drive from 1:44pm to 2:30pm was to Westonia.
- (ii) The drive from 2:38pm to 3:25pm was back from Westonia.
- (iii) The purpose of Westonia was to do a 'longer drive on highway driving.'
- (iv) The drive from 4:46pm to 5:10pm was around town. On that day, after going to and from Westonia, AB chopped wood and did yard work at her house, and then 'on the way home, we did another lesson'.
- (j) When asked if she accepts that there were extended periods of time when she was alone with AB in the car, she said:
In public spaces, yes.
What do you mean by 'public spaces'?---Well, we were always on roads where there were other road users able to view us at any time.
So between Merredin and Perth, was there ever a time where you were driving and there wasn't a car in sight?---Yes.
- (k) On 27 April 2024:
- (i) The drive from 7:47am to 10:25am was when they left Merredin to travel to Perth and stopped at Mundaring. She took over the driving at Mundaring because AB had not driven in the city before and they were going on the freeway.
- (ii) Between 10:25am and 4:05pm, she went to her naturopath appointment while AB waited in the waiting room, and she went to her second appointment which was in a shopping centre while AB did his own thing in the shopping centre. When she finished her appointment she texted AB, they got back in the car and then drove to Armadale to pick up something from her parents' house. They arrived there at approximately 3:50pm/3:55pm. AB waited in the car and her parents came out to say hello. AB drove when they left Armadale to Merredin 'because that way, he could get some city driving along the highway there'.
- (iii) The drive from 4:05pm to 5:50pm was from Armadale to Northam where they stopped for dinner at McDonald's.
- (iii) The drive from 6:20pm to 8:05pm was from Northam to Merredin.
- (l) She accepts that being alone with a student for that period of time was a breach of professional boundaries as a

teacher. When asked whether she accepts it was a serious breach of professional boundaries, she said:

Do you accept that being alone with your student for an extended period of time was a serious breach of professional boundaries?---I'm still unclear as to what a 'serious breach' is, because in my mind, I was still in the instructor-student relationship, as I was his driving instructor and he was my student. And also, there have been many instances in my career, and other teachers that I know, where they have had to be in the car alone with students before.

So do you accept that it was a serious breach of professional boundaries, or you don't accept that?---With the nature of the driving lessons, yes. Because this was not part of a school excursion. It was not driving lessons done as part of a school program. Um, so now that I have been made aware of it, I do think, yes, I should not have been alone with him in the car for that period of time for that particular activity.

- (m) She accepts that her contract of employment requires her to remain familiar with guidelines about professional behaviour and accepts that the Code of Conduct is one of those documents.
- (n) She is unfamiliar with the Department's 'Our Code of conduct and standards' document.
- (o) She saw the TRBWA Teacher-Student Professional Boundary booklet (**TRBWA Booklet**) for the first time when Ms Cattaway showed it to her at their meeting on 10 May 2024.
- (p) She does not recall completing the Accountable and Ethical Decision Making (**AEDM**) training on 26 March 2018 and on 23 June 2022. She knows she would have completed the training she just cannot recall when she last completed it.
- (q) She does not recall completing the Child Protection and Abuse Prevention (**CPAP**) training on 8 February 2024. She said: 'These sorts of things, they come up, you do them, you forget about them.'
- (r) She accepts that her behaviour, spending time one-on-one for an extended period of time with a student, in the circumstances, is a breach of the Code of Conduct.
- (s) When asked whether she accepts that texting over the personal mobile phone was a breach of the Code of Conduct, she said:

That is a hard one. Because it was for student welfare and his well-being and his safety. Because he had had a PTSD episode a couple of weeks' prior, at the end of the first term. And so having seen him that morning, and then not seeing him in my classroom, and then not having any explanation as to why he was not there, I was concerned for his welfare.
- (t) When asked again whether she accepts that texting over the personal mobile phone was a breach of the Code of Conduct, she said 'I should have done things differently. Yes.'
- (u) She does not accept that AB performing chores at her house is a breach of professional boundaries. The first time AB came to perform chores at her house was to feed her pets when she was away. The second time, AB chopped wood, which was between 3:25pm and 4:46pm on 21 April 2024. While she was home at the time, he did not come inside the house.
- (v) The slide from the AEDM training titled '4.4 Conduct Open to Misinterpretation' states:

Conduct Open to Misinterpretation

Conduct, even well intended, may be observed by someone (a student, a parent, or a colleague) and perceived as inappropriate for a person working with children.

Staff should avoid being alone with a student and where it is unavoidable; do so with the informed consent of parents and school principal.

Staff should conduct themselves in a way that will not give others reason to question their fitness/suitability to teach and that will not create discomfort for their students.
- (w) Having read the slide, she accepts that one of the key elements or overriding purposes of the procedures in relation to professional boundaries, is to protect herself and the Department from any misunderstanding. However, without having the benefit of reading the slide, she would not have thought that one of the purposes of professional boundaries was to avoid any misunderstanding that others might have of her and the Department.
- (x) The slide asks:

Which of the behaviours would you consider unprofessional or inappropriate for someone working with children?

 - o Communicating or corresponding with students about sexual or personal feelings for the student
 - o Inviting a student to your home or attend theirs without a professional educational reason
 - o Giving a student money
 - o Meeting up with students at the local cinema or shopping centre
 - o Transporting a student in your car without parent and principal approval
 - o Invite students to join your personal social networking site or accept their invitation to join theirs
- (y) When taken to the section of the slide that refers to 'inviting a student to your home or attend theirs without a professional educational reason' and asked whether she accepts that it is inappropriate to invite a student over to her home without a professional educational reason, she said:

That hasn't been my experience.

So – but what – do you accept that it's a breach of professional boundaries or not?---It depends on the context.

So in your context?---In my context, I should not have had [AB] over at my house doing yard work.

(z) She accepts that, as the teacher, it is her responsibility to maintain professional boundaries.

(aa) The slide from the CPAP training titled 'Inappropriate relationships' states:

Inappropriate relationships

Establishing a relationship with a student for the purpose of committing child sexual abuse is considered to be 'grooming' behaviour. Grooming is intended to lower the resistance of the child in preparation for sexual abuse.

Behaviours may include but are not limited to:

- offering personal gifts, special favours or special treatment
- adopting a welfare role that is the responsibility of another staff member e.g., a counsellor, or doing so without the knowledge of key staff members
- inviting or allowing a student or students to visit their home
- working outside of professional boundaries to find ways to see students alone
- being present when students dress or undress when not in a supervisory role
- developing a special relationship with a particular student
- participating in online chat room discussions with students
- phone/SMS contact with students
- after hours interactions with students without parental consent
- arranging time alone with a particular student
- driving a student unaccompanied, without knowledge and consent of key staff members
- conversations with students of a sexual nature.

Note: Staff should be aware that these behaviours towards students, while not illegal, may not be within professional boundaries. Refer to the Department's Staff Conduct and Discipline policy and procedures.

(bb) When asked whether she accepts that the CPAP training has identified the behaviours of 'inviting or allowing a student or students to visit their home', 'working outside of professional boundaries to find ways to see students alone' and 'developing a special relationship with a particular student' as inappropriate, she said:

I accept that it says if you're grooming, it is inappropriate to do these things.

So if you're not grooming – and again, that's not alleged, do you accept that those behaviours are still inappropriate?---No.

So you don't accept that they're inappropriate?---If you say that they're inappropriate for all staff members, then I would raise the question as to why staff members, who have children that are students, are allowed to have the students – their children's friends over their house. I would question why staff members are allowed to coach football teams, which is working outside of professional boundaries to see – like, sorry. Not that one. Um, a coaching relationship is a special relationship with students, especially if you take on a more mentorship role, or you're coaching that student one-on-one. There are a lot of ways – yes, these can be grooming behaviours. But there are also a lot of ways that teachers do these things in an innocent manner.

(cc) The next slide states:

Correspondence of a personal nature including letters, email, phone, SMS text, and on social networking sites i.e. Facebook, Twitter etc. (not including class postcards or bereavement cards, etc.) is considered a violation of professional boundaries.

(dd) She accepts the above statement in certain contexts but not in all contexts.

(ee) She does not agree that having received the AEDM training and the CPAP training, it should have been clear to her that it was a breach of professional boundaries to:

- (i) Drive one-on-one with a student.
- (ii) Swap personal phone numbers with AB and texting him.
- (iii) Invite AB to her home or arrange for him to be doing chores at her house.

(ff) She maintains that it was unclear to her that her conduct was a breach of professional boundaries.

(gg) When asked if she accepts that driving to and from Perth, spending that time alone, was open to misinterpretation, she said:

At the time that it happened, I didn't think that it was. All I thought was that people would think I am helping out a family friend. With hindsight, I see now how this behaviour can be open to misinterpretation. I have done a lot of self-reflecting in this whole process, since that first meeting with [Ms Cattaway], when it was raised

that these were issues. And I understand now how these sorts of things can be misinterpreted by people like students or parents or colleagues, because obviously they have been misinterpreted. But at the time, that is not a thought that crossed my mind, because I had pure intentions. All I thought was, 'I am helping out a family friend'.

And do you accept that there's also – by engaging in that activity – I'm talking about the driving, that that posed a risk to the Department's reputation as well?---It didn't cross my mind at the time.

But now?---Now, I understand. Yes.

- (hh) She accepts that the relationship between a teacher and a student is not equal and that there is a power imbalance.
- (ii) When asked whether the risks associated with the driving arrangement should have been obvious to her at the time, she said:
- So the risks that I considered were his safety, in the sense that I got comprehensive car insurance. At no point did I ever think he would owe me anything for these lessons. They were voluntarily entered into. There was no mention of payment or repayment. When the two accidents did happen, the tyre, and then the run-in with the gate, I never asked for money. [Mrs B] offered. In the first instance, I said, 'No. Let's do yard work in exchange instead'. The second instance, I accepted her offer to pay the insurance excess. But in no way did I ever think [AB] would owe me anything for this.
- (jj) She accepts that driving with AB would have continued if Ms Cattaway did not speak to her about it. In fact, she had spoken with Mrs B about another trip to Perth for AB to get his eyes tested. AB had said that the speed signs were difficult to see. It was her plan for AB to drive to Perth despite this, because she felt he had been a good driver. While there were two accidents, she said 'that's what happens when you have a learner driver in the car. Sometimes, they misjudge things'.
- (kk) She went through the TRBWA Booklet very thoroughly after Ms Cattaway gave it to her. When asked if she accepts that the TRBWA Booklet warns against driving one-on-one with a student she said:
- That booklet does not take into account the context of a small town. It may have a section on there about, 'Yes, you live in regional areas', but it is, in no way, ah – any teacher that you speak to, that works in a country school, in a small country town, will say that that booklet is not something that country teachers can stick to.
- So what's your opinion though? Is it fit for purpose, that booklet?---No.
- It's a - - -?---And – and I would – I would actually go to argue that the TRB didn't think it was fit for purpose, because it has, just recently, in the last year, revised it and added in additional caveats about not being friends with parents, not being alone with car – in cars with students. They have been added since this investigation.
- So do you accept that the new booklet is fit for purpose?---It still does not take into account a small town context.
- Right. The old booklet that we're talking about, the one that's been filed in this [proceeding], that does talk about rural towns, though, doesn't it?---It talks about rural towns, but it doesn't understand it.
- (ll) The Expert Report of Dr Ian Sherman dated 13 August 2025 (**Exhibit A6**) records that Dr Sherman had 'asked her whether she felt that, in retrospect, she had gotten too close to [AB]. She said she does not think so'. When asked what she thinks now, she said that she still does not think that she had gotten too close to AB.
- (mm) In relation to telling Dr Sherman (**Exhibit A6** [19.31]) that she had 'thought about every safety in relation to [AB], except my reputation. My thinking was I'm not planning on having sex with this student, so there's nothing wrong with what I'm doing', she said:
- The context of that comment was, at the time, I didn't think about – think what I was doing was wrong, because my motivations were not that way inclined. So that comment is not me saying, now, that's what I think. The comment was, at the time, that's what my thinking was.
- (nn) She last consulted with a psychologist at the beginning of 2025 and has not booked any other appointments since. However, she is currently taking anti-depressant medication.
- (oo) In relation to the Repertory Club, she agrees that Ms Cattaway having warned her to keep her distance from AB that in hindsight, she should not have applied AB's make-up and she should have gone and tried to find somebody else to do it.

12 Ms Warnock gave the following evidence under re-examination:

- (a) The TRBWA Booklet states the following in relation to rural towns:

Is it ever acceptable for a teacher to socialise with a student or students?

Social engagements are an important part of community life in small towns or rural communities, and indeed in larger communities, and contribute positively to the wellbeing of teachers working in these communities.

Teachers involved in social or sporting groups, or working in small towns or rural communities face additional challenges in managing professional boundaries with students and their families. They are more likely to have social relationships with the parents of the students who attend their school and are therefore more likely to see their students out of school hours, in social or sporting settings, or at various community clubs or associations.

The situation may also arise where there is likely interaction between students and teachers outside school (for example, in some faith-based schools where the school and church community are intertwined). Similarly, the

situation may arise at social events where the children or families of other teachers are also present, and where the children are students at the schools where the unrelated teachers teach.

This means that teachers will have legitimate reasons, on occasions, to attend social or sporting events which are also attended by students that they teach. It is also possible that they will visit students' homes or be visited by them, due to the teacher's social or sporting connections with students' parents or older, adult siblings. Teachers should generally avoid being in these situations with their students, unless they are in the company of other adults.

The recommendations below may assist teachers to enjoy these social or sporting engagements without compromising their professional responsibilities or crossing professional boundaries:

- » Social contact should be generated via the relationship the teacher has with the event organisers (such as a social or sporting event) or parents/carers or adult siblings of students.
- » Teachers should avoid being alone with their students in these situations and where it is unavoidable, do so with the informed consent of parents.
- » Teachers should conduct themselves in a way that will not give others reason to question their fitness/suitability to teach and that will not create discomfort for their students.
- » Consuming alcohol in these situations may lessen a teacher's capacity to judge when a professional boundary is at risk, so alcohol consumption should be avoided or limited.
- » Teachers should politely avoid discussing matters relating to their workplace and should not discuss any student's learning or progress, at social or sporting occasions.
- » Any concern a teacher has about whether or not a situation may be compromising or may breach professional boundaries should be disclosed to a senior/supervising colleague or their principal in advance, and an approved plan of action prepared and followed.

- (b) While the TRBWA Booklet does cover some of the parts of being a rural teacher, it is saying to generally avoid these situations, unless in the company of other adults, which is very hard to do in a rural town.
- (c) The TRBWA Booklet asks the question 'Is it ever acceptable for a teacher to socialise with a student or students?' but does not actually answer the question.
- (d) The TRBWA Booklet describes situations that arise in rural towns but does not give an evaluation; it does not outline what is acceptable and what is not acceptable.
- (e) The line that 'Teachers should generally avoid being in these situations with their students, unless they are in the company of other adults' gives a little bit of direction, but it is not necessarily feasible in a country town.
- (f) She did not see the TRBWA Booklet until Ms Cattaway provided it to her on 10 May 2024. If she had read the TRBWA Booklet beforehand, she would have put a pause on things and would have gone and sought somebody else's opinion on whether what she was doing was appropriate or not.
- (g) She has no bookings to see a psychologist because she was seeing a psychologist for 2023 and parts of 2024, but the psychologist 'was happy with how I progressed and basically graduated me from seeing her. She said I didn't need to go back and see her anymore.'
- (h) In relation to Dr Sherman's report and his recommendations, she said:

He was very fixated, during those four hours, on my depression. He didn't understand the nuances that come from being a – a practicing Christian and the faith that I have. Um, the whole interview was rather odd, because he was supposed to be assessing me for autism and ADHD, and he was just so narrow focused on my depression and whether I felt hopeless and whether I, ah, was seeing people and what medication I was on.

13 In answer to clarifying questions from the bench, Ms Warnock said:

- (a) Previously, she only had compulsory third party insurance on her car. She took out comprehensive car insurance prior to offering the driving lessons.
- (b) She did not have a conversation with Mrs B or AB about what would happen if AB crashed her car.
- (c) She did not ask for any payment for the driving lessons or for the fuel.
- (d) After the accident, she did not ask for any money. It was Mrs B who offered.

14 Ms Cattaway gave the following evidence-in-chief:

- (a) She has worked for the respondent for at least 24 years.
- (b) Since the start of 2024, she has been the Principal at Merredin College.
- (c) Previously, she held various Associate Principal positions at Piara Waters in Perth, Newton Moore Senior High School in Bunbury, and Kalgoorlie-Boulder Community High School in Kalgoorlie.
- (d) She met with Ms Warnock on 10 May 2024 to discuss the concerns that had been raised with her by other staff members. The concerns had been raised with her both verbally and via email. This included the email from Zane Walker dated Tuesday, 7 May 2024. She also received other emails, all of which she forwarded to SID (**Exhibit R2**).
- (e) Mrs B had also made contact and arranged a meeting which took place on 9 May 2024. Mrs B was concerned about AB and Ms Warnock's interactions. She was not concerned there was any wrongdoing, but she felt there could be some lines that had been crossed and that AB could potentially place Ms Warnock in a vulnerable situation, and that

she was concerned about the whole situation. She took notes at the meeting. This included Mrs B stating that 'I know [Ms Warnock] has crossed the lines.'

15 Ms Cattaway gave the following evidence under cross-examination:

- (a) She started as a teacher in 1995 and became an administrator in 2000.
- (b) She was Associate Principal at Piara Waters for about 18 months, then in Bunbury for about nine years, and following that was in Kalgoorlie for nearly 18 years.
- (c) While Bunbury and Kalgoorlie are regional towns, Merredin is the smallest community that she has resided in. She accepts that in regional towns, you often have staff members who might have their children at the school so there are opportunities for conflicts of interest to be managed.
- (d) She accepts that in a regional town, there is an increased likelihood of students and teachers interacting outside of the school context, such as at community events. Examples in Merredin would include teachers and students playing on the same sporting teams, or a teacher may be shopping at the local shop or going to the local cinema and a student would be serving them.
- (e) As an educator, she considers that you would be informed around working with children and would avoid situations that might put you into a difficult position. Even in a classroom. They often have conversations that if you are going to sit in a classroom with a child that you should leave the door open or make sure someone knows you are there; it is 'common practice to not place yourself in those positions'.
- (f) While the frequency of the intermingling between students and teachers in a social or sporting context may happen more in a regional town than a metropolitan area, in her experience and having worked in regional areas, it is well-managed and there are transparent conversations in those settings.
- (g) For example, when she was private tutoring in Kalgoorlie, she was advised to not do it on the school site and to declare it to the parents beforehand.
- (h) On her first day at Merredin College, the Deputy Principal presented to all staff about communicating with students in the IGA when people can overhear.
- (i) Another example involved a staff member asking her whether it would be a conflict of interest for a student to work on their farm. After they discussed it, the staff member ended up not hiring the child.
- (j) If she went to the local pharmacy and a student was serving her and she did not want the student to see what medication she was taking, she would ask to present the script to someone else rather than the child.
- (k) She is aware that some of the teachers are involved in the Repertory Club.
- (l) However, as the Principal, she would hold staff members accountable to not place themselves in vulnerable positions. The onus is on the employee to not place themselves in a vulnerable position.
- (m) While a teacher may hire a child to work on their farm or to be their babysitter, that connection is through the adults knowing each other, that relationship is not just the teacher and the child. In the example of babysitting, her advice is to do that through the adults; if you know the adult you might use their children for that services, but you do not recruit the children from within your work as a teacher.
- (n) She queries whether the staff members who were aware of Ms Warnock giving driving lessons and not having discussed it with Ms Warnock, are the same people that reported their concerns to her. However, sometimes it takes people time to process and contemplate whether it sits comfortably with them and whether they need to report it. Sometimes people need to consult with line managers, friends or colleagues to determine whether they need to report it.
- (o) She did not know that Ms Warnock or any other teachers had been driving students home from Follow the Dream.
- (p) Her concern about Ms Warnock giving driving lessons was the fact that it was a one-on-one situation. Regardless of how innocent or kind-minded it is for Ms Warnock to offer driving lessons, given it was a one-on-one situation then any allegation that a student can make will put a staff member in a vulnerable position.
- (q) Staff had brought their concerns to her, so the perceptions of the situation were already concerning for people.
- (r) She had not received any information to say there was wrongdoing. Her concern was the potential for allegations to be raised that could put Ms Warnock in a compromising position.
- (s) She does not accept that it is just about the perceptions; she says it is inbuilt into the conduct of a teacher to keep professional boundaries between students and staff. It is not just how it looks, but also the vulnerable position that you put yourself in.
- (t) Her direction to Ms Warnock about the driving was that it had to stop. Her direction to Ms Warnock about the Repertory Club was different because there are a group of people involved with the Repertory Club, so her direction was that Ms Warnock could continue with it but she needed to be more aware.
- (u) She asked Ms Warnock about friending students on social media and Ms Warnock told her that her account was private and people can only see her account if they are friends of friends.
- (v) She asked Ms Warnock if she had messaged AB during a class and Ms Warnock admitted that she had. She thinks that is crossing boundaries because texting a student's personal phone is of a personal nature. Communications with a student is through their email address and is about assessments or following up on work. If it is about attendance, the communication should be with the parent and not with the child. In any event, communication about attendance

is managed through Administration.

- (w) In relation to the text message at [11(b)] above, she is not as concerned about the content of the message, but about the means by which that communication occurred. Communication through an SMS raises concerns because it is of a personal nature, whereas the same conversation occurring in a classroom would not raise concerns for her.
- (x) Ms Warnock's language in the text is not overly professional. She expects a bit more professional communication, but SMS lends itself to emojis and abbreviations; which is personal communication.
- (y) At the meeting on 10 May 2024, she discussed with Ms Warnock the risks associated with having AB doing yard work. The risk is the one-on-one situation, with Ms Warnock being one person in the house and AB being one person in the yard, there are no witnesses or anyone else that can confer as to what is happening in case an allegation is raised.
- (z) She had concerns about the whole connection. AB was doing yard work to pay back the driving lessons. For a staff member, she would expect the friendship is through the parent and not with the child. If Ms Warnock had needed garden work and she was working through Mrs B and Mrs B had organised it, that would be different. Her concern was that AB was paying back garden work for driving lessons.
- (aa) Even if Mrs B was aware of and approved AB performing yard work, she would still have a concern about it because of the one-on-one scenario permitting any allegations to come up. She would still speak to a staff member about it and advise them against it.
- (bb) SID's investigation report records her as saying that after counselling Ms Warnock on 10 May 2024 she was concerned Ms Warnock was going to continue with driving AB around. She did not hold concerns that Ms Warnock was necessarily going to continue driving AB around, her concerns were that instead of accepting the direction to stop, Ms Warnock asked a number of clarifying questions such as whether she could continue if she had someone else in the car. It appeared to her that Ms Warnock was trying to find ways around the direction, which is what raised concerns for her. In her mind, she questioned whether Ms Warnock fully understood the importance of professional boundaries, which could lead to her continuing the behaviour.

16 Ms Cattaway gave the following evidence under re-examination:

- (a) The 15 May 2024 order made under s 240 of the *School Education Act 1999* (WA) ordering Ms Warnock to leave Merredin College and remain away until further notice, was not a decision she made but a decision made by the respondent. Her role was to meet with Ms Warnock, provide her with a copy of the s 240 letter, accompany her to collect her personal belongings, and then accompany her to leave the site.
- (b) When she reported the matter to SID, they take over and she no longer has delegated authority in the disciplinary process; she is required to act on SID's behalf and follow their instruction. When she met with Ms Warnock on 10 May 2024, she had already reported the matter to SID and informed Ms Warnock of doing so during the meeting on 10 May 2024.

17 Ms Warnock's expert witness, Dr Sherman was not required for cross-examination with his Expert Report tendered as **Exhibit A6**.

18 The respondent called Zane Walker (**Ms Walker**), Danielle Megan Clark (**Ms Clark**) and Laura Wimsett (**Ms Wimsett**).

19 Ms Walker gave the following evidence:

- (a) She has worked as a teacher at Merredin College since 2008.
- (b) She has served as the Follow the Dream Champion for three years which involves her organising after-school tutoring on Mondays and Tuesdays.
- (c) AB was a participant. Ms Warnock was one of the five tutors, and tutored on Mondays.
- (d) On each day, she tries to schedule a maths tutor and an English tutor.
- (e) The Follow the Dream Enrolment Form (**Exhibit R3**), states:

Transport (Merredin Town Students Only)

Regular transport home after tuition needs to be organized by students and their families. In the event my child cannot obtain transport home from a parent/carer, and they are unwell, injured, or due to bad weather, I give permission for my child to be transported home via a Merredin College Vehicle, or in the case of an emergency a Merredin College staff member's private vehicle. Any emergency transport required we will try to communicate this to families as soon as possible.

- (f) She sent Ms Cattaway an email on 7 May 2024 outlining her concerns. The context was that she thought it was a bit odd that in week 3 of Term 2 (Monday, 29 April 2024: **Exhibit R4**) for Ms Warnock to tutor AB in maths when she was there as the English tutor. On the Wednesday (1 May 2024), she walked past Ms Warnock's car and Ms Warnock said that she was teaching AB to drive and that they had done a day trip to Perth together on the weekend and AB had crashed her car. Finally, she thought it was odd that on the Tuesday in week 4 of Term 2 (Tuesday, 7 May 2024: **Exhibit R4**) for Ms Warnock to attend tutoring when it was not her rostered day, and drive AB home. She thought there must have been communication between AB and Ms Warnock for her to pick him up from tutoring and take him home on her non-tutoring day.
- (g) If it was the case that AB and another student had requested Ms Warnock to assist them with the maths ESTs (Externally Set Tasks) but the other student did not show up at tutoring, and she was in Ms Warnock's shoes, she would have given the ESTs to Justin Roberts (**Mr Roberts**), the trained maths teacher, and asked Mr Roberts to work

through the EST with AB. Mr Roberts is university qualified to teach maths whilst Ms Warnock is not, and Ms Warnock has no experience in teaching maths.

- (h) She can count on one hand the number of times in three years that a child has been dropped home after Follow the Dream tutoring.
- (i) She thought it was odd for Ms Warnock to tutor AB in maths on the Monday but did not speak to Ms Warnock about it at the time. On the Wednesday, Ms Warnock told her that she was giving AB driving lessons. On the Thursday, she spoke with the maths tutor (Mr Roberts, who confirmed to her that he thought it was odd too for Ms Warnock to tutor AB in maths), and on the Friday, she spoke with the Deputy Principal (David O'Neill) who told her that she needed to share her concerns with Ms Cattaway. She accepts that she could have spoken with Ms Warnock about her concerns, but by that time she realised it was not for her to raise her concerns with Ms Warnock but with those 'higher up'.
- (j) She had no managerial responsibility over Ms Warnock.
- 20 Ms Clark gave the following evidence:
- (a) She is a teacher at Merredin College and started working there in Term 1, 2024. Previously she worked as a teacher in England.
- (b) She was AB's homeroom teacher. They had homeroom every Monday, Tuesday, Thursday and Friday. Ms Warnock was the house coordinator for the house factions.
- (c) Ms Warnock would come into the homeroom every day to speak with AB. She confided with a colleague that she was concerned about this and the colleague told her to provide a statement to SID.
- (d) She accepts that Ms Warnock was in charge of going around to several homerooms. She accepts that when Ms Warnock attended her homeroom, she provided her with assistance as a new teacher when she needed it, and that she did have a need for Ms Warnock's assistance because she had some difficult students in her homeroom.
- (e) On one occasion she saw Ms Warnock lean on the table in front of AB with her elbow and they were 'quite face-to-face'.
- (f) She accepts that other than that one occasion that Ms Warnock would be standing with a table in between her and AB.
- 21 Ms Wimsett gave the following evidence:
- (a) She is the Principal Project Officer in charge of the Department's online professional learning systems and has been in the position for close to three years.
- (b) The AEDM training (**Exhibit R6**) is mandatory, and all staff are required to complete it within six months of appointment and to repeat it every three years. Ms Warnock's online learning records (**Exhibit R5**) indicate that she completed the AEDM training on 26 March 2018 and 23 June 2022.
- (c) The CPAP training (**Exhibit R7**) is mandatory, and all staff are required to complete it every three years. Ms Warnock's online learning records (**Exhibit R5**) indicate that she completed the CPAP training on 17 February 2018, 4 February 2021 and 8 February 2024.
- (d) The Department's 'Our Code of conduct and standards' document is available on the Department's public website and on the intranet (Ikon). It is a more complete version of the Code of Conduct.

The respondent's written submissions

22 On 17 June 2025, the respondent filed written submissions, stating:

2.1 Dismissal without notice and task of the Commission

8. [Ms Warnock] was dismissed from employment, after following a disciplinary process, pursuant to Part V of the [PSM Act]: Which applies to teachers by virtue of s 239(1)(a)(i) of the *School Education Act 1999*. Further, [Ms Warnock] was dismissed without notice, or payment in lieu thereof, pursuant to clause 11(4)(a) of the *Teachers (Public Sector Primary and Secondary Education) Award 1993 (Award)* on the basis that the breach of discipline amounted to serious misconduct: Noting the definition of 'serious misconduct' under clause 11(4)(b) of the Award.
9. [Ms Warnock] has emphasised that she was dismissed without notice. The Respondent accepts that, having dismissed [Ms Warnock] without notice, he bears the evidentiary burden, in the application, to establish the facts underpinning the misconduct: *Newmont Australia Ltd v Australian Workers Union, WA Branch* (1988) 68 WAIG 677 [(*Newmont*)]. However, the application of this principle is somewhat redundant in this application as the core factual elements of the misconduct are not in dispute. Therefore, it is open for the Commission to conclude that the Respondent, following a thorough disciplinary investigation, had a genuine belief that the misconduct, the subject of the disciplinary findings, occurred and that dismissal was warranted: *Bi-Lo Pty Ltd v Hooper* (1992) 53 IR 224 [(*Bi-Lo*)].
10. Ultimately, the overarching test in this application is whether, in all the circumstances, the dismissal of [Ms Warnock] constituted an abuse of the Respondent's right to terminate the contract of employment: [*Undercliffe*].
11. In applying this approach, the Commission is not to take a rigid approach, and all factors of the case must be considered consistent with the requirement to act in accordance with equity, good conscience and the substantial merits of the case: See, for example, [*McDonald*] v *Kwik Express (Timemasters Pty Ltd)* [2006] WAIRC 03603 at [13]. It follows, even if the Commission is of the view that [Ms Warnock's] conduct did not justify dismissal

without notice, it should still refuse to reinstate [Ms Warnock] on the basis that the conduct warrants dismissal and/or that reinstatement is impracticable.

23 On proportionality, the respondent submits: (references to Ms Warnock's written submissions omitted)

42. As stated above, the Respondent's doubts regarding [Ms Warnock's] discretion and judgement in relation to professional boundaries were justified. When considering the Respondent's duty of care towards students in Department of Education Schools, and the risk of harm associated with a teacher's breach of professional boundaries, it was appropriate for the Respondent to take a position that prioritised the interests of students over [Ms Warnock's] interests: *Balfour v Attorney-General* [1991] 1 NZLR 519 at 524
43. Moreover, [Ms Warnock's] submissions in this application have served to reinforce and magnify the Respondent's concerns. That is, as above, not only does [Ms Warnock] not accept that her conduct was a breach of professional boundaries, but she also submits that 'all' her conduct was a demonstration of her performing a purported fundamental duty of [sic] term of her employment. Similar submissions were made in relation to her contacting [AB] via text message and giving [AB] lifts home.
44. Put simply, [Ms Warnock's] fundamental misunderstanding regarding an essential term of her contract is cause alone to not reinstate her to into a teaching position.

The respondent's closing submissions

24 The respondent maintains its written submissions, especially [6]–[7], which provide a high-level overview of the respondent's case: (footnotes omitted)

6. The Respondent's position is that [Ms Warnock's] conduct was a very serious matter as she breached professional boundaries with her student in objective ways that created a significant risk to her, to [AB], and to the Department's good reputation. Some of those risks materialised, such as when [AB] damaged her vehicle resulting in him being in an implied financial debt to his English teacher. Alarming, the first accident did not cause [Ms Warnock] to reflect and put a stop to the situation. Rather, household chores were arranged as payment for the damage and the driving continued. In view of this, and all the elements of the misconduct, the Respondent's significant doubts about [Ms Warnock's] discretion and judgement in relation to professional boundaries were justified and formed a reasonable basis to terminate her employment.
7. The above doubts are magnified by [Ms Warnock's] position in this Application. That is, having the benefit of time to reflect on her actions, [Ms Warnock] submits that all her conduct was an example of her providing 'pastoral care' to [AB], which was a 'fundamental duty of her employment as a teacher'. This demonstrates a significant lack of insight into her behaviour and a fundamental lack of understanding of her role as a teacher, which reinforces the Respondent's position that, due to a lack of discretion and judgement, [Ms Warnock] should not be employed as a state school teacher.

25 After Mr Stace's and Ms Warnock's evidence was given, Ms Warnock conceded that her conduct breached professional boundaries. The respondent says there was a serious breach. The conduct is not on the margins of acceptability, where there may be doubt. The conduct is not an unavoidable outcome of living in a small town and is patently inappropriate.

26 There is no ambiguity in relation to the appropriateness of Ms Warnock's conduct in any of the following:

- (a) AEDM training (**Exhibit R6**).
- (b) CPAP training (**Exhibit R7**).
- (c) Code of Conduct (**Exhibit R8**).
- (d) Our Code of conduct and standards (**Exhibit R9**).
- (e) TRBWA Booklet (**Exhibit R1**: Document 3).

27 These documents make it clear that professional boundaries are not just put in place to protect the safety of student; they are put in place to avoid misunderstandings. Avoiding conduct that would cause a misunderstanding eliminates the need to analyse a teacher's intention as no questions arise.

28 It is trite that the relationship between a teacher and a student is not equal, and therefore open to scrutiny; as it should be. The boundaries are in place to protect the teacher, the Department and the student.

29 Notably, Ms Warnock did not call Mrs B as a witness, and therefore the appropriate inference can be drawn that Mrs B's evidence would not have assisted Ms Warnock's case. Regardless, a teacher dealing with a student outside of school hours, whether in a sporting or drama context, or where the student is a family friend, still needs to maintain teacher professional boundaries.

30 The small town context does not excuse the arrangement. If anything, there is a greater need for vigilance with professional boundaries in that context.

31 Ms Warnock's conduct was completely avoidable.

32 After hearing all of the evidence, the respondent's concerns about Ms Warnock's suitability for employment as a teacher remains.

33 Significantly, 10 months after her dismissal, Ms Warnock opened her case arguing that her conduct did not amount to a breach of professional boundaries. Only after Mr Stace referred to Ms Warnock's conduct as highly inappropriate and Ms Warnock accepted in cross-examination that her conduct did amount to a breach of professional standards, was the concession made that her conduct constituted a breach of professional boundaries.

- 34 Despite this, during cross-examination, Ms Warnock was quick to characterise her time in the car with AB as ‘in public’ and would not accept that it should have been obvious to her at the time that the conduct was inappropriate. When meeting with Dr Sherman, Ms Warnock did not accept that she had gotten too close to AB. She described the training as things you do and forget. She was particularly critical of the TRBWA Booklet.
- 35 While applying AB’s make-up at the Repertory Club performance did not form any disciplinary findings, Ms Warnock agreed that she applied AB’s make-up in circumstances where her evidence was that she had asked Ms Cattaway whether she could continue with the Repertory Club given the concerns raised, and that Ms Cattaway had warned her to keep her distance from AB. Ms Warnock’s decision to apply AB’s make-up after being excluded from the school under a s 240 order, and being investigated by SID in relation to AB, demonstrates Ms Warnock’s poor decision making, which is relevant to the respondent’s concerns about suitability.
- 36 Accordingly, the respondent’s concerns about Ms Warnock’s suitability were warranted at the time of the dismissal and have not been allayed through the proceedings.
- 37 Dr Sherman found there was no diagnosis of ADHD or autism spectrum disorder. He refers to the ongoing need to explain to Ms Warnock what is expected of her in relation to professional boundaries at [22.74], [22.82], [22.78]:

9. Does Ms Warnock have the capacity, either totally or partially, to work as a teacher?

...

22.74 As a result of her suspension and subsequent dismissal, she is acutely aware of boundary issues, and if she is permitted to return to the teaching career which she loves and to which she has devoted herself for nearly a decade, it is highly unlikely that she would breach boundaries with students again.

...

12. Are there any work tasks that are contraindicated for Ms Warnock? If so, please describe them.

22.82 In my opinion, there are no work tasks that are contraindicated for her. My impression is that as a result of these events, she has a better understanding of boundary expectations and will be capable of maintaining appropriate boundaries at all times, regardless of the type of work task.

...

10. What workplace accommodations, if any, would assist Ms Warnock if she were to be returned as a teacher?

...

22.78 It would be necessary for the senior managers to ensure they had a thorough understanding of her psychiatric/psychological issues and to take the time to explain everything expected of her, for instance, regarding boundaries, with care.

- 38 In relation to the impracticability of reinstatement, Dr Sherman has qualified Ms Warnock’s fitness for work, in relation to her diagnosis for depression, as provisional on her being engaged in psychological counselling:

11. Is Ms Warnock presently able to return to work as a teacher, and if not, when do you believe she will be able to return to that occupation?

22.79 In my opinion, once she has reengaged with a clinical psychologist and made regular appointments with her psychiatrist, Dr Chang, she will be able to return to work as a teacher.

22.80 She will require a weekly session with the clinical psychologist for at least six months, followed by fortnightly sessions thereafter for two to three years, depending on progress.

22.81 She should consult with her psychiatrist on a monthly basis for the next 12 months, then every three months for the next two years, or as the psychiatrist recommends.

- 39 Ms Warnock’s evidence was that she is not engaged in psychological counselling and therefore, at this point in time, she is not fit to be teaching. The respondent acknowledges that Ms Warnock has since produced an undertaking to the Commission (**Exhibit A7**) dated 16 October 2025, to provide her clinical psychologist with Dr Sherman’s report, commence psychological counselling, continue to take her anti-depressant medication, and in the event the Commission orders her reinstatement or reemployment undertakes that she will continue to comply with each undertaking beyond the date of the decision.
- 40 Ms Warnock was dismissed for committing acts of misconduct amounting to a breach of discipline pursuant to s 80(c) of the *Public Sector Management Act 1994 (WA)* (**PSM Act**). Where a breach of discipline is found, s 82A(3)(b) of the PSM Act provides that disciplinary action can include dismissal.
- 41 Ms Warnock was dismissed under Part 5 of the PSM Act, which only requires a breach of discipline, not a serious breach of discipline. The disciplinary action taken was in the form of dismissal.
- 42 Part 5 of the PSM Act does not contemplate dismissal with notice. In any event, Ms Warnock was dismissed three days before the summer school holidays.
- 43 Dismissal under Part 5 of the PSM Act is not conditioned by what is in the Award.
- 44 In an event, the respondent has met the evidentiary onus that falls upon an employer where an employee has been dismissed summarily.

Ms Warnock’s written submissions

- 45 On 3 June 2025, Ms Warnock filed an outline of submissions, in which she submits it was unfair for the respondent to dismiss

her because: (footnotes omitted)

- a. Ms Warnock first met [Mrs B and AB] at church in around 2018. Ms Warnock considers [Mrs B] to be a church friend, and they have interacted with each other through the church for many years.
- b. As a teacher, one of Ms Warnock's important responsibilities was to provide pastoral care to her students. This is achieved through 'promoting positive environments that support the physical, social, intellectual, and emotional development of every student.' Ms Warnock considers all of her interactions with [AB] fell within her pastoral care responsibilities.
- c. To the extent that the Department was concerned about the blurring of the lines between pastoral care and professional boundaries, that line was not as clearly crossed as the Department made out in its dismissal decision of 10 December 2024.
- d. Ms Warnock had a clean employment record. Aside from the events that led to her dismissal, she had not previously come under notice for misconduct.
- e. There was room, on at least one interpretation of the facts, to provide Ms Warnock with the benefit of the doubt and to allow her to continue on with her employment.
- f. Summary dismissal is the harshest of penalties an employer can impose on an employee. It should not be imposed lightly. In this case, summary dismissal was a disproportionate response to the events.

46 Ms Warnock submits the relevant legal principles are:

6. The overarching issue to be determined is whether the Department's right to terminate the contract of employment has been abused, such as to render the exercise of that right unfair. See: [*Undercliffe*].
7. All of the circumstances of the case must be considered in determining the overarching issue. See: *Garbett v Midland Brick Company Pty Ltd* [2003] WASCA 36 (*Garbett*).
8. The Department bears the evidentiary onus to establish the facts on which the decision to dismiss was based. This is because the termination was a summary dismissal for alleged misconduct. See: [*Newmont*].
9. It is only in exceptional circumstances that an employer is entitled to dismiss an employee summarily. See: *Laws v London Chronicle (Indicators Newspapers) Ltd* (1959) 2 ALL ER 285 [(*Laws*)].
10. If summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show Ms Warnock disregarded the essential conditions of the contract of service. See: *North v Television Corporation Ltd* (1976) 11 ALR 599 [(*North*)].
11. Until the terms of the contract are known and identified, it is impossible to say whether or not any particular conduct is in breach thereof or is a breach of such gravity or importance as to indicate a rejection or repudiation of the contract. One cannot begin the inquiry without ascertaining what work the employee was employed and had undertaken to perform. It is also necessary to ascertain what particular obligations the parties had agreed upon as important or even vital. See: [*North*].
12. A relevant consideration in determining whether a person has been unfairly dismissed is whether dismissal was a proportionate and appropriate penalty for the alleged conduct. See for example: [*The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority of Western Australia* [2017] WAIRC 00066] [43]–[46] [(*ARTBUE*)].

47 On proportionality, Ms Warnock submits:

The Department's decision was a disproportionate response to the events

28. None of the events relied upon by the Department, either individually or collectively, were sufficiently serious to justify a decision to summarily dismiss Ms Warnock from her employment.
29. Ms Warnock had a prior good record. There was no evidence that [AB] had suffered any harm or had been exposed to any behaviours that may have adversely impacted his development. To the contrary, each of the events were examples of Ms Warnock providing pastoral care to [AB] to assist him in his development as a young adult. This was a fundamental duty of her employment as a teacher.
30. Even if the Commission were to have a different view about one or more of the events, it would still be open for the Commission to make a finding that summary dismissal was a disproportionate response to the events.

Ms Warnock's closing submissions

- 48 The issue of proportionality is the core issue. Ms Warnock wore multiple hats: her teacher hat, church hat, tutoring hat and Repertory Club hat. She had taught AB when he was in Year 9, and AB's whole family was known to Ms Warnock through the church. A teacher wearing multiple hats can cause misunderstandings when it comes to professional boundaries because it can blur the lines between what is acceptable conduct and what is unacceptable conduct.
- 49 Mr Stace's evidence was that it did not register with him at the time that Ms Warnock providing driving lessons to AB might be a breach of professional boundaries and Ms Warnock is a far less experienced teacher than Mr Stace.
- 50 Ms Warnock's explanation for engaging in the conduct was that as she had different hats on, she did not see at the time that her conduct was a breach of professional boundaries. Her explanation about why she engaged in the conduct is relevant to whether the respondent exercised their discretion in a manner that is harsh, unjust or unreasonable. Her explanation (her underlying subjective reasons for engaging in the conduct) goes to the issue of proportionality.
- 51 She now accepts that she breached professional boundaries, however, she does not accept the breach was serious enough to

ground a finding for summary dismissal. She relies on *Trestrail v City of Karratha* [2025] WAIRC 00820 (*Trestrail*), as requiring summary dismissal to accord with the terms of the contract, which links back to clause 11 of Award.

52 While she did not admit to breaching professional standards in her responses during the investigation, she did acknowledge that she should have done things differently:

(a) Her response to SID's allegations letter dated 19 June 2024 (**Exhibit A2**: Document 3, p 16), states:

I have been devastated to receive these allegations and I wish to express that at all times I have been honest and transparent about the out of school interactions I had with [AB]. My interactions with [Mrs B] and [AB] have been respectful, honest, courteous and well-intentioned, occurring in the context of a small farming community where people regularly help each other out. At no time did my line manager suggest to me that there may be a concern or conflict of interest regarding this and my work as a teacher. If this had been raised with me, I would have followed all suggestions provided by my line manager.

(b) Her response to the respondent's proposed findings letter dated 31 October 2024 (**Exhibit A2**, Document 6, p 132), states:

Please be aware that my only experience as a teacher has occurred in my 7-year tenure at Merredin College, and in this small community environment, I have seen community members help each other out on such a regular basis. I regretfully did not understand that my actions in what I thought was helping a family from my church community, was crossing the boundary that I am required to follow in any engagement with a Merredin College student. I understand that my conduct – giving [AB] driving lessons, providing him with transport home after repertory club and Follow the Dream, and his doing yard work – has not met the standards expected and am deeply remorseful. I would like to provide my sincere assurance that I will never engage in such conduct in the future. However, there are additional findings made against me in the Investigation Report which I do not believe to be fairly drawn, specifically about my intentions, and I strongly reject those findings and will endeavour to address this below.

Consideration

Legal principles

53 As outlined at [4] above, the parties agree that in determining the application, the principal question is whether the respondent's right to terminate Ms Warnock's employment has been exercised so harshly or oppressively as to amount to an abuse of that right: *Undercliffe*.

54 Ms Warnock bears the onus of establishing that the dismissal was, in all the circumstances, unfair within the principles set out in *Undercliffe*.

55 However, as Ms Warnock was summarily dismissed, the evidentiary onus falls on the respondent to demonstrate that Ms Warnock's conduct was of sufficient gravity to warrant her summary dismissal: *Newmont*.

56 Pursuant to *Bi-Lo*:

Where the dismissal is based upon the alleged misconduct of the employee, the employer will satisfy the evidentiary onus which is cast upon it if it demonstrates that insofar as was within its power, before dismissing the employee, it conducted as full and extensive investigation into all of the relevant matters surrounding the alleged misconduct as was reasonable in the circumstances; it gave the employee every reasonable opportunity and sufficient time to answer all allegations and respond thereto; and that having done those things the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee's work record, such misconduct justified dismissal. A failure to satisfactorily establish any of those matters will probably render the dismissal harsh, unjust or unreasonable.

57 As outlined at [46] above, Ms Warnock relies on *Garbett, Laws, North* and *ARTBUE*.

58 Ms Warnock relies on *Garbett* for the proposition that all of the circumstances of the case must be considered. I accept that proposition. As outlined by Heenan J [72], the assessment of whether a dismissal is harsh, oppressive or unfair requires a broad evaluative judgment, taking into account the nature and gravity of the proven misconduct and any mitigating circumstances associated with the misconduct, the employee's length of service and disciplinary history, and the consequences of the dismissal for the employee:

Because there is such a wide variety of factors which may affect any individual case, no universal or exhaustive list of the circumstances which may constitute harsh, oppressive or unfair dismissal can be given. Often, however, the issue in a particular case will require a consideration of the length or quality of the employee's service, the culture of the workplace, the prospects for other employment of the individual employee, and the employer's treatment of past incidents and of other employees. Where misconduct is alleged or relied upon there will be a burden on the employer to demonstrate that the alleged incident did occur and also to evaluate any mitigating circumstances. Factors such as these going to the reasons for the particular dismissal are frequently referred to in the authorities in this area as matters of 'substantive' fairness, as opposed to issues of 'procedural' fairness which relate to the manner in which the employee was notified of the proposed termination, what opportunity, if any, he or she was given to respond and the time and method employed in effecting the termination. This distinction between substantive and procedural issues going to the question of whether or not a particular dismissal was harsh, oppressive or unfair can be useful in certain cases but it entails the danger of regarding the statutory test as having separate application and different meanings in different contexts. Such an approach must be rejected because, however the issue may arise, the decision for the Commission, or a court in any particular case, is simply whether the individual termination of employment was harsh, oppressive or unfair and that test must always be

applied without any gloss.

- 59 **Laws** is a 1959 decision of the England and Wales Court of Appeal (Civil Division), in which Miss Laws, an advertisement representative in her third week of employment, followed her immediate manager out of the managing director's office during a heated argument, despite the director saying 'stay where you are'. She was summarily dismissed the following day for refusing to abide by a lawful and reasonable direction. In circumstances where Miss Laws' evidence was that she left the room out of loyalty to her immediate manager, and the letter of dismissal was couched as the 'defiance of the managing director's request that you remain', the court found that the managing director's order was not an order related to her duties as advertisement representative, but a wise direction for him to have given, to calm down the heated exchange in his office. Accordingly, the court agreed with the first instance Judge's finding that Miss Laws was unlawfully dismissed. Lord Evershed MR stated the relevant principles as follows:

[S]ince a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is no doubt therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.

... [O]ne act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.

- 60 **North** is a 1976 decision of the Australian Industrial Court (AIC), in which Mr Pemberton, a Deputy News Director at TCN9, sent a telex message during a critical pre-broadcast period when the Department of the Media was monopolising telex lines with an acknowledgement procedure. The message read: 'If Media Min had any sense of Media he would not be tying up telexes at this time of night. Go away pls.' This coincided with a ministerial complaint about TCN9. Mr Pemberton was summarily dismissed for misconduct. The AIC found Mr Pemberton's dismissal to be in breach of the award clause entitling him to notice.

- 61 **Smithers and Evatt JJ** said:

There was a tendency in argument to treat the terms of the written contract between Pemberton and the respondent as if they were irrelevant to the inquiry arising under cl 10(e). But although a definition of misconduct contained in that contract could not control the meaning of the expression 'misconduct' in cl 10(e) of the award, the question as to whether any particular conduct constitutes misconduct within the meaning of cl 10(e) does depend upon the terms of the contract of employment.

Until the terms of the contract are known and identified it is impossible to say whether or not any particular conduct is in breach thereof or is a breach of such gravity or importance as to indicate a rejection or repudiation of the contract.

One cannot begin the inquiry without ascertaining what work as a journalist the employee was employed and had undertaken to perform. It is also necessary to ascertain what particular obligations the parties had agreed upon as important or even vital.

- 62 **Franki J**, applied **Laws**, and said:

It is clear that a single act of disobedience may be sufficient to justify dismissal on the ground of misconduct but it was held in [**Laws**], that to justify summary dismissal a single act must be such as to show that the employee was repudiating the contract of service or one of its essential conditions.

In the subject case Pemberton had been employed for over two years and there was no evidence that his conduct had been unsatisfactory or that he received any warnings in that period. The misconduct relied upon by the respondent was misconduct in relation to an isolated incident when Pemberton was undoubtedly under considerable strain arising from the necessity for ensuring that the 6.30pm news service would be able to proceed at the appropriate time and in the appropriate way.

In my opinion the conduct of Pemberton was reprehensible, but I consider that in the circumstances in which it took place it fell short of misconduct entitling the respondent to dismiss him summarily under cl 10(e) of the award.

The standard of conduct that justifies summary dismissal of an employee under this award is difficult to lay down and is a matter to a great extent of degree and it seems clear that the respondent had no intention to commit a breach of the award. In the circumstances I do not think that any penalty is called for and indeed counsel for the claimant expressly stated that he made no submissions at all in relation to penalty. ...

- 63 **ARTBUE** is a 2017 decision of the Commission, in which Mr Merlo, a transit officer, was dismissed for deploying pepper spray at a person of interest (POI), a 12-year-old who appeared much older on the concourse of the Perth Railway Station. The POI was intoxicated, aggressive, making threats to punch and spit at officers. When the POI balked as if about to spit, Mr Merlo deployed his pepper spray in what he described as a split-second reflex action. Senior Commissioner Kenner found that Mr Merlo deployed his pepper spray in self-defence, and his use of the pepper spray in the circumstances did not contravene the Transit Officer Manual. Consequently, and taking into account Mr Merlo's contrition after the incident, Kenner SC found that dismissal was not a proportionate and appropriate penalty for Mr Merlo's conduct and ordered reinstatement at a demoted level.

- 64 In closing submissions, Ms Warnock, relying on *Trestrail*, submitted that:
- (a) The Full Bench in *Trestrail*:

[M]ade it clear that when we've got a case of serious misconduct, which then the employer relies upon, of summary dismissal ... working out whether that's justified or not requires a consideration of the contract of employment and what the parties had agreed in relation to under what circumstances an – the employer could summarily terminate without providing notice.
 - (b) Her contract of employment (**Exhibit A2**: Document 1) states:
 2. The terms and conditions of your employment are governed by the provisions of the [Award] and the [Agreement], as amended or replaced from time to time. ...
 12. Notwithstanding any provisions contained herein, either party may terminate the contract by giving the required notice or payment in lieu of notice in accordance with clause 11 – Termination of Employment of the Award.
 - (c) Therefore, the respondent dismissed her summarily 'pursuant to an express term' in her contract.
 - (d) Clause 11.4 of the Award states:
 - (4) Termination of an Employee for Serious Misconduct
 - (a) The Employer may terminate an employee without notice or payment in lieu of notice if the employee is guilty of serious misconduct. In such cases, wages will be paid up to the time of dismissal only.
 - (b) 'Serious misconduct' means misconduct of such a nature that it would be unreasonable to require the Employer to continue the employment of the employee concerned during the required period of notice.
 - (e) Like *Trestrail*, cl 11(4) of the Award refers to 'guilty'. Therefore, it is insufficient for the respondent to have a belief of guilt, or for there to be a risk of guilt; there needs to be guilt and it has to be 'guilty of serious misconduct'.
 - (f) Accordingly, the Commission needs to resolve whether she engaged in serious misconduct as defined in cl 11(4)(b) of the Award. The definition requires her to have engaged in conduct of such a nature that it would be unreasonable for the respondent to continue employing her during her notice period of either three or four weeks, in the context where she could have been assigned other work or transferred to another school, during her notice period.
- 65 Whether cl 11 of the Award is incorporated into Ms Warnock's contract such that Ms Warnock can rely on the propositions at [64] above, is not a matter I need to determine, because *Trestrail* does not stand for the proposition contended by Ms Warnock.
- 66 *Trestrail* involved two distinct claims, an unfair dismissal claim and a denied contractual benefit claim. The Full Bench said:
- 32 It is also important to bear in mind that there were two distinct claims before the Commission for determination. The claim of unfair dismissal involved a discretionary decision by the Commission, as to whether the appellant's dismissal was an abuse of the respondent's legal right to terminate the Contract. Having regard to all of the circumstances of the case, and balancing the interests of both the employer and the employee, the question to be answered in a claim of this kind, was whether the respondent abused its legal right to terminate the Contract, such that as a matter of industrial fairness, the dismissal should be regarded as harsh, oppressive or unfair.
 - 33 The second claim before the Commission was a claim for the enforcement of a term of the Contract for payment of entitlements, on the basis that the appellant contended his dismissal was wrongful. This was a separate common law claim, which did not attract the same approach as the unfair dismissal claim. The question was one of fact, or perhaps mixed fact and law, that being did the evidence establish, as cl 11.3(1)(a) of the Contract required, that the appellant was guilty of grave or wilful misconduct, such as to enable the respondent to exercise its rights under the Contract to terminate it summarily without notice.
 - 34 Given the respondent exercised this contractual right provided by cl 11.3(1)(a) of the Contract, the burden was on it to establish on the balance of probabilities, that the appellant did commit grave or wilful misconduct. For the purposes of the contractual claim, an honest and genuine belief, based on reasonable grounds, after a proper inquiry, that the appellant was guilty of misconduct, would be insufficient. Alternatively, did the appellant commit a serious breach of any provision of the Contract, under cl 11.3(1)(c)? Again, as a matter of fact or mixed fact and law, this was required to be established by the respondent on the balance of probabilities, as the basis to exercise the contractual right to terminate the Contract summarily without notice.
 - 35 We raise this matter because from the written and oral submissions of the parties at first instance, it appears that there was a conflation of the claims, and the approach set out in *Bi-Lo* was argued as the appropriate test to apply globally. The approach in *Bi-Lo* had no application to the determination of the contractual benefits claim. They were separate and distinct claims and the tests are different. The unfair dismissal claim did not turn on the exercise of the legal right to dismiss, but the contractual benefits claim did. The remedies available under the Act in respect of each claim are different. This conflation appears in the summary of principles referred to by the learned Commissioner at [14]-[15] of her reasons. No reference is made to the requirement in the denied contractual benefits claim, for it to be established that the appellant was actually guilty of grave and serious misconduct under the Contract, for the respondent's contractual right to summarily dismiss to be enlivened (see AB552-553). In effect, given that both claims were concurrently before the Commission for determination, the establishment by the respondent of the guilt of the appellant of grave and serious misconduct, on the balance of probabilities, for the purposes of the contractual benefits claim, would defeat both claims.

- 67 As noted by the Full Bench in *Trestrail* [32]–[34], consideration of whether an employee has engaged in serious misconduct as defined in the contract such as to disentitle them to the contractual benefit to notice is necessary in determining a denied contractual benefit claim. However, in an unfair dismissal claim, the question to be answered, essentially that in *Undercliffe*, is whether the employer abused its legal right to terminate the contract, such that as a matter of industrial fairness, the dismissal should be regarded as harsh, oppressive or unfair.
- 68 As noted by the Full Bench in *Trestrail* [35], where a contractual clause defines serious misconduct as involving guilt, then the establishment of guilt is necessary in determining the denied contractual benefit claim. However, in an unfair dismissal claim, the approach set out in *Bi-Lo* is the appropriate test to apply.
- 69 As outlined at [56] above, the *Bi-Lo* test is satisfied where ‘the employer honestly and genuinely believed and had reasonable grounds for believing on the information available at that time that the employee was guilty of the misconduct alleged; and that, taking into account any mitigating circumstances either associated with the misconduct or the employee’s work record, such misconduct justified dismissal’.
- 70 By extension, where an Award clause defines serious misconduct as involving guilt, then the establishment of guilt may be necessary in determining a claim for enforcement of cl 11 of the Award. However, Ms Warnock’s application is not a claim seeking enforcement of the Award; it is an unfair dismissal claim, which, as outlined at [68] above, the *Bi-Lo* test applies.
- 71 Accordingly, I accept the respondent’s submission that Ms Warnock was dismissed under Part 5 of the PSM Act, which operates independently of the Award’s notice provisions.

The critical question to be answered

- 72 As outlined in the Agreed Statement of Facts at [5] above, Ms Warnock does not dispute that she engaged in the conduct that formed the basis for her dismissal.
- 73 There is also no dispute that Ms Warnock was afforded procedural fairness during the disciplinary process. The evidence indicates that Ms Warnock was given notice of the allegations against her, was provided with the opportunity to respond to both the allegations and the proposed findings and did in fact provide detailed written responses at each stage. I am satisfied that the disciplinary process was procedurally fair.
- 74 Ms Warnock initially maintained, both during the disciplinary investigation and at the commencement of these proceedings, that her conduct did not constitute a breach of professional boundaries. She characterised her actions as an extension of pastoral care and community involvement, consistent with the norms of a small country town.
- 75 However, and as outlined in [25], [33] and [51] above, during cross-examination, Ms Warnock conceded that her conduct constituted a breach of professional boundaries. She accepted that:
- (a) It was inappropriate for her to text message AB via personal phones: [11(d)] above.
 - (b) Being alone with AB in the car for extended periods in the circumstances of the driving lessons was a breach of professional boundaries as a teacher: [11(l)] above.
 - (c) Her conduct, in the circumstances, was a breach of the Code of Conduct: [11(r)] above.
- 76 However, Ms Warnock did not accept that the breach was serious and did not accept that all elements of her conduct were inappropriate in all circumstances:
- (a) She did not accept that having AB perform chores at her house was a breach of professional boundaries: [11(u)] above.
 - (b) She did not accept that it should have been obvious to her at the time that the conduct was inappropriate: [11(ee)] above.
 - (c) She continued to express the view that the TRBWA Booklet was not fit for purpose in the context of a small town: at [11(kk)] above.
- 77 Accordingly, the critical question to be answered is whether Ms Warnock’s breaches of professional boundaries were of sufficient gravity to warrant dismissal, specifically summary dismissal.

Was Ms Warnock’s breach of professional boundaries serious?

- 78 Ms Warnock accepts that her contract of employment required her to remain familiar with the guidelines about professional behaviour, which includes the Code of Conduct: [11(m)] above.
- 79 Clause 7 of Ms Warnock’s contract of employment states:
- During the contract of employment you are required to obtain and maintain any statutory registrations as required from time to time and provide satisfactory evidence of their possession and currency to the Department of Education. Failure to maintain the appropriate registrations will be deemed to be a repudiation of the contract of employment entitling the Department to confirm your contract at an end. You agree that the Department is also entitled to suspend you without pay if you fail to maintain any statutory registrations for the period they have lapsed.
- 80 Clause 9 of Ms Warnock’s contract of employment states:
- It is your responsibility during the contract of employment to abide by and remain familiar with any applicable instruments including but not limited to the Public Sector Code of Ethics, the Department of Education Code of Conduct, legislation, policies, rules, guidelines and professional standards relevant to your employment in this position, as introduced and amended from time to time. These applicable instruments are contained in **Schedule 1** attached hereto for your information and may be amended from time to time.
- 81 Schedule 1 states:

SCHEDULE 1 – Applicable Instruments

- [PSM Act];
- Public Sector Management Regulations 1995;
- School Education Act 1999;
- School Education Regulations 2000;
- Working with Children (Criminal Record Checking) Act 2004;
- Western Australian College of Teaching Act 2004;
- Teacher Registration Act 2012;
- Western Australian Public Sector Code of Ethics;
- Public Sector Standards in Human Resource Management, made pursuant to the [PSM Act];
- [the Agreement] 2014;
- [the Award];
- Occupational Health and Safety Act 1984;

All relevant Department of Education policies and procedures, including but not limited to:

- Appointment Procedures for Fixed Term and Graduate Teachers and School Psychologists;
- Staff Conduct policy; and
- Transfer and Deployment of Teaching Staff policy; and

Any other law, instrument, policy or procedure which may apply to employment.

- 82 The Allegation letter (**Exhibit A2**: Document 2), alleges that Ms Warnock’s conduct was misconduct amounting to a breach of discipline pursuant to s 80(c) of the PSM Act, that may be considered an encroachment on professional boundaries, which if proved, is conduct that breaches the Code of Conduct, Standards 1 and 4:

Standard 1 – Behave professionally and with integrity

We are honest and trustworthy in our relationships, and demonstrate dignity and integrity at all times, both at work and in the community.

We:

- treat colleagues, students, parents, carers, stakeholders and members of the public with respect, courtesy, honesty and fairness
- behave in a manner that will not damage the reputation of ourselves, our workplace, the Department or the Public Sector
- follow all Department policies and procedures, including when working as a volunteer, a member of a committee, working group or advisory body
- are accountable for our actions and decisions
- do our job lawfully, with reasonable care and diligence and as efficiently and effectively as possible
- exercise reasonable care and skill in the performance of our work

Standard 4 – Maintain safety and wellbeing

We maintain the safety and wellbeing of ourselves, our students, our colleagues and our stakeholders.

We:

- provide and maintain safe and healthy work and learning environments that are mindful of staff and student wellbeing
- take reasonable steps to not cause foreseeable harm to ourselves, students in our care, each other, contractors, suppliers and volunteers
- protect students from actual or potential abuse and harm, in line with Department policies and procedures and the National Principles for Child Safe Organisations
- only use physical contact if reasonable and necessary and in line with the Department policies and guidelines

- 83 Standards 1 and 4 of the Code of Conduct do not use the phrase ‘professional boundaries’. Standard 1 requires staff to ‘behave in a manner that will not damage the reputation of ourselves, our workplace, the Department or the Public Sector’ and to ‘follow all Department policies and procedures.’ Standard 4 requires staff to ‘protect students from actual or potential abuse and harm, in line with Department policies and procedures’.

- 84 While the term ‘professional boundaries’ does not appear, I am satisfied that the substance of the obligation to maintain professional boundaries is encompassed by Standards 1 and 4. Conduct that breaches professional boundaries between a teacher and a student is, by its nature, conduct that risks damage to the reputation of the teacher, the school, and the Department (Standard 1), and conduct that may compromise the safety and wellbeing of students (Standard 4) by placing both the teacher and the student in a vulnerable and unsupervised situation.

- 85 The obligation to maintain professional boundaries is not a freestanding concept that exists only where those words are

expressly used; it is a necessary implication of the obligation to act professionally and with integrity, and to maintain the safety and wellbeing of students.

- 86 This is reinforced by the Department's training materials, which Ms Warnock was required to complete and did complete.
- 87 The AEDM training, completed by Ms Warnock on 26 March 2018 and 23 June 2022, explicitly addresses 'Conduct Open to Misinterpretation' and specifically identifies behaviours including 'transporting a student in your car without parent and principal approval' and 'inviting a student to your home or attend theirs without a professional educational reason': [11(v)] above.
- 88 The AEDM training contains a section titled '4.5 Maintaining Professional Boundaries with Students', which states:

Maintaining Professional Boundaries with Students

You are responsible for maintaining a professional role with students. This means establishing clear professional boundaries with students that help to protect everyone from misunderstandings or a breach of the professional relationship.

Select each example to learn more about establishing and maintaining appropriate boundaries:

- Targeting individual students
- Personal disclosure
- Physical contact and interaction
- Communication
- Grooming

Examples of breaches include:

- offering gifts and personal favours
- adopting a welfare role that is the responsibility of another staff member (e.g. counsellor) or doing so without the knowledge of key staff members

...

- correspondence of a personal nature including letters, email, phone, SMS, and on social networking sites (e.g. Facebook, Instagram, Twitter, etc)

- 89 The CPAP training, completed by Ms Warnock on 17 February 2018, 4 February 2021 and 8 February 2024, identifies a list of behaviours that 'may not be within professional boundaries', including 'driving a student unaccompanied, without knowledge and consent of key staff members', 'phone/SMS contact with students', 'inviting or allowing a student or students to visit their home', and 'arranging time alone with a particular student': [11(aa)], [11(x)] above.
- 90 Separate to the 'Inappropriate relationships' section (at [11(aa)] and [89] above), the CPAP training contains a section titled 'Guidelines for maintaining professional boundaries with students', which states:

Guidelines for maintaining professional boundaries with students

Staff who work directly with students have an influential relationship with them. They have the ability to significantly impact on students' lives in important and long-lasting ways. The relationships between staff members and students are characterised by differing roles and an imbalance of power based on factors such as age, authority and gender.

As an employee of the Department, you are responsible for maintaining a professional role with the students you come into contact with. This means establishing clear professional boundaries with students that help to protect everyone from misunderstandings or a violation of the professional relationship.

For further information, please refer to the Department's Code of Conduct.

...

Always obtain permission from your principal or residential college manager and the child's parents when meeting with students off the school grounds and outside of school activities e.g. tutoring, coaching.

...

The provision of your contact details should be justified in terms of educational purposes and be approved by your principal or residential college manager.

...

Correspondence of a personal nature including letters, email, phone, SMS text, and on social networking sites i.e. Facebook, Twitter etc. (not including class postcards or bereavement cards, etc.) is considered a violation of professional boundaries.

...

Be aware that the offering of personal gifts or special favours, giving extra attention to a student, accepting a different standard of behaviour from a student or having 'special time' with a student are considered violations of professional boundaries.

- 91 The AEDM training and CPAP training materials use the phrase 'professional boundaries' expressly and link those boundaries back to the Code of Conduct.

- 92 Clause 9 of the contract (at [80] above), requires Ms Warnock to abide by, and remain familiar with, the Department's Code of Conduct and 'professional standards relevant to your employment'. Accordingly, this would include the document that expands upon the Code of Conduct, the Department's 'Our Code of conduct and standards' which contains a section titled 'Maintain professional relationships, interactions and boundaries with students', which states:

Maintain professional relationships, interactions and boundaries with students

The [TRBWA] has important information about Teacher-Student Professional Boundaries [7] that you should familiarise yourself with. This includes allied professionals.

You have a responsibility to manage child protection at your school [8].

The following questions may help you assess whether your boundaries with students are appropriate and professional:

- Am I dealing with a particular student in a different manner to how I would deal with another student in the same circumstances?
- Is my availability and language with a particular student different from usual?
- Would I do or say this if a colleague was present?
- Would I condone my conduct if I observed it in another adult?
- Could the consequences of my actions have negative outcomes for a student or for me?
- If I were a parent would I want an adult behaving this way toward my own children?

Note:

Information is always growing and changing on Ikon. Search Ikon using key words to find current information to help you behave professionally and with integrity.

- 93 In the above paragraph, footnote [7] links to the TRBWA's Booklet and footnote [8] links to a document on Ikon titled 'Child protection at your school'.
- 94 Ms Warnock says that she did not see the TRBWA Booklet until Ms Cattaway provided it to her on 10 May 2024. The TRBWA Booklet is published by the TRBWA, which is the statutory body established under the *Teacher Registration Act 2012* to regulate the teaching profession. The *Teacher Registration Act 2012* is expressly listed in Schedule 1 of Ms Warnock's contract: [81] above.
- 95 Clause 7 of the contract (at [79] above), requires Ms Warnock to 'obtain and maintain any statutory registrations as required from time to time' and the TRBWA registration is plainly the registration contemplated.
- 96 In addition, cl 9 of the contract (at [80] above), requires Ms Warnock to abide by and remain familiar with 'professional standards relevant to your employment' and Schedule 1 includes 'any other law, instrument, policy or procedure which may apply to employment'. Accordingly, the TRBWA Booklet, addressing professional boundaries between teachers and students is a 'guideline' or 'professional standard' relevant to the employment of a registered teacher, and falls within the broad language of cl 9 and Schedule 1.
- 97 Regardless of whether the TRBWA Booklet is directly incorporated as a contractual obligation by cl 9, I am satisfied that the Department's mandatory training, the AEDM training and CPAP training, which Ms Warnock was required to complete and did in fact complete, explicitly identified the very behaviours in which Ms Warnock engaged as being inconsistent with professional boundaries.
- 98 Ms Warnock's evidence was that she completed these training programs but described them as things you do and forget: [11(q)] above. The fact that she did not recall the content of the training does not relieve her of the obligation to comply with it.
- 99 The cumulative effect of the AEDM training and the CPAP training, together with the Code of Conduct, was sufficient to put a reasonable teacher on notice that the conduct in question was inconsistent with professional expectations, whether or not she had also read the TRBWA Booklet.
- 100 Accordingly, while I accept Ms Warnock's evidence that she did not see the TRBWA Booklet until 10 May 2024, I do not accept that the obligation to maintain professional boundaries was unclear or unknowable to her. The obligation arises from the Code of Conduct, is reinforced and particularised by the Department's mandatory training, and is further supported by the Department's 'Our Code of conduct and standards' and the TRBWA's Booklet. Ms Warnock's contract required her to be familiar with all of these instruments.
- 101 In Ms Warnock's response to SID's allegations letter dated 19 June 2024 (**Exhibit A2**: Document 3, p 16), she said: (emphasis added)

Merredin is a small country town and farming community and over the past 7 years I have become part of the community. I have been an active member of the community, serving as a member of the Merredin Church of Christ which I have had connections to since 2010, and more recently in the repertory club and playing the last post at the community's dawn service, all of which I greatly value. The church is a community, where we help those in need. I have worked with young people through my various churches since I was 12 years of age, starting by helping at Sunday school. I have been a Youth Leader, Youth Pastor and School Chaplain. **Since becoming an educator, I have always strived to ensure a distinction between my role as a teacher and my relationships with young people at the church, maintaining an appropriate boundary.**

- 102 Ms Warnock's statement (at [101] above), demonstrates that Ms Warnock herself recognised the importance of maintaining a distinction between her role as a teacher and her church relationships with young people. Her statement that she has 'always

strived to ensure a distinction between my role as a teacher and my relationships with young people at the church, maintaining an appropriate boundary' is difficult to reconcile with her contention, maintained throughout these proceedings, that it was unclear to her that her conduct with AB breached professional boundaries. At minimum, Ms Warnock's own articulation of the boundary she says she has always strived to ensure, indicates that she was aware of the concept and its relevance to her circumstances. This would tend to reinforce, rather than alleviate, concerns about Ms Warnock's insight and judgment.

103 The following features of Ms Warnock's conduct elevate the seriousness of the breach beyond a single, isolated lapse of judgment:

- (a) The driving lessons commenced on 4 April 2024 and continued until Ms Warnock was directed to stop on 10 May 2024. During that time, Ms Warnock drove with AB on multiple occasions, exchanged phone numbers, texted him during class, and had him perform chores at her house. This was not a one-off error, rather, a pattern of conduct.
- (b) The first lesson occurred on 4 April 2024. The parties agree that this lesson took place before Ms Warnock had confirmed with Mrs B that she permitted Ms Warnock providing driving lessons to AB: Agreed Statement of Facts [8] (at [5] above).
- (c) Even before Ms Warnock had obtained Mrs B's permission, she had already taken out comprehensive car insurance to provide the driving lessons: [11(ii)], [13(a)] above.
- (d) The Merredin-to-Perth and return trip involved extended one-on-one time. On 27 April 2024, Ms Warnock and AB were together from 7:47am until 8:05pm, travelling to Perth, attending appointments, and returning to Merredin. For much of this time they were alone together in the car: [11(h)], [11(k)] above.
- (e) When AB damaged Ms Warnock's car during the first accident, Ms Warnock rejected Mrs B's offer to pay and instead arranged for AB to perform chores at her home. This created a transactional element in the teacher-student relationship. As Ms Cattaway observed, the concern was that AB was 'paying back garden work for driving lessons': [15(z)] above. While Ms Warnock's evidence was that she never intended for AB to owe her anything, the objective effect was that a Year 12 student was performing physical labour at his English teacher's house to compensate her for damage caused during the driving lessons.
- (f) The conduct was not limited to the driving lessons. Ms Warnock also drove AB home from Follow the Dream tutoring and the Repertory Club on various occasions. While she described this as 'common practice,' there is no evidence of this. In fact, the Follow the Dream Enrolment Form envisaged transport by a Merredin College vehicle or, in the case of an emergency, a staff member's private vehicle. Furthermore, Ms Walker's evidence was that she could count on one hand the number of times a student had been driven home from Follow the Dream in three years. However, Ms Warnock's evidence was that she had been giving AB lifts home from Follow the Dream since she started tutoring in 2023: [10(u)] above.
- (g) This means that Ms Warnock's one-on-one contact with AB in her car pre-dated the driving lessons by more than a year, extending the period of conduct potentially crossing professional boundaries beyond the five-week driving lesson period. While the pre-existing church relationship with the B-family, which Ms Warnock states commenced in 2018, provides context for why Ms Warnock may have been familiar with AB (addressed at [105] below), the lifts home from Follow the Dream arose through a school tutoring program, not through the church. Significantly, Ms Warnock's own evidence demonstrates that the driving lessons grew directly out of the Follow the Dream arrangement: 'I give you a lift home after Follow the Dream anyway, if it's okay with your mum, maybe I can give you some driving lessons?': [10(d)] above. The pre-existing pattern of one-on-one contact, established through the school tutoring program, was the foundation from which the driving lessons extended.
- (h) The text exchange on 22 April 2024 demonstrates that Ms Warnock used her personal phone to contact AB on his personal phone during class time. While Ms Warnock explained this as a welfare concern related to AB's previous PTSD episode, the appropriate course was to raise the concern with student services rather than to contact the student directly via a personal and unsupervised communication channel. Ms Warnock acknowledged that there were other text messages between her and AB, which she did not show to anyone and deleted, together with AB's phone number, after the investigation concluded in December 2024, because her understanding was that having them was 'a bad thing': [11(c)] above.

104 These features, taken together, demonstrate a sustained pattern of conduct that crossed professional boundaries in multiple, mutually reinforcing ways. The arrangement was not confined to one isolated incident but involved driving, financial entanglement, unsupervised contact in a private home, and texting, all with the same student.

105 Against the seriousness of the breach, are the following mitigating factors:

- (a) There is no allegation or finding of grooming, sexual misconduct, or any improper motive.
- (b) Ms Warnock's evidence is that she believed she was helping a family friend and acting in AB's best interests. Ms Warnock's acquaintance with the B-family through church pre-dated the teacher-student relationship. Mrs B was a regular attendee at Ms Warnock's church and was in the same morning tea group. This provides important context for why Ms Warnock may have perceived her conduct as falling within the norms of a community and church relationship rather than a teacher-student relationship.
- (c) Ms Warnock told colleagues in the staffroom about the driving lessons. She mentioned it specifically because she 'didn't want it to appear like it was something secret' and 'didn't want people to raise questions if they saw me and him leaving the school in the same car': [10(i)] above. This is not the conduct of a person seeking to conceal an improper arrangement.
- (d) When Ms Cattaway directed her to stop the driving lessons on 10 May 2024, she stopped immediately and did not

resume them.

- (e) Ms Warnock had not previously been the subject of any disciplinary action and had an otherwise satisfactory employment record over approximately five and a half years of teaching at Merredin College (noting that Ms Warnock was not teaching but on a deferred salary arrangement in 2023), before she was issued with the s 240 letter.
- (f) Ms Warnock's line manager, Mr Stace, with 22 years' experience, also failed to recognise the conduct as inappropriate when it came to his attention.
- (g) Ms Warnock has suffered significant consequences. She has had to sell her house because her post-dismissal income was insufficient to meet her loan repayments. The dismissal has had a significant impact on her mental and physical health: [10(y)] above.

106 These are genuine and substantial mitigating factors. However, several matters diminish the force of the mitigation:

- (a) Ms Warnock did not concede that her conduct breached professional boundaries until cross-examination. Her case opened on day one of the hearing on the basis that her conduct did not amount to such a breach. Her responses during the investigation, while expressing regret, did not unreservedly accept that her conduct was inappropriate. This pattern is relevant to assessing whether Ms Warnock has the insight necessary to avoid similar conduct in the future.
- (b) Even after conceding the breach in cross-examination, Ms Warnock resisted characterising it as serious. She did not accept that AB performing chores at her house was a breach. She was critical of the TRBWA Booklet. She did not accept that the risks should have been obvious to her at the time. This suggests that Ms Warnock's understanding of professional boundaries, while improved, remains incomplete.
- (c) After being excluded from the school under a s 240 order and while under investigation by SID, Ms Warnock applied AB's makeup at a Repertory Club performance. While Ms Cattaway had permitted Ms Warnock to continue with the Repertory Club, the direction was to keep her distance from AB. The make-up incident did not form part of the disciplinary findings, and I do not treat it as an additional ground for dismissal. However, Ms Warnock's decision to apply AB's make-up in these circumstances is relevant to the assessment of her judgment and insight. She acknowledged in cross-examination that, in hindsight, she should have found someone else to do it: [11(oo)] above.
- (d) As outlined at [103(g)] above, the conduct that gave rise to the driving lessons (the regular lifts home from Follow the Dream since 2023), originated through a school tutoring program, not a church activity. While the church relationship may explain the initial familiarity, the pattern of one-on-one contact that directly preceded and precipitated the driving lessons was established in Ms Warnock's capacity as a tutor in a Department of Education program.
- (e) Ms Warnock did not call Mrs B as a witness. Mrs B's evidence was potentially material to Ms Warnock's case, particularly in relation to the nature of the community relationship, the circumstances in which consent was given, and the chores arrangement. Ms Cattaway's evidence was that Mrs B had told her 'I know [Ms Warnock] has crossed the lines': [14(e)] above. In accordance with the principles in *Jones v Dunkel* (1959) 101 CLR 298, I draw the inference that Mrs B's evidence would not have assisted Ms Warnock's case.
- (f) While Mr Stace, Ms Warnock's line manager, did not raise concerns with her at the time, the weight of this consideration is diminished by his cross-examination evidence. Mr Stace confirmed that he did not know how long the driving lessons went for or how often they occurred: [7(a)] above. He did not give Ms Warnock permission for any of the conduct, neither the driving, nor having AB at her home, nor swapping personal phone numbers, nor texting AB: [7(b)] above. Ms Warnock did not discuss her intentions with him beforehand or seek his views: [7(c)] above. In these circumstances, Mr Stace's failure to intervene reflects the limited information available to him rather than any endorsement or acceptance of the conduct. It carries modest, though not negligible, mitigating weight.
- (g) Ms Warnock told Dr Sherman that she had 'thought about every safety in relation to [AB], except my reputation' and that her thinking was 'I'm not planning on having sex with this student, so there's nothing wrong with what I'm doing': [11(mm)] above. When asked by Dr Sherman whether she had gotten too close to AB, she said she did not think so: [11(ll)] above. While Ms Warnock explained in cross-examination that these comments reflected her thinking at the time rather than her current understanding, they are consistent with the respondent's concern that Ms Warnock's insight into the nature and seriousness of the breach remains limited.

107 I have carefully weighed the seriousness of Ms Warnock's conduct against the mitigating factors and the consequences of the dismissal.

108 I accept that Ms Warnock's intentions were not improper and that the pre-existing community relationship with the B-family provides genuine, though not exculpatory, context. I note that Mr Stace did not raise concerns with Ms Warnock at the time, although the mitigating force of this is limited given the extent of Ms Warnock's conduct was not known to him. I accept that Ms Warnock has suffered significant personal consequences.

109 However, the teaching profession occupies a position of unique trust and responsibility in relation to students. As Mr Stace acknowledged: 'Our role is a unique profession and position which has certain professional boundaries, and we can't do these things others ordinarily would'. The power imbalance inherent in the teacher-student relationship is well-recognised and is the very reason professional boundaries exist.

110 Those boundaries exist not only to protect students but also to protect teachers and the reputation of the Department. As the AEDM training recognises, conduct 'even well intended, may be observed by someone (a student, a parent, or a colleague) and perceived as inappropriate for a person working with children'.

111 Ms Warnock's conduct, viewed objectively, placed her in precisely such a situation. The concerns were raised by other staff

members and, independently, by Mrs B herself. The misunderstanding that the boundaries are designed to prevent had already occurred by the time Ms Cattaway became aware of the situation.

- 112 More significantly, the respondent's ongoing concern is not limited to the historical conduct but extends to Ms Warnock's suitability for continued employment as a teacher. That concern is grounded in the gap between Ms Warnock's subjective understanding of professional boundaries and the objective requirements of her role. As the respondent submitted, Ms Warnock entered these proceedings maintaining that her conduct was not a breach of professional boundaries, and even after conceding the breach, resisted accepting its seriousness. The respondent's doubts about Ms Warnock's judgment and discretion in relation to professional boundaries are, in my view, reasonably held.
- 113 Dr Sherman's expert report, while expressing the opinion that Ms Warnock would be capable of returning to work as a teacher, is itself qualified. Dr Sherman states that it would be 'necessary for the senior managers to ensure they had a thorough understanding of her psychiatric/psychological issues and to take the time to explain everything expected of her, for instance, regarding boundaries, with care': [37] above. The qualified nature of this opinion, rather than allaying concerns about Ms Warnock's suitability for continued employment as a teacher, would tend to reinforce them.
- 114 I have considered the principles in *Laws* and *North*, which are relied upon by Ms Warnock.
- 115 As outlined at [59] above, in *Laws*, Lord Evershed MR held that a single act of disobedience or misconduct can justify summary dismissal 'only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions.'
- 116 As outlined at [61] above, in *North*, Smithers and Evatt JJ emphasised that the gravity of misconduct cannot be assessed without first identifying the terms of the contract and what obligations the parties had agreed upon as important or vital.
- 117 Applying the principles at [115]–[116] above, the relevant obligations of Ms Warnock's contract are those in the Code of Conduct, Standards 1 and 4, which require Ms Warnock to behave professionally and with integrity, behave in a manner that avoids damage to her own reputation or that of the Department, and maintain the safety and wellbeing of students. These are plainly essential conditions of the teacher-student relationship. The question is whether Ms Warnock's conduct, viewed in totality, demonstrates a disregard of those essential conditions sufficient to warrant summary dismissal, or whether a lesser sanction would have been adequate.
- 118 As outlined at [63] above, in *ARTBUE*, Kenner SC found that dismissal was not a proportionate and appropriate penalty where Mr Merlo's use of pepper spray occurred as a split-second reflex action in circumstances of genuine threat, was not in contravention of the Transit Officer Manual, and was followed by genuine contrition. In that case, the misconduct was confined to a single, isolated incident in which the employee acted in self-defence and immediately recognised the error. Reinstatement at a demoted level was ordered.
- 119 Ms Warnock's case is distinguishable. Her conduct was not a single, isolated lapse in a moment of pressure, but a sustained pattern of boundary breaches extending over a period of at least five weeks, involving multiple forms of boundary breaches with the same student. Unlike Mr Merlo, Ms Warnock did not immediately recognise the error. She entered these proceedings maintaining that her conduct was not a breach of professional boundaries, and even after conceding the breach during cross-examination, resisted accepting its seriousness.
- 120 As outlined at [62] above, in *North*, Franki J found that Mr Pemberton's misconduct, while reprehensible, fell short of misconduct justifying summary dismissal in circumstances where it related to an isolated incident when Mr Pemberton was under considerable strain, had been employed for over two years with an unblemished record, and there was no evidence his conduct had been previously unsatisfactory. Here, while Ms Warnock similarly had an unblemished record, the critical distinction is that her conduct was not isolated. The driving lessons, the exchange of personal phone numbers, the texting during class, the chores arrangement, and the lifts home from extracurricular activities together constitute a cumulative pattern of boundary breaches that, viewed objectively, go beyond a single misjudgement. The financial entanglement created by the chores arrangement is a particularly concerning feature that compounded the other breaches. Moreover, Ms Warnock's limited insight into the seriousness of her conduct, as demonstrated throughout the investigation and these proceedings, is a matter of genuine concern in circumstances where the respondent must be able to trust that its teachers will exercise appropriate judgment in their dealings with students.
- 121 Having regard to all of the circumstances, as required by *Undercliffe* and *Garbett*, I am satisfied that the cumulative nature of Ms Warnock's conduct demonstrates a disregard of the essential conditions of her contract of service, within the meaning of that expression as used in *Laws* and applied in *North*. The professional boundary obligations are essential to the teacher-student relationship, not peripheral to it. Ms Warnock's sustained pattern of boundary breaches with the driving lessons, the financial entanglement through the chores arrangement, the extended one-on-one time, and the personal texting, together demonstrate, objectively, a disregard of those essential conditions. The respondent's decision to summarily dismiss Ms Warnock did not constitute an abuse of its right to terminate. Summary dismissal was not, in all the circumstances, a disproportionate response.
- 122 While I have considerable sympathy for Ms Warnock's personal circumstances, and I accept the genuineness of her subjective intentions, the assessment under *Undercliffe* requires me to balance the interests of both the employer and employee, taking into account all of the circumstances, and only intervene when 'intervention is necessary to protect an employee against an unjust or unfair exercise of the employer's right of dismissal, a right which is as fundamental in the relationship of employer and employee as is the right of an employee to leave [their] employment'.
- 123 Having taken into account all of the circumstances, I am satisfied that the respondent has established that the decision to summarily dismiss was not an abuse of its right to terminate. The respondent was entitled to take the view that the cumulative effect of the misconduct, and Ms Warnock's demonstrated lack of insight into the seriousness of her breach, warranted the most serious disciplinary sanction. The respondent's obligation to prioritise the safety and wellbeing of students, and to protect

the reputation of the teaching profession, are legitimate considerations in that balance.

124 The respondent has met its evidentiary onus in establishing that the misconduct was of sufficient gravity to warrant summary dismissal.

Conclusion

125 For the preceding reasons, I find that Ms Warnock's dismissal was not harsh, oppressive or unfair.

126 While I accept that Ms Warnock's intentions were not improper, the cumulative effect of her sustained breach of professional boundaries, the financial entanglement between Ms Warnock and AB, the lack of insight demonstrated during the investigation and these proceedings, and the respondent's reasonably held concerns about Ms Warnock's suitability for continued employment as a teacher, lead me to conclude that the respondent did not abuse the right to terminate Ms Warnock's contract of employment.

127 Accordingly, I will issue an order dismissing the application.

2026 WAIRC 00169

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

NATALIE WARNOCK

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM COMMISSIONER C TSANG

DATE MONDAY, 23 MARCH 2026

FILE NO. U 3 OF 2025

CITATION NO. 2026 WAIRC 00169

Result Application dismissed

Representation

Applicant Mr C Fogliani (of counsel)

Respondent Mr M McIlwaine (of counsel)

Order

HAVING heard from Mr C Fogliani (of counsel) on behalf of the applicant and Mr M McIlwaine (of counsel) on behalf of the respondent, and Reasons for Decision ([2026] WAIRC 00165) having been delivered on 20 March 2026, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application U 3 of 2025 be, and by this order is, dismissed.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

2026 WAIRC 00198

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2026 WAIRC 00198
CORAM : COMMISSIONER T B WALKINGTON
HEARD : TUESDAY, 29 JULY 2025
DELIVERED : TUESDAY, 7 APRIL 2026
FILE NO. : U 8 OF 2025
BETWEEN : OLASOJI RAYMOND BAYONLE FALOHUN
Applicant
AND
DEPARTMENT OF COMMUNITIES
Respondent

CatchWords	:	Industrial Law (WA) - Unfair dismissal application - Constructive dismissal - Casual employment - Whether there was an advance commitment to ongoing employment - No firm advance commitment - Whether there was a termination at the initiative of the employer - Contract of employment considered - Separate and distinct engagements - Employee not engaged at the time of resignation - Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA)
Result	:	Application dismissed for want of jurisdiction
Representation:		
Applicant	:	Mr O Falohun
Respondent	:	Mr M McIlwaine (of counsel)

Case(s) referred to in reasons:

Balagopalan v South Metropolitan Health Service [2022] WAIRC 00692; (2022) 102 WAIG 1306

Mohazab v Dick Smith Electronics Pty Ltd (No 2) (1995) 62 IR 200

Reasons for Decision

- 1 Mr Olasoji Raymond Bayonle Falohun (**applicant**) was employed as a casual Level 2 Residential Care Worker by the Department of Communities (**respondent**). The applicant claims he was forced to resign on 3 January 2025 because of the respondent's conduct, and he was constructively dismissed.
- 2 The respondent objects to the application on the basis that the Commission lacks the necessary jurisdiction. The respondent says the applicant was engaged as a casual employee under a contract of employment which provides that each occasion the applicant was engaged to perform duties, was a separate period of employment. Therefore, there was no dismissal of employment as the cessation of engagement in any further shifts, does not constitute a dismissal.
- 3 The respondent refers the Commission to the contract of employment signed by the applicant on 18 December 2020, which was provided in the response to the application:

Dear Mr Falohun

CASUAL Residential Care Worker, POSITION NUMBER 004634, LEVEL 2.1, Specialised care and accommodation, COMMUNITY SERVICES, DEPARTMENT OF COMMUNITIES

I am pleased to offer you casual engagement from time to time in the above position.

From time to time, and in accordance with operational requirements, you may be engaged to perform duties consistent with this position. Each occasion you are engaged will constitute a separate period of employment and the following conditions will apply:

1. Your engagement in the above position will be on a casual basis pursuant to the provisions of Section 100(2) of the *Public Sector Management Act 1994* (the Act), with nothing in this arrangement conferring upon you "permanent officer" status within the meaning of Section 64(1)(a) of the Act.
2. Casual employment may be offered from time to time from 18 December 2020
3. The terms and conditions of any period of casual employment per the Public Service Award 1992 (the Award) and the Public Sector CSA Agreement 2019 (the Agreement).
4. Remuneration for your work will be calculated based on the annual salary of Level 2.1 on an hourly basis of \$32.29 with a minimum engagement of three hours with an additional 25% loading in lieu of annual leave, personal leave and payment for public holidays, as per clause 19 of the Agreement.
5. Any engagement may be terminated by either party giving to the other party one hours' notice of such intention subject to the minimum engagement period of three hours.
6. Casual engagement is subject to a satisfactory medical and functional capacity examination and meeting of mandatory training requirements.
7. Any employment opportunities that arise from this engagement are subject to a satisfactory National Police Clearance as conducted by the agency and Communities may request Spent Convictions details under Schedule 3 of the *Spent Convictions Act 1988*. Communities reserves the right to terminate employment in the event that the Police Clearance/Check highlights a conviction that is at conflict with your employment.
8. This position requires a Working with Children assessment notice in accordance with the *Working with Children (Criminal Record Checking) Act 2014*. Failure to obtain this assessment notice will immediately render this engagement of employment void and your services may be terminated.
9. Communities reserves the right to not provide casual employment in the event that the Police Clearance or National Criminal History Check highlights a conviction that is in conflict with your role.
10. You will be under no obligation to accept any offers of casual employment from time to time nor will your declining of an offer preclude you from being offered further periods of casual employment.

11. In the event you are employed as a casual in the position of Residential Care Worker, you will be expected to meet the performance requirements as outlined in the job description form (JDF). You must maintain appropriate confidentiality at all times and not disclose any information or documents acquired during any periods of casual engagement, other than as required by law or where proper authorisation has been provided by Communities.

You are to comply with all relevant legislation, Communities policies and procedures and adhere to the requirements and work procedures, as amended from time to time.

12. The following are not incorporated as conditions of this offer, but any casual employment is subject to:

- *Public Sector Management Act 1994 and Regulations;*
- *Occupational Health and Safety Act 1984;*
- Communities Code of Conduct;
- Western Australian Public Sector Code of Ethics;
- Public Sector Standards in Human Resource Management; and
- Any other relevant legislation and Communities policies.

These documents are available to all employees on the Communities website. If you are unable to access any of these documents, or require any documentation in an alternative format, you may request copies from your manager.

13. Any offer of casual engagement is conditional upon sighting the following:

- Proof of identification
- Substantiated evidence your eligibility to live and work in Australia for the duration of the fixed term contract
- Proof of qualifications (if applicable)
- A current Western Australian 'C' or 'C-A' Class Driver's licence or equivalent (if applicable)
- Current Senior First Aid Certificate (if applicable)

Should you wish to accept this offer of casual engagement, please initial and date all pages of this document, sign and date below and return together with the required documentary evidence as outlined above to HRHub@Communities.wa.gov.au as soon as possible.

If you have any questions in relation to this offer, please contact Michelle Walters on 9249 1037

Yours sincerely

Anne McMullan

A/Director Residential Care Specialised Care and Accommodation

17 December 2020

- 4 The Commission has jurisdiction to hear and determine industrial matters under s 29(1)(c) of the *Industrial Relations Act 1979* (WA) (**the Act**) only where the employee has been 'dismissed'.
- 5 The term 'dismissal' has been held to mean a termination at the initiative of the employer. That is, the action of the employer is the principal contributing factor which leads to the termination: *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 (205) - (206).
- 6 The applicant agrees that he was a casual employee. As set out by Cosentino SC in *Balagopalan v South Metropolitan Health Service* [2022] WAIRC 00692; (2022) 102 WAIG 1306 (*Balagopalan*), further inquiries are required to resolve the issue of whether there has been a dismissal in these circumstances:

There is no dispute that Mr Balagopalan was a casual employee. His offer of employment was expressed to be for casual employment. Mr Balagopalan accepts that he was a casual employee.

However, to conclude that Mr Balagopalan was a casual employee takes us only part of the way towards resolving the issue of whether there has been a termination of the employment at the initiative of the employer. As Le Miere J stated in *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* [2008] WASCA 175; (2008) 175 IR 455 at [103]:

In Australian law, the expressions 'casual employee' or 'casual employment' are expressions with no fixed meanings.

His Honour referred to the statements of Moore J in *Reed v Blue Line Cruisers Ltd* (1996) 73 IR 420 and of the Full Court of the Federal Court in *Hamzy v Tricon International Restaurants* [2001] FCA 1589; 115 FCR 78 that the essence of casual employment is the absence of a firm advance commitment as to the duration of the employee's employment, or the days (or hours) the employee will work, noting that such characterisation is not inconsistent with the possibility of the employee's work pattern turning out to be regular and systematic. At [106], his Honour also noted that it is not a necessary characteristic of casual employment that the employee work under a series of separate and distinct contracts of employment each entered into for a fixed period.

In *WorkPac Pty Ltd v Rossato* [2021] HCA 23; 95 ALJR 681, the High Court similarly characterised casual employment in the terms articulated in *Hamzy*. In *WorkPac* the High Court was concerned with the meaning of 'casual employee' in the *Fair Work Act 2009* (Cth). At [49] in *WorkPac*, the High Court stated:

The Act did not, at material times, define the term “casual employment”. However, the view that there must exist a “firm advance commitment” to continuing work unqualified by indicia of irregularity, such as uncertainty, discontinuity, intermittency and unpredictability, in order for employment to be other than casual conforms with several provisions of the Act...

The High Court also stated at [57]:

A court can determine the character of a legal relationship between the parties only by reference to the legal rights and obligations which constitute that relationship. The search for the existence or otherwise of a “firm advance commitment” must be for enforceable terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement. To the extent that Bromberg J expressed support for the notion that the characterisation exercise should have regard to the entirety of the employment relationship, his Honour erred.

The High Court restated this theme in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 at [61], emphasising that in characterising an employment relationship, one must look to the rights and duties established by the contract and not simply how the contract has played out in practice unconnected with the contractual obligations.

It is possible for there to be a continuing casual contract, a term of which is that the employer can elect to offer work on a particular day or days, and when offered, the employee can elect to work or not. Such a contract might create a casual employment relationship of a continuing nature: *Melrose Farm* at [106] and [110].

It follows that characterising an employment relationship as casual employment does not preclude the possibility of the employment ending by a termination at the initiative of the employer rather than ending by the effluxion of time at the end of a particular engagement.

The pertinent enquiry in this case, then, is whether Mr Balagopalan was a casual employee in the sense of:

- (a) having a continuing or ongoing employment relationship with SMHS of indefinite duration without definite or regular hours fixed in advance; or
- (b) working under separate and distinct [contracts] of employment, each for the fixed period of a shift.

Following the statements of the High Court in *Workpac* and *Personnel Contracting* referred to above, the answer to this question must be sought in the terms of the legally enforceable instruments which determine the parties’ respective rights and obligations rather than in their subsequent conduct or performance of the contract. Accordingly, matters which Mr Balagopalan relies upon, such as the provision to him of a uniform, training and a locker, the distinction between casual pool employees and agency casuals and indeed his pattern of hours, are not matters which assist in determining the character of the legal relationship between the parties unless they are a consequence of the parties’ legal rights and obligations [43] – [52].

- 7 As in *Balagopalan*, I must decide, by reference to the legally enforceable instrument, whether the applicant had an ongoing employment relationship with the respondent for an indefinite duration, or was employed under separate contracts of employment for each shift. In this matter, the legally enforceable instrument is the contract of employment dated 17 December 2020 and signed by the applicant on 18 December 2020.
- 8 The applicant notified the respondent of his resignation during a period he was not engaged on a casual shift. The employment contract explicitly states that shifts would be offered ‘from time to time’ and that ‘Each occasion you are engaged will constitute a separate period of employment’. The terms of the employment contract confirm there was no firm advance commitment of ongoing work.
- 9 Given the terms of the employment contract, that each occasion the applicant is engaged to perform duties is a separate period of employment, the applicant was not employed at the time of his resignation and therefore was not dismissed.
- 10 For the reasons set out above, I find that the Commission lacks the necessary jurisdiction to hear and determine this application and it will be dismissed.

2026 WAIRC 00199

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

OLASOJI RAYMOND BAYONLE FALOHUN

APPLICANT

-v-

DEPARTMENT OF COMMUNITIES

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

TUESDAY, 7 APRIL 2026

FILE NO/S

U 8 OF 2025

CITATION NO.

2026 WAIRC 00199

Result	Application dismissed for want of jurisdiction
Representation	
Applicant	Mr O Falohun
Respondent	Mr M McIlwaine (of counsel)

Order

HAVING heard from the applicant on his own behalf, and Mr McIlwaine (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 for want of jurisdiction.

[L.S.]

(Sgd.) T B WALKINGTON,
Commissioner.

2026 WAIRC 00167

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2026 WAIRC 00167
CORAM	:	COMMISSIONER T B WALKINGTON
HEARD	:	THURSDAY, 8 JANUARY 2026
DELIVERED	:	MONDAY, 23 MARCH 2026
FILE NO.	:	U 105 OF 2024
BETWEEN	:	STACEY MCCABE
		Applicant
		AND
		DAVID AQUAILIA FAMILY TRUST
		Respondent

CatchWords	:	Industrial Law (WA) - Unfair dismissal application - Deed of settlement - Parties executed deed of settlement - Whether the Commission has jurisdiction to alter the terms of a deed of settlement - Commission does not have jurisdiction to alter the terms of a deed of settlement - Whether it is in the public interest for application to remain on foot - Public interest for parties to comply with agreement's reached - Not in the public interest for matter to proceed - Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA)
Result	:	Application Dismissed
Representation:		
Applicant	:	Ms S McCabe
Respondent	:	Mr I Bennett (of counsel)

Case(s) referred to in reasons:

Joseph Kluchar v Hamersley Iron Pty Ltd (2002) 82 WAIG 628

Maurice Bradbury v Jos Van Baren, John Denwick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate (1995) 75 WAIG 2927

Prudential Assurance Co. Ltd. v McBains Cooper [2000] 1 WLR 2000; (2001) 3 All ER 1014

Reasons for Decision

- Ms Stacey McCabe (**applicant**) applied to the Western Australian Industrial Relations Commission (**Commission**) on 23 October 2024, claiming that her dismissal from the David Aquailia Family Trust (**respondent**) was harsh, oppressive and unfair.
- The applicant's employment was terminated on 9 July 2024. Section 29(2)(a) of the *Industrial Relations Act 1979* (WA) (**IR Act**) requires an unfair dismissal application to be made within 28 days of a dismissal. Therefore, this application is well beyond the prescribed timeframe. The Commission may accept an unfair dismissal application made outside of the prescribed timeframe if it is not unfair to do so.
- The respondent contends that the dismissal was fair in the circumstances.

- 4 The applicant commenced employment with the respondent on or around 8 December 2022 and was engaged on a Sponsorship Visa Subclass 482 (**Work Visa**). The Work Visa was to expire on 14 July 2024.
- 5 On 16 September 2022, the applicant signed a contract of employment with the respondent which includes the following term concerning the requirement for an appropriate working visa at clause 2.2:

Your continued employment is contingent on having and maintaining an appropriate working visa. Where your visa expires, your employment will be terminated.
- 6 On 8 July 2024, the applicant notified the respondent of the expiry of the Work Visa and that she had not applied for a further working visa, nor made alternative arrangements to be able to continue to work lawfully in Australia.
- 7 The respondent and the applicant met the following day to discuss the applicant's circumstances and ongoing employment.
- 8 Following the meeting, the respondent made inquiries with the relevant authorities. The respondent concluded that it would not be possible for the applicant to secure the same ongoing working rights and there would likely be an associated and indefinite delay in the applicant obtaining the necessary visa to lawfully work in Australia. Consequently, the respondent concluded that there would be a period in which the applicant would not be able to be employed by them.
- 9 On 9 July 2024, the Respondent confirmed in writing that the employment relationship was terminated citing the applicant's inability to perform the inherent requirements of her employment, because of the expiry of the Work Visa and the absence of other arrangements. The respondent submits that it was not unfair, nor harsh, nor oppressive to dismiss the applicant because continuing to employ the applicant in circumstances in which she did not possess a valid visa would have meant employing her unlawfully.
- 10 The applicant argues that her dismissal was unfair because it was made four days before the Work Visa expired. The applicant submits four days was not sufficient time for her to arrange another sponsorship.

Timeline

- 11 The respondent reserved their position on the issue of the application being out of time and the Commission convened a conciliation conference on 3 April 2025. The parties did not reach agreement, and the Commission issued programming steps to hear and determine the issue of whether to accept the application outside the prescribed timeframe.
- 12 On 20 June 2025, the respondent informed the Commission that the parties had reached an in-principle settlement and requested the matter remain open while the parties formalised the terms of their agreement.
- 13 On 21 July 2025, in response to the Commission's enquiry for a status update on the matter, the respondent advised that the parties were continuing to progress finalising their in-principle agreement.
- 14 An agreement to settle the issues between the parties was reached sometime in July 2025. The respondent provided a copy of the Deed of Settlement (**Deed**) recording the terms of the agreement signed by the applicant on 24 July 2025 and signed by the respondent on 29 August 2025.
- 15 On 3 September 2025, in response to the Commission's further enquiry for an update, the respondent advised that their view was that all settlement actions had been completed. The only outstanding item was for the applicant to discontinue these proceedings as per the terms of the Deed.
- 16 On 4 September 2025, the applicant informed the Commission that she had not discontinued her application because she had not received the full payment of the agreed settlement sum. The applicant claimed that she was to receive \$11,500.00 and says the payment made to her was only \$6,745.00. The applicant attached a transaction record to the correspondence showing an employment termination payment of \$11,500.00 and PAYG withholding payment of \$4,755.00.
- 17 On this same date, the respondent emailed the Commission and the applicant explaining that the terms of the Deed expressly state that the monetary amount was subject to and less than any applicable taxation. Given the respondent had made the agreed payment to the applicant in accordance with the terms of settlement recorded in the Deed, the respondent requested that the applicant discontinue the proceedings as soon as possible.
- 18 The applicant replied stating that she had 'agreed to \$11,500 in my hand, not \$11,500 tax deductible'.
- 19 On 12 September 2025 the respondent emailed the Commission and the applicant setting out their position along with extracts of the relevant terms of the Deed agreed between the parties and requested the applicant discontinue her application or that the Commission discontinue and close the proceedings because of the settlement reached.
- 20 The applicant emailed the Commission and the respondent reiterating her earlier position.
- 21 On 17 September 2025, the Commission notified the parties of a hearing for the applicant to show cause why the matter ought not be dismissed considering the agreement reached. The show cause hearing was listed for 8 January 2026.
- 22 At the show cause hearing listed on 8 January 2026, the respondent submitted a copy of the Deed. The applicant did not dispute the terms of the Deed which provided for payment less than and subject to applicable taxation. She did not dispute that she had signed the Deed.
- 23 The applicant submits that she had understood that during a Directions Hearing before the Commission on 3 June 2025, there had been an oral agreement for the respondent to pay her \$11,500.00 in settlement of her claim.
- 24 The respondent contends that their position concerning any payment offered, had consistently been made and the parties' discussions were always on the basis that the payment would be subject to the relevant taxation laws. The respondent submits that in all correspondence with the applicant, they had reiterated that the proposal extended was always stated to be less than applicable taxation.

- 25 The respondent says that the parties did not reach agreement at the Directions Hearing before the Commission on 3 June 2025, and any subsequent discussions were independent of the Commission. The respondent refers the Commission to clause 4E of the Deed, which states that the applicant freely entered the Deed after having the opportunity to consider the contents of the Deed, and obtain legal advice as she wished. The respondent says there is nothing surprising in the terms of the Deed, and it is consistent with the proposals that were put. The respondent submits that the applicant acknowledged the terms of the Deed, and that the terms were accepted both in principle and in writing.
- 26 The respondent submits that if the applicant refuses to discontinue the application in line with the terms of the Deed, the application ought to be dismissed.

The Law

- 27 I am satisfied that a compromise was reached between the applicant and the respondent in July 2025, in settlement of the applicant's claim. The settlement agreement was recorded in the Deed signed by the applicant on 24 July 2025 and signed by the respondent on 29 August 2025.
- 28 The parties have reached a compromise agreement, and this ends the dispute between them: *Prudential Assurance Co. Ltd. v McBains Cooper* [2000] 1 WLR 2000; (2001) 3 All ER 1014.
- 29 The Commission has previously considered similar circumstances in *Maurice Bradbury v Jos Van Baren, John Denwick, Paul Gangemi and Ivan Hill, Management Agent, Proprietor of Great Western Real Estate* (1995) 75 WAIG 2927 (*Bradbury*) and *Joseph Kluchar v Hamersley Iron Pty Ltd* (2002) 82 WAIG 628. In these matters, the Commission dismissed the application because it was not in the public interest that they proceed.
- 30 In this matter, the Deed required the respondent to pay the applicant a monetary amount. The respondent has made payment in the terms required by the Deed setting out the terms of the agreement between the parties.
- 31 The applicant's understanding that she was to receive \$11,500.00 in her hand, is not reflected in the terms of the Deed. The applicant's understanding of the terms of settlement cannot form the basis for the application to continue when this understanding conflicts with the expressly recorded terms of settlement.
- 32 The applicant signed the Deed on 24 July 2025, which was after 3 June 2025. Consequently, any terms of settlement the applicant understood to have been considered on 3 June 2025, have been overtaken by the terms of the Deed. The Commission does not have the jurisdiction and necessary powers to adjust the terms of the Deed as requested.
- 33 In *Bradbury* the Full Bench observed:
 ... It is certainly not in the public interest, too, that the Commission should have proceeded to hear something which had been settled by agreement, even if, as a matter of law, the Commission could have heard the matter, which it could not have. The Commission did not err in the exercise of its discretion or otherwise (2928).
- 34 I am of the view that it is in the public interest that the parties be held to their agreements. It is not in the public interest for an application to be pursued when a deed of settlement has been signed and agreed between the parties.
- 35 For these reasons, I exercise the Commission's powers under s 27(1)(a) of the IR Act and dismiss the application.

2026 WAIRC 00168

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

STACEY MCCABE

APPLICANT

-v-

DAVID AQUAILIA FAMILY TRUST

RESPONDENT

CORAM COMMISSIONER T B WALKINGTON

DATE MONDAY, 23 MARCH 2026

FILE NO/S U 105 OF 2024

CITATION NO. 2026 WAIRC 00168

Result Application Dismissed

Representation
Applicant Ms S McCabe

Respondent Mr I Bennett (of counsel)

Order

HAVING heard from the applicant on her own behalf and Mr I Bennett of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the application be and by this order, is dismissed.

(Sgd.) T B WALKINGTON,
Commissioner.

[L.S.]

UNIONS—Matters dealt with under Section 66

2026 WAIRC 00179

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

THURSDAY, 26 MARCH 2026

FILE NO/S

PRES 8 OF 2024

CITATION NO.

2026 WAIRC 00179

Result

Order issued

Appearances

Applicant

Mr T Borgeest of counsel

Respondent

Mr T Borgeest of counsel

Order

HAVING heard Mr T Borgeest of counsel on behalf of the applicant and the respondent, the Chief Commissioner, pursuant to the powers conferred under s 66 of the *Industrial Relations Act 1979* (WA), hereby orders –

THAT unless otherwise further varied, the order made on 22 December 2025 ([2025] WAIRC 01020) be and is hereby further extended to 31 July 2026.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

PRACTICE NOTES—

2026 WAIRC 00201

PRACTICE NOTE 1 OF 2026

Use of artificial intelligence

Introduction

1. Practice Note 1 of 2026 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of providing guidance to parties and their representatives in relation to the use of artificial intelligence (AI) in proceedings before the Commission.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 1 of 2026 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 22 April 2026, and remains in force until such time as it is replaced.

Generative AI

3. AI is a broad concept referring to an engineered system that generates predictive outputs such as content, forecasts, recommendations, or decisions for a given set of human defined objectives or parameters without explicit programming. AI

systems are designed to operate with varying levels of automation. Traditional AI systems are primarily focused on tasks related to data analysis and prediction, whereas generative AI goes a step further by generating new data like its training data.

4. This Practice Note concerns the use of generative AI in proceedings before the Commission. It applies to all those involved in proceedings, including lawyers, industrial agents (collectively ‘practitioners’), self-represented parties and witnesses.
5. There are risks in using generative AI content. Generative AI such as ChatGPT and Google Gemini can produce material that may look accurate and plausible but is inaccurate, incomplete and contains biased content. Therefore, generative AI content must be checked for accuracy. The use of generative AI is not a substitute for the use of professional skill and judgment by a practitioner. Also, generative AI information may not be secure, especially when using public AI tools. Information submitted to an AI tool may become publicly available.
6. This Practice Note does not apply to specialised industrial relations/legal research tools which use AI technology to search and collate information from decisions of courts and tribunals, legislation, and secondary source research material such as articles and books etc.

Use of generative AI in Commission proceedings

7. A party or practitioner must not mislead the Commission or any other party to proceedings before the Commission, when using generative AI to produce documents to be used in the proceedings. Parties and practitioners are to disclose the use of generative AI in the preparation of documents to be used in Commission proceedings.
8. A party or practitioner who signs or certifies a document, files a document with the Commission or who otherwise relies on a document’s contents in proceedings before the Commission is responsible for the accuracy of its content. Errors or omissions in the document will not be able to be explained as being attributable to the use of a generative AI tool.
9. In the case of affidavits and witness statements, particular care must be taken when using generative AI to assist in their preparation. Affidavits and witness statements should reflect a witness’ own words, based on their own personal knowledge. This also applies to expert reports and opinions.
10. As the development and use of generative AI is rapidly evolving, this Practice Note will be kept under review.

Relevant legislation

Industrial Relations Act 1979, ss. 113(1).

Industrial Relations Commission Regulations 2005, regs. 39(3).

Useful resources

11. The Commission’s website contains additional [resources](#).

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2026 WAIRC 00202

PRACTICE NOTE 2 OF 2026

Delivery of reserved decisions

Introduction

1. Practice Note 2 of 2026 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing parties to matters before it of the general practice in relation to the delivery of reserved decisions. It applies to the Commission however constituted. It replaces Practice Note 1 of 2021.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 2 of 2026 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 22 April 2026, and remains in force until such time as it is replaced.

Practice of the Commission

3. It is the general practice of the Commission to deliver decisions within three months of a decision being reserved.
4. Decisions in large or complex matters, including appeals to the Full Bench and Commission in Court Session matters, may take longer. Other than in exceptional cases, decisions should not generally take longer than six months to deliver.

Communication between the Commission and parties

5. Parties, their lawyers and their industrial agents should not feel inhibited from making enquiries regarding the progress of a decision which has not been delivered within the time frames in paragraphs three and four above.

6. Where a party to proceedings wishes to enquire about the time being taken for the delivery of a reserved decision, they, or where applicable, their lawyer or industrial agent, should make contact in writing to the Principal Associate to the Chief Commissioner at chambers-kenner@waipc.wa.gov.au.
7. In the case of a matter before the Chief Commissioner or where the Chief Commissioner is presiding on a Full Bench or a Commission in Court Session matter, contact in writing should be made with the Registrar at susan.bastian@waipc.wa.gov.au.
8. The enquiry should set out the names of the parties, the matter number, a brief description of the proceedings and when the decision was reserved. Each party to the proceedings should be provided with a copy of the enquiry.
9. The relevant Commissioner will not be informed of the identity of the party making the enquiry.
10. The enquiry will be responded to in writing and may include an expected date when the decision will be delivered.

Relevant legislation

Industrial Relations Act 1979, ss. 22B, 27, 28, 113(1).

Industrial Relations Commission Regulations 2005, regs. 39(3).

Useful resources

11. The Commission's website contains additional [resources](#).

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2026 WAIRC 00203

PRACTICE NOTE 3 OF 2026

Appeal Books

Introduction

1. Practice Note 3 of 2026 is issued by The Western Australian Industrial Relations Commission (**the Commission**) for the purpose of informing appellants in appeals before the Full Bench about the content and format of Appeal Books.
2. In accordance with s 113(1) of the *Industrial Relations Act 1979* and reg 39(3) of the *Industrial Relations Commission Regulations 2005*, Practice Note 3 of 2026 is effective 14 days after the date of its publication in the Western Australian Industrial Gazette, being 22 April 2026, and remains in force until such time as it is replaced.

Contents of the Appeal Book

3. In accordance with the *Industrial Relations Commission Regulations 2005*, subject to any direction of the presiding Commissioner of the Full Bench, the Appeal Book must contain:
 - (a) a copy of the Notice of Appeal (Form 8);
 - (b) a copy of the application, originating claim or referral commencing the original proceedings before the Commission/Industrial Magistrates Court;
 - (c) a copy of any response filed in the original proceedings;
 - (d) where applicable, a copy of that part or those parts of any agreed issues for determination, including any statement of agreed facts, containing the matters relevant to the appeal which were before the Commission/Industrial Magistrates Court in the original proceedings;
 - (e) any written submissions, or outline of submissions provided to the Commission/Industrial Magistrates Court in the original proceedings;
 - (f) a copy of the order, direction, award, declaration or finding that is the subject of the appeal;
 - (g) a copy of the reasons for decision of the Commission/Industrial Magistrates Court for making the order, direction, award, declaration or finding that is the subject of the appeal;
 - (h) a list of the page numbers of the transcript of the original proceedings at which reference is made to the subject matter of the appeal;
 - (i) a copy of all relevant exhibits tendered during the original proceedings (the Commission/Industrial Magistrates Court stamped version of those exhibits); and
 - (j) a copy of any other document which will be required by the Full Bench to determine the appeal, including any further particulars of the claim or response filed in the original proceedings.

4. If an appellant requires copies of the stamped version of exhibits tendered during the proceedings referred to in paragraph 3(i) above, a written request must be sent to registry@waipc.wa.gov.au.

Format of the Appeal Book

5. Appeal Books can be lodged electronically via the Registry online portal, which can accept documents up to 100MB, or by email. Files exceeding 30MB may also be submitted using a file sharing service. Parties may contact the Registry for assistance with electronic lodgment.
6. The Appeal Book must be lodged as one (single) electronic PDF file, presented in a neat and professional manner and must:
- commence with a cover page that includes the matter number and the names of the parties;
 - include an index page at the front, listing each document with its corresponding page number;
 - contain continuous page numbers in numerical order;
 - be clearly legible. The Registrar may reject an Appeal Book containing unclear or unreadable content; and
 - be searchable and include bookmarks for each document.

Relevant legislation

Industrial Relations Act 1979, ss.113(1).

Industrial Relations Commission Regulations 2005, regs. 4(6), 39(3), 102(10), 102(10A), 102(11A), 102(11), 102(12).

Useful resources

7. The Commission's website contains additional [resources](#).

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

PROCEDURAL DIRECTIONS AND ORDERS—

2026 WAIRC 00151

APPEAL AGAINST THE DECISION OF COMMISSIONER TO TAKE REMOVAL ACTION ON 15 APRIL 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JOHN HENDERSON

APPELLANT

-v-

COMMISSIONER OF POLICE

RESPONDENT

CORAM

CHIEF COMMISSIONER S J KENNER
COMMISSIONER T B WALKINGTON
COMMISSIONER T KUCERA

DATE

MONDAY, 16 MARCH 2026

FILE NO/S

APPL 29 OF 2025

CITATION NO.

2026 WAIRC 00151

Result

Order issued

Representation

Appellant

Mr R French of counsel

Respondent

Ms E Tapsell of counsel

Order

HAVING heard Mr R French of counsel on behalf of the appellant and Ms E Tapsell of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Police Act 1892* (WA), hereby orders –

- (1) THAT the appellant be and is hereby granted leave to tender new evidence in the form of the amended witness statement of Dr Martin Chapman dated 6 March 2026.

- (2) THAT the hearing be and is hereby adjourned to a date to be fixed by the Commission, not before 27 April 2026.

By the Commission

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2026 WAIRC 00152

APPLICATION FOR AN ENTERPRISE ORDER PURSUANT TO SECTION 42I

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS

APPLICANT

-v-

CITY OF CANNING

FIRST RESPONDENT

WESTERN AUSTRALIAN MUNICIPAL, ADMINISTRATIVE, CLERICAL AND SERVICES
UNION OF EMPLOYEES

SECOND RESPONDENT

LOCAL GOVERNMENT, RACING AND CEMETERIES EMPLOYEES UNION (WA)

THIRD RESPONDENT

CORAM SENIOR COMMISSIONER R COSENTINO

DATE MONDAY, 16 MARCH 2026

FILE NO. APPL 33 OF 2025

CITATION NO. 2026 WAIRC 00152

Result Directions issued

Representation

Applicant Mr R Cardinal on behalf of The Construction, Forestry, Mining and Energy Union of Workers

First Respondent Mr C Beetham of counsel on behalf of the City of Canning

Second Respondent Mr C Fogliani of counsel on behalf of Western Australian Municipal, Administrative, Clerical and Services Union Of Employees

Third Respondent Mr K Trainer on behalf of the Local Government, Racing and Cemeteries Employees Union (WA)

Direction

HAVING heard from Mr R Cardinal, on behalf of The Construction, Forestry, Mining and Energy Union of Workers (**CFMEUW**), Mr C Beetham of counsel on behalf of the City of Canning, Mr C Fogliani of counsel on behalf of Western Australian Municipal, Administrative, Clerical and Services Union Of Employees, and Mr K Trainer on behalf of the Local Government, Racing and Cemeteries Employees Union (WA), the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) (**IR Act**), hereby directs –

- (1) THAT the City of Canning prepare and file an application requesting the Commission exercise its powers in accordance with section 27(1)(f) and (g) of the IR Act (**Stay Application**) by 4:00 pm on Friday, 20 March 2026;
- (2) THAT any party wishing to file written submissions in support of the Stay Application do so by 4:00 pm on Friday, 27 March 2026, but such written submissions should not repeat or duplicate the grounds or submissions contained in the City of Canning's application;
- (3) THAT if the CFMEUW wishes to file written submissions opposing the Stay Application, it does so by 4:00 pm on Wednesday, 8 April 2026;
- (4) THAT the Stay Application be dealt with on the papers;
- (5) THAT the orders in paragraphs 6 and 7 below have effect if the Commission does not make the orders sought by the City of Canning in the Stay Application;
- (6) THAT the CFMEUW file any written submissions and/or evidence in support of its application for an enterprise order under section 42I(2)(b) of the IR Act by 4:00 p.m. on Friday, 24 April 2026;

- (7) THAT the matter be listed for a further directions hearing on Friday, 1 May 2026 at 10:30 a.m.; and
 (8) THAT there be liberty to apply on short notice.

[L.S.]

(Sgd.) R COSENTINO,
Senior Commissioner.

2026 WAIRC 00177

AN APPLICATION TO REVOKE THE RIGHT OF ENTRY PERMIT OF EDMOND MARGJINI

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	APPLICANT
	-v-	
	EDMOND MARGJINI, WORKERS	FIRST RESPONDENT
	THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION OF WORKERS	SECOND RESPONDENT
CORAM	COMMISSION IN COURT SESSION	
	CHIEF COMMISSIONER S J KENNER	
	COMMISSIONER T B WALKINGTON	
	COMMISSIONER C TSANG	
DATE	WEDNESDAY, 25 MARCH 2026	
FILE NO/S	CICS 12 OF 2025	
CITATION NO.	2026 WAIRC 00177	

Result	Order issued
Representation	
Applicant	Mr J Carroll of counsel
First Respondent	Mr D Rafferty of counsel
Second Respondent	Mr D Rafferty of counsel

Order

HAVING heard Mr J Carroll of counsel on behalf of the applicant and Mr D Rafferty of counsel on behalf of the respondents, the Commission in Court Session, pursuant to the powers conferred on it by the *Industrial Relations Act 1979* (WA), hereby orders –

- (1) THAT the proceedings be and are hereby re-opened.
 (2) THAT the one minute and 41 second CCTV footage referred to in the cross-examination of Mr Margjini in the proceedings at 159-161 of the transcript, annexed to the letter from Eureka Lawyers dated 24 March 2026, is tendered as exhibit A.
 (3) THAT should the parties wish to make further written submissions in relation to this evidence they should do so by no later than 8 April 2026.

By the Commission in Court Session

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2026 WAIRC 00164

**APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 9 OF 2024 GIVEN ON 15
AUGUST 2025**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION MYANDRAN SUBRAYAN	APPELLANT
	-v- LYNWOOD CHRISTIAN CHURCH	RESPONDENT
CORAM	FULL BENCH CHIEF COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL COMMISSIONER T KUCERA	
DATE	FRIDAY, 20 MARCH 2026	
FILE NO.	FBA 7 OF 2025	
CITATION NO.	2026 WAIRC 00164	

Result	Directions issued
Representation	
Appellant	No appearance
Respondent	Mr L Davies SC of counsel

Direction

THERE having been no appearance by the appellant and having heard Mr L Davies SC of counsel on behalf of the respondent, the Full Bench, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT the appeal be heard and determined on the papers.
- (2) THAT the matter of jurisdiction of the Commission at first instance to hear and determine the application by the respondent under s 27(1)(a) of the *Industrial Relations Act 1979* (WA) be the subject of further written submissions from the parties to be filed by no later than 3 April 2026.
- (3) THAT on receipt of the further written submissions the decision of the Full Bench on the appeal will be reserved.

By the Full Bench

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2026 WAIRC 00188

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2025

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES	GLENN ROBERT MACDONALD	APPELLANT
	-v- PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA	RESPONDENT
CORAM	THOMSON J	
DATE	MONDAY, 30 MARCH 2026	
FILE NO/S	IAC 1 OF 2026	
CITATION NO.	2026 WAIRC 00188	

Result Programming order issued

Order

1. Orders in terms of the notice of motion filed 27 March 2026 are granted, subject to order 2.
2. By 10 April 2026, in compliance with regulation 5(d) of the *Industrial Relations (WA Industrial Appeal Court) Regulations 1980* the appellant shall include in the electronic appeal book a list of the page numbers of the transcript of the proceedings at which reference is made to the subject matter of the appeal.

[L.S.]

(Sgd.) S KEMP,
Clerk of Court.

2026 WAIRC 00153

APPEAL AGAINST THE DECISION OF THE FULL BENCH IN FBA 5 OF 2025

WESTERN AUSTRALIAN INDUSTRIAL APPEAL COURT

PARTIES

GLENN ROBERT MACDONALD

APPELLANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT

CORAM

THOMSON J

DATE

TUESDAY, 17 MARCH 2026

FILE NO/S

IAC 1 OF 2026

CITATION NO.

2026 WAIRC 00153

Result Programming order issued

Order

1. The Court waives the requirement for the appellant to file hard copies of the appeal book.
2. The Court grants leave for the appellant to file the appeal book electronically as separate electronic documents.
3. The appellant serve a copy of the electronic appeal book on the respondent by **4 pm on 27 March 2026**.

[L.S.]

(Sgd.) S BASTIAN,
Clerk of Court.

2026 WAIRC 00166

REFERRAL OF A DECISION TO TAKE DISCIPLINARY ACTION ON 18 NOVEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THOMAS STAPLES

APPLICANT

-v-

THE DIRECTOR OF PUBLIC PROSECUTIONS AS THE EMPLOYING AUTHORITY OF THE
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (WA)

RESPONDENT

CORAM

SENIOR COMMISSIONER R COSENTINO

DATE

MONDAY, 23 MARCH 2026

FILE NO.

P 64 OF 2025

CITATION NO.

2026 WAIRC 00166

Result Directions issued

Representation

Applicant Mr S Pack of counsel on behalf of the applicant
Respondent Mr J Carroll of counsel on behalf of the respondent

Direction

HAVING heard Mr S Pack on behalf of the applicant, and Mr J Carroll 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. This order is not an order for discovery under reg 20 of the *Industrial Relations Commission Regulations 2005* (WA) and a party may apply for orders under that regulation;
- (2) THAT the parties file a statement of agreed facts and a bundle of agreed documents by no later than 13 April 2026;
- (3) THAT the applicant file and serve upon the respondent any outlines of witness evidence and any documents upon which he intends to rely (which are not contained in the bundle of agreed documents) by no later than 4 May 2026;
- (4) THAT the respondent file and serve upon the applicant any outlines of witness evidence and any documents upon which he intends to rely (which are not contained in the bundle of agreed documents) by no later than 25 May 2026;
- (5) THAT the applicant file and serve upon the respondent any reply outlines of witness evidence and any expert medical evidence by no later than 15 June 2026.
- (6) THAT the parties have liberty to apply at short notice.

(Sgd.) R COSENTINO,
Senior Commissioner.

[L.S.]

2026 WAIRC 00157

REFERRAL OF A DECISION TAKEN BY THE EMPLOYER ON 12 DECEMBER 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
GAIL MCKENZIE

PARTIES

APPLICANT

-v-

EAST METROPOLITAN HEALTH SERVICE

RESPONDENT

CORAM COMMISSIONER T EMMANUEL
DATE WEDNESDAY, 18 MARCH 2026
FILE NO/S P 67 OF 2025
CITATION NO. 2026 WAIRC 00157

Result Programming orders issued
Representation
Applicant On her own behalf
Respondent Ms S Walsh (of counsel)

Programming orders

HAVING heard from the applicant on her own behalf and Ms S Walsh (of counsel) 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 20 April 2026, the respondent file any materials on which it relies to support its Form 1A Application to Dismiss application P 67 of 2025 (**Application to Dismiss**), including any outlines of evidence, documents, and written submissions;
2. THAT by 4pm on 18 May 2026, the applicant file her responsive materials, including any outlines of evidence, documents, and written submissions, opposing the Application to Dismiss;
3. THAT by 4pm on 1 June 2026, the respondent file any reply submissions; and

4. THAT application P 67 of 2025 will be listed for a short hearing on a date to be fixed to determine the Application to Dismiss.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2026 WAIRC 00200

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KIRSTEN MENNELL

APPLICANT

-v-

THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE WEDNESDAY, 8 APRIL 2026
FILE NO. PRES 1 OF 2026
CITATION NO. 2026 WAIRC 00200

Result Directions issued
Representation
Applicant In person
Respondent Mr A Illich of counsel

Direction

This matter having come on for directions before me on 24 March 2025 and having heard from Ms K Mennell on her own behalf and Mr D Rafferty of counsel on behalf of the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), made directions ([2026] WAIRC 00171) (directions). By consent of the parties, the Chief Commissioner further directs –

- (1) THAT in par 1 of the directions the date of 7 April 2026 be deleted and in lieu therefore the date 16 April 2026 be inserted.
- (2) THAT in par 2 of the directions the date of 21 April 2026 be deleted and in lieu therefore the date 30 April 2026 be inserted.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2026 WAIRC 00171

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

KIRSTEN MENNELL

APPLICANT

-v-

THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE TUESDAY, 24 MARCH 2026
FILE NO/S PRES 1 OF 2026
CITATION NO. 2026 WAIRC 00171

Result Directions issued
Appearances
Applicant In person
Respondent Mr D Rafferty of counsel

Direction

This matter having come on for directions before me on 24 March 2026, and having heard from Ms K Mennell on her own behalf and Mr D Rafferty of counsel on behalf of the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT the applicant file an amended application by no later than 7 April 2026.
- (2) THAT the respondent file an amended response by no later than 21 April 2026.
- (3) THAT the application be re-listed for further directions on a date to be fixed.
- (4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2026 WAIRC 00172

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
 JANE-ANNE GARDNER

PARTIES

APPLICANT

-v-

AUSTRALIAN NURSING FEDERATION INDUSTRIAL WORKERS UNION PERTH

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE TUESDAY, 24 MARCH 2026
FILE NO/S PRES 2 OF 2026
CITATION NO. 2026 WAIRC 00172

Result Directions issued
Appearances
Applicant In person
Respondent Mr D Rafferty of counsel

Direction

This matter having come on for directions before me on 24 March 2026, and having heard from Ms J A Gardner on her own behalf and Mr D Rafferty of counsel on behalf of the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT the applicant file an amended application by no later than 7 April 2026.
- (2) THAT the respondent file an amended response by no later than 21 April 2026.
- (3) THAT the application be re-listed for further directions on a date to be fixed.
- (4) THAT the parties have liberty to apply on short notice.

(Sgd.) S J KENNER,
Chief Commissioner.

[L.S.]

2026 WAIRC 00182

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

REGISTRAR, WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

APPLICANT

-v-

THE AUSTRALIAN NURSING FEDERATION, INDUSTRIAL UNION OF WORKERS PERTH

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE FRIDAY, 27 MARCH 2026
FILE NO. PRES 3 OF 2026
CITATION NO. 2026 WAIRC 00182

Result Direction issued
Representation
Applicant Mr J Carroll of counsel
Respondent Mr D Rafferty of counsel

Direction

This matter having come on for directions before me on 27 March 2026, and having heard from Mr J Carroll of counsel on behalf of the applicant and Mr D Rafferty of counsel on behalf of the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby directs –

- (1) THAT at the hearing of this matter evidence in chief is to be given by affidavit.
- (2) THAT by 4.00 pm on 10 April 2026 the respondent is to file:
 - (a) a document setting out the orders it seeks; and
 - (b) any affidavits upon which it intends to rely.
- (3) THAT by 4.00 pm on 24 April 2026 the applicant is to file:
 - (a) any affidavits in reply; and
 - (b) an outline of written submissions upon which she intends to rely.
- (4) THAT by 4.00 pm on 8 May 2026 the respondent is to file an outline of written submissions upon which it intends to rely.
- (5) THAT the parties give written notice to one another of witnesses they require to attend at the proceedings for the purposes of cross-examination no later than three clear business days prior to the date of hearing.
- (6) THAT the matter is to be listed for hearing for one day on a date to be fixed not before 13 May 2026.
- (7) THAT the parties have liberty to apply on short notice.

[L.S.]

(Sgd.) S J KENNER,
Chief Commissioner.

2026 WAIRC 00184

ORDER PURSUANT TO S.66

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SCOTT ALEXANDER SULLEY

APPLICANT

-v-

WESTERN AUSTRALIAN POLICE UNION OF WORKERS

RESPONDENT

CORAM CHIEF COMMISSIONER S J KENNER
DATE FRIDAY, 27 MARCH 2026
FILE NO/S PRES 4 OF 2026
CITATION NO. 2026 WAIRC 00184

Result Order issued
Appearances
Applicant In person
Respondent Mr N Morrison of counsel

Order

This matter having come on for directions before me on 27 March 2026, and having heard from Mr S Sulley on his own behalf and Mr N Morrison of counsel on behalf of the respondent, the Chief Commissioner, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the matter be and is hereby adjourned for 21 days.

[L.S.]

(Sgd.) S J KENNER,
 Chief Commissioner.

2026 WAIRC 00161

DISPUTE RE ALLEGED CONTRAVENTION OF THE OWNER-DRIVERS (CONTRACTS AND DISPUTES) ACT 2007

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES JOONDALUP TRANSPORT PTY LTD

APPLICANT

-v-

ONSITE RENTAL GROUP OPERATIONS PTY LTD

RESPONDENT

CORAM COMMISSIONER T KUCERA
DATE THURSDAY, 19 MARCH 2026
FILE NO/S RFT 1 OF 2025
CITATION NO. 2026 WAIRC 00161

Result Order issued
Representation
Applicant Melissa Gillespie (of counsel)
Respondent 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 Industry Tribunal, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA) hereby orders by consent –

1. THAT the applicant is to file any responsive witness statements in the manner required by Practice Note 9 of 2021 by Thursday, 16 April 2026.
2. THAT the respondent is to file any responsive witness statements in the manner required by Practice Note 9 of 2021 by Thursday, 14 May 2026.
3. THAT the applicant is to file outlines of opening submission by Thursday, 28 May 2026.
4. THAT the respondent is to file outlines of opening submission by Thursday, 28 May 2026.
5. THAT the matter be listed for a five-day hearing not before Thursday, 28 May 2026.
6. THAT there be liberty to apply.

[L.S.]

(Sgd.) T KUCERA,
 Commissioner.

2026 WAIRC 00183

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

YUNG PETER NAGON

APPLICANT

-v-

WA COUNTRY HEALTH SERVICE AND OTHERS

RESPONDENTS

CORAM COMMISSIONER T KUCERA
DATE FRIDAY, 27 MARCH 2026
FILE NO/S S 2 OF 2026
CITATION NO. 2026 WAIRC 00183

Result Order issued
Representation
Applicant Mr Yung Peter Nagon
Respondents Mr Dylan Botica
Ms Swagata Ghosal

Order

HAVING heard from Mr Y Nagon on behalf of the applicant and Mr D Botica and with him Ms S Ghosal on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders -

1. THAT the applicant is to file his witness outlines and any documents on which he intends to rely, in the manner required by Practice Note 9 of 2021 by Friday, 17 April 2026.
2. THAT the respondents are to file their witness outlines and any documents on which they intend to rely, in the manner required by Practice Note 9 of 2021 by Friday, 8 May 2026.
3. THAT the parties are to provide their unavailable dates by Monday, 30 March 2026.
4. THAT the matter is to be listed for a directions hearing via video-link not before Friday, 8 May 2026.
5. THAT the matter is to be listed for a two-day hearing on a date to be fixed.
6. THAT there be liberty to apply.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2026 WAIRC 00181

STOP BULLYING ORDER

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

YUNG PETER NAGON

APPLICANT

-v-

WA COUNTRY HEALTH SERVICE GREAT SOUTHERN AND OTHERS

RESPONDENTS

CORAM COMMISSIONER T KUCERA
DATE FRIDAY, 27 MARCH 2026
FILE NO/S S 2 OF 2026
CITATION NO. 2026 WAIRC 00181

Result Order issued
Representation
Applicant Mr Yung Peter Nagon
Respondents Mr Dylan Botica

Ms Swagata Ghosal

Order

HAVING heard from Mr Y Nagon on behalf of the applicant and Mr D Botica and with him Ms S Ghosal on behalf of the respondents, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the name of the first respondent to the application ‘WA Country Health Service Great Southern’ be deleted and substituted with ‘WA Country Health Service’.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

2026 WAIRC 00191

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SHANE BASHAM

APPLICANT

-v-

DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

COMMISSIONER C TSANG

DATE

WEDNESDAY, 1 APRIL 2026

FILE NO.

U 7 OF 2026

CITATION NO.

2026 WAIRC 00191

Result

Order issued correcting name of respondent

Representation

Applicant

Mr T Lethbridge (of counsel)

Respondent

Ms H Ticehurst (of counsel)

Order

HAVING heard from Mr T Lethbridge (of counsel) on behalf of the 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 orders –

THAT the name of the respondent to the application ‘Department of Education’ be deleted and substituted with ‘Director General, Department of Education’.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

2026 WAIRC 00180

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SHANE BASHAM

APPLICANT

-v-

DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

COMMISSIONER C TSANG

DATE

THURSDAY, 26 MARCH 2026

FILE NO.

U 7 OF 2026

CITATION NO.

2026 WAIRC 00180

Result	Direction issued
Representation	
Applicant	Mr T Lethbridge (of counsel)
Respondent	Ms H Ticehurst (of counsel)

Direction

HAVING heard from Mr T Lethbridge (of counsel) on behalf of the 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 the parties file **by Thursday, 23 April 2026**:
 - (a) An agreed statement that identifies:
 - (i) The agreed facts.
 - (ii) The agreed issues that are to be determined at the hearing of this matter.
 - (iii) The agreed legal principles applicable to the issues at 1(a)(ii) above.
 - (b) A bundle of agreed documents.
2. THAT the applicant file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Thursday, 21 May 2026**.
3. THAT the respondent file any outlines of witness evidence and documents (other than those in the bundle of agreed documents) **by Thursday, 18 June 2026**;
4. THAT the applicant file an outline of legal submissions **by Thursday, 9 July 2026**.
5. THAT the respondent file an outline of legal submissions **by Thursday, 23 July 2026**.
6. THAT the matter be listed for a 4-day hearing not before **Thursday, 30 July 2026**.
7. THAT the parties have liberty to apply.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

2026 WAIRC 00147

UNFAIR DISMISSAL APPLICATION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ZLATKO TODOROVSKI

PARTIES

APPLICANT

-v-

MAIN ROADS WESTERN AUSTRALIA

RESPONDENT

CORAM	COMMISSIONER T KUCERA
DATE	FRIDAY, 13 MARCH 2026
FILE NO/S	U 138 OF 2025
CITATION NO.	2026 WAIRC 00147

Result	Order
Representation	
Applicant	Mr Z Todorovski
Respondent	Mr M McIlwaine (of counsel)

Order

HAVING heard from Mr Z Todorovski 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 orders –

1. THAT the applicant is to file any witness outlines in the manner required by Practice Note 9 of 2021, by Friday 10 April 2026.
2. THAT the respondent is to file any witness outlines in the manner required by Practice Note 9 of 2021, by Friday 8 May 2026.
3. THAT there be liberty to apply.

[L.S.]

(Sgd.) T KUCERA,
Commissioner.

INDUSTRIAL AGREEMENTS—Notation of—

Agreement Name/Number	Date of Registration	Parties		Commissioner	Result
Building and Engineering Trades (Government) Agreement 2025 AG 5/2026	31/03/2026	Commissioner of Police, WA Police, Director General, Department of Primary Industries and Regional Development, Director General, Department of Biodiversity, Conservation and Attractions, Chief Executive Officer, Zoological Parks Authority	The Construction, Forestry, Mining and Energy Union of Workers, The Plumbers and Gasfitters Employees' Union of Australia, West Australian Branch, Industrial Union of Workers, The Automotive, Food, Metals, Engineering, Printing & Kindred Industries – Western Australian Branch, Electrical Trades Union WA	Commissioner T Kucera	Agreement Registered
Mindarie Regional Council Industrial Agreement 2025 AG 3/2026	12/03/2026	Mindarie Regional Council - Tamala Park Waste Facility	Western Australian Municipal, Administrative, Clerical and Services Union	Senior Commissioner R Cosentino	Agreement registered
Shire of Yalgoo Union Industrial Agreement 2024 AG 4/2026	16/03/2026	Shire of Yalgoo	Western Australian Municipal, Administrative, Clerical and Services Union of Employees	Senior Commissioner R Cosentino	Agreement Registered

INDUSTRIAL AGREEMENTS—BARGAINING—Matters dealt with—

2026 WAIRC 00142

APPLICATION FOR DECLARATION THAT BARGAINING HAS ENDED

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

UNITED PROFESSIONAL FIREFIGHTERS UNION OF WESTERN AUSTRALIA

APPLICANT

-v-

DEPARTMENT OF FIRE AND EMERGENCY SERVICES

RESPONDENT

CORAM

COMMISSIONER T B WALKINGTON

DATE

FRIDAY, 13 MARCH 2026

FILE NO.

APPL 11 OF 2026

CITATION NO.

2026 WAIRC 00142

Result Declaration issued

Representation

Applicant Mr C Fogliani (of counsel)

Respondent Mr J Carroll (of counsel)

Declaration

WHEREAS on or around February 2025, the United Professional Firefighters Union of Western Australia (**applicant**) and the Department of Fire and Emergency Services (**respondent**) commenced informal bargaining for a replacement industrial agreement to replace the *Western Australian Fire Service Enterprise Bargaining Agreement 2023 (2023 Agreement)*;

AND WHEREAS on 11 July 2025, the respondent provided the applicant with a first offer to replace the 2023 Agreement;

AND WHEREAS on 15 July 2025, the applicant advised the respondent that it had rejected the respondent's first offer;

AND WHEREAS on 25 July 2025, the applicant responded to the offer with its first counteroffer;

AND WHEREAS on 17 September 2025, the respondent presented its second offer to the applicant by way of a counteroffer. In this offer, the respondent noted that this was their 'final offer';

AND WHEREAS on 1 October 2025, the respondent issued the applicant a revised second offer;
 AND WHEREAS on 1 October 2025, the respondent initiated good faith bargaining pursuant to s 42 of the *Industrial Relations Act 1979* (WA) (**IR Act**) for the purpose of commencing formal negotiations for a replacement industrial agreement;
 AND WHEREAS on 21 October 2025, the applicant formally responded to the initiation of bargaining, advising that they would commence bargaining pursuant to s 42A of the IR Act;
 AND WHEREAS on 23 October 2025, the respondent filed an application pursuant to s 42E of the IR Act, seeking the Commission's assistance in bargaining for a replacement industrial agreement;
 AND WHEREAS the applicant rejected the respondent's offer made on 1 October 2025 by way of a ballot of the applicant's members, and the respondent was informed of the rejection on 6 November 2025;
 AND WHEREAS the Commission convened conferences on 31 October 2025, 10 November 2025, 13 November 2025, 25 November 2025, 11 December 2025, and 18 December 2025 for the purposes of assisting the parties in reaching agreement;
 AND WHEREAS on 16 December 2025, the applicant made a second offer to the respondent;
 AND WHEREAS on 22 December 2025, the respondent rejected the applicant's second offer;
 AND WHEREAS 22 bargaining meetings were held between the parties from 20 February 2025 to 21 January 2026;
 AND WHEREAS on 10 February 2026, the applicant filed an application seeking a declaration that bargaining has ended pursuant to s 42H of the IR Act;

AND WHEREAS the test for the Commission to apply pursuant to s 42H(1) of the IR Act is that:

- (a) the applicant has bargained in good faith;
- (b) bargaining between the applicant and another negotiating party has failed; and
- (c) there is no reasonable prospect of the negotiating parties reaching an agreement;

AND WHEREAS the applicant submits that they have bargained in good faith, bargaining between the negotiating parties has failed and the parties say there is no reasonable prospect of reaching an agreement;

AND WHEREAS the respondent has indicated that its second offer issued on 1 October 2025, represented the maximum financial parameters that it was willing to provide the applicant, and the applicant rejected this offer;

AND WHEREAS the Commission has considered the application, the response and the statement of agreed facts and bundle of documents filed by the parties on 11 March 2026;

AND WHEREAS after considering the parties' respective positions, the Commission is satisfied:

- (a) The applicant has bargained in good faith;
- (b) Bargaining between the applicant and the respondent has failed; and
- (c) There is no reasonable prospect of the parties reaching an agreement.

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

THAT bargaining for a replacement industrial agreement between the United Professional Firefighters Union of Western Australia and the Department of Fire and Emergency Services, has ended.

(Sgd.) T B WALKINGTON,
 Commissioner.

[L.S.]

PUBLIC SERVICE APPEAL BOARD—

2026 WAIRC 00155

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 6 MARCH 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2026 WAIRC 00155
CORAM	:	PUBLIC SERVICE APPEAL BOARD COMMISSIONER T B WALKINGTON - CHAIRPERSON MR M HAYMAN - BOARD MEMBER MR B HAWKINS - BOARD MEMBER
HEARD	:	ON THE PAPERS
DELIVERED	:	WEDNESDAY, 18 MARCH 2026
FILE NO.	:	PSAB 21 OF 2024
BETWEEN	:	JORG ARNO NOTTLE Appellant AND DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE Respondent

CatchWords	:	Industrial Law (W.A) - Public Service Appeal Board - Appeal against decision to terminate employment - Application for discovery Whether documents sought are necessary to the fair disposal of the appeal - Whether it would be 'just' to make the order sought by the appellant - Relevant principles applied - Application for discovery refused
Legislation	:	<i>Industrial Relations Act 1979</i> (WA)
Result	:	Order Issued
Representation:		
Appellant	:	Mr M Gutzinger (of counsel)
Respondent	:	Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

Compagnie Financiere Du Pacifique v Peruvian Guano Co (1882) 11 QBD 55

Ellis v The Grand Lodge of WA of Antient Free and Accepted Masons Incorporated and Others (1998) 79 WAIG 1736

Ellis v The Grand Lodge of WA of Antient and Free Accepted Masons Incorporated and Others (1999) 79 WAIG 1723

Millward v Chief Executive, North Metropolitan Health Service [2021] WAIRC 00152; (2021) 101 WAIG 414

Mulvey v Manifold [1959] HCA 23; (1959) 103 CLR 341

Reasons for Decision

- 1 Mr Jorg Arno Nottle (**appellant**) applies to the Public Service Appeal Board (**Board**) for orders that the Director General of the Department of Justice (**respondent**) provide all employment records relating to the employment of the appellant. The appellant seeks six categories of documents:
 - (1) Personal file, including any records related to his application, hiring, promotion, compensation, benefits, and termination (**Category One**).
 - (2) Performance evaluations, including email correspondence, any records related to his job performance, attendance, punctuality, and conduct (**Category Two**).
 - (3) Disciplinary records, including any records including email correspondence, related to any investigations, warnings, suspensions, or terminations (**Category Three**).
 - (4) All records, evidence of service or notification of matters raised in preceding paragraphs (2) and (3). Including proof of service of any extension notice of probationary periods (**Category Four**).
 - (5) Payroll records, including any records related to his compensation, hours worked, and overtime (**Category Five**).
 - (6) Training records, including any records related to any training or certifications received by Jorg Arno Nottle (**Category Six**).
- 2 The respondent opposes the orders sought.
- 3 Section 27(1)(o) of the *Industrial Relations Act 1979* (WA) (**IR Act**) provides that the Board has the power to 'make such orders as may be just' with respect to, amongst other things, the 'discovery, inspection, or production of documents'.
- 4 The appellant submits the relevant principles to be adopted by the Board in matters concerning discovery are set out in *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801 (*Burswood*) and *Ellis v The Grand Lodge of WA of Antient and Free Accepted Masons Incorporated and Others* (1999) 79 WAIG 1723. The Board notes that the latter case cited by the appellant in their written submissions, concerns the respondent's interlocutory application for the substantive matter to be dismissed, or alternatively adjourned because the applicant had failed to comply with an earlier consent order of the Commission for discovery and production of documents.
- 5 By s 80L(1) of the former IR Act, s 27 of the IR Act applies to the exercise of jurisdiction of the Board.
- 6 In *Millward v Chief Executive, North Metropolitan Health Service* [2021] WAIRC 00152; (2021) 101 WAIG 414 at [7], the Board, citing *Burswood*, sets out the principles to be applied to matters concerning discovery:

Discovery is confined to what is in issue on the pleadings. The Board can only make an order for discovery under s 27(1)(o) of the *Industrial Relations Act 1979* (WA) if it is just to do so and necessary for the fair disposal of the case. "Just" means "right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right": *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v The Western Australian Hotels and Hospitality Association Incorporated and Burswood Resort Hotel & others* at 1805 [7].
- 7 The appellant seeks several 'classes' or 'categories' of documents. The principles to be applied in these instances are set out by Kenner C (as he then was) in *Ellis v The Grand Lodge of WA of Antient Free and Accepted Masons Incorporated and Others* (1998) 79 WAIG 1736 (*Ellis*) at (1736 - 1737):

Relevant Principles Regarding Discovery

In the context of discussing the relevant principles, it should be observed that these applications are not for a general order for discovery of documents. As noted above, the parties by consent have already provided discovery to one another by way of informal list. The present proceedings relate to applications for further and better discovery of particular

documents or classes of documents. However, notwithstanding this, in my opinion, the relevant principles in this jurisdiction applicable to an application for general discovery pursuant to s 27(1)(o) of the Act apply. Discovery is not available as of right in this jurisdiction and it is for a party making an application for an order pursuant to s 27(1)(o) to establish that it would be just for such an order to be made: *ALHMWU v Burswood Resort Management (Ltd)* (1995) 75 WAIG 1801. In *Burswood* (supra) it was observed at 1805 –

“The Commission may therefore only make an order if such order is just (see *Springdale Comfort Pty Ltd t/a Dalfield Homes v BTA* (op cit)(IAC)).

s 26(1)(a) of the Act would not seem to be excluded from operation by the words of s 27 (1)(o) but we do not think it alters the questions to be asked and answered under s 27(1)(o).

It is for the applicant for an order under s 27(1)(o), to establish that is just for such an order to be made. The expression “just” means “right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right”. See *Loxton v Ryan* (1921) State Reports (Qld) 79 at 84, 88 per Lukin J”. Perhaps more appositely in *Smith’s Weekly Publishing Co Ltd v Sunday Times Newspaper Co Ltd* (op cit), which was a case relating to discovery of documents, Isaacs and Rich JJ at page 562 held that “just” means “just according to law”.

In the event that the discretion to order discovery is exercised, general principles require the provision by one party to the other of a list of documents, which may be verified by affidavit, which are or have been in a party’s possession, custody or power relating to any matter in question in the proceedings. A classic statement as to whether a document relates to a matter in question, is contained in the judgment of Brett LJ in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 where he observed at 63–

“It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly” because, as it seems to me, a document can properly said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences”.

The case of *Board v Thomas Hedley & Co Ltd* (1951) 2 All ER 431 is authority for the proposition that the net is to be cast broadly in relation to determining what documents are discoverable based upon the matters in question in the action. To determine whether a document may fairly lead to a train of inquiry relevant to a matter in question, regard is to be had to the pleadings in civil litigation. In this case, regard should be had to the particulars of claim and the amended notice of answer and counter proposal: *Mulley v Manifold* (1959) 103 CLR 341 at 345 (1736 – 1737).

- 8 Following the principles set out above, the Board must ascertain the key issue/s in this appeal. The appellant must establish that the documents are relevant to the issue/s and that it is just for the orders to be made.
- 9 The appellant submits the issues that the Board must decide are:
 - (a) Whether the respondent had the power to terminate retrospectively because the respondent applied the assessment of suitability for employees on probation in circumstances where the appellant says he was no longer on probation.
 - (b) Whether the allegations concerning the appellants behaviour justified the termination of employment.
 - (c) Whether the payment in lieu of notice was correct.
- 10 The respondent contends that the question of whether the appellant’s behaviour justified the termination of employment, does not arise in the appellant’s notice of appeal filed on 13 August 2024.
- 11 The Board understands the key issues to be determined in the appeal are whether the appellant was engaged on an extended period of probation, or whether the appellant’s period of probation had concluded and therefore the appellant was an ongoing employee. Secondly, in either circumstance of being a probationary employee or an ongoing employee, whether it was unfair for the respondent to terminate the appellant’s employment.
- 12 The Board has considered the submissions of the appellant and respondent as follows.
- 13 Category One comprises the appellant’s ‘personal file, including any records related to his application, hiring, promotion, compensation, benefits, and termination’. The appellant submits these records are relevant because they deal with matters in issue.
- 14 The respondent says the appellant has not explained the relevance of the documents sought, other than a ‘bald assertion’ that they deal with the matters in issue. The respondent submits this is not sufficient and the appellant will need to be more precise to identify the documents that may be discoverable.
- 15 Category Two comprises all documents concerning ‘performance evaluations, including email correspondence, any records related to his job performance attendance punctuality and conduct’. The appellant described these documents as containing allegations of the appellant’s alleged display of dismissive, aggressive and belligerent attitude and submits documents of this kind should be produced and are in fact relevant to the matters in issue. The appellant submits it would be unjust to deny access to these documents, which would be considered for the preparation of his evidence.
- 16 The respondent says this category of documents does not arise in the notice of appeal.
- 17 Category Three comprises ‘Disciplinary records, including any records including email correspondence related to any investigation warnings suspensions or terminations’. The appellant submits these documents are relevant to the appeal and it would be particularly unjust to deny the appellant to these documents including documents taken into consideration by the decision maker to terminate his employment.
- 18 The respondent says this category of documents does not arise in the notice of appeal.

- 19 Category Four comprises ‘All records, evidence of service or notification of matters raised in ... paragraphs two and three including proof of service of any extension notice of the probationary periods’. The appellant asserts that whilst the respondent in their response filed on 28 August 2024 says the appellant may not have been provided with notification that his probation was extended, it is nevertheless unclear whether the respondent accepts, denies, or otherwise does or does not admit this issue. The respondent suggests that this concern is immaterial to the issue of suitability. However, the appellant contends that the suitability issue arose from allegations regarding his alleged performance during the probationary period in the termination letter. The appellant comments that it is unclear whether this is an issue for the respondent. The appellant notes that an issue arises as to whether seven days was a suitable period to respond considering the respondent’s serious allegations, and that the documents under Category Four would be relevant to this matter.
- 20 The respondent says this category of documents does not arise in the notice of appeal.
- 21 Category Five comprises ‘payroll records, including related to his compensation, hours worked and overtime’. In support of discovery orders, the appellant says he has a right to inspect his employment payment records and whilst the appellant seeks reinstatement, the appellant should still be entitled to inspect payments made by the respondent.
- 22 The respondent says the appellant has not explained how the documents are relevant to the issue/s in this matter. The respondent submits that the appellant’s application is for discovery and not an application to inspect records under the IR Act. The respondent says the rights to inspect conferred under the IR Act is irrelevant to this application.
- 23 Category Six comprises ‘Training records including any records related to any training or certificate received by Jorg Arno Nottle’. The appellant says that he received his CSC30122 Certificate III in Correctional Practice on or about 18 March 2024.
- 24 The respondent says the appellant has not explained the relevance of these documents to the matter in issue.

Conclusion and Determination

- 25 The Board’s view is that the key issues in this appeal are whether it was fair for the respondent to terminate the appellant’s employment because he was considered unsuitable. A further issue the Board must also decide is whether, in fact, the appellant’s probationary period has been extended.
- 26 In the Board’s view, the appellant has failed to explain how the documents sought will assist the Board in making our determination of the issues arising from the notice of appeal. The appellant asserts the documents are either relevant and it would be unjust or particularly unjust to not order the discovery of the documents sought. However, other than the broad statement that the documents are relevant, the appellant has not adequately set out the relevance of the documents to the issue/s in the appeal and how the production, and consideration of the documents, will assist in determining the issue/s.
- 27 The appellant’s application for discovery filed on 7 October 2025, is supported by a general statement to the effect that all documents concerning the appellant’s employment are relevant and therefore ought to be discovered. The Board considers this does not adequately satisfy the need to set out how the documents sought are necessary for the fair disposal of the appeal.
- 28 The Board has assessed the documents sought in accordance with the test in *Compagnie Financiere Du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at [63], *Mulley v Manifold* [1959] HCA 23; (1959) 103 CLR 341. That is, documents are relevant when the documents sought advance a parties’ case, damage their opponent’s case, or lead to a train of inquiry that can do either.
- 29 The Board considers any documents in Category Four relevant to the service and/or receipt of the notification of the appellant’s extension of probation, may be relevant to the appeal. However, the respondent submits that they do not have any such records. As such, the Board cannot make an order for discovery, inspection or production of documents that do not exist.
- 30 In the absence of any supporting rationale for the relevance of the documents sought by the appellant in the other categories, the Board will decline the application.

2026 WAIRC 00156

APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 6 MARCH 2024

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JORG ARNO NOTTLE

APPELLANT

-v-

DIRECTOR GENERAL OF THE DEPARTMENT OF JUSTICE

RESPONDENT

CORAM

PUBLIC SERVICE APPEAL BOARD

COMMISSIONER T B WALKINGTON - CHAIRPERSON

MR M HAYMAN - BOARD MEMBER

MR B HAWKINS - BOARD MEMBER

DATE

WEDNESDAY, 18 MARCH 2026

FILE NO

PSAB 21 OF 2024

CITATION NO.

2026 WAIRC 00156

Result

Order Issued

Representation

Appellant Mr M Gutzinger (of counsel)
Respondent Mr J Carroll (of counsel)

Order

HAVING heard from Mr M Gutzinger of counsel on behalf of the appellant and Mr J Carroll of counsel on behalf of the respondent, the Public Service Appeal Board, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT the appellant’s application for discovery be, and is hereby dismissed.

(Sgd.) T B WALKINGTON,
 Commissioner,

[L.S.]

On behalf of the Public Service Appeal Board.

PUBLIC SECTOR INDUSTRIAL MATTERS—Matters dealt with

2026 WAIRC 00158

REFERRAL OF A DECISION TO TAKE DISCIPLINARY ACTION ON 20 JUNE 2025

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2026 WAIRC 00158
CORAM	:	COMMISSIONER T EMMANUEL
HEARD	:	WEDNESDAY, 3 FEBRUARY 2026
DELIVERED	:	WEDNESDAY, 18 MARCH 2026
FILE NO.	:	P 19 OF 2025
BETWEEN	:	RICHARD DETURT
		Applicant
		AND
		CEO, EAST METROPOLITAN HEALTH SERVICE
		Respondent

CatchWords	:	Industrial law (WA) – Breach of discipline – Whether dismissal was harsh, oppressive or unfair – De novo hearing – Employee engaged in alleged conduct – Conduct amounted to a breach of discipline – Employer’s right to dismiss employee exercised lawfully – Dismissal a fair and proportionate response – Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) s 29(1)(j) <i>Health Services Act 2016</i> (WA) s 171(1)(b)
Result	:	Application dismissed
Representation:		
Applicant	:	On his own behalf
Respondent	:	Mr J Carroll (of counsel)

Case(s) referred to in reasons:

Director General of the Department of Education v Guretti [2014] WAIRC 00074; (2014) 94 WAIG 425

Harvey v Commissioner for Corrections, Department of Corrective Services [2017] WAIRC 00728; (2017) 97 WAIG 1525

Miles & Ors t/a Undercliffe Nursing Home v The Federated Miscellaneous Workers’ Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Reasons for Decision

- 1 Mr Deturt was dismissed from his role as a handyman at the East Metropolitan Health Service (**Health Service**) after his employer found he engaged in a breach of discipline. Mr Deturt says the dismissal was harsh, oppressive and unjust. He asks the Commission to reinstate him.
- 2 The Health Service says its finding that Mr Deturt committed the breach of discipline was reasonably open and dismissal was a fair response in the circumstances.
- 3 Although Mr Deturt has a range of concerns about his treatment in the workplace, the way his workplace operates and the Health Service’s conduct generally, Mr Deturt’s dismissal and this decision are not about that. The Health Service dismissed

Mr Deturt because of the seriousness of the breach of discipline that it found he engaged in when he broadcast serious, untested allegations affecting a range of Health Service staff to a long list of staff and other senior people outside the Health Service.

Questions to be answered

- 4 The Commission must decide whether Mr Deturt was unfairly dismissed. In the circumstances of this case, that involves deciding:
 - a. Did Mr Deturt engage in the alleged conduct?;
 - b. If so, did the conduct amount to a breach of discipline?; and
 - c. If so, was dismissal harsh, oppressive or unfair?

Legal framework

- 5 Section 29(1)(j) of the *Industrial Relations Act 1979* (WA), read with s 171(1)(b) of the *Health Services Act 2016* (WA), give Mr Deturt a right to refer to the Commission the Health Service's decision to take disciplinary action against him.
- 6 Given Mr Deturt disputes that he engaged in a breach of discipline as alleged, his referral proceeds as a de novo hearing: *Director General of the Department of Education v Guretti* [2014] WAIRC 00074; (2014) 94 WAIG 425. Procedural defects can be cured by the Commission's de novo hearing: *Harvey v Commissioner for Corrections, Department of Corrective Services* [2017] WAIRC 00728; (2017) 97 WAIG 1525 at [66].

Background

- 7 On 4 February 2025 Mr Deturt sent an email to 14 Health Service employees, (including the Chief Executive) and copying in the Director General, WorkSafe, the Public Sector Commission, the then Health Minister and the then Leader of the Opposition, with the subject line 'EMHS – A new year. A new start' (**4 February Email**).
- 8 On 14 April 2025 the Health Service wrote to Mr Deturt outlining seven of breach of discipline allegations.
- 9 On 10 June 2025 the Health Service wrote to Mr Deturt proposing to find allegations 1, 3, 4 and 5 unsubstantiated and to not treat allegations 2 and 6 as disciplinary matters. The Health Service proposed to substantiate allegation 7.
- 10 The effect of allegation 7 is that by sending the 4 February Email, Mr Deturt engaged in a breach of discipline.
- 11 Allegation 7 is:

It is alleged that on the 4 February 2025, you breached the WA Health Code of Conduct – Principals [sic] 1 and 3, when you sent an email to Denver Prince, Judy Brand, Graeme Edwards and Denzil Padua and included 10 other EMHS staff and other agencies external to EMHS. (**Allegation 7**)
- 12 The Health Service proposed to substantiate Allegation 7 and to dismiss Mr Deturt with the payment of four weeks' notice in lieu.
- 13 On 16 June 2025 Mr Deturt responded to the Health Service's proposal.
- 14 On 20 June 2025 the Health Service wrote to Mr Deturt, confirming its proposed findings and disciplinary action and dismissing Mr Deturt effective that day with the payment of four weeks' notice in lieu.

The hearing

- 15 This matter was heard at an in person hearing after the parties had an opportunity to file the materials they relied on. I have carefully considered all of the material before the Commission.
- 16 At the hearing, Mr Deturt confirmed that he did not press his discovery application.
- 17 Mr Ben Noteboom gave evidence for the Health Service. He presented as an honest, credible witness. His evidence was not disturbed in cross-examination and I accept his evidence.
- 18 Mr Deturt gave evidence on his own behalf. He eventually made some concessions. He did not make many other concessions that were very obviously due. Below from [25] - [29] and [32] - [33], I describe some examples of this. This was an unusual case, in that broadly I was left with the impression that Mr Deturt was telling the truth, and describing events and matters as he perceives them. Overall I find that Mr Deturt honestly held the views he expressed, notwithstanding that often they were without foundation or did not reflect the reality of the situation.

Did Mr Deturt engage in the alleged conduct?

- 19 Mr Deturt agrees he sent the 4 February Email. The dispute is about whether the 4 February Email amounts to a breach of discipline.
- 20 Mr Deturt addressed or copied the 4 February Email to:
 - a. the Acting Director of Nursing at Armadale-Kalamunda Hospital;
 - b. the Acting Coordinator of Nursing at Armadale-Kalamunda Hospital;
 - c. the Campus Manager of Armadale-Kalamunda Hospital Facilities Management;
 - d. the Supervisor of Armadale-Kalamunda Hospital Facilities Management;
 - e. the Chief Executive of the Health Service;
 - f. the Acting Executive Director of the Royal Perth Bentley Group;
 - g. an industrial relations consultant who worked for the Health Service;

- h. the Director of People and Culture at the Health Service;
 - i. the Director of Work Health and Safety at the Health Service;
 - j. the Director of Human Resources at the Health Service;
 - k. the Executive Director of the Armadale-Kalamunda Group;
 - l. the Health Service Area Director Facilities Management;
 - m. the Facilities Management Director Royal Perth Bentley Group;
 - n. the Facilities Management Manager of Bentley Health Services;
 - o. the Director General's office;
 - p. WorkSafe WA;
 - q. the Public Sector Commission Minor Misconduct Reporting email address;
 - r. the Minister for Health; and
 - s. the Leader of the Liberal Party.
- 21 Plainly Mr Deturt engaged in the alleged conduct. The dispute is about whether the 4 February Email amounts to a breach of discipline, and if it does, whether the dismissal was harsh, oppressive or unjust.
- Did the conduct amount to a breach of discipline?**
- 22 Mr Noteboom gave evidence that he honestly held the concerns set out in his email to Dr Lesley Bennett and Ms Christine Thompson dated 4 February 2025. Specifically Mr Noteboom was concerned about the content and nature of Mr Deturt's email, and the people who were copied into that email, being a number of staff within the Health Service and also external parties:
- I - I recall writing this. I didn't write it lightly, and I think I, um, gave it, you know, consideration before I just fired off an email at the time, um, to try and present a - a clear and, you know, considered view around my concerns.
- 23 The inferences Mr Noteboom made about the people and roles referred to in the 4 February Email are the obvious inferences a reasonable person would make.
- 24 In effect Mr Deturt argues that the 4 February Email was acceptable and sending it does not amount to a breach of discipline. He says it was truthful, consistent with the Code of Conduct (**Code**) and intended to promote positive working relationships.
- 25 I have concerns about Mr Deturt's reluctance in cross-examination to make concessions that were obviously due. This reflects poorly on him. For example, Mr Deturt would not agree that his email to Mr England was not respectful of Mr England, even though he agreed that his email copied in ten colleagues and told Mr England that his presentation was uninspiring, lacked any real interest, implied he was a conman and was 'the pied piper with the gift of the gab'. Mr Deturt had to be asked several times before he would admit that he was being critical of Mr England. He would not agree that his email was disrespectful.
- 26 Mr Deturt had to be asked four times before he would agree that his email reference to the FM Manager was a reference to Mr Peter Carrick. Mr Deturt would not agree:
- a. that the 4 February Email breached the 2023 direction he was given by Mr Jones (see [48] below). Mr Deturt said that he believed he could act inconsistently with Mr Jones' direction because it was not valid, because the direction was inconsistent with the Code; and
 - b. that the tone and content of his email was a disrespectful way to communicate with colleagues in the workplace.
- 27 Mr Deturt would not agree that a person reading his email would understand his reference to FM Manager to be Mr Carrick. He said he did not know if it would have been possible for those reading the email to identify that his email was about Mr Carrick and Mr England, despite Mr Deturt previously having raised concerns about Mr Carrick and Mr England to some of the recipients of the email.
- 28 Mr Deturt would not agree that:
- a. he wanted to 'throw as much mud on as many people' as he could;
 - b. the 4 February Email breached Mr Jones' April 2023 direction; and
 - c. the tone and content of his email was disrespectful.
- 29 The effect of Mr Deturt's evidence was that if an email contains the truth as far as he sees it, it could never be inappropriate.
- 30 I cannot accept Mr Deturt's submissions, in particular his argument that the 4 February Email:
- i. was warranted because of the intention within its truthful content to sustain the relevant Values and Principles of the EMHS Code of Conduct for EMHS and the staff;
 - ii. did not breach the Values and Principles of the EMHS Code of Conduct;
 - iii. did not identify any individual (other than addressees) within the truthful content of that email;
 - iv. did not publicly defame any particular individual (by ensuring anonymity within the truthful content);
 - v. provided truthful accounts and circumstances of workplace relationships within EMHS;
 - vi. offered forgiveness to the individuals mentioned in those harmful, truthful accounts and circumstances;
 - vii. offered everyone the opportunity for healthy workplace relationships and a positive way forward for the future;

- viii. was appropriately addressed to relevant persons because of the importance of its content, and the overlapping involvement and responsibilities of the addressees in the circumstances and events mentioned within that email;
 - ix. at all times followed due processes for raising awareness of the truthful content within that email; and
 - x. led to further confirmation of the victimisation of the applicant by EMHS management through more allegations against the applicant being issued, and the culminated unfair, harsh, and oppressive dismissal of the applicant.
- 31 Mr Deturt's evidence was that he needed to write the 4 February Email so that he could move forward. He does not believe he breached any aspect of the Code. Mr Deturt said he tried to 'keep any identifications of those persons out of that email'. In essence, Mr Deturt said he sent the email so that everyone could 'recognise the circumstances of the past', learn from that and move forward.
- 32 Despite Mr Deturt's attempts to characterise the 4 February Email in a different light, eventually Mr Deturt conceded in cross-examination that the 4 February Email:
- a. was not raising a complaint or a concern but contains a number of bare assertions of serious misconduct by senior management;
 - b. criticises the Health Service's senior management and alleges that certain senior management staff have treated him with contempt;
 - c. suggests the Health Service was using bullying as a management tool against Mr Deturt and others;
 - d. suggests two of the recipients of his email have victimised him since 2021;
 - e. was referring to the FM Director and FM Manager, but Mr Deturt said it did not identify them;
 - f. alleges that the Health Service's senior management was trying to get rid of him and doing the wrong thing by trying to push him out of the organisation;
 - g. asserts that a Health Service director engaged in misconduct by knowingly misleading staff, which is serious misconduct;
 - h. asserts that misconduct within the Health Service is knowingly being covered up by the Health Service's senior management and the Health Service, or its senior managers, is trumping up charges against Mr Deturt to try to dismiss him;
 - i. asserts that the Health Service's senior management has bullied other staff at Mr Deturt's facility; and
 - j. suggests that the Health Service's misconduct is of a grave nature and could have caused him to commit suicide.
- 33 Mr Deturt gave evidence that his dismissal was most likely just an ongoing part of serious wrongdoing to cover up misconduct in the Health Service, and the Chief Executive possibly was a 'puppet' for someone else's decision-making, because she was given misinformation. Despite his evidence set out at [32] above, Mr Deturt would not agree that his email was not about wishing everyone a happy new year and a new start for all.
- 34 The tone and content of the 4 February Email speak for themselves. Plainly it is unacceptable for an employee of the Health Service to send such an email to and about colleagues.
- 35 It is obvious from even a cursory read that the 4 February Email was not about wishing everyone a happy new year and a new start for all. There can be no doubt that the 4 February Email is highly critical of the Health Service's senior management. It was extremely inappropriate for Mr Deturt to raise his grievances in the manner that he did. Proper processes exist within the Health Service to do so, and contrary to Mr Deturt's testimony, Mr Jones' letter did not prevent Mr Deturt from raising complaints about the workplace.
- 36 As the Health Service submits, the 4 February Email amounts to a breach of discipline because:
- a. the content and tone is concerning. It contains bare assertions of serious wrongdoing (including bullying and corruption), without detail, presented as fact;
 - b. it was sent to many people (see [20] above), including members of Parliament and people who were the subject of the bare assertions of wrongdoing;
 - c. while it is not necessary to be able to specifically identify persons from the email for the conduct to amount to a breach of discipline, in the circumstances the Facilities Management Director and the then Facilities Management Manager were identifiable; and
 - d. obviously the people who received the email might wonder or speculate about who of those copied in were the subject of the assertions of serious wrongdoing.
- 37 I cannot accept Mr Deturt's evidence that the 4 February Email was consistent with the Code. It is a clear breach of the Code. It is full of bare assertions of serious wrongdoing and obviously has the potential to be distressing and damaging for at least some of the recipients, including Mr England, the Royal Perth Bentley Group Facilities Management Director, and Mr Carrick, the Bentley Health Service Facilities Management Manager.
- 38 In my view, sending the 4 February Email would have amounted to a breach of discipline, even if Mr Deturt had not already been directed in writing to refrain from communicating in exactly that way. It is a seriously disrespectful way to communicate with colleagues and is clearly disparaging. It is a breach of discipline to make serious, bare allegations, to an email 'audience', in a way that does not allow the person/s the subject of the serious allegations to properly consider and respond to those serious allegations.
- 39 In my view, the 4 February Email breaches principles 1 and 3 of the Code, which require employees to act professionally and ethically, and to promote a positive work environment. Sending the 4 February Email amounts to a breach of discipline.

- 40 I am therefore satisfied that the conduct amounts to a breach of discipline.
Was dismissal harsh, oppressive or unfair?
- 41 Justice Brinsden in *Miles & Ors t/a Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385 at 386 (*Undercliffe*) describes the test that the Commission must apply when determining whether a dismissal was harsh, oppressive or unfair. Namely, whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right.
- 42 I accept that this matter has adversely impacted Mr Deturt. It would be surprising if it had not. However it is clear from the oral and documentary evidence, as well as his submissions, that Mr Deturt has no insight into his wrongdoing.
- 43 Mr Deturt submits that his dismissal was oppressive because he has not engaged in misconduct or poor performance as alleged. He says his dismissal was unfair, and the Health Service is trying to suppress his communications and raising of concerns. Mr Deturt says there was no valid reason for dismissal and the Chief Executive made a hasty decision. He argued that no one contacted him directly to speak about concerns with his email and noted that the allegation was made two and a half months after the email was sent.
- 44 Throughout, Mr Deturt maintained that he has behaved according to the Code. He has no insight into why his conduct was not consistent with the Code. Mr Deturt genuinely believes that his conduct does not breach the Code and is not otherwise problematic.
- 45 While Mr Deturt may have preferred the matter to have been raised directly with him in person, and sooner than it was, the process followed by the Health Service was orthodox and fair. The allegation was clearly put to Mr Deturt, he had a reasonable opportunity to respond to it and the Health Service made a finding that was open to it.
- 46 The Health Service's finding that Mr Deturt committed a breach of discipline by sending the 4 February Email was correct. It is a valid reason for dismissal. For completeness, the evidence in this matter does not in any way support a finding that the real reason for the dismissal was to retaliate against or bully Mr Deturt, or to interfere with his bullying claim before the Commission.
- 47 I accept the Health Service's submission that Mr Deturt's lack of insight means there remains a serious risk of similar conduct occurring if Mr Deturt were to remain in the Health Service's employment. On the evidence before the Commission, including Mr Deturt's testimony about his view of various directions given to him, the Health Service has a reasonable and valid concern that Mr Deturt 'essentially will not comply with directions and will not comply with the [Code] if he considers in his mind that the conduct is appropriate'.
- 48 In cross-examination Mr Deturt agreed that on 14 April 2023 Mr Jones informed him in writing that the content and tone of the email Mr Deturt sent to Mr England three days earlier was inappropriate, not in line with the Health Service's values and would not be tolerated by the Health Service. Mr Deturt also agreed that he had previously been counselled for sending inappropriate emails and advised to stop corresponding with people in that way. It is also not in dispute that Mr Jones emailed Mr Deturt on 28 April 2023 and told Mr Deturt:
- I would like to take this opportunity to remind you that there are appropriate channels for raising issues within our organisation and sending a public email with multiple cc's to a colleague is not one of them. It is important that we conduct ourselves in a professional and respectful manner, and your behaviour has fallen short of this expectation ... As mentioned in my previous correspondence, if you continue to raise issues in a public format inappropriately, we may need to pursue further action.
- 49 That Mr Deturt still sent the 4 February Email, despite the circumstances outlined in [48] above, along with his refusal to acknowledge wrongdoing and his lack of insight into why his conduct was wrong, makes dismissal a fair and proportionate response in this case.
- 50 Applying the test in *Undercliffe*, I find that the Health Service did not exercise its lawful right to dismiss Mr Deturt so harshly or oppressively as to amount to an abuse of that right.
- 51 An order will issue dismissing application P 19 of 2025.

2026 WAIRC 00159

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

WEDNESDAY, 18 MARCH 2026

FILE NO/S

P 19 OF 2025

CITATION NO.

2026 WAIRC 00159

Result

Application dismissed

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 –

THAT application P 19 of 2025 be, and by this order is, dismissed.

[L.S.]

(Sgd.) T EMMANUEL,
Commissioner.

2026 WAIRC 00189**REFERRAL OF A DECISION TO DISMISS EMPLOYEE ON 22 DECEMBER 2025**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

VICTORIA SUMMERS

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM** COMMISSIONER C TSANG**DATE** TUESDAY, 31 MARCH 2026**FILE NO.** P 1 OF 2026**CITATION NO.** 2026 WAIRC 00189**Result** Application dismissed for want of prosecution**Representation****Applicant** No appearance**Respondent** No appearance*Order*

WHEREAS on 12 January 2026, the applicant filed a *Form 5 – Application to Refer Public Sector Matter*, and on 2 February 2026, the respondent filed a *Form 4 – Response* raising two issues concerning the Commission’s jurisdiction and requesting that the question of jurisdiction be determined as a preliminary matter before any further steps are taken including conciliation;

AND WHEREAS the matter was listed for a Directions Hearing on 11 February 2026, at which the following Directions ([2026] WAIRC 00085) were issued: (original emphasis)

1. THAT the part-heard Directions Hearing on Wednesday, 11 February 2026 be adjourned.
2. THAT the applicant inform the Commission and the respondent of her intentions regarding the re-listing of the part-heard Directions Hearing **by 4:00pm on Thursday, 26 February 2026.**
3. THAT the parties have liberty to apply.

AND WHEREAS no response was received from the applicant, and on 27 February 2026, the Commission wrote to the parties requesting the applicant to confirm by 4:00pm on 3 March 2026, whether she seeks to have the matter discontinued or listed for hearing and determination;

AND WHEREAS no response was received from the applicant, and on 6 March 2026, the Commission wrote to the parties requesting the applicant to respond by 4:00pm on 10 March 2026 as to whether she seeks to have the matter discontinued or listed for hearing and determination. The Commission informed the applicant that as the applicant she bears the onus of actively prosecuting her application, and informed the applicant that if she did not respond by 4:00pm on 10 March 2026, that the Commission may list the matter for a Show Cause Hearing;

AND WHEREAS on 6 March 2026, the applicant wrote to the Commission stating: “I emailed ages ago saying that I wanted to stop the whole thing”;

AND WHEREAS on 6 March 2026, the Commission wrote to the parties requesting, on the understanding of the applicant’s email that she wished to discontinue the matter, that the applicant discontinue the matter pursuant to one of the two options available for discontinuing a matter under reg 16 of the *Industrial Relations Commission Regulations 2005* (WA) by 4:00pm on 10 March 2026 (**Regulation 16**);

AND WHEREAS on 6 March 2026, the respondent wrote to the Commission notifying that the applicant had directly emailed the respondent on 15 February 2026 and on 16 February 2026 to indicate that she no longer wishes to continue with the matter, but had not copied in the Commission as required under Regulation 16;

AND WHEREAS on 9 March 2026, the Commission wrote to the parties requesting, given the applicant's direct correspondence of her intentions to the respondent, that the applicant discontinue the matter by the first of the two options for discontinuing a matter under Regulation 16, namely by 'Reply All' email stating her wish to discontinue the matter;

AND WHEREAS on 11 March 2026, the Commission telephoned the applicant and the applicant stated that she had received the Commission's correspondence and would send a 'Reply All' email "by today" to discontinue the matter;

AND WHEREAS no response was received from the applicant, and on 16 March 2026, the Commission telephoned the applicant, and wrote to the parties, requesting the applicant's unavailable dates for the listing of a Show Cause Hearing by 4:00pm on 20 March 2026. The Commission informed the applicant that if she did not respond by 4:00pm on 20 March 2026 that the Commission may list the Show Cause Hearing without her input as to her unavailable dates;

AND WHEREAS no response was received from the applicant, and on 19 March 2026 and on 20 March 2026, the Commission telephoned the applicant and left voice messages requesting the applicant's response to the Commission's request for the applicant's unavailable dates for the listing of the Show Cause Hearing;

AND WHEREAS no response was received from the applicant, and on 23 March 2026, the Commission wrote to the parties issuing the Notices of Hearing listing the Show Cause Hearing on Tuesday, 31 March 2026 at 11:30am. The Commission informed the applicant that if she no longer wishes to pursue the matter that she could formally discontinue the matter before the Show Cause Hearing;

AND WHEREAS no response was received from the applicant, the applicant did not formally discontinue the matter before the Show Cause Hearing and did not attend the Show Cause Hearing;

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

THAT application P 1 of 2026 is dismissed for want of prosecution.

[L.S.]

(Sgd.) C TSANG,
Commissioner.

BREACH OF PUBLIC SECTOR STANDARDS CLAIMS REFERRED—

2026 WAIRC 00185

APPLICATION TO REFER BREACH OF PUBLIC SECTOR STANDARDS CLAIM

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2026 WAIRC 00185
CORAM	:	COMMISSIONER C TSANG
HEARD	:	ON THE PAPERS
DELIVERED	:	FRIDAY, 27 MARCH 2026
FILE NO.	:	P 51 OF 2025
BETWEEN	:	SLADJANA NESKOVIC
		Applicant
		AND
		CHILD AND ADOLESCENT HEALTH SERVICE
		Respondent

CatchWords	:	Industrial Law (WA) – Application to refer breach of public sector standards claim – Alleged breach of Grievance Resolution Standard – Jurisdictional issue as to whether applicant raised a grievance under the Grievance Resolution Standard – Finding that no grievance raised
Legislation	:	<i>Industrial Relations Act 1979</i> (WA) <i>Public Sector Management Act 1994</i> (WA) <i>Public Sector Management (Breaches of Public Sector Standards) Regulations 2005</i> (WA) <i>Interpretation Act 1984</i> (WA)
Result	:	Application dismissed for want of jurisdiction
Representation:		
Applicant	:	Ms S Neskovic

Respondent : Mr J Raja

Case(s) referred to in reasons:

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28

The Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Company Inc [1994] HCA 54

Reasons for Decision

- 1 On 20 October 2025, the applicant (**Ms Neskovic**), filed a *Form 24 – Application to Refer Breach of Public Sector Standards Claim*, seeking to refer a breach of the Grievance Resolution Standard that she contends she submitted to the respondent (**CAHS**) on 24 September 2025.
- 2 On 10 November 2025, CAHS filed a *Form 4 – Response*, raising the jurisdictional objection that as Ms Neskovic did not lodge a grievance with it, there can be no claim of a breach of the Grievance Resolution Standard that is capable of review by the Commission.
- 3 On 6 February 2026, the matter was listed for a Directions Hearing, at which the following Directions ([2026] WAIRC 00072) were issued:
 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.

The legislative framework

- 4 For the Commission to have jurisdiction, Ms Neskovic’s application must meet the requirements of s 36AJ of the *Industrial Relations Act 1979* (WA) (**IR Act**), which states:

36AJ. Breach of public sector standards claim

A *breach of public sector standards claim* is a claim for relief –

- (a) made by a person to a public sector body on the ground that the public sector body breached a specified public sector standard in taking action to which the standard applies; and
 - (b) made in accordance with procedures prescribed under the *Public Sector Management Act 1994* [(**PSM Act**)] section 98(a); and
 - (c) that is not resolved by agreement or withdrawn within the period of 21 days starting on the day after the day on which the claim was made (the *agency resolution period*).
- 5 Section 36AI of the IR Act defines the terms relevant to s 36AJ:

human resource management activity means a human resource management activity relating to employees prescribed under the [PSM Act] section 21(1)(a)(ii);

public sector body includes an employing authority of the public sector body;

specified public sector standard means a public sector standard (as defined in the [PSM Act] section 3(1)) that relates to 1 or more of the following – (emphasis added)

- (a) the transfer of employees;
- (b) the performance management of employees;
- (c) the redeployment of employees;
- (d) the termination of employment of employees;
- (e) **if grievance resolution is a human resource management activity – grievance resolution;**
- (f) another human resource management activity relating to employees that is prescribed as a specified public sector standard by regulations made by the Governor;

taking action includes –

- (a) making a decision; and
 - (b) failing to take, or delaying taking, action.
- 6 Under s 21 of the PSM Act, the Public Sector Commissioner establishes minimum standards of merit, equity and probity for the public sector. The standards relate to a number of human resource activities and are collectively referred to as the Public Sector Standards in Human Resource Management. The six standards are:
 - (a) Employment.
 - (b) Performance Management.
 - (c) Grievance Resolution.
 - (d) Redeployment.

- (e) Termination.
- (f) Discipline.
- 7 Neither party disputes that grievance resolution is a human resource management activity prescribed under s 21(1)(a)(ii) of the PSM Act, and that the Grievance Resolution Standard is accordingly a ‘specified public sector standard’ within the meaning of s 36AI of the IR Act.
- 8 Section 36AJ provides that the claim for relief that is made to the Commission must:
- (a) Involve a breach of a ‘specified public sector standard’ (defined in s 36AI at [5] above to include the Grievance Resolution Standard);
- (b) Involve a breach of the standard in ‘taking action’ to which the standard applies (defined in s 36AI at [5] above to include action and inaction);
- (c) Be made in accordance with procedures prescribed under s 98(a) of the PSM Act; namely the *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005 (WA) (Regulations)*; and
- (d) Not be made in relation to a claim resolved or withdrawn within 21 days after the claim was made.
- 9 The Grievance Resolution Standard states:
- The minimum Standard of merit, equity and probity is met for grievance resolution if:
- employees are informed of their rights and responsibilities in the grievance resolution process.
 - the process is based on a proper consideration of the facts and circumstances prevailing at the time of the grievance.
 - decisions are impartial, transparent and capable of review.
- 10 As outlined at [8(c)] above, Ms Neskovic’s application must be made in accordance with the Regulations.
- 11 Regulation 6(1) of the Regulations states:
- 6. Making claims for relief for breaches of public sector standards**
- ...
- (1) Subject to subregulations (3) and (4), if –
- (a) a person considers that, in making a reviewable decision or otherwise, a public sector body or an employing authority of a public sector body has breached a public sector standard; and
- (b) the person is adversely affected by the breach,
- the person may make a claim for relief to the public sector body.
- 12 Relevantly, reg 3 of the Regulations defines a ‘reviewable decision’ as a decision made as the result of the completion of a process to which a public sector standard applies, in this case, the grievance resolution process:
- reviewable decision** means a decision made by the employing authority of a public sector body as the result of the completion of a process to which a public sector standard applies;
- 13 Regulations 7(1) and (5) of the Regulations state:
- 7. Lodging claims with public sector bodies**
- (1) Subject to subregulation (2), a claim made in respect of a reviewable decision is to be lodged with the public sector body within the prescribed lodgement period.
- ...
- (5) In this regulation –
- prescribed lodgement period** means –
- ...
- (b) for a reviewable decision referred to in regulation 5(1) – 10 business days after the claimant was given notice under that subregulation;
- 14 Regulations 6 and 7 (at [11]–[13] above) provide that if Ms Neskovic considers that, in CAHS making a reviewable decision (as defined at [12] above) or otherwise, that CAHS has breached the Grievance Resolution Standard and she is adversely affected by the breach, that she must make a claim for relief to CAHS. If the claim relates to the making of a reviewable decision, then the claim for relief must be made to CAHS within 10 business days of her being notified of the reviewable decision under reg 5(1).
- 15 Regulations 5(1) and (3) of the Regulations state:
- 5. Public sector bodies to give notice of certain reviewable decisions**
- (1) If an employing authority makes a reviewable decision as the result of the completion of a process to which a public sector standard that is established in respect of the resolution of employees’ grievances applies, the employing authority must give written notice that complies with subregulation (3) to –
- (a) the person whose grievance resulted in the making of the reviewable decision; and
- (b) each person (if any) who was the subject of the grievance.
- ...
- (3) Notice complies with this subregulation if it states –
- (a) that the person may make a claim under these regulations in relation to the reviewable decision;
- (b) how the claim may be made;

- (c) the date no later than which the claim may be lodged with the public sector body, in accordance with regulation 7(1); and
- (d) anything specified in the guidelines for the purposes of this subregulation.
- 16 Implicit in reg 5(1) and in the definition of a ‘reviewable decision’, is that the obligation on CAHS to give notice in the form prescribed by reg 5(3), does not arise unless CAHS has completed a grievance resolution process and made a decision.
- 17 The upshot of the matters at [4]–[16] above, is that the Commission does not have jurisdiction to hear Ms Neskovic’s application, unless she can evidence all of the following:
- (a) She lodged a grievance.
- (b) If, as the result of the completion of the grievance resolution process, CAHS made a reviewable decision:
- (i) in making the reviewable decision, CAHS breached the Grievance Resolution Standard, and she was adversely affected by the breach; and
- (ii) within 10 business days of being notified of the reviewable decision, she made a claim for relief for CAHS’ breach of the Grievance Resolution Standard to CAHS.
- (c) She made a claim for relief to CAHS that CAHS breached the Grievance Resolution Standard, which was not resolved or withdrawn within 21 days of the date she made the claim for relief to CAHS.
- 18 As Ms Neskovic is seeking to invoke the Commission’s jurisdiction, she bears the onus of establishing the facts upon which her s 36AJ application depends: *The Owners of the Ship ‘Shin Kobe Maru’ v Empire Shipping Company Inc* [1994] HCA 54 [46] (per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). The standard of proof is the balance of probabilities.

Ms Neskovic’s evidence and submissions

- 19 On 20 February 2026, Ms Neskovic filed her witness statement in accordance with Direction 2, stating:
5. On 24 September 2025, I lodged a written breach of standard claim with CAHS under the [Regulations].
 6. A copy of the signed Breach of Standard Claim Form dated 24 September 2025 is attached and marked **Annexure 1**.
 7. By correspondence dated 13 October 2025, CAHS advised that no formal grievance had been lodged and that the breach-of-standards claim was refused and closed on that basis.
 8. A copy of the 13 October 2025 correspondence is attached and marked **Annexure 2**.
- 20 **Annexure 1** is the *Public Sector Commission – Breach of standard claim form: Claimant to agency*, dated 24 September 2025, in which Ms Neskovic states:

Grievance Resolution Standard

- In June 2024, I lodged an official complaint concerning the unsafe use of non-TGA-approved surgical implants and adverse management practices by my direct line manager.
 - Rather than being managed fairly, I was excluded from committees and professionally isolated.
 - In September 2024, I was informed that I was a witness in a disciplinary matter. On 27 November 2024, I was advised that my line manager had been issued with an allegations letter. Less than a week later, on 5 December 2024, I was abruptly suspended on the basis of allegations said to have occurred 8-10 months earlier – matters of which I had never previously been made aware.
 - In January 2025, I also submitted a disclosure under **WA Health MP 0125/19 – Notifiable and Reportable Conduct Policy**, formally reporting the use of non-TGA-approved surgical implants to ensure that patient safety was treated as the highest priority.
 - Since then, I have had no substantive updates on the progress of my grievance lodge [sic] against my line manager, other than being told in March 2025 that the decision maker had changed.
- 21 **Annexure 2** contains two emails from CAHS; one from Julia Maybee, Manager People & Partnering (**Ms Maybee**), and the other from Mark Golesworthy, Acting Director Workforce (**Mr Golesworthy**):
- (a) Ms Maybee’s email to Ms Neskovic, dated 2 October 2025, states:

Thank you for your correspondence regarding a breach claim under the Grievance Resolution Standard. Please be advised that [Mr Golesworthy] is currently A/Workforce Director and as such any future correspondence regarding your concerns relating to processes should be directed to him accordingly.

After reviewing the information you have provided, it has been noted that a formal grievance was not lodged with CAHS prior to this submission of your breach claim. As outlined in the [Regulations], a breach claim can only be considered where an individual has been adversely affected by a decision made in a breach of a Public Sector Standard – in this case, the Grievance Resolution Standard. This requires that a grievance process has been initiated and managed by the agency.

On 25 June 2024 during a verbal conversation with you and confirmed in email on 26 June 2024, it was confirmed that you did not wish to lodge a grievance, but were submitting a complaint regarding bullying behaviours against your Nursing Co-Director that would be managed under the WA Health Discipline policy.

As no grievance was lodged, there is no decision or process to assess against the requirements of the Standard. Therefore, we are unable to progress your concerns regarding the process as a breach of standard claim. I can confirm that your complaint against the Nursing Co-Director is ongoing and not yet finalised and that you will be provided with formal notification at the conclusion of this matter.

In relation to the concerns, you have raised below regarding your own disciplinary process which also falls outside the scope of a breach of standards claim. If you wish to raise a grievance or complaint regarding any of the below, this option is available to you through the appropriate channels.

- (b) Mr Golesworthy's email to Ms Neskovic, dated 13 October 2025, states:

I refer to your email hereunder and the multiple attachments provided with respect to your claim that [CAHS] has breached several Public Sector Standards. Attached for reference is the breach of standards claim form sent to Ms Maybee on 24 September 2025. I note that Ms Maybee provided you with a response on 2 October 2025.

Your claims alleging you experienced adverse treatment after raising patient safety concerns are noted. However, I can confirm Ms Maybee's previous advice that to be able to lodge a breach of standard claim, a reviewable decision would need to have been made by CAHS arising from the completion of a grievance process. Our records indicate that you did not lodge a formal grievance with CAHS prior to the lodgement of your claim. Therefore, there is no final decision able to be reviewed as there was no grievance process undertaken. Accordingly, no breach of the grievance resolution standards has occurred.

Please note that the grievance resolution standard does not apply to judging the merits of a grievance, sub-standard performance or disciplinary action and allegations of victimisation following the lodgement of a grievance.

...

Having reviewed the claims raised in your correspondence and in the included attachments, I am of the view that CAHS has acted appropriately and in accordance with the relevant policies and that you have been afforded procedural fairness. Accordingly, the remedies sought by you in the attached and the email from you hereunder will not be accommodated and I now consider that the breach of standard claim closed.

- 22 Ms Neskovic filed two sets of submissions which, in parts, advance different bases for her claim. For the purposes of these reasons, I have considered both sets of submissions and have sought to identify what I understand to be the strongest construction of her case.
- 23 On 20 February 2026, Ms Neskovic filed submissions in accordance with Direction 2, effectively contending that:
- (a) She lodged a grievance in June 2024, however, CAHS elected to manage her grievance under the disciplinary framework.
 - (b) She raised concerns regarding the handling of the disciplinary process. However, CAHS did not notify her of the right to have those concerns addressed as a grievance.
 - (c) On 24 September 2025, she lodged a breach of standard claim with CAHS, which CAHS 'closed down' in October 2025 by the emails which are marked 'Annexure 2' to her witness statement.
 - (d) CAHS' decision to 'close down' her breach of standard claim is a 'reviewable decision' under the Regulations.
- 24 In response to Ms Neskovic's witness statement and submissions (at [19]–[23] above), CAHS filed a witness statement for Jodi Pinch, Manager, People and Partnering (**Ms Pinch**), which amongst other things, attached her email to Ms Neskovic, dated 26 June 2024; 7:40am, stating:
- Thank you for taking the time to talk to me on the phone yesterday.
- This email is to confirm with you, as we discussed, that you wish to submit [sic] a complaint regarding bullying behaviour that you allege to have received by [your line manager]. We discussed the difference between lodging a grievance (where the aim is to resolve the working relationship) and submitting a bullying complaint.
- You are also aware that as part of this bullying complaint process, [your line manager] will be informed that the complaint has come from you.
- In relation to your email from 24 June 2024 stating that you have been bullied, you will provide details of each alleged incident and any supporting evidence that you may have, by email to me. Once this is received the complaint will be progressed. In the mean time you may contact me if you feel you require interim/further support.
- 25 On 6 March 2026, CAHS filed submissions in accordance with Direction 3, stating: (footnotes omitted)
30. [CAHS] submits that no relevant reviewable decision was made.
 31. On 21 June 2024, the Applicant lodged a complaint to [CAHS] alleging that the Applicant was being bullied by their manager. The complaint was actioned by [Ms Pinch].
 32. On 25 June 2024, Ms Pinch had a telephone conversation with the Applicant to discuss the Applicant's complaint, to ascertain whether the Applicant sought to proceed with a formal grievance or a bullying complaint. Ms Pinch explained that the aim of a formal grievance process would be to repair and restore the working relationship between the parties. The Applicant sought for the complaint to proceed as a bullying complaint. The Applicant agreed to provide additional information to support the complaint, in order for [CAHS] to determine whether there existed a reasonable suspicion of a breach of discipline by her manager.
 33. On 26 June 2024, Ms Pinch emailed the Applicant confirming the discussion and agreement arising from the telephone conversation outlined above.
 34. On 29 June 2024, The Applicant provided [CAHS] with a USB device containing additional information in support of their bullying complaint.
 35. The complaint was subsequently progressed as a disciplinary matter. The Applicant was aware of this given they

participated as a witness in that matter and was provided with routine updates on the matter, including on its conclusion.

36. It is evident that there was never any grievance process for which the Grievance Resolution Standard applied to, and as such no relevant reviewable decision had been made by [CAHS].
 37. The Applicant was therefore unable to validly make a breach of Grievance Resolution Standard Claim to [CAHS] on 24 September 2025.
 38. On 13 October 2025, the above was explained with absolute clarity to the Applicant by [Mr Golesworthy], in response to the breach claim form lodged.
 39. The Applicant is unable to furnish any evidence of a reviewable decision for which the Grievance Resolution Standard applied to, in any of her materials. Concerningly the Applicant suggests in their submissions in support of their Application, that the Commission ought to accept that [CAHS'] response to the breach claim lodged on 24 September 2025 constitutes a reviewable decision for which the Grievance Resolution Standard applies. [CAHS] submits that this is incorrect and lacks any logic, and even if that were true, the Applicant was required to submit a breach claim to [CAHS] in relation to the response, prior to being able to lodge a referral to the Commission.
 40. [CAHS] asserts that no grievance had been lodged by [the Applicant] and there was no reviewable decision made by [CAHS] arising out of a completed grievance process. It follows that the Applicant has no been [sic] complied with regulation 6 of the Regulations.
- 26 On 8 March 2026, Ms Neskovic filed a *Form 1A – Application* seeking leave to file responsive submissions to CAHS' submissions. I was prepared to grant Ms Neskovic leave to file her responsive submissions, and I have had regard to them.
- 27 What I understand from her responsive submissions, is that Ms Neskovic contends that:
- (a) The complaint she lodged against her line manager in June 2024 is background information only. She does not rely on that complaint as the lodgement of a grievance which enlivens the Commission's jurisdiction.
 - (b) Rather, CAHS breached the Grievance Resolution Standard by:
 - a. the handling of the Applicant's suspension and disciplinary process from 5 December 2024 to 16 September 2025;
 - b. the absence of any identified grievance-resolution pathway during that period; and
 - c. the respondent's written refusal and closure of the breach claim in October 2025.
 - (c) She agrees that Ms Pinch's email (at [24] above) records that in June 2024, she did not lodge a grievance but wished to submit a complaint against her line manager.
 - (d) Ms Pinch's email does not record that she agreed to waive her rights to raise a grievance in the future.

Considerations

- 28 As outlined at [17] above, Ms Neskovic must establish the matters at [17(a)–(c)] above.
- 29 As outlined at [3] above, the Directions outlined CAHS' jurisdictional objection, namely, that there has been no breach of the Grievance Resolution Standard because Ms Neskovic did not lodge a grievance with CAHS.
- 30 Whether Ms Neskovic lodged a grievance is a matter of fact. As outlined at [18] above, it is a matter that Ms Neskovic bears the onus of establishing.
- 31 The Grievance Resolution Standard does not define the scope of matters that may constitute a grievance. However, CAHS' Employee Grievance Resolution Procedure (**Procedure**) identifies certain matters as 'out of scope' of the grievance resolution process. While the Procedure cannot limit the scope of the standard as it is subsidiary legislation (discussed further below), the Procedure is relevant to assessing whether a matter raised with CAHS would, in practice, be managed through the grievance resolution process to which the standard applies.
- 32 As outlined at [19]–[21] above, Ms Neskovic filed a witness statement in which she refers to lodging a breach of standard claim form with CAHS on 24 September 2025. As outlined at [20] above, in the form, Ms Neskovic refers to having lodged two complaints in June 2024:
- (a) The first complaint concerns 'the unsafe use of non-TGA-approved surgical implants', about which she submitted a disclosure under the Notifiable and Reportable Conduct Policy in January 2025. I do not understand Ms Neskovic to say that this was her raising a grievance. However, to the extent that she is saying this was her raising a grievance, I note that the matter is not something that can be addressed under the Procedure. It does not involve an issue regarding 'workplace relationships' nor an issue of 'workplace conflicts' which 'can negatively impact relationships if not resolved'. In fact, it is a matter that is specifically identified as 'out of scope':

Out of Scope

Matters outside the CAHS Grievance Resolution Procedure (the Procedure) include those that are regulated by legislation or other WA Health policies some of which include, but are not limited to, the following:

- Alleged acts of misconduct or breaches of discipline including behaviours which may place an individual at risk of harm including actions that may be contrary to CAHS Values.
 - o Refer to Notifiable and Reportable Conduct Policy (WA Health)
 - o Refer to Discipline Policy (WA Health)
 - ...
- CAHS child safeguarding concerns related to CAHS staff, sites or services.
 - o Refer to CAHS Child Safeguarding Concerns – Report within CAHS procedure (CAHS Policy Manual).

- ...
- Public Interest Disclosure matters.
- (b) The second complaint concerns ‘adverse management practices by my direct line manager’. As outlined at [24]–[25] above, during a telephone discussion on 25 June 2024, Ms Pinch informed Ms Neskovic about the different pathways for resolving her concerns about her line manager’s treatment; specifically, as a grievance, or as a complaint pursuant to the Discipline Policy (which as outlined at [32(a)] above, is ‘out of scope’ of the Procedure).
- 33 The evidence (outlined in Ms Pinch’s witness statement and summarised in CAHS’ submissions at [25] above), indicates that on 21 June 2024, either:
- (a) Ms Neskovic lodged a complaint about her line manager’s behaviour which she sought to have addressed under the Discipline Policy; or
 - (b) Ms Neskovic raised a grievance, but after the telephone discussion with Ms Pinch, she withdrew the grievance and instead elected to proceed with a complaint to be addressed under the Discipline Policy.
- 34 I note that in Ms Neskovic’s breach of standard claim form (at [20] above), she refers to ‘my grievance lodge [sic] against my line manager’. This suggests that at the time of completing the form, Ms Neskovic may have subjectively believed that a grievance had been lodged.
- 35 However, the question of whether a grievance was lodged is an objective one. It depends on what was communicated to CAHS and how the communication was understood and acted upon by both parties. Ms Pinch’s email of 26 June 2024 (at [24] above), the accuracy of which Ms Neskovic does not dispute, records clearly that Ms Neskovic elected to submit a complaint rather than a grievance. Ms Neskovic confirms this in her responsive submissions: [27(a)], [27(c)] above.
- 36 Ms Neskovic’s characterisation of her complaint as a ‘grievance’ in the breach of standard claim form (at [20] above), does not retrospectively convert it into one.
- 37 Simply put, there is no evidence that Ms Neskovic lodged a grievance in June 2024 which required application of the Grievance Resolution Standard.
- 38 I acknowledge that the substance of Ms Neskovic’s concerns about her line manager, described as bullying and adverse management practices may, in principle, be capable of being the subject of a grievance under the Procedure. However, the question is not whether the subject matter *could* have been raised as a grievance, but whether it *was* raised as a grievance. On the evidence, Ms Pinch informed Ms Neskovic of the distinction between the grievance pathway (aimed at resolving the working relationship) and the complaint pathway (to be managed under the Discipline Policy), and Ms Neskovic elected to proceed with a complaint. That election was confirmed in writing by Ms Pinch’s email of 26 June 2024, the accuracy of which Ms Neskovic does not dispute. The Grievance Resolution Standard does not apply to a disciplinary process, even where the underlying subject matter could also have been raised as a grievance.
- 39 As outlined at [6] above, there are separate standards for distinct human resource management activities, including grievance resolution (at [6(c)] above) and discipline (at [6(f)] above). Each standard governs its own process. The Grievance Resolution Standard governs grievance resolution processes and the Discipline Standard governs disciplinary processes. Ms Neskovic’s election to have her complaint managed under the disciplinary pathway rather than the grievance resolution pathway, may engage the Discipline Standard, but it does not engage the Grievance Resolution Standard.
- 40 While I am satisfied by the evidence and Ms Neskovic’s submissions at [27(a)] and [27(c)] above, that Ms Neskovic’s election was made with full understanding of the consequences of each pathway, this is not determinative in resolving the jurisdictional objection. It is sufficient for present purposes that Ms Neskovic was made aware that a grievance pathway existed, that she elected not to pursue it, and that the characterisation of her complaint was confirmed in writing without objection from her. The question before me is not whether CAHS should have done more to facilitate a grievance, but whether a grievance was in fact lodged. On the evidence, it was not.
- 41 If there is no grievance there is no application of the Grievance Resolution Standard. If there is no application of the Grievance Resolution Standard, there is no completion of a grievance resolution process, and it follows that there is no reviewable decision that can be the subject of a breach of standard claim.
- 42 I note that reg 6(1)(a) of the Regulations (at [11] above) permits a claim to be made where a public sector body has breached a public sector standard ‘in making a reviewable decision or otherwise’. The ‘or otherwise’ limb recognises that a breach of a public sector standard may occur otherwise than in the making of a reviewable decision, for example, during the conduct of a grievance resolution process but prior to the making of a final decision. However, whether the claim is made under the ‘reviewable decision’ limb or the ‘or otherwise’ limb, it remains necessary that the standard in question has been engaged. For the Grievance Resolution Standard to be engaged, there must be a grievance, and a grievance resolution process to which the standard applies. Where no grievance has been raised, there is no grievance resolution to which the standard applies, and the standard cannot be breached, whether in the making of a reviewable decision, or otherwise.
- 43 I also note that s 36AI of the IR Act (at [5] above) defines ‘taking action’ to include ‘failing to take, or delaying taking, action’. To the extent that Ms Neskovic contends that CAHS’ failure to direct her to the grievance resolution pathway, or its failure to institute a grievance resolution process of its own motion, constitutes ‘failing to take’ action under the standard, I do not accept that contention. The definition of ‘taking action’ in s 36AI expands the concept of action to include omissions and delays. However, the action (or inaction) must still relate to a matter ‘to which the standard applies’: s 36AJ(a) at [4] above.
- 44 The Grievance Resolution Standard applies to ‘grievance resolution’, that is, the process of resolving a grievance that has been raised. Where no grievance is raised, there is no grievance resolution process to which the standard applies, and accordingly, no action (or inaction) by CAHS in relation to such a process that can constitute a breach of the standard.
- 45 The ‘failing to take’ action limb of the definition does not create an obligation on employers to initiate grievance processes.

Rather, it addresses failures within or in relation to a process that the standard governs. The standard presupposes the existence of a grievance.

- 46 Whether it is taking action, or failing to take action, the Grievance Resolution Standard must apply. The standard applies to grievance resolution. Without a grievance, there is nothing for the standard to apply to.
- 47 Ms Neskovic contends in her responsive submissions that CAHS breached the Grievance Resolution Standard by how it managed her suspension and the matters of discipline that were raised against her. As outlined at [32(a)] above, matters under the Discipline Policy are ‘out of scope’ of the Procedure. However, even assuming such matters could, in principle, be the subject of a grievance under the Procedure, there is no evidence that Ms Neskovic raised a grievance about those matters with CAHS. An employee’s mere dissatisfaction with a process does not constitute the lodgement of a grievance. The lodgement of a grievance requires a positive communication by the employee to the employer, in which the employee identifies a workplace concern and seeks to have it addressed through the grievance resolution process. No such communication has been identified in the evidence.
- 48 Ms Neskovic also contends that CAHS breached the Grievance Resolution Standard by ‘the absence of any identified grievance-resolution pathway’. I understand her to be saying, that the words in the standard, that ‘employees are informed of their rights and responsibilities in the grievance resolution process’, required CAHS to have informed her in the period from 5 December 2024 to 16 September 2025 **about** the grievance resolution process.
- 49 If that is Ms Neskovic’s contention, she has misread the standard. As outlined at [9] above, the standard refers to employees being ‘informed of their rights and responsibilities **in the** grievance resolution process’.
- 50 Unlike the Public Sector Commissioner’s instructions issued under s 22A of the PSM Act, which are expressly excluded by s 22A(7) of the PSM Act from being ‘subsidiary legislation’ under the *Interpretation Act 1984* (WA) (*Interpretation Act*); public sector standards made under s 21 of the PSM Act would constitute ‘subsidiary legislation’ under the *Interpretation Act*.
- 51 As ‘subsidiary legislation’, the standards are ‘written law’ within the meaning of the *Interpretation Act*, with the consequence that the principles of statutory interpretation, including those in ss 18–19 of the *Interpretation Act*, apply to their construction.
- 52 Applying those principles, the phrase ‘**in the** grievance resolution process’ is to be given its ordinary meaning. The word ‘in’ ordinarily conveys ‘inclusion within, or occurrence during the course of’ the grievance resolution process: *Macquarie Dictionary* (online).
- 53 The standard therefore provides that employees are to be informed of their rights and responsibilities *during* or *within* the grievance resolution process, not informed *about* the existence of the grievance resolution process.
- 54 Applying a purposive construction, the purpose of the Grievance Resolution Standard is to ensure that grievance resolution processes, once engaged, meet the minimum standards of merit, equity and probity. The standard prescribes how a grievance resolution process must be conducted; it does not impose an obligation on employers to publicise the existence of the grievance resolution process to employees who have not raised a grievance. To read the standard as imposing such an obligation would extend its operation beyond its text and purpose. To read the Grievance Resolution Standard as imposing an obligation to inform employees *about* the grievance resolution process, in the absence of any grievance, would effectively render the standard applicable at all times and in all interactions between an employer and its employees. Such a construction would be impractical and could not have been intended by the legislature. It would transform a standard designed to govern a specific process (grievance resolution) into a general and free-standing duty of information dissemination that is unconditional upon any particular process or event.
- 55 The obligation to make information available *about* the Grievance Resolution Standard arises outside of the standard, under reg 28 of the Regulations:

28. Information about public sector standards and regulations to be made available to employees

The employing authority of a public sector body is to take reasonable steps to ensure that information regarding the operation and effect of—

- (a) the public sector standards; and
- (aa) the application of the [IR Act] to, and the WAIRC’s jurisdiction to deal with, claims regarding a breach of a specified public sector standard; and

(b) these regulations,

is made available to the employees of the public sector body.

- 56 For the reasons outlined at [48]–[54] above, I do not accept that the Grievance Resolution Standard requires employers to inform employees of the existence of the grievance resolution process. To read the standard as imposing this obligation, would render reg 28 of the Regulations imposing that obligation, ‘superfluous, void, or insignificant’: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 [71] (per McHugh, Gummow, Kirby and Hayne JJ). Accordingly, while reg 28 addresses the obligation to inform employees about the standards generally; the standard itself addresses how grievance resolution processes must be conducted once a grievance is raised.
- 57 Even if CAHS failed to comply with reg 28, a breach of reg 28 is not a breach of the Grievance Resolution Standard. Regulation 28 imposes an obligation on employing authorities that is separate from, and additional to, the obligations arising under the standards themselves. A failure to comply with reg 28 may have other consequences, but it does not constitute a breach of the Grievance Resolution Standard and cannot found a claim under s 36AJ of the IR Act.
- 58 It follows that, if there is no grievance, no employee is *within* the grievance resolution process, and there is no requirement under the standard for the employee to be informed of their rights and responsibilities *in* the grievance resolution process.
- 59 Finally, in both her original and responsive submissions, Ms Neskovic contends that CAHS breached the Grievance Resolution

Standard by responding to the breach of standard claim form that she submitted on 24 September 2025 and stating that as she had not lodged a grievance, there was no reviewable decision capable of review, which effectively refused and closed down her breach claim.

- 60 In effect, Ms Neskovic is contending that the closure of her breach of standard claim is a reviewable decision. However, as outlined at [12] above, a reviewable decision is defined under reg 3 of the Regulations as a decision made 'as the result of the completion of a process to which a public sector standard applies'. The breach claim process is not a grievance resolution process. CAHS' response to Ms Neskovic's breach of standard claim was not a decision made as a result of the completion of a grievance resolution process. Even if CAHS' response to her breach of standard claim could be characterised as a reviewable decision, which it cannot, reg 6(1) of the Regulations provides that Ms Neskovic would first need to lodge a further breach of standard claim with CAHS in respect of that response before referring it to the Commission. Ms Neskovic's contention that each refusal of a breach of standard claim itself generates a new breach of standard claim, circumventing the requirement that the Grievance Resolution Standard must actually have been engaged, cannot be accepted.
- 61 As outlined at [41]–[42] above, if there is no grievance, there can be no breach of the Grievance Resolution Standard. CAHS' response to Ms Neskovic's breach of standard claim, which informed her that no grievance had been lodged and that no grievance resolution process had been undertaken, was a correct statement of the position. CAHS' refusal to progress the breach of standard claim, and its closure of the claim, was the necessary consequence of no grievance having been lodged and no grievance resolution process having been undertaken.
- 62 Ms Neskovic is correct in contending at [27(d)] above, that she is not prevented from raising a grievance in the future.
- 63 However, in this matter (P 51 of 2025), there is simply no evidence that Ms Neskovic has raised a grievance. As Ms Neskovic has not raised a grievance, there has been no grievance resolution process, the completion of which has resulted in a reviewable decision or otherwise. As there is no completion of the grievance resolution process that has resulted in a reviewable decision or otherwise, CAHS cannot have breached the Grievance Resolution Standard. As there has been no breach of the standard, Ms Neskovic cannot make a claim for relief for a breach of standard to CAHS. As she cannot make a claim for relief for a breach of standard to CAHS, she cannot apply to the Commission for review of that breach of standard claim.

Conclusion

- 64 For the preceding reasons, I am not satisfied that Ms Neskovic has established that her application meets the requirements of s 36AJ of the IR Act.
- 65 Accordingly, I will issue an order dismissing application P 51 of 2025 for want of jurisdiction.

2026 WAIRC 00186

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, 27 MARCH 2026
FILE NO. P 51 OF 2025
CITATION NO. 2026 WAIRC 00186

Result Application dismissed for want of jurisdiction
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, and Reasons for Decision ([2026] WAIRC 00185) having been delivered on 27 March 2026, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979* (WA), hereby orders –

THAT application P 51 of 2025 is dismissed for want of jurisdiction.

(Sgd.) C TSANG,
 Commissioner.

[L.S.]